[* 1]

SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:
HON. ANTHONY L. PARGA
JUSTICE

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IRENE M. BLANCHARD AND GREGG BLANCHARD,

Plaintiffs,

-against-

CHRISTINE A. DEMAO, GERARD L. DIERKER, and LEVI S. STAUFFER,

Defendants.

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PART 6

INDEX NO. 10732/07
XXX
MOTION DATE: 06/05/12
SEQUENCE NO. 005, 006

Notice of Motion, Affs & Exs	1
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Upon the foregoing papers, defendants' motion and cross-motion for summary judgment, pursuant to CPLR §3212, on the grounds that the plaintiff did not sustain a "serious injury" within the meaning of New York State Insurance Law §5102(d), is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Irene Blanchard, as a result of a motor vehicle accident which occurred on April 24, 2006, at or near the intersection of Ocean Avenue and Garfield Place, in East Rockaway, Nassau County, New York.

Defendants contend that plaintiff's injuries fail to meet the "serious injury" requirements of Insurance Law §5102(d). In support of their motions, defendants submit, *inter alia*, the plaintiff's bill of particulars, plaintiff's deposition transcript, an examination report of orthopedic surgeon, Dr. Michael Katz, and an examination report of neurologist, Dr. Maria Audrie DeJesus.

Defendants contend that during plaintiff's deposition, she testified that her wrist came into contact with the steering wheel at the scene of the accident. Plaitniff was taken from the

scene by ambulance to Mercy Medical Center in Rockville Centre. She was not admitted to the hospital and next treated with neurologist, Dr. Fazzini, several days later. While plaintiff testified that she never received a diagnosis of carpal tunnel prior to this accident, the EMG report of Dr. Alan A. Mazurek, dated March 9, 1999, reveals that she had been diagnosed with right carpal tunnel in 1999. Plaintiff treated with Dr. Fazzini for four to five times in total. The last time she treated with him was three years prior to her June 30, 2010 deposition. Plaintiff testified that she treated with another neurologist after Dr. Fazzini, in 2007, by the name of Dr. Dulai. Plaintiff treated with physical therapy for three to four months post-accident. Plaintiff also testified that she treated with her private physician, Dr. Magun for injuries sustained in this accident. In 1997, prior to this accident, plaintiff complained of left wrist tenderness and was advised by Dr. Magun to use a wrist band as needed. In addition, during plaintiff's January 12, 1999 visit and her February 10, 1999 visit, Dr. Magun notes that plaintiff was diagnosed with carpal tunnel syndrome. In May 2007, plaintiff was referred to Dr. Verghes George, who advised plaintiff that she needed surgery on her right wrist and thumb. Plaintiff had carpal tunnel surgery performed to her right wrist on June 4, 2007, and she had physical therapy for two to three weeks following the surgery. Thereafter, four years post-accident, plaintiff also had carpal tunnel surgery to her left wrist on July 2, 2010.

At the time of the accident, plaintiff was employed as an independently contracted occupational therapist. She worked 40 hours per week in 2005, prior to the accident, and was working 60 hours per week at the time of her deposition. Plaintiff's job duties entailed training adults in self-care skills, including transferring patients into the bed and tub. She also worked at schools providing fine motor instructions to children, such as buttoning, zippering, putting on jackets, and hand writing skills. Defendants contend that plaintiff is not claiming a loss of income as a result of the accident. Plaintiff testified that she had no medical care or treatment since her deposition on June 30, 2010. Plaintiff also admitted at her second deposition, that she was involved in three prior incidents where she was injured. She was involved in motor vehicle accidents in 1999 (which resulted in right shoulder surgery) and in 2003 (as a result of which she injured her back), and she fell down the stairs and dislocated her shoulder in December 1999.

Defendants submit the report of Dr. Michael Katz, a board certified orthopedic surgeon

who examined plaintiff at defendant's request on October 8, 2010. Dr. Katz examined the plaintiff, performed range of motion testing on the plaintiff, and compared those findings to normal findings. Dr. Katz found that plaintiff had normal ranges of motion in her cervical spine, lumbosacral spine, right shoulder, left shoulder, right wrist and hand, left wrist and hand, right hip, and left hip. Dr. Katz commented that plaintiff's right carpal tunnel surgery was for a preexisting documented carpal tunnel syndrome unrelated to the April 24, 2006 accident and that her left carpal tunnel surgery was also unrelated to the accident, given the fact that it was performed four years after the accident and that plaintiff's occupation involves lifting heavy patients and children, and that she performs occupational therapy. Dr. Katz opined that plaintiff is not currently disabled and that she is capable of her activities of daily living, her employment as an occupational therapist, and of her pre-loss activities.

Dr. Katz also performed an addendum to his October 8, 2010 report on December 12, 2011, in which he reviewed the records from plaintiff's left carpal tunnel surgery. Dr. Katz did not change the opinions that he gave in his October 8, 2010 report. Dr. Katz opined that the carpal tunnel syndrome was related to plaintiff's work as an occupational therapist. He also again opined that "both the left and right carpal tunnel syndrome and the subsequent surgeries were not related to the accident of April 24, 2006."

Defendants further submit the report of neurologist, Dr. Maria Audrie DeJesus, who examined plaintiff at defendant's request on November 4, 2010. Dr. DeJesus examined the plaintiff, performed range of motion testing on the plaintiff, and compared those findings to normal findings. Dr. DeJesus found that plaintiff had normal ranges of motion in her cervical spine and lumbar spine. Dr. DeJesus performed a detailed motor system examination, which revealed 5/5 power in the upper and lower extremities, and she noted that there was no weakness, fasciculations, or atrophy noted. Dr. DeJesus diagnosed plaintiff with a normal neurological examination and noted that "there is no indication of a neurologic disability." She also opined that plaitniff can work and perform all of her usual daily activities without restriction or any neurological limitations resulting from this accident.

In addition to the reports of Dr. Katz and Dr. DeJesus, defendants submit the pre-accident EMG Report of Dr. Alan A. Mazurek, dated March 9, 1999, wherein Dr. Mazurek notes that

plaintiff complained of numbness in both hands and in which he concludes that the study revealed evidence of moderate right carpal tunnel syndrome. Defendants further submit the plaintiff's CPLR 3101(d) expert disclosure, in which Dr. Verghese George's report fails to causally relate plaintiff's carpal tunnel injury and surgeries to the within accident. Dr. George also reports that no further treatment was suggested and that plaintiff's prognosis is good. Lastly, defendants submit the ambulance call report from the April 24, 2006 accident which shows that plaintiff made no complaints of hand or wrist pain at the scene of the accident.

The defendants have made a prima facie showing of entitlement to summary judgment on the grounds that the plaintiff's injuries do not meet the "serious injury" requirements of Insurance Law §5102(d). (*Tourre v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 (2002); *Gaddy v. Eyler*, 79 N.Y.2d 955 (2002)). The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

In opposition, plaintiff contends that she testified at her deposition that she was unable to perform services as an occupational therapist for anyone for five months after the accident. Plaintiff submits no evidence to support her testimony regarding same, however. New York State Insurance Law §5102(d) requires that to satisfy the 90/180 requirement, plaintiff must have "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." Plaintiff has failed to submit any competent medical evidence to demonstrate that she had "a medically determined injury," causally related to the accident, which prevented her from working as an occupational therapist after the accident. Plaintiff also failed to establish that she was prevented

from performing substantially all of her customary daily activities. *(See, Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008) (dismissing claim where plaintiff was advised by physicians to refrain from landscaping and heavy lifting and was only somewhat restricted in daily activities); *Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008)(although plaintiff testified at deposition that as a result of accident she was confined to her home for two or three months and suffered certain limitations in her activities around home, there was no competent medical evidence indicating that she was unable to perform substantially all of her daily activities); *See also*, *Charley v. Goss*, 863 N.Y.S.2d 205 (1st Dept. 2008); *Rodriguez v. Virga*, 24 A.D.3d 650, 808 N.Y.S2d 373 (2d Dept. 2005)).

Further, while plaintiff refers to reports from her physical examinations with board-certified neurologist, Dr. Fazzini, no such reports are submitted with her opposition. Plaintiff does, however, submit an affirmation of her physician, Dr. Ihor Magun, M.D., who counsel for plaintiff contends conducted an objective medical evaluation of the plaintiff and indicated that plaintiff suffered serious injuries to her right and left wrist, requiring surgery. The Court has reviewed the affirmation of Dr. Magun, and Dr. Magun fails to state whether he ever examined plaintiff or when such examination was performed. In addition, Dr. Magun does not note that he performed any range of motion testing or other objective tests upon the plaintiff. In addition, while Dr. Magun affirms that there was "no history of preexisting medical issues to her neck, wrists, fingers, and hands," Dr. Magun's own records, which are annexed to the defendants' motion for summary judgment as Exhibit "H," indicate that plaintiff complained of wrist tenderness and difficulty dating back to September 1997 and January 1999. In fact, Dr. Magun notes "carpal tunnel symptoms" in his January 12, 1999 entry. Dr. Magun's affirmation consists only of the history of plaintiff's procedures, including the dates of her MRIs, EMGs, and wrist surgeries. Dr. Magun fails to state specifically which records he reviewed in making his affirmation and fails to state that he reviewed the actual diagnostic tests to which he refers (such as the actual MRI films or the actual EMG image results). Dr. Magun's conclusory statement that "based on my clinical evaluation of plaintiff and the medical records I have reviewed and evaluated, it is my medical opinion that the injuries Irene Blanchard's injuries [sic] to her wrist with a reasonable degree of medical certainty are causally related to the accident of April 24,

2006," is unsupported by any examination results or any other objective evidence. Accordingly, Dr. Magun's affirmation is insufficient to raise a question of fact sufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment.

Additionally, the MRI report from Five Towns Total Medical Care, P.C. is unsworn and therefore inadmissible. (*See, Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

Lastly, plaintiff fails to offer any explanation of her gap in treatment. "While a cessation in treatment is not dispositive...plaintiffs who terminate therapeutic measures following the accident, while claiming 'serious injury' must offer some reasonable explanation for having done so." (*Pommels v. Perez*, 4 N.Y.3d 566, 830 N.E.2d 278 (2005)).

As plaintiff has failed to offer sufficient evidence in admissible form to make an affirmative showing that she suffered a serious injury pursuant to Insurance Law §5102(d), she has failed to demonstrate a triable issue of fact sufficient to defeat defendants' prima facie showing of entitlement to summary judgment. (*See, Kwak v. Villamar*, 71 A.D.3d 762 (2d Dept. 2010)). Accordingly, defendants' motion and cross-motion for summary judgment is granted on the grounds that plaintiff injuries do not meet the serious injury threshold as defined in New York Insurance Law §5102(d), and the plaintiffs' action is dismissed.

Dated: July 27, 2012

Anthony L. Parga, J.S.C.

ENTERED
JUL 31 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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