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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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JANICE MENTORE,

Plaintiff,

-against-

J.D. COREAS-BENITEZ and MARIO COREAS,

Defendants.

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Index No. 14229/10

Motion Submitted: 5/30/12
Motion Sequence: 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants move this Court for an order granting summary judgment in their favor and dismissing the complaint on the ground that the plaintiff has not suffered a "serious injury" within the meaning of Insurance Law § 5102(d). Plaintiff opposes the requested relief.

This action arises from a motor vehicle accident that occurred on July 28, 2007, at approximately 1:30 p.m. The accident occurred at an intersection of two streets in Nassau County, New York. As a result of the accident, plaintiff is claiming that she suffered various injuries to her cervical and lumbar spine, left shoulder, headaches, dizziness, and numbness "radiating down" her left leg.

According to plaintiff's Bill of Particulars, which is attached as Exhibit C to defendants' motion for summary judgment, plaintiff is asserting claims of 1) fracture; 2) permanent loss of use of a body function or system; 3 and 4) permanent consequential and significant limitation of use of a body function or system, and 5) a medically determined injury or impairment of a non-permanent nature, which prevented him from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the accident ("90/180") claim.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***(Winegrad v. New York Univ. Med. Center,*** 64 NY2d 851[1985]; ***Zuckerman v. City of New York,*** 49 NY2d 557 [1980]). Here, the defendants must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident ***(Felix v. New York City Transit Auth.,*** 32 AD3d 527 [2d Dept 2006]).

A tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from injury and its duration (***Little v. Locoh***, 71 AD3d 837 [2d Dept 2010]; ***Ciancio v. Nolan***, 65 AD3d 1273 [2d Dept 2009]).

In support of their motion, defendants have submitted, *inter alia*, plaintiff's bill of particulars, plaintiff's deposition testimony, and the affirmed report of defendants' examining orthopedic surgeon, John C. Killian.[1]

Plaintiff was examined by Dr Killian on September 16, 2011, more than four years after the subject accident. Dr. Killian reviewed a number of plaintiff's medical records, including emergency room records, records from a multi-specialty group consisting of

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[1]Neither the complaint, nor the Bill of Particulars, is verified by plaintiff; thus, they cannot not be considered by the Court as evidence of her injuries.

physiatry, physical therapy, chiropractic, and acupuncture practitioners, physical therapy notes, and MRI reports of the cervical and lumbar spine from 2008. Dr. Killian measured range of motion in plaintiff's cervical and lumbar spine areas, with a goniometer. Dr. Killian also conducted a straight leg raising test, which was negative. Dr. Killian set forth his specific findings in terms of degrees of range of motion, comparing those findings to normal range of motion as set forth in the treatise referred to in his report.

With respect to plaintiff's cervical spine, plaintiff's range of motion was documented as being full, without muscle spasm or restriction, and despite plaintiff's complaints of pain. Dr. Killian's examination of the lumbar spine also revealed full range of motion despite plaintiff's complaints of pain and pressure.

Dr. Killian's examination also revealed that plaintiff's reflexes were intact, that the circumferential muscle masses of her upper and lower extremities were symmetrical, and that her gait was normal, without evidence of a limp.

Plaintiff's range of motion in her left shoulder was also found to be full and symmetrical, without any weakness, despite her complaints of pain upon certain movements.

Dr. Killian noted that the MRI reports describes bulging discs in her cervical and lumbar spine areas, to which he ascribed "no clinical significance." Dr. Killian stated that plaintiff does not describe radicular symptomatology, and that there are "no positive objective physical findings" to confirm plaintiff's subjective complaints of pain. Dr. Killian concluded that plaintiff has fully recovered from any orthopedic injuries sustained as a result of the accident and that she has no residual causally related impairment or disability. In Dr. Killian's opinion, plaintiff is capable of working at her normal capacity and capable of performing her usual activities of daily living without restriction.

Examining the reports of defendants' physician, there are sufficient tests conducted set forth therein to provide an objective basis so that his respective qualitative assessments of plaintiff could readily be challenged by any of plaintiff's expert(s) during cross examination at trial, and be weighed by the trier of fact ***(Toure v. Avis Rent A Car Systems, Inc.,*** 98 NY2d 345, 350 [2002]; ***Gaddy v. Eyler,*** 79 NY2d 955 [1992]).

In view of the foregoing, defendants have met their burden in establishing their *prima facie* entitlement to summary judgment as a matter of law with respect to the

following categories of injury: 1) fracture[2]; 2) permanent loss of use of a body function or system, 3 and 4) permanent consequential and significant limitation of use of a body function or system.

Defendants' examining physician did not address plaintiff's 90/180 claim. As to whether or not defendants have sustained their burden on the 90/180 claim, the Court considers plaintiff's deposition testimony submitted by defendants.

A defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature, which prevented plaintiff from performing substantially all of the material acts, which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (***Kuperberg v. Montalbano***, 72 AD3d 903 [2d Dept 2010]; ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664 [2d Dept 2008]).

Moreover, a plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the accident (***Omar v. Goodman***, 295 AD2d 413 [2d Dept., 2002]; ***Lauretta v. County of Suffolk***, 273 AD2d 204 [2d Dept., 2000]).

Plaintiff's deposition testimony establishes that she was not working at the time of the accident, and that she was approximately five months pregnant at the time. According to her testimony, immediately after the accident plaintiff was not bleeding, or did she have any scrapes or cuts. Plaintiff testified that she felt like she was "getting a headache." She was transported to the hospital by ambulance, where she was released after a few hours. Plaintiff testified that she complained of pain in her back, neck and left side. She was given Tylenol, but no x-rays or other scans were performed because of the pregnancy. When plaintiff was released, she was not given any assistive devices, or any kind of brace.

Approximately two weeks to one month after the accident, plaintiff went to a clinic where she complained of pain in her neck, back and left shoulder. She apparently consulted with a chiropractor at that time. Plaintiff received massage therapy and ice packs until she delivered her child in January 2008. The massage therapy continued after

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[2]There has been no evidence presented that plaintiff ever sustained a fracture, or even complained of a fracture.

the birth of her child until early 2009, when plaintiff sought physical therapy/chiropractic treatment. The physical therapy, which included massage and "electronic patches" continued until late 2009. According to plaintiff, she could not receive physical therapy and the patches while she was pregnant. Plaintiff also received a prescription for "minor pain medication" to be taken when needed.

Plaintiff testified that she also received some acupuncture treatment some months after she delivered her child until the fall of 2008. The MRI tests were performed in March 2008. Plaintiff has had no surgery in connection with her alleged injuries.

At the time of her deposition in September 2011, plaintiff was employed full-time in the credit department of an international distributor of office supplies. Her job involves a lot of sitting at a computer, "and neck pain is an everyday thing." Plaintiff testified that she used a back brace and a neck brace for a few months following the birth of her child, but that "it was just from having a baby and having to deal with picking up the baby. [She] nursed [the baby], so [she] think[s] that caused a little bit of neck strain also." Approximately one to two weeks after the accident, plaintiff was able to drive a car, and presently drives to work.

Plaintiff's testimony also establishes that she was confined to bed rest for a total of sixteen (16) days within the first six months following the subject accident. The first time was immediately after the accident for five days; the second time was approximately a month or two later for seven days, and the last time occurred when plaintiff was nine months pregnant, for approximately four days.

Plaintiff testified that she presently experiences headaches a few times a week, and experiences neck and back pain, difficulty sitting or standing for long periods of time, and cannot lift heavy objects. Plaintiff admitted that she has "good days and bad days," and that she takes Tylenol. At work, plaintiff gets up a lot during the day, but she has apparently not suffered a reduced work schedule as a result. Plaintiff also testified that she does not really go to the gym anymore, but did not elaborate as to the reason why she is unable to work out as a result of the subject accident.

Thus, defendants' submission of plaintiff's deposition testimony (***Jackson v. Colvert***, 24 AD3d 420 [2d Dept 2005]; ***Batista v. Olivo***, 17 AD3d 494 [2d Dept 2005]), and affirmation of defendants' physician are sufficient herein to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (***Paul v. Trerotola***, 11 AD3d 441 [2d Dept 2004]), under the fracture, permanent loss of use, permanent consequential limitation and significant limitation categories of the applicable law, nor under the 90/180 category of the law.

Plaintiff is now required to come forward with viable, valid objective evidence to verify her complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 AD3d 458 [2d Dept 2005]). Plaintiff has failed to meet her burden.

In opposition to the instant motion, plaintiff has submitted the MRI reports related to plaintiff's cervical and lumbar spine areas dated March 6, 2008. Apparently, an MRI of plaintiff's left shoulder was never performed. While those MRI reports are not affirmed, they were relied upon by defendants' examining orthopedic surgeon; thus, they will be considered by the Court in determining this motion. Aside from these MRI reports, plaintiff has not submitted any other evidence in opposition to the instant motion.

Plaintiff relies on the fact that the MRI reports disclose disc bulges in her lumbar and cervical spine areas, and a straightening of the cervical lordosis. Other than these findings, there are no other abnormalities noted, with the exception of a possible cyst, which is not being claimed as an injury resulting from the subject accident. Notably, neither of the MRI reports, which were prepared by a board certified radiologist, states that the bulges detected are causally related to the subject accident, nor has plaintiff supplied an affirmation from any other physician relating the bulges to the subject accident.

In any event, even if the bulges and straightening are assumed, *arguendo*, to have been caused by the subject accident, there is no objective evidence that plaintiff has suffered any physical limitations resulting therefrom. Plaintiff has not submitted any affirmation from any physician contradicting Dr. Killian's findings of full range of motion in plaintiff's cervical and lumbar spine areas, in addition to full range of motion of her left shoulder.

Plaintiff has not submitted to this Court for its consideration any recent findings to verify her subjective complaints of pain and limitation of movement (*see* ***Tudisco v. James***, 28 AD.d 536 [2d Dept 2006]; ***Hernandez v. DIVA Cab Corp.***, 22AD3d 722 [2d Dept 2005]).

As to plaintiff's 90/180 claim, the Court notes that a plaintiff must set forth competent medical evidence to establish that she sustained a medically determined injury or impairment of a nonpermanent nature, which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for 90 of the 180 days following the subject collision (***Ly v. Holloway***, 60 AD3d 1006 [2d Dept 2009]).

As discussed above, plaintiff's deposition testimony is the only evidence submitted to this Court regarding her 90/180 claim, and that testimony has been found to be lacking.

For all the foregoing reasons, this Court has determined that plaintiff has failed to raise a triable issue of fact with respect to the issue of serious injury within the meaning of Insurance Law § 5102 (d), as to any of the categories alleged in her Bill of Particulars.

Accordingly, defendants' summary judgment motion is granted in its entirety, and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: July 25, 2012
Mineola, New York

Karen V. Murphy
J. S.C.

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