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SHORT FORM ORDER

INDEX No. 11-8915
CAL No. 12-00737MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 8-28-12
ADJ. DATE 11-13-12
Mot. Seq. # 001 - MD

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PATRICIA KLUEBER-SPARACIO,

Plaintiff,

- against -

MICHELLE GALLO, MICHAEL T. GALLO and ALBERT W. AKRIVAS,

Defendants.

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MULLEN and IANNARONE, P.C.
Attorney for Plaintiff
300 East Main Street, Suite 3
Smithtown, New York 11787

ABAMONT & ASSOCIATES
Attorney for Defendants
200 Garden City Plaza, Suite 400
Garden City, New York 11530

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 12; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13-18; Replying Affidavits and supporting papers 19-20; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants, Michelle Gallo, Michael T. Gallo, and Albert W. Akrivas, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

In this action, plaintiff Patricia Klueber-Sparacio seeks damages for personal injuries alleged to have been sustained when she was involved in a motor vehicle accident on October 13, 2008, when her vehicle and the defendants' vehicle came into contact on Route 109 at or near its intersection with Herzel Boulevard in Babylon, New York. It is alleged that Albert W. Akrivas, who was traveling westbound on Route 109, made a left turn onto Herzel Boulevard while the plaintiff was traveling eastbound on Route 109. The vehicle which Akrivas was operating was owned by defendants Michelle Gallo and Michael T. Gallo.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979];

Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (001) the defendants have submitted, inter alia, an attorney's affirmation, a copy of the summons and complaint, defendants' answer, and plaintiff's verified bill of particulars; a signed copy of the deposition transcript of Patricia Klueber-Sparacio dated January 4, 2012; an unauthenticated activity and date-property/casualty printout which is not in admissible form pursuant to CPLR 3212; and the sworn reports of Edward A. Toriello, M.D. dated March 19, 2012 concerning his independent orthopedic examination of the plaintiff, and the undated report of Mark J. Zuckerman, M.D. relative to his independent neurological examination of the plaintiff on March 19, 2012.

Pursuant to Insurance Law § 5102 (d), " '[s]erious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of her bill of particulars, Patricia Klueber-Sparacio has alleged that she sustained injuries consisting of severe supraspinatus tendinosis and Type II anterior acromion compromising the subacromial space and abutting the muscular tendons junction as demonstrated by a MRI dated March 8, 2009; ongoing pain and discomfort in the left shoulder; pain and discomfort in the impingement arc with radiation of pain down the left arm along the biceps tendon; cortisone injections into the left shoulder, and left elbow; post traumatic bursitis/tendinitis of the left shoulder; and post traumatic lateral epicondylitis of the left elbow.

Based upon a review of the evidentiary submissions, it is determined that the defendant has not demonstrated prima facie entitlement to summary judgment dismissing the complaint on either category of injury defined by Insurance Law § 5102 (d). The moving papers raise factual issues which preclude summary judgment. The defendant has not submitted copies of the medical records and reports as required pursuant to CPLR 3212, inclusive of the MRI of the left shoulder and arm, EMG studies, disability note from Dr. Mendelsohn dated July 8, 2009, and the independent orthopedic report of Dr. Howard Kiernan dated January 12, 2009, which the defendants' experts reviewed in forming their respective opinions. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts, Inc***. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which evidence has not been provided in this case.

Neither of defendants' experts, Dr. Toriello nor Dr. Zuckerman, have submitted a copy of his respective curriculum vitae to each qualify as an expert in this matter, thus precluding summary judgment on that basis as well. Even considering their respective reports, it is determined that the defendants have failed to establish that the plaintiff did not sustain a serious injury in either category of injury defined by Insurance Law § 5102 (d). The normal range of motion values to which Dr. Zuckerman and Dr. Toriello compared their range of motion findings with regard to plaintiff's lumbar spine differ, thus leaving it to the Court to speculate as to which values are the correct normal range of motion values, thus raising factual issues. Moreover, Dr. Zuckerman has set forth various range of motion values which he obtained with the use of a goniometer. However, the normal range of motion values set forth by Dr. Zuckerman, to which he compared the plaintiff's cervical and lumbar ranges of motion, have been set forth in a range or spectrum rather than a specific number. When a normal

reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; ***Lee v M & M Auto Coach, Ltd.***, *supra*; ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]), thus raising factual issues.

Dr. Zuckerman did not discuss the findings of the EMG study conducted on the plaintiff's left arm and does not rule out that the findings on that study are causally related to the accident, raising a further factual issue to preclude summary judgment. He does not address the plaintiff's complaints of numbness in her left arm and hand, as well as the cause of the ongoing pain and alleged limitations in activity involving the left shoulder, elbow and hand. Nor does he address the disability notes dated July 8, 2008, January 17, 2011, and February 28, 2011 by Dr. Mendlesohn, leaving this court to speculate on the issue of disability, as Dr. Zuckerman opined that he made no finding of disability upon examination of the plaintiff.

Dr. Toriello set forth that the range of motion examination is a subjective test under the voluntary control of the individual being tested. This statement raises factual issues as to whether he is implying credibility issues exist concerning the plaintiff and her orthopedic examination. Dr. Toriello further stated in his report that the MRI of the plaintiff's left shoulder revealed degenerative changes and a down sloping acromion, however, his opinion is conclusory and he does not indicate what degenerative changes were demonstrated, or when they occurred, again raising factual issues, leaving this court to speculate as to the same. Dr. Toriello does not comment on the plaintiff's alleged injuries regarding post traumatic bursitis/tendinitis of the left shoulder, and post traumatic lateral epicondylitis of the left elbow, thus raising further factual issues.

The defendants' experts offered no opinion as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident, and he did not examine the plaintiff during that statutory period (*see* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]; ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The plaintiff testified that following the accident she experienced pain in her left shoulder, her left elbow and throbbing and numbness, radiating down her arm. She obtained physical therapy from just before Thanksgiving through February. She wakes up in the morning with numbness in her left arm, and her index finger does not bend properly any longer. She treated for about eight months and had multiple injections into her shoulder and left elbow. When it is extremely cold, her left arm throbs and goes numb, is very sore and inflamed, and she has to use Loratadine gel and take Aleve. Since the accident, she cannot dangle her left arm and has to hold it on the commute to work on the railroad. If someone bumps into her arm at Penn Station, it aggravates her arm. She can no longer grocery shop by herself because she cannot lift or hold bags. It is painful to do cleaning and her husband has to do the majority

of the cleaning. She had to cancel her gym membership as she can no longer participate due to the injury to her arm.

Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Based upon the foregoing, the defendants have failed to establish that the plaintiff did not sustain a serious injury under either category set forth in Insurance Law § 5102 (d), and motion (001) is denied.

Dated: DECEMBER 19, 2012

J.S.C.

____ FINAL DISPOSITION ___X__ NON-FINAL DISPOSITION