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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Winifred Fazio,

Plaintiff,

-against-

Frank T. Gargano, Bruce Sykes and Diane Sykes,

Defendants.

Motion Sequence No.: 001; MD
Motion Date: 8/21/12
Submitted: 1/9/13

Index No.: 32182/2010

Attorney for Plaintiff:

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Attorney for Defendants
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Attorney for Defendant
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Clerk of the Court

Upon the following papers numbered 1 to 28 read upon this motion for summary judgment: Notice of Motion and supporting papers (001), 1 - 19; Answering Affidavits and supporting papers, 20 - 26; Replying Affidavits and supporting papers, 27 - 28; it is

ORDERED that motion (001) by the defendant, Frank Gargano, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Winifred Fazio, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

In this action, plaintiff Winifred Fazio seeks damages for personal injuries allegedly sustained

on July 15, 2009, on County Road 48 approximately 1000 feet from the intersection with Albertson Lane, in the Hamlet of Greenport, New York, when the vehicle operated by Bruce Sykes and owned by Diane Sykes collided with the vehicle operated by defendant Frank T. Gargano in which the plaintiff was a passenger.

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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). 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" (CPLR3212 [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]).

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 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."

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 this motion for summary judgment on the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the moving party to present evidence in competent form, showing that the plaintiff did not sustain a serious injury as a result of the accident (*see* ***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met the burden, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does exist (*see* ***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 (***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*).

In support of the motion defendant Gargano has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, the defendants' answers, and plaintiff's verified bill of particulars; the transcript of the examination before trial of Winifred Fazio dated October 5, 2011; uncertified copies of the plaintiff's medical records; an unauthenticated copy of the plaintiff's no-fault file from State Farm Insurance; no-fault letter by Henry Monetti, D.O. dated July 17, 2009 to State Farm Insurance; an unauthenticated, unsigned letter which was dictated but not read by the unidentified sending physician, and is not considered herein; report of Isaac Cohen, M.D. concerning his independent orthopedic examination of the plaintiff dated December 1, 2011; report of Alan B Greenfield concerning his review of the plaintiff's MRIs of her cervical spine June 21, 2011 and report of Alan B. Greenfield, M.D. concerning his review of the MRI films of plaintiff's cervical spine dated July 17, 2009, lumbar spine dated August 18, 2009 and October 23, 2009, and left shoulder x-rays dated July 15, 2009.

By way of the bill of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of traumatic injuries to the head, face, neck, left shoulder, extremity, and back; left sided ear pain; bruise on face; cervicalgia; broad based disc bulge with facet arthrosis at C3-4; encroachment at the exiting C5 and C6 nerve roots; foraminal disc bulge with arthrosis at C6-7; cervical sprain/strain; loss of range of motion of the cervical spine; radiating paint to the left forearm and hand; disc protrusion with bilateral facet arthrosis and foraminal stenosis at L2-3; broad based disc bulge with facet arthrosis and narrowing with encroachment on the exiting nerve roots at L3-4; broad based disc bulge with facet arthrosis and narrowing with encroachment on the exiting nerve roots at L4-5; broad based disc bulge with facet arthrosis and joint effusion at L5-S1; lumbar sprain/strain; restricted range of motion of the lumbar spine; and abrasions and bruises throughout various parts of her body.

Based upon a review of defendant's evidentiary submissions, it is determined that the defendant has failed to establish *prima facie* entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury.

The curriculum vitae for Dr. Cohen has not been submitted with his report to qualify him as

an expert. Dr. Cohen set forth the materials and records which he reviewed, however, they do not include the plaintiff's cervical and lumbar MRIs and x-rays referenced to by Dr. Greenfield in his report. The MRI reports for plaintiff's cervical lumbar spine and left shoulder have not been provided in support of his opinions. Dr. Greenfield, likewise, has not submitted the copies of the MRI reports generated by the plaintiff's examining physicians. 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]).

Although the plaintiff has claimed radicular and nerve injury resulting from the injuries to her cervical and lumbar discs, no report from an examining neurologist has been submitted in support of this application and to rule out that such injuries were causally related to the subject accident (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996]).

Although Dr. Greenfield has set forth that there are no cervical disc herniations, he has not ruled out the cervical disc bulges claimed in the bill of particulars, and theinitial MRI report from the plaintiff's treating physician has not been provided for this court's review. Additionally, his opinion that the plaintiff's injuries are degenerative has not been supported with evidentiary submissions. Likewise, Dr. Greenfield opined that there is diffuse degenerative disc disease which is long-standing, and unrelated to the accident, without setting forth a basis for his opinion.

Based upon the foregoing, the defendant has failed to demonstrate *prima facie* entitlement to summary judgment dismissing the complaint as to the first category of injury defined in Insurance Law § 5102 (d).

Defendant's examining physician offers 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, as 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]), and he offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The plaintiff claims that she was confined to bed for one week following the accident, confined to home for approximate y two weeks immediately following the accident, and totally disabled for a period of approximately six months from the date of the accident, and remains partially disabled to date. Thus, factual issues and lack of evidentiary support preclude summary judgment with regard to this category of serious injury.

Based upon the foregoing, the defendants have failed to demonstrate *prima facie* entitlement to summary judgment dismissing the complaint as to the second category of injury defined in Insurance Law § 5102 (d), as well.

Inasmuch as the moving party has failed to establish *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 plaintiff's 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]).

Accordingly, the motion by defendant Frank Gargano for summary judgment dismissing the complaint is denied.

Dated: 2/4/13

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**