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SHORT FORM ORDER

COPY

INDEX No. 09-36629
CAL No. 12-01868MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 1-30-13
ADJ. DATE 4-19-13
Mot. Seq. # 004 - MD

ANGELA CANNASTRACI,

Plaintiff,

- against -

JERRY MENZIONE and HAROLD MENZIONE,

Defendants.

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1-15; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants, Jerry Menzione and Harold Menzione, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Angela Cannastraci, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this action, the plaintiff, Angela Cannastraci, seeks damages for personal injuries allegedly sustained on October 27, 2006, at about 2:45 a.m., on Route 495 (Long Island Expressway) 1000 feet west of Exit 62, in the Town of Brookhaven, New York, when her vehicle was struck in the rear by the defendants' vehicle operated by Jerry Menzione and owned by Harold Menzione.

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

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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 motion (001), defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answer and demands, and plaintiff's verified bill of particulars; the transcript of the examination before trial of Angela Cannastraci dated January 27, 2012; plaintiff's medical records dated March 23, 2000 through October 8, 2003; and the reports of Edward Toriello, M.D. dated April 23, 2012, concerning his independent orthopedic examination of the plaintiff,

and Scott Coyne, M.D. dated December 31, 2012, concerning his independent radiology review of the MRI of the plaintiff's lumbar spine of November 21, 2006.

By way of the bill of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of severe traumatic cervical, thoracic and lumbar sprains; C5-6 disc bulge with disc material approximating the ventral canal and encroaching on the ventral thecal sac; L4-5 disc bulge with disc material approximating the ventral canal encroaching on the ventral thecal sac; cervical radiculopathy; strain of the left shoulder; headaches; cervical and lumbar myofascial derangement; straightening of the normal lordosis; cervical paravertebral spasms; denervation of the left pronate teres; manifested by, but not limited to pain, stiffness, marked restrictions and limitations of normal ranges of motion of the neck, back, lower back, and shoulder; and tenderness and numbness in the hands and fingers bilaterally pain; pain radiating in the low back to the left posterior thigh. The plaintiff further alleges that following the accident, she suffered from dizziness, was in a dazed condition, suffered nightmares, and experienced fear and nervousness in cars. She sought physical therapy, neurological therapy, and orthopedic therapy, and also took Skelaxin and Naprosyn.

Based upon a review of defendants' evidentiary submissions, it is determined that the defendants have 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.

None of the medical records, including the MRI studies of the plaintiff's cervical and lumbar spine, and EMG studies, conducted for injuries related to this accident have been submitted in support of the experts' opinions as required pursuant to ***Friends of Animals v Associated Fur Mfrs***., *supra*. Expert testimony is limited to facts in evidence (*see also* ***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]), and these records and reports are not in evidence. Thus, this court is left to speculate as to the contents and findings in those records.

Dr. Toriello set forth that the plaintiff is a fifty-four year old female who was involved in an accident on October 27, 2006, when her vehicle was struck in the rear, causing injury to her neck, left shoulder, and lower back. Nine years prior, she experienced some pain in her shoulder and neck, but it was not associated with any injuries. She now complains of pain in her neck with parathesis in her left arm, left shoulder pain, low back pain, left leg pain which is worse at night. Dr. Toriello set forth the finding that upon examination of the plaintiff's lumbar spine, he found a decreased flexion value of 45 degrees out of the normal 60 degrees.

Dr. Toriello set forth that the MRI of the plaintiff's lumbar spine dated November 26, 2006 revealed straightening of the lumbar lordosis and a bulging disc at L4-5. The plaintiff's cervical spine MRI of November 30, 2006 revealed straightening of the cervical lordosis and bulging at C5-6. He continued that the injuries appear to be causally related to the accident, but the report is unclear as to what injuries he is referring. Dr. Toriello does not address the injury of bulging cervical or lumbar discs or the finding of decreased lumbar flexion, leaving this court to speculate as to his opinions with regard

to the same. He does state that the range of motion examination is a subjective test under the voluntary control of the individual, thus, leaving this court to further speculate whether he is implying that the plaintiff in some way controlled any of the range of motion findings. Dr. Toriello does not address the duration of the finding of limited lumbar flexion (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 9000; ***Carmona v Youssef***, 27 Misc3d 1238(a) 910 NYS2d 761 [Sup. Ct. Queens County 2010]). This raises factual issues, further precluding summary judgment.

Dr. Toriello also indicated that the EMG nerve conduction study of the upper extremities dated October 27, 2006 revealed findings consistent with mild left chronic cervical radiculopathy. Although the plaintiff has alleged that she suffered cervical radiculopathy, and experiences back pain radiating down into her left thigh, and was under the care of a neurologist, no report concerning an independent neurological evaluation has been submitted by the defendants (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus, raising factual issues concerning whether the plaintiff's radicular/neurologic claims have been ruled out.

Dr. Coyne's report relating to the plaintiff's lumbar MRI of November 21, 2006, is not supported with a copy of the original report of the interpreting physician, leaving this court to speculate as to whether plaintiff's physician and Dr. Coyne are in agreement in their interpretations of the study. While Dr. Coyne stated that there are mild degenerative changes mainly at L4-5 characterized by shallow annular bulging, he continued that these findings are chronic and long-standing, and causally unrelated to the accident. However, he does not give a basis for this opinion, or render an opinion with regard to the duration and causation of the findings, precluding summary judgment. Dr. Coyne does not comment on the findings set forth in plaintiff's lumbar MRI study.

Defendants' 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, 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]), and 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 testified that she received physical therapy and chiropractic treatment for a couple of months following the accident. She had MRIs to her neck and back. She treated with a neurologist for about a year after the accident for pain, numbness, and tingling in her arm and neck. Nerve conduction studies were conducted by him. In about 2002, she started treating with a chiropractor, Dr. Guzinski, for pain in her left arm, shoulder, and neck, and was advised that she had a herniated disc, as per MRI. Prior to the subject accident, she was an avid gym-goer. She went every day, lifted weights, and went on the treadmill on a very high incline; now she has not been there in a year. She can no longer wear high heels as she was able to do prior to the accident as it hurts her back. She now has difficulty taking long drives. Her doctor prescribed anti-depressant medication for the depression and anxiety she experienced following the accident. However, she stopped taking the medication as it made her hands shake.

Based upon the foregoing, it is determined that the defendants have failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain serious injury as defined by Insurance Law § 5102 (d) in either category.

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]).

In view of the foregoing, the defendants' motion for summary judgment dismissing the complaint is denied.

Dated: June 14, 2013

Hon. Denise F. Molia
A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**