[* 1]

SHORT FORM ORDER

INDEX No. 11-19767
CAL. No. 12-02217MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-16-13
ADJ. DATE 8-15-13
Mot. Seq. # 001 - MD

INNA KUCHERYAVENKO AND GELA KIPSHIDZE, Plaintiffs, - against - CHRISTOPHER FANTINI and RICHARD FANTINI, Defendants.	TINARI, O'CONNELL & OSBORN, LLP Attorney for Plaintiffs 320 Carleton Avenue Central Islip, New York 11722 RICHARD T. LAU & ASSOCIATES Attorney for Defendant P.O. Box 9040 Jericho, New York 11753-9040

Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001)1-16; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 17-28; Replying Affidavits and supporting papers 29-31; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendants, Christopher Fantini and Richard Fantini, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Inna Kucheryavenko, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this negligence action, the plaintiff, Inna Kucheryavenko, seeks damages for personal injuries alleged to have been sustained on October 15, 2010, at or near the intersection of Route 112 and Old Town Road, in Coram, New York, when the vehicle operated by her was struck by the vehicle owned by Richard Fantini and operated by defendant Christopher Fantini. A derivative claim has been asserted by plaintiff's spouse, Gela Kipshidze.

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]). 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 this motion, the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; unsigned and uncertified x-ray reports; report of February 5, 2013 by Alan B Greenfield, M.D. concerning a review of left shoulder x-rays taken October 15, 2010, May 31, 2011, and April 10, 2012; John T. Mather Hospital record; transcript of the examination before trial of Inna Kucheryanvenki dated April 11, 2012; office records of Blyznak Nestor, M.D. which appear to have been obtained from a website; and the sworn report of Lee M. Kupersmsith, M.D dated June 26, 2012 concerning his independent orthopedic examination of the plaintiff.

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 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 the verified bill of particulars, the plaintiff alleges having sustained the following injuries in the subject accident: extensive left posterior labral tear propagating superiorly into the biceps anchor; labral detachment to the left shoulder; posterior decentering of the left humeral head; separation of the left acromioclavicular joint; fraying and articular surface tearing of the left subscapularis; sprain of the left rotator cuff; tenopathy of the left supraspinatus and infraspinatus; left reverse Bankart fracture; contusions of the left rib; multiple contusions; sprain of the right wrist; contusions of the right trapezoid and second metacarpal base; full thickness perforation of the right triangular fibrocartilage; pain, stiffness, and restriction of motion of the affected areas.

Upon careful review and consideration of the defendants' evidentiary submissions, it is determined that the moving parties have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Inna Kucheryavenko did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Neither Dr. Kupersmith nor Dr. Greenfield have submitted copies of their respective curriculum vitae or set forth their respective education, training and experience, in order to qualify to render expert testimony. Although Dr. Kupersmith set forth the materials and medical records and reports which he reviewed, copies of the reports of the arthrogram and MRI/MR studies of the plaintiff's left shoulder and right wrist have not been provided. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that 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]). Here, although the aforementioned reports are not in evidence, in searching the record, they are found in plaintiff's opposing papers.

Additionally, while defendants submitted Dr. Greenfield's reports concerning the x-rays of the plaintiff's left shoulder, no report concerning the findings of the MRI of the plaintiff's left shoulder and right wrist, or the arthrogram of the left shoulder have been provided, raising factual issues concerning his expert opinions with regard to the findings set forth in those reports.

The plaintiff has pleaded in her bill of particulars that she sustained a left reverse Bankart fracture, however, neither Dr. Kupersmith nor Dr. Greenfield have commented on this injury and have not ruled it out, precluding summary judgment. Also, Dr. Kupersmith does not address other injuries alleged by the plaintiff, consisting of extensive left posterior labral tear propagating superiorly into the biceps anchor, labral detachment to the left shoulder, posterior decentering of the left humeral head, separation of the left acromioclavicular joint, and fraying and articular surface tearing of the left subscapularis. He does, however, report that surgery has been recommended to treat the plaintiff's shoulder injury, but she has not yet had surgery, although she has undergone physical therapy, injections into her shoulder, and medical treatment. Such factual issues preclude summary judgment.

It is noted that the movants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering their physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiffs were unable to substantially perform all of the material acts which constituted their usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***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 the expert 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]). Thus, summary judgment is precluded to the moving parties with regard to this category of injury as well.

Additionally, the plaintiff testified that she received care and treatment at Mather Hospital emergency room and was discharged with a sling to her left arm. Upon following up with her private health care provider, she was given an orthopedic referral with Dr. Blyznak. She saw him in November and presented with complaints of being unable to use her right arm/wrist or left arm as she could prior to the accident. She could not squeeze objects or open doorknobs or write with her right hand and wrist, which she had to do as a teacher. Br. Blyznak ordered an MRI of her right wrist. She has pain upon using her left arm, for which she was given injections into her left shoulder joint, which caused her to faint. She had physical therapy for a total of twelve weeks, twice a week. The prescription was for three times a week, but because she has young children, she could only attend twice a week. Thereafter, due to continued pain, Dr. Blyznak ordered an MRI of her shoulder, which he told her revealed a tear in the labrum and torn cartilage. She testified that he told her she could have surgery to restore the damaged cartilage, or live with it the rest of her life. Thereafter, she saw Dr. Seleo who advised her to have surgery to restore the cartilage. He scheduled her for surgery. She rescheduled the surgery. He advised her of the consequences of surgery, that she could have stiffness in her arm and not be able to raise her arm, for which nothing could be done. She also saw Dr. Kottmeier who is in the same group with Dr. Balznak and Dr. Seleo. Dr. Kottmeier sent her for x-rays of her left shoulder and reviewed the MRI CD of her left shoulder and confirmed that she has torn cartilage. He advised surgery to her shoulder, but she told him that she is afraid of the consequences associated with the shoulder surgery. She currently experiences weakness in her left arm and pain when she tries to reach behind her back or tries to perform physical exercise. She cannot lift anything heavier than ten pounds with her left arm, and experiences pain and difficulty at work lifting books, pulling the white board up or down, and reaching. She can still vacuum, and clean, but it creates pain and discomfort. She has difficulty putting sheets on the beds. She has trouble digging in the garden.

The factual issues raised in the moving papers preclude summary judgment and the defendants have failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties have failed to establish prima facie entitlement to judgment as a matter of law, it is unnecessary to consider whether the opposing papers are 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, motion (001)for summary judgment on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: November 15, 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION