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SHORT FORM ORDER

INDEX No. 11-33542
CAL No. 13-00691MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 5-21-13
ADJ. DATE 8-6-13
Mot. Seq. # 002 - MG; CASEDISP

SAMANTHA V. ESPOSITO,

Plaintiff,

- against -

DANIEL T. FITZGERALD,

Defendant.

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Bay Shore, New York 11706

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 31 ; Replying Affidavits and supporting papers 32 -33 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Daniel Fitzgerald seeking summary judgment dismissing the complaint is granted.

Plaintiff Samantha Esposito commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Gardiner Drive and Bardolier Lane in the Town of Islip on April 30, 2011. The accident allegedly occurred when the passenger side of plaintiff's vehicle was struck by the vehicle owned and operated by defendant Daniel Fitzgerald as she was attempting to execute a three-point turn. By her bills of particulars, plaintiff alleges, among other things, that she sustained various personal injuries as a result of the subject accident, including lumbosacral radiculopathy; a disc herniation at level L5-S1; and lumbar and cervical sprain. Plaintiff alleges that as a result of the injuries she sustained in the collision she was confined to her bed and home for approximately one week. Plaintiff further alleges that she was incapacitated from her employment for approximately one week immediately following the accident.

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Defendant now moves for summary judgment on the basis that plaintiff's alleged injuries do not come within the meaning of the "serious injury" threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical records regarding the injuries at issue, and the sworn medical report of Dr. Marc Chernoff. Dr. Chernoff, at defendant's request, conducted an independent orthopedic examination of plaintiff on March 11, 2013. Plaintiff opposes the motion on the grounds that defendant failed to meet his prima facie burden with evidence establishing she did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject accident, and that her papers submitted in opposition demonstrate that she sustained injuries in the "limitations of uses" categories and the "90/180" category of the Insurance Law. In opposition to the motion, plaintiff submits her own affidavit, the sworn medical report of Dr. Frank Oliveto, and certified copies of her medical records from Dr. John Acampa, Dr. Albert Zilkha and Dr. Steven Litman, and Excel Rehabilitation and Sports Therapy, and New York Pain Consultants.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, defendant has established his prima entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of § 5102 (d) of the Insurance Law as a result of the subject accident (***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendant's examining orthopedist, Dr. Chernoff, used a goniometer to test plaintiff's ranges of motion in her spine, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Chernoff states that an examination of plaintiff revealed full range of motion in the lumbar and cervical regions of her spine, that she was able to heel and toe walk appropriately, that her sensation was intact, and that her muscle strength was 5/5. Dr. Chernoff opines that the spinal strains which plaintiff sustained as a result of the subject accident have resolved, and that the examination did not reveal any evidence of an orthopedic disability. In addition, Dr. Chernoff states that his examination of the MRI films of plaintiff's spine do not reveal any evidence of radiculopathy or nerve compression, and that plaintiff's complaints of pain are subjective in nature. Dr. Chernoff concludes that plaintiff, who is currently a full-time student and working part-time, is capable of performing her daily living activities without restriction.

Furthermore, plaintiff's deposition testimony demonstrates that "substantially all" of her daily activities were not curtailed due to her alleged injuries (*see e.g.* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Kolodziej v Savarese***. 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]). Plaintiff testified at an examination before trial that she has not seen any doctors for the injuries she allegedly sustained in the subject collision since November 2012, that she missed approximately nine days from school when she was confined to her bed immediately following the accident, and that none of her doctor's prescribed bed-rest for her. Plaintiff testified that she stopped attending physical therapy after two months on her own accord, and did not return to physical therapy even after her doctor recommended that she do so, because she did not believe it was improving her condition. She further testified that she stopped working part-time as an aide at Adult and Children with Learning and Developmental Disabilities, because the hours were not "very good" for her, and not due to the injuries she allegedly sustained in the subject accident. As a result, plaintiff's claims only indicate a slight curtailment of her daily activities, which is not sufficient to establish a serious injury within the 90/180 category (*see* ***Licari v Elliott***, *supra*; ***Siew Hwee Lim v Dan Dan Tr., Inc.***, 84 AD3d 1213, 923 NYS2d 677 [2d Dept 2011]).

Defendant, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal

function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, plaintiff has failed to raise a triable issue of fact to refute defendant's prima facie showing that she did not sustain a serious injury as a result of the accident (*see* ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]). Plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the limitations of use categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]), or within the 90/180 category of the Insurance Law (*see* ***Jack v Acapulco Car Serv., Inc.***, 72 AD3d 646, 897 NYS2d 648 [2d Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]). The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [3d Dept 1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [3d Dept 1988]). Indeed, the vast majority of the medical reports submitted by plaintiff are not in admissible form and, therefore, are without probative value (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Luna v Mann***, 58 AD3d 699, 872 NYS2d 467 [2d Dept 2009]). However, the sworn medical report of Dr. Frank Oliveto, an orthopedic surgeon who examined plaintiff on July 26, 2011, indicates, in relevant part, that the cervical and lumbosacral strains sustained by plaintiff as a result of the subject accident have resolved, that she has full range of motion in her spine, and that there was no evidence of spasm or tenderness upon palpation of her paralumbar spinal musculature.

In addition, the medical report of Dr. Albert Zilkha, the radiologist who performed an MRI study of plaintiff's lumbar spine June 24, 2011, states that she has a small central herniated disc at level L5/S1. "The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury, as well as its duration" (***Rivera v Bushwick Ridgewood Props.***, 63 AD3d 712, 713, 880 NYS2d 149 [2d Dept 2009]; *see* ***Bacon v Bostany***, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Chanda v Varughese***, 67 AD3d 947, 890 NYS2d 88 [2d Dept 2009]).

Further, plaintiff's submissions failed to address her lengthy gap in treatment (*see* ***Pommells v Perez***, *supra*). Finally, in absence of objective medical proof of a serious injury, plaintiff's affidavit was

insufficient to raise a triable issue of fact (*see* ***Little v Locoh***, 71 AD3d 837, 897 NYS2d 183 [2d Dept 2010]; ***Niles v Lam Pakie Ho***, 61 AD3d 657, 877 NYS2d 139 [2d Dept 2009]; ***Hargrove v New York City Tr. Auth.***, 49 AD3d 692, 854 NYS2d 182 [2d Dept 2008]).

Accordingly, defendant's motion for summary judgment seeking to dismiss the complaint is granted.

The foregoing constitutes the Order of this Court.

Dated: November 20, 2013
Riverhead, NY

Hector D. LaSalle
HON. HECTOR D. LASALLE, J.S.C.

__X___ FINAL DISPOSITION _____ NON-FINAL DISPOSITION