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SHORT FORM ORDER

INDEX No. 07-29838
CAL No. 13-00221MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.,
Acting Justice of the Supreme Court

MOTION DATE 5-2-13 (#002 & #003)
MOTION DATE 9-17-13 (#004)
ADJ. DATE 11-19-13
Mot. Seq. # 002 - MG
003 - XMG
004 - XMD; CASEDISP

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PATRICIA A. ROUSE,

Plaintiff,

- against -

DEBRA R. HOGARTY and JOHN D. WALTERS,

Defendants.

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Upon the following papers numbered 1 to 43 read on this motion and these cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 30; 31 - 38; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 39 -40; 41 - 43; Other ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Debra Hogarty seeking summary judgment dismissing the complaint against her is granted; and it is

ORDERED that the cross motion by defendant John Walters seeking summary judgment dismissing the complaint against him is granted; and it is further

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ORDERED that the cross motion by plaintiff Patricia Rouse seeking summary judgment in her favor on the issue of liability is denied, as moot.

Plaintiff Patricia Rouse commenced this action to recover damages for injuries she allegedly sustained in two separate motor vehicle accidents. By her complaint, plaintiff alleges that her vehicle was struck in the rear by the vehicle owned and operated by defendant Debra Hogarty while she was at a complete stop at a stop sign at the intersection of Panamoka Trail and Route 25 in the Town of Brookhaven on March 2, 2005. Plaintiff also alleges that the vehicle owned and operated by defendant John Walters struck the rear of her vehicle while she was stopped at the red light timer of the entrance ramp to the eastbound Long Island Expressway in the Town of Islip on July 25, 2005. By her bill of particulars, plaintiff alleges, among other things, that she sustained various personal injuries as a result of the accident on March 2, 2005, including cervical and lumbar sprains, and disc bulge at level C6-C7. Plaintiff alleges that she was incapacitated from her employment for approximately eight days as result of the injuries she sustained in this accident. Additionally, plaintiff alleges that, as a result of the accident on July 25, 2005, she sustained disc herniations at levels C5 through C7 and levels L4 through S1; disc bulges at C2 through C5; cervical radiculopathy and cervical osteophytes. Plaintiff further alleges that she was confined to her bed for approximately 14 days and to her home for approximately 60 days as a result of the injuries she sustained in the second accident. Lastly, plaintiff alleges that she was incapacitated from her employment for approximately 25 days as a result of the injuries she sustained in such accident.

Defendant Hogarty now moves for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the accident that occurred on March 2, 2005. In support of the motion, defendant Hogarty submits, inter alia, copies of the pleadings, plaintiff's deposition transcript, uncertified copies of the plaintiff's medical records, and the sworn medical report of Dr. Michael Katz. Defendant Walters cross-moves for summary judgment on the same grounds as defendant Hogarty and relies on the same evidence submitted by defendant Hogarty on her motion for summary judgment. At the request of defendants Hogarty and Walters, Dr. Katz conducted an independent orthopedic examination of plaintiff on July 12, 2011. Plaintiff opposes the motions on the grounds that each defendant failed to make a prima facie case, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" categories of Insurance Law § 5102(d). In opposition to the motions, plaintiff submits the medical report of Dr. Robert Leahy, her treating chiropractor and her own affidavit.

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*).

Once a defendant has established a prima facie case that the plaintiff's alleged injuries do not meet the serious injury threshold requirement of § 5102 (d) of the Insurance Law, a plaintiff must come forward with evidence in admissible form to raise a material triable issue of fact as to whether he or she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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). 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). 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]).

Here, defendants Hogarty and Walters, through the submission of plaintiff's deposition transcript and competent medical evidence, established a prima facie case that plaintiff did not sustain an injury within the meaning of § 5102(d) of the Insurance Law (*see* ***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]), and, in any event, that plaintiff's alleged injuries were not caused by the accident that occurred on either March 2, 2005 or July 25, 2005 (*see* ***Barkare v Kakouras***, 110 AD3d 838, 972 NYS2d 710 [2d Dept 2013]; ***Jilani v Palmer***, 83 AD3d 786, 920 NYS2d 424 [2d Dept 2011]). Defendants' examining orthopedist, Dr. Katz, states in his medical report that an examination of plaintiff reveals that she has full range of motion in her spine and that palpation of the paravertebral spinal muscles does not reveal any tenderness or spasms. Dr. Katz states that plaintiff's motor strength is intact, that the straight leg raising test is normal, and that the sensory examination reveals full sensation to touch. Dr. Katz opines that the strains plaintiff sustained in the subject accidents have resolved, and that plaintiff does not have any residual objective orthopedic findings or disability as a result of either the March 2, 2005 accident or the July 25, 2005 accident. Dr. Katz further explains that his review of the MRI studies of plaintiff's cervical spine reveals that there were no changes to her cervical spine as a result of the second accident on July 25, 2005, and that the MRI examination of her spine revealed changes that were degenerative in nature, and not causally related to either accident. Dr. Katz concludes that plaintiff may continue with her activities of daily living and her present employment.

In opposition, plaintiff failed to raise a triable issue of fact to refute defendants' prima facie showing that she did not sustain a serious injury as a result of the accidents (*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 her alleged injuries meet the serious injury threshold requirement of the Insurance Law (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]). While plaintiff is not required to submit contemporaneous range of motion testing, she is required to submit competent medical evidence demonstrating that she sustained range of motion limitations in her spine contemporaneously with the accident and plaintiff has failed to submit such evidence (*see* ***Perl v Meher***, *supra*; ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]).

Moreover, plaintiff's submissions 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]). Plaintiff has submitted the report of Dr. Robert Leahy. The cover of the report states: "Robert C. Leahy, D.C. being duly sworn, depose and says: I am a chiropractor, duly licensed to practice in the State of New York. I hereby state under penalties of perjury that all of the statements made by me in this affidavit are true to the best of my knowledge and belief." However, the report concludes: " I Robert C Leahy, D.C. being a chiropractor, duly licensed to practice in the State of New York under the penalties of perjury, pursuant to Civil Practice Law and Rules sec 2106, due hereby affirm the integrity of this document. The information contained within this document was prepared and reviewed by and is the work product of the undersigned, and it is true to the best of my knowledge and information. Any change to the content of this report has been reviewed and reflects the opinion of the undersigned." The report is signed: Robert C Leahy, D.C. Dr. Leahy's report leaves the Court to speculate as to whether it is an affidavit, which is required to be submitted by a chiropractor (*see* CPLR 2106; *see also* ***Paul-Austin v McPherson***, 111 AD3d 610, 974 NYS2d 281 [2d Dept 2013]), or if it is an affirmation, which usage is impermissible by a chiropractor under section 2106 of the CPLR (*see* ***Doumanis v Conzo***, 265 AD2d 296, 696 NYS2d 201 [2d

Dept 1999]). In any event, even if the Court were to overlook such confusion, the report still fails to raise a triable issue of fact, since it is apparent that Dr. Leahy relied upon the unsworn reports of numerous other doctors and plaintiff's subjective statements in reaching his conclusions (*see* ***Hargrove v New York City Tr. Auth.***, 49 AD3d 692, 854 NYS2d 182 [2d Dept 2008]; ***Casas v Montero***, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]; ***Govori v Agate Corp.***, 44 AD3d 821, 843 NYS2d 459 [2d Dept 2007]; *see also* ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). Also, Dr. Leahy's examination of plaintiff was conducted more than eight years after the accidents at issue and, since plaintiff has not submitted any competent medical evidence to connect her alleged injuries and subject complaints to the accidents at issue, the report is insufficient to establish such connections or the extent of the limitations caused by the injuries and their duration (*see* ***Sanchez v Romano***, 292 AD2d 202, 739 NYS2d 368 [1st Dept 2002]).

Furthermore, the self-serving affidavit of plaintiff was insufficient to raise a triable issue of fact as to whether she sustained a serious injury as a result of the accidents that occurred on either March 2, 2005 or July 25, 2005 (*see* ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]). Accordingly, defendant Hogarty's motion and defendant Walter's cross motion for summary judgment dismissing the complaint are granted.

Having granted defendant Hogarty's motion and defendant Walters' cross motion for summary judgment dismissing the complaint for failure to sustain a serious injury within the meaning of the Insurance Law, plaintiff's cross motion for summary judgment in her favor on the issue of liability is denied, as moot. In any event, the Court notes that the note of issue in this action was filed on January 31, 2013 and that dispositive motions were required to be filed by May 31, 2013. Plaintiff filed her cross motion for summary judgment on September 13, 2013, more than three months after the deadline set for the filing of such motions, and failed to show good cause for filing a late motion (*see* CPLR 3212; ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***Powers v Sculco***, 89 AD3d 1075, 933 NYS2d 602 [2d Dept 2011]). In fact, plaintiff failed to state any reason as to why she filed a late cross motion. Although a late cross motion for summary judgment may be considered, even in the absence of good cause, where there is a timely motion for summary judgment seeking relief nearly identical to that sought by the cross motion (*see* ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]), here, plaintiff's cross motion for summary judgment in her favor on the issue of liability was not responsive to a timely, pending motion for summary judgment (*see* ***Bicounty Brokerage Corp. v Burlington Ins. Co.***, 101 AD3d 778, 957 NYS2d 161 [2d Dept 2012]).

Dated: 3. 31. 14

A.J.S.C.

X **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**