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SHORT FORM ORDER

INDEX No. 11-33165
CAL No. 13-00938MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 9-19-13
ADJ. DATE 1-7-14
Mot. Seq. # 001 - MG; CASEDISP

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YOLANDA R. FLORES-BONILLA,

Plaintiff,

- against -

GEORGE HEYWARD JR. and WILLIAM E. SLOAN,

Defendants.

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Upon the following papers numbered 1 to 38 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 36 ; Replying Affidavits and supporting papers 37 - 38 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on April 28, 2011 in a motor vehicle accident that occurred on Wicks Road near its intersection with Expressway Drive South in Islip, New York. Plaintiff's vehicle was struck by a vehicle owned by defendant George Heyward, Jr. and operated by defendant William E. Sloan.

By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including herniated disc L5-S1 encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally; disc bulge L4-5 encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally; lumbar radiculopathy; lumbar myofascial pain syndrome; lumbar myofascial

derangement; disc bulges C3-4, C4-5, C5-6, C6-7, C7-T1, and T1-2 encroaching upon the ventral aspect of the thecal sac at said levels; cervical radiculopathy; cervical myofascial derangement; thoracic myofascial derangement; left shoulder derangement; and post-traumatic headaches. In addition, plaintiff alleges that following said accident she received emergency room treatment at Southside Hospital, in Bay Shore, and that thereafter she was confined to bed until approximately May 5, 2011 and confined to home until approximately June 7, 2011. Plaintiff also alleges that she sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendants now move for summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Their submissions in support of their motion include the summons and complaint, their answer, plaintiff's bill of particulars, plaintiff's Southside Hospital Emergency Department record, the affirmed report of their examining orthopedist, Lee M. Kupersmith, M.D., and plaintiff's deposition transcript.

Insurance Law § 5102 (d) defines "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of plaintiff's limitation or loss of range of motion 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.***, 98 NY2d 345, 746 NYS2d 865 [2000]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos*** 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

At her deposition on January 18, 2013, plaintiff testified that her stopped vehicle was struck in the rear and propelled into the stopped vehicle in front of her; she described the force of the impact to her rear as "medium"; her body did not contact any part of her vehicle; and she told the police at the scene that her neck hurt. In addition, plaintiff testified that her stepfather took her from the scene of the accident to Southside Hospital where she complained of neck, back and left arm pain; she underwent x-rays of her neck and back; she was released the same day with instructions to rest and was given Ibuprofen. Plaintiff also testified that the following day she saw a chiropractor in Brentwood with whom she began treatment twice a week which continued for approximately six months. She described the treatment as consisting of hot pads and exercises for her left arm and massages for her neck and back. Plaintiff stated that she underwent MRI testing of her neck, back and arm. Plaintiff also stated that she stopped treatment because the no-fault insurance stopped paying for the treatment. She did not have private health insurance through her employment. According to plaintiff, the treatment that she did receive helped. She explained that she did not receive further treatment from anyone else. Plaintiff further testified that following said accident she missed one month from her job, which involves working on a computer, and that her job duties have not changed, and her salary has increased. Plaintiff described her current complaints as almost daily soreness in her neck and a sharp pain in her back which both last approximately 20 minutes and ensue from sitting and bending. She stated that she takes Ibuprofen for relief. Plaintiff explained that she is able to perform all of her daily chores and activities that she was able to do prior to the accident but that the pain bothers her.

Dr. Kupersmith indicated in his affirmed report dated March 19, 2013 that he performed an independent orthopedic examination of plaintiff on said date. He reported range of motion testing results that he performed using a handheld goniometer. With respect to plaintiff's cervical spine, Dr. Kupersmith indicated that there was no tenderness to palpation or evidence of spasm, and that range of motion testing revealed forward flexion to 50 degrees (normal 50 degrees), extension 60 degrees (normal 60 degrees), left and right lateral rotation 80 degrees (normal 80 degrees) and right and left lateral flexion to 45 degrees (normal 45 degrees). Regarding plaintiff's thoracic and lumbar spines, he found minimal tenderness to palpation but no spasm and reported range of motion testing as forward flexion to 60 degrees (normal 60 degrees), extension to 25 degrees (normal 25 degrees), left and right lateral rotation to 30 degrees (normal 30 degrees), and right and left lateral flexion to 25 degrees (normal 25 degrees). Dr. Kupersmith noted that plaintiff had negative right and left straight leg raises in the seated and supine positions and no sensory deficits in the upper and lower extremities. As for plaintiff's left shoulder, he reported that there was no tenderness around the sternoclavicular joint, the AC joint or the anterior deltoid and cuff. The range of motion testing results revealed abduction to 180 degrees (normal 180 degrees), forward flexion to 180 degrees (normal 180 degrees), internal rotation 80 degrees (normal 80 degrees), external rotation to 90 degrees (normal 90 degrees), posterior extension of 40 degrees (normal 40 degrees), and crossed abduction of 30 degrees (normal 30 degrees). Dr. Kupersmith added that said normal range of motion findings were comparable to plaintiff's right shoulder and that plaintiff had negative Hawkins and Neer signs bilaterally. He also found that supraspinatus strength was 5/5 bilaterally. Dr. Kupersmith diagnosed cervical, thoracic, and lumbosacral sprain/strain resolved and left shoulder strain resolved and opined in conclusion that plaintiff showed no orthopedic disability, had no objective findings to substantiate her subjective complaints and that her prognosis was good.

Here, defendants met their prima facie burden of showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Ranford v Tim's Tree and Lawn Service, Inc.***, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]). Defendants also submitted evidence establishing, prima facie, that plaintiff did not sustain a "serious injury" under the 90/180-day category of Insurance Law § 5102 (d) (*see* ***Jackson v Aghwana***, 114 AD3d 728, 980 NYS2d 145 [2d Dept 2014]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Yunatanov v Stein***, 69 AD3d 708, 893 NYS2d 569 [2d Dept 2010]; ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2d Dept 2009]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see* ***Moran v Palmer***, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact (*see* ***Marietta v Scelzo***, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition to the motion, plaintiff contends that she did sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. Plaintiff's submissions in support of her opposition include her own affidavit, the affirmation and attached report dated October 17, 2013 of Alvin Stein, M.D. of Brentwood Medical Plaza, P.C., the affirmation and attached lumbar spine MRI report of John Himelfarb, M.D., plaintiff's Southside Hospital Emergency Department records, the New York Motor Vehicle No-Fault Insurance Law Denial of Claim Form, and plaintiff's Brentwood Medical Plaza, P.C. records.

Plaintiff's Emergency Department records reveal that her x-rays of the cervical spine, lumbar spine and thoracic spine were all normal. Her records from Brentwood Medical Plaza, P.C. indicate that she received treatment from May 2011 to November 2011. The New York Motor Vehicle No-Fault Insurance Law Denial of Claim Form indicates that all orthopedic benefits were denied effective December 13, 2011 based on a negative independent medical examination performed on November 22, 2011.

The affirmed lumbar spine Magnetic Resonance (MRI) report dated May 31, 2011 by Dr. Himelfarb based on an examination of May 28, 2011 reports posterior bulge at the L4-5 level, central posterior herniation at the L5-S1 level, and an incidentally noted posterior disc bulge at the T11-12 level favoring the right side.

The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the alleged physical limitations resulting from the disc injury, as well as its duration (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***Ranford v Tim's Tree and Lawn Service, Inc.***, 71 AD3d 973, 897 NYS2d 245; ***Bleszcz v Hiscock***, 69 AD3d 890, 894 NYS2d 481 [2d Dept 2010]).

Dr. Stein's affirmed report dated October 17, 2013 based on a final medical evaluation of plaintiff's cervical spine and lumbar spine and left shoulder indicated that plaintiff complained of pain in all three areas and that he found trigger points in her cervical paraspinal muscles but that trigger points

were absent in the lumbar spine paraspinal muscles as well as in the shoulder. Notably, Dr. Stein provided no range of motion testing results and reported that lumbar spine range of motion testing was unable to be performed because plaintiff was five months pregnant and limited. He diagnosed cervical disc displacement, lumbar herniation with disc displacement and left shoulder sprain/strain, concluded that plaintiff was partially, mildly, disabled, 25-49 percent, and noted that plaintiff had returned to her normal clerical work duties full time since the accident. Dr. Stein further noted that plaintiff had no history or previous complaints or disability with respect to prior existing trauma and was able to fully function prior to the accident. He opined within a reasonable degree of medical certainty based on his clinical findings that the subject accident was the competent producing cause of plaintiff's limitations of motion and pain syndrome resulting in a permanent partial disabling injury.

Here, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the permanent loss, the permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law § 5102 (d), since she failed to set forth any objective medical findings from a recent examination (*see* ***Valera v Singh***, 89 AD3d 929, 932 NYS2d 530 [2d Dept 2011]). Specifically, plaintiff failed to proffer any recent medical evidence regarding any range-of-motion limitations in her spine (*see* ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). The next-to-last report contained in her attached records from plaintiff's treating physicians, the affirmed report based on a follow-up medical evaluation by Joseph Perez, M.D. of Brentwood Medical Plaza, P.C., is dated September 30, 2011, only five months after the subject accident. Said report and the earlier reports and records are insufficient to raise a triable issue of fact as to whether any alleged limitations in the range of motion of plaintiff's cervical and lumbar regions of her spine existed for a sufficient period of time to rise to the level of "significance" and, thus, whether plaintiff sustained a significant limitation of use of a body function or system (*see* ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; ***Lively v Fernandez***, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]). In any event, said report would not raise a triable issue of fact inasmuch as Dr. Perez does not quantify his range of motion testing results and instead merely stated that with respect to plaintiff's cervical spine, "[t]here is decreased range of motion, especially on flexion, extension and lateral flexion" and regarding plaintiff's thoracic and lumbar spine, "[t]here is a decreased range of motion in all directions." Nor did Dr. Perez provide a qualitative assessment (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]). Dr. Stein's affirmed report dated October 17, 2013 is also deficient as it contains no range of motion testing results or any other objective test results and merely reports the presence of pain. "It is well established that any subjective complaints of pain and limitation of motion must be substantiated by verified objective medical findings based on recent examination of the plaintiff" (***Young v Russell***, 19 AD3d 688, 689, 798 NYS2d 101 [2d Dept 2005]; *see* ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322).

In addition, the MRI reports of Dr. Himelfarb of plaintiff's cervical spine and left shoulder were insufficient to raise a triable issue of fact since they were unaffirmed and, thus, in inadmissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Lively v Fernandez***, 85 AD3d 981, 925 NYS2d 650). Even if the Court were to consider the cervical MRI report, it would not raise an issue of fact inasmuch there is no indication that the finding of posterior disc bulges at the C3-4 through T 1-2 levels is causally related to the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Itskovich v Lichenstadter***, 2 AD3d 406, 767 NYS2d 859 [2d Dept 2003]) and no

objective evidence of the alleged physical limitations resulting from the disc injuries and their duration have been provided (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726; ***Ranford v Tim's Tree and Lawn Service, Inc.***, 71 AD3d 973, 897 NYS2d 245; ***Bleszcz v Hiscock***, 69 AD3d 890, 894 NYS2d 481). Similarly, the findings in the left shoulder MRI report of small joint effusion and no evidence of fracture or rotator cuff tear would not raise a question of fact absent any indication that said findings are "serious", as defined by the statute and are causally related to the subject accident (*see* ***Verrelli v Tronolone***, 230 AD2d 789, 646 NYS2d 542 [2d Dept1996]; *see also* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759; ***Correa v City of New York***, 18 AD3d 418, 794 NYS2d 408 [2d Dept 2005]; ***Itskovich v Lichenstadter***, 2 AD3d 406, 767 NYS2d 859).

Also, plaintiff's self-serving affidavit was insufficient to raise a triable issue of fact as to whether she sustained a serious injury under the no-fault statute (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151; ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]).

Moreover, plaintiff failed to provide any competent medical evidence that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see* ***Shaji v City of New Rochelle***, 66 AD3d 760, 886 NYS2d 764 [2d Dept 2009]). Furthermore, plaintiff failed to establish economic loss in excess of basic economic loss (*see* ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: MARCH 27, 2014

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION