SHORT FORM ORDER

INDEX No. 10-21117
CAL No. 13-02091MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 2-21-14
ADJ. DATE 4-10-14
Mot. Seq. #002 - MD

ANDREA ARAGON,

Plaintiff,

- against -

BRENDA I. GONZALEZ,

Defendant.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-16; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 17-20; Replying Affidavits and supporting papers 21-22; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (seq. #002) by defendant, Brenda I. Gonzalez, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the basis that the plaintiff, Andrea Aragon, did not sustain a serious injury as defined by Insurance Law §§ 5102 (d) and 5104 (a), is denied.

This negligence action arises out of an automobile accident wherein the plaintiff, Andrea Aragon, alleges she sustained serious personal injuries on December 5, 2008, on Mastic Beach Road at or near its intersection with Mastic Road, in the Town of Brookhaven, State of New York, when the plaintiff's vehicle and the vehicle owned and operated by defendant Brenda Gonzalez, came into contact.

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]). 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***, 64 NY2d 851, 487 NYS2d 316 [1985]). 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 submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; the sworn reports of Lee Kupersmith, M.D. dated May 1, 2012 concerning his independent orthopedic examination of the plaintiff, and Alan Greenspan, M.D. concerning his independent radiology review of the MRI studies of plaintiff's cervical spine of January 17, 2009, and thoracic spine of January 20, 2009; the transcript of the plaintiff's examination before trial dated February 24, 2012; uncertified copy of Stony Brook Hospital emergency department record; copies of unsworn electronically signed reports of x-ray studies of plaintiff's cervical spine and thoracic spine on December 12, 2008.

CPLR 2106 governs the use of physician affirmations. While deemed admissible by the Appellate Division, First Department, electronic signatures are not recognized by the Second Department (*see* ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, 50 AD3d 778, 860 NYS2d 532 [2d Dept 2008]; ***Eill v Morck***, 37 Mis3d 1211 [A], 961 NYS2d 357 [Sup Ct Kings County 2012]). In ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, *supra*, the Second Department held medical reports to be inadmissible where they contained computerized, affixed, or stamped facsimiles of a physician's signature. The court stated the records failed to comport with CPLR 2106 as the signatures were not subscribed or affirmed, and the reports merely contained facsimiles of the physician's signature without any indication as to who placed them on the reports, or as to whether they were properly authorized. Subsequent to ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, the Appellate Term, Second Department ruled inadmissible "affirmed" medical reports with stamped or electronic facsimile signatures where the record did not demonstrate that the signature was placed on the report by the doctor or at the doctor's direction (*see* ***Rogy Med., P.C. v Mercury Cas. Co.***, 23 Misc3d 132 [A], 885 NYS2d 713, 2009 NY Slip Op 50732[U] [App Term, 2d Dept 2009]); ***Sweeney v Springs***, 2012 NY Slip Op 30415 [U] [Sup Ct, Nassau County 2012], [affirmed medical report with stamped signature submitted on serious injury motion ruled inadmissible]).

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 90 days during the 180 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 to have sustained the following injuries in the subject accident: herniated disc at C5-C6 intervertebral disc space effacing the ventral aspect of the thecal sac; cervical nerve root injury; cervical myofascitis and spasm; cervical radiculopathy; carpal tunnel syndrome; right ulnar sensory neuropathy; thoracic nerve root injury with disc bulging at T6-7 and T7-8 levels necessitating the use of trigger point injections; and thoracic myofascitis and spasms.

Upon careful review and consideration of the defendant's evidentiary submissions, it is determined that the moving party has not established *prima facie* entitlement to summary judgment dismissing the complaint on the basis that Andrea Aragon did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury.

Although the plaintiff alleges that she sustained cervical nerve root injury, cervical radiculopathy; carpal tunnel syndrome, right ulnar sensory neuropathy, and thoracic nerve root injury, a report from a neurologist who examined the plaintiff on behalf of the moving defendant has not been submitted to rule out the claimed neurological injury, precluding summary judgment (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County 2011]).

Dr. Kupersmith set forth the materials and medical records and reports which he reviewed, including MRIs of plaintiff's cervical and thoracic spine and EMG/NCV studies, and upon which he bases his opinions in part, however, copies of those records and reports have not been provided. While Dr. Greenfield has submitted his radiologic review of those MRIs, the original reports have not been provided, raising factual issues concerning whether or not the opinions of Dr. Greenfield and plaintiff's examining physician concur with regard to their findings and interpretations. 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, the aforementioned records and reports are not in evidence, leaving this Court to speculate as to the contents of those reports, precluding summary judgment.

Dr. Kupersmith reported that the plaintiff is a 52-year-old female who presented with pain in her neck, mid-back, and left hand at Stony Brook University Hospital emergency room following the accident. Thereafter, she came under the care of Dr. Roteman and underwent physical therapy and chiropractic treatments three times per week, then two times per week for approximately one year. She had acupuncture and trigger point injections into her back region. She denied any significant medical history.

Dr. Kupersmith performed an examination of plaintiff's cervical and thoracic spine, right elbow, and right and left hand and wrists, and reported no deficits in the ranges of motions reported. His diagnosis was cervical sprain/strain resolved; cervical herniated nucleus pulposus as per report only; left hand contusion; and thoracic sprain/strain resolved. Dr. Kupersmith does not rule out that the cervical herniated nucleus pulposus is causally related to the accident. He does opine that because he found bilateral carpal tunnel syndrome, it is unrelated to the accident, however, he does not indicate the basis for his finding of bilateral carpal tunnel syndrome as his examination was reportedly negative, raising factual issues. He also found right ulnar sensory neuropathy per EMG testing, unrelated to the accident as there was no evidence of right elbow injury.

In reviewing the cervical MRI study of January 17, 2009, Dr. Greenfield stated that he found diffuse disc desiccation and dehydration of all cervical disc levels; degenerative disc bulging at C4-5 and C5-6 with flattening of the dural sac, and degenerative bony osteophyte formation seen posteriorly at C4-5 and anteriorly from C5-7; shallow broad-based disc herniation at C5-6 indenting the dural sac but not contacting the cord, and straightening of the normal lordotic curvature. He stated the straightening of the spine was constitutional related to patient positioning or restricted range of motion rather than muscular spasm. The diffuse disc disease, he opined, is degenerative at all cervical disc levels along with degenerative discs, including bulging at C4-C5 and C5-C7 with mild flattening of the dural sac. He stated that all of these findings are long-standing due to the absence of any focal bright signal in the region of the herniations to indicate a recently torn annulus fibrosis of recent post-traumatic edema. However, Dr. Greenfield offered no opinion with regard to the duration and causation of his findings of diffuse degenerative changes, precluding summary judgment (***Estella v Geico Insurance Company***, 102

AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]). In reviewing the thoracic spine MRI study of January 20, 2009, Dr. Greenfield diagnosed multilevel degenerative disc disease associated with minimal degenerative disc bulging at T6-T7 and T7-T8 with flattening of the dural sac, which findings, he stated, cannot be attributed to the subject accident. However, his opinion is conclusory and he offers no opinion with regard to duration and causation. Thus, Dr. Greenfield's radiologic review, even if admissible, raises factual issues which preclude summary judgment from being granted as well.

It is noted that the movant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the examining physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted the 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.

The plaintiff testified that on the date of the accident, she was employed as a sewing machine operator. About one week after she was seen in the emergency room, she presented to her doctor for pain in her neck, back and left hand. She went to another doctor for physical therapy and chiropractic care for her neck, back and left hand. She denied prior or subsequent injuries to those parts of her body. She still experiences much pain in her neck and back on a frequent basis. She has difficulty playing with her children and cannot jump, jog, run, walk, or play on the trampoline, as her back hurts too much. She has difficulty cleaning her house and doing her chores, which she now had to do "more softly and more slowly." At work, she has to stop sewing and then continue.

The factual issues raised in the defendant's moving papers preclude summary judgment and the defendant has 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 party has failed to establish *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether the 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]).

Accordingly, this motion for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102 (d) is denied.

Dated: June 24, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**