Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Gianna Velletta,

Plaintiff,

-against-

John Atkinson,

Defendant.

Motion Sequence No.: 002; MD
Motion Date: 2/18/14
Submitted: 6/18/14

Index No.: 22427/2012

Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers numbered 1 to 17 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 11; Answering Affidavits and supporting papers, 12 - 15; Replying Affidavits and supporting papers, 16 - 17; it is

ORDERED that motion by defendant, John Atkinson, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Gianna Velletta, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This negligence action is premised upon an automobile accident wherein the plaintiff, Gianna Velletta, seeks damages for serious personal injury she alleges she sustained on June 9, 2011 on Deer Park Avenue at or near its intersection with Eddie Street, in Suffolk County, New York, when her vehicle and the vehicle operated by defendant John Atkinson were involved in a collision.

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]). 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" CPLR3212 [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]).

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 this motion for summary judgment on the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the moving party to present evidence in competent form, showing that the plaintiff did not sustain a serious injury as a result of the accident (*see* ***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does exist (*see* ***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 (***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*).

In support of motion (002), defendant submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer with counterclaim, and plaintiff's verified bill of particulars; transcript of the examination before trial of plaintiff Gianna Velletta; and the reports of Michael Katz, M.D. dated November 1, 2011 concerning his independent orthopedic examination of the plaintiff, Arthur M. Bernhang, M.D. dated May 16, 2013 concerning his independent orthopedic examination of the plaintiff, and Edward M. Weiland , M.D. dated May 17, 2013 concerning his independent neurological examination of the plaintiff.

By way of her verified bill of particulars, Gianna Velletta alleges that as a result of this accident she sustained injuries consisting of: posterior central disc herniation at L4-5 and L5-S1 with focal impingement of the ventral thecal sac; epidural steroid injections in the lumbar spine; significant limitation of range of motion of the lumbar spine; difficulty sleeping due to pain and discomfort; difficulty ambulating due to pain and discomfort; pain, numbness, tingling and weakness of her legs bilaterally; loss of range of motion in the lumbar spine; loss of range of motion of the cervical spine; and focal right paracentral disc herniation at C7-T1 with impingement of the anterior subarachnoid space.

Dr. Weiland has not submitted a copy of his curriculum vitae or otherwise provided his qualifications to testify as a neurology expert. The defendant's orthopedic expert, Dr. Bernhang, and his neurological expert, Dr. Weiland, set forth the materials and records which they each reviewed, none of which have been provided to this court, including reports of the cervical and lumbar MRI studies of July 15, 2011, as required pursuant to ***Friends of Animals v Associated Fur Mfrs.***, *supra*, leaving this court to speculate as to the contents of same. Expert testimony is limited to facts in evidence (*see also* ***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]), and these records are not in evidence, precluding summary judgment.

Dr. Bernhang set forth that the plaintiff is a twenty-one year old female operator of a motor vehicle who was wearing her seat belt when her vehicle was struck in the rear by the defendant's vehicle. She sustained injuries to her neck, hips and lower back, was seen at, and released from Good Samaritan Hospital. He noted that the plaintiff was followed thereafter by Dr. Raymond Rak on neurosurgical consultation, and Dr. Madan Raj for pain management. Dr. Raj's clinical impression was lumbar radiculopathy, chronic low back pain, lumbar discogenic pain, and he further felt that the plaintiff would benefit from lumbar steroid epidural injections to help with pain relief, and injections were administered on March 6, 2012, April 10, 2012 and June 5, 2012. The plaintiff underwent physical therapy and chiropractic treatment as well.

Dr. Bernhang indicated that an independent neurosurgical examination was performed by Dr. James Sarno on May 17, 2012, an independent pain management examination was performed by Dr. Sohal on April 24, 2012, an independent chiropractic medical examination was performed by Dr. Portnoy, and an independent physical medicine and rehabilitation examination by Dr. Fahmy on July 19, 2011, however, none of these reports have been provided by defendant.

Dr. Bernhang conducted a physical examination and obtained range of motion findings for plaintiff's cervical, shoulder, dorsolumbar spine, and compared his findings to the average range of motion values. To establish entitlement to summary judgment on the issue of serious injury, the defendant was required to submit admissible medical evidence demonstrating that plaintiff's range of motion findings were not significantly limited in comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see* ***Frey v Fedorciuc***, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]). Instead of comparing his findings to the normal range of motion values, Dr. Bernhang compared his findings to the average range of motion. Thus, Dr. Bernhang's report is deficient inasmuch as the standard of comparison used, average range of motion, does not comport with the required comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see* ***Frey v Fedorciuc***, 36 AD3d 587 [2d Dept 2007]; ***Powell v Alade***, 31 AD3d 523 [2d Dept 2006]; *see also* ***Somers v Macpherson***, 40 AD3d 742 [2d Dept 2007]). It is additionally noted that Dr. Bernhang stated that the disc protrusions at L4-5 and L5-S1 are causally related to the accident, but are asymptomatic at the time. Thus, he had not ruled out that the plaintiff did not sustain a serious injury.

Dr. Weiland, in performing his neurologic examination of the plaintiff, compared his range of motion findings to the normal ranges of motion, and indicated that the ranges of motion were obtained by visual inspection. However, he has not set forth the objective method employed to obtain such measurements, such as the goniometer, inclinometer or arthroidal protractor, (*see* ***Martin et al v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero et al v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]) leaving it to this court to speculate as to how he determined such ranges of motions during visual inspection.

The plaintiff testified that she saw a psychologist after the accident, as Dr. Eleman recommended that she attend, however, no independent psychological report has been submitted by defendant (*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]).

Based upon the foregoing, the defendant has not demonstrated entitlement to summary judgment dismissing the complaint. Defendants' examining physician offers no opinion as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident, and he did not examine the plaintiff during that statutory period (*see* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d

Dept 2001]; ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). He offers no opinion with regard to this category of serious injury as well (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), raising factual issues concerning whether the plaintiff sustained a serious injury with regard to this second category of injury. The plaintiff testified that since the accident, she is not permitted to lift, and cannot stock at work. She cannot do certain workouts now because it causes pain to her hips and back. She gets pain when she walks or if she sits too long. She has difficulty sleeping due to the pain and is unable to get comfortable. She feels pins and needles in her legs if she sits for too long. She experiences pain in her neck as well as in her back on an ongoing basis.

These factual issues raised in defendant's moving papers preclude summary judgment, as the defendant failed to satisfy the burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) under either category (*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]) as the burden has not shifted to the plaintiff.

Accordingly, motion by the defendant for summary judgment dismissing the complaint is denied.

Dated: 8/13/2014

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**