Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Silvia Patricia Bermudez,

Plaintiff,

-against-

Gavin Farrell and Site Services Group,

Defendant.

Gavin Farrell and Site Services Group,

Third-Party Plaintiffs,

-against-

Manuel Amaya and S.H. Cuadra-Campos,

Third-Party Defendants.

Clerk of the Court

Index No.: 31893/2011

Motion Sequence No.: 001; MD
Motion Date: 5/5/14
Submitted: 5/5/14

Motion Sequence No.: 002; XMD
Motion Date: 5/5/14
Submitted: 5/5/14

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Upon the following papers numbered 1 to 20 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; Notice of Cross Motion and supporting papers, 13 - 15: Answering Affidavits and supporting papers, 16 - 20; it is

ORDERED that the motion by the defendants Gavin Farrell and Site Services Group seeking summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by the third-party defendants Manuel Amaya and S. H. Cuadra-Campos seeking summary judgment dismissing the third-party complaint is denied.

The plaintiff Silvia Bermudez 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 Veterans Highway and Suffolk Avenue in the Town of Islip on April 7, 2011. The accident allegedly occurred when the vehicle operated by the defendant Gavin Farrell and owned by the defendant Site Services Group struck the left rear passenger door of the vehicle operated by Manuel Amaya and owned by S. H. Cuadra-Campos while attempting to make a right turn onto Suffolk Avenue from Veterans Highway. As a result of the impact between the Farrell and Amaya vehicles, the right passenger side of the Amaya vehicle struck a light pole located on the right side of Suffolk Avenue. At the time of the accident, the plaintiff was riding as a front seat passenger in the vehicle operated by Amaya. By her bill of particulars, the plaintiff alleges, among other things, that she sustained various personal injuries as a result of the subject collision, including a tear of the subscapularis of the right shoulder; a labral tear of the right shoulder; a disc herniation at level L5-S1; and cervical and lumbar radiculopathy. The plaintiff further alleges that she was confined to her bed for approximately 2 weeks and to her home for approximately 30 days as result of the injuries she sustained in the accident. In addition, the plaintiff alleges that she underwent arthroscopic surgery on her right shoulder as a result of the injuries she sustained in the subject accident.

Thereafter, the defendants Gavin Farrell and Site Services Group instituted a third-party action against third-party defendants Manuel Amaya and S. H. Cuadra-Campos seeking indemnification and contribution.

The defendants now move for summary judgment on the basis that the injuries alleged to have been sustained by the plaintiff as a result of the subject accident fail to meet the "serious injury" threshold requirement of § 5102 (d) of the Insurance Law. In support of the motion, the defendants submit copies of the pleadings, the plaintiff's deposition transcript, and the sworn medical reports of Dr. Isaac Cohen and Dr. Scott Coyne. Dr. Cohen, at the defendants' request, conducted an independent orthopedic examination of the plaintiff on March 14, 2013. Also, at the defendants' request, Dr. Coyne performed an independent radiological review of the magnetic resonance images ("MRI") films of the plaintiff's cervical spine, lumbar spine and right shoulder conducted on May 17, 2011, May 20, 2011 and May 23, 2011, respectively. The third-party defendants cross-move for summary judgment on the same grounds as the defendants and rely on the evidence submitted by the defendants to establish that the plaintiff did not sustain a serious injury as a result of the subject collision.

The plaintiff opposes the motions on the grounds that the defendants and the third-party defendants (hereinafter collectively referred to as "the defendants") failed to make a prima facie case that she did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result

of the subject accident, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" category of the Insurance Law. In support of the motion, the plaintiff submits the sworn medical reports of Dr. Michele Rubin and Dr. Arthur Thompson, and the affidavit of Dr. Nicholas Martin.

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, the defendants through the submission of the plaintiff's deposition transcript and competent medical evidence established a prima face case that the 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]). The defendants' examining orthopedist, Dr. Cohen states in his medical report that an examination of the plaintiff reveals that she has full range of motion in her cervical spine and right shoulder, that there are spasm or trigger points observed upon palpation of her paraspinal muscles, and that there is no evidence of radiculopathy. Although Dr. Cohen notes range of motion limitations in the plaintiff's lumbar spine, he explains that the limitations are secondary to her body's habitus, which is sufficient to establish the absence of a significant permanent consequential or significant limitation in her lumbar spine (*see e.g.* ***Swift v New York Tr. Auth.***, 115 AD3d 507, 981 NYS2d 706 [1st Dept 2014]; ***Santos v Perez***, 107 AD3d 572, 968 NYS2d 43 [1st Dept 2013]). Dr. Cohen further states that the straight leg raising test is negative, that the plaintiff walks with a normal gait, and that there are no sensorial deficits or muscle atrophy. Dr. Cohen concludes that the injuries the plaintiff sustained to her spine and right shoulder as a result of the subject accident have resolved, and that she has full functional capacity of her musculosketal system with no evidence of sequelae or permanency present.

Furthermore, Dr. Coyne, the defendants' examining radiologist, states in his medical report that the MRI examination of the plaintiff's right shoulder was normal for a person of her age, that there was no evidence of a subacromial impingement phenomenon, and that the tendons in her rotator cuff are structurally intact without tear or other trauma causally related to the subject accident. Dr. Coyne further states that the MRI studies of the plaintiff's cervical and lumbar spine show evidence of mild degenerative changes that are chronic, long-standing, and pre-existent, and are not causally related to the subject accident.

The defendants, having made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to the plaintiff to come forward with evidence to overcome the defendants' 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 to the defendants' prima facie showing, the plaintiff has raised a triable issue of fact as to whether she sustained an injury within the meaning of the serious injury threshold requirement of § 5102 (d) of the Insurance Law (*see* ***Stanley v Caddie Serv. Co., Inc.***, 110 AD3d 711, 971 NYS2d 886 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]; ***Park v Shaikh***, 82 AD3d 1066, 918 NYS2d 887 [2d Dept 2011]), and as to whether such injuries were causally related to the subject accident (*see* ***Windisch v Fasano***, 105 AD3d 1039, 963 NYS2d 401 [2d Dept 2013]; ***Jilani v Palmer***, 83 AD3d 786 [2d Dept 2011]). The plaintiff primarily relies upon the affidavit of her treating chiropractor, Dr. Nicholas Martin, who began treating her on April 14, 2011, and re-examined her on April 14, 2014. In his affidavit, Dr. Martin opines, based upon his contemporaneous and recent examinations, that the plaintiff sustained lumbar derangement, which resulted in significant range of motion limitations in her lumbar spine, and that such restrictions are permanent and directly related to the subject motor vehicle accident (*see* ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Tai Ho Kang v Young Sun Cho***, 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]; ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2d Dept 2010]). Additionally, Dr. Martin states that when the plaintiff was dismissed from his treatment on March 13, 2012, she had received maximum benefit from the provided treatment and that any additional treatment would have been palliative in nature, despite the fact she remained symptomatic (*see e.g.* ***Echevarria v G&G Classic, Inc.***, 91 AD3d 902, 937 NYS2d 608 [2d Dept 2012]; ***Jean-Baptiste v Tobias***, 88 AD3d 962, 931 NYS2d 645 [2d Dept 2011]; ***Abdelaziz v Fazel***, 78 AD3d 1086, 912 NYS2d 103 [2d Dept 2010]; ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]). Lastly, Dr. Martin states that the plaintiff was asymptomatic prior to the subject collision, that the subsequent symptomology displayed by the plaintiff is consistent with a trauma related injury, and that the plaintiff does not have any pre-existing or degenerative conditions which are contributing to such symptomology.

Moreover, the affirmation of the plaintiff's treating orthopedist, Dr. Thompson, states that he began treating the plaintiff for injuries to her neck, back and right shoulder on June 28, 2011, and that an examination of her right shoulder revealed tenderness along the medial scapular borders, significant restrictions in the range of motion in her right shoulder, and a positive Hawkins Test on her right shoulder. Dr. Thompson states that the plaintiff underwent right shoulder surgery on August 26, 2011, because she had not made any significant improvements with physical therapy. Dr Thompson states that his operative findings were a partial tear of the subscapulars, a partial labral tear, subacromial bursitis and anterolateral impingement syndrome. Dr. Thompson states that when he re-examined the plaintiff on May 13, 2014, her range of motion continued to be restricted in her right shoulder. Dr. Thompson further states that, as a result of the subject accident, the plaintiff sustained a right shoulder derangement, which required decompression and debridement, and low back syndrome. Dr. Thompson concludes that the injuries sustained by the plaintiff to her right

shoulder and lumbar spine have resulted in significant range of motion limitations, which are permanent, and are not the result of a pre-existing degenerative condition.

Thus, the affirmed medical reports of the plaintiff's experts conflict with those of the defendants' experts, who found that the injuries the plaintiff sustained to her right shoulder and lumbar spine as a result of the subject accident were resolved. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see* ***Johnson v Garcia***, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Moreover, "where [a] plaintiff establishes that at least some of [her] injuries meet the 'no-fault' threshold, it is unnecessary to address whether [her] proof with respect to other injuries [she] allegedly sustained would have been sufficient to withstand [defendants'] motion[s] for summary judgment" (***Linton v Nawaz***, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see* ***Rubin v SMS Taxi Corp.***, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, the defendants' motion and the third-party defendants' cross motion for summary judgment dismissing the plaintiff's complaint is denied.

Dated: September 30, 2014

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

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