To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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DAYANNET CARABALLO and JORGE CARABALLO,

Plaintiffs,

-against-

RAMON CARO and HUDSON VALLEY TRANSPORTATION INC.,

Defendant.
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Index No.57975/2012
DECISION & ORDER
Seq # 1

The following papers were read on Defendants' motion for summary judgment and dismissal on the grounds that Dayannet Caraballo ("plaintiff") did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d):

PAPERS	NUMBERED
Notice of Motion/Affirmation/Exhibits A-F	1-8
Affirmation In Opposition/Affidavit in Opposition/Exhibits A-F	9-16
Reply Affirmation/Exhibits A-C	16-19

Based on the foregoing submissions the motion is DENIED.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on January 25, 2011 in Westchester County.

Plaintiffs filed a Summons and Verified Complaint on or about May 13, 2012, claiming that Dayannet Caraballo sustained a "serious injury" under Insurance Law §5102.

Defendants filed their Answer on or about August 3, 2012 and have now moved for summary judgment pursuant to CPLR § 3212 and/or dismissal pursuant to CPLR § 3211(a)(7), due to plaintiff's failure to meet the "serious injury" threshold specified in Insurance Law § 5102 (d).

On a summary judgment motion, defendants have the initial obligation to show its entitlement to judgment as a matter of law. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557(1980). Thus, it is defendants' burden to show that plaintiff did not suffer a significant disfigurement; a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body member or member; a significant limitation of use of a body member or member; or a medically determined injury or impairment that prevents plaintiff from performing substantially all of the material acts which constitute his ordinary and customary daily activities for not less than 90 days during the 180 day immediately following the occurrence. Insurance Law § 5102(d).

A "movant must affirmatively eliminate all material issues of fact to meet its prima facie burden." *George v. Marshalls of MA, Inc.,* 61 A.D.3d 925, 929 (2d Dept., 2009) " 'As a general rule, a party does not meet its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense' ". *Doe v. Orange-Ulster Bd. of Co-op. Educational Services*, 4 A.D.3d 387, 771 (2d Dept., 2004), *quoting*, *Larkin Trucking Co. v. Lisbon Tire Mart*,185 A.D.2d 614, 615 (1992).

Once the moving party has made a prima facie showing of entitlement to summary judgment, the party opposing the motion must present evidence in admissible form establishing the existence of a triable issue of fact in order to defeat the motion (see *Zuckerman v. City of New York*, 49 N.Y.2d 557(1980). The evidence must be viewed in a light most favorable to the nonmoving party, *Gonzalez v. Metropolitan Life Ins. Co.*, 269 A.D.2d 495 (2d Dept. 2000). In reviewing a motion for summary judgment, the court accepts as true the evidence presented by the nonmoving party, and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue", *Baker v. Briarcliff School Dist.,* 205 A.D.2d 652, 653 (2d Dept. 1994).

Defendants argue that Plaintiff's injuries do not fall within any one of the nine categories of "serious injury" as required by Insurance Law §5102(d)[1]. Defendants allege that plaintiff did not seek any treatment and was not admitted to a hospital immediately after the accident and that plaintiff cannot state with reasonable certainty how long she was confined to home/bed.

Defendants requested that Edward L. Mills, M.D., an orthopedist, conduct an independent medical evaluation ("IME") of plaintiff and defendants contend that such examination failed to reveal that plaintiff sustained any objective evidence of a permanent injury or disability. Dr. Mills' IME report, dated September 25, 2013 found plaintiff's cervical spine to have range of motion as allowed by the claimant and no muscle spasms, plaintiff's

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[1]Insurance Law §5102(d) states "Serious 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

thoracic spine to have good range of motion with no complaints of pain, tenderness or muscle spasm and plaintiff's lumbar spine to have normal range of motion with some complaints of pain and mild tenderness. Dr. Mills found plaintiff's leg raising to be negative bilaterally with good muscle strength and that plaintiff allowed limited right shoulder, left shoulder range of motion, with a negative Neer impingement sign and complaint of diffuse tenderness. The doctor further found plaintiff allowed limited right knee and left knee range of motion, with no complaint of tenderness, the leg being grossly stable and no obvious significant atrophy.

Dr. Mills' impression is that all of plaintiff's alleged injuries have resolved, that there is no evidence of a residual and that plaintiff is able to perform activities of daily living without restrictions. Dr. Mills notes that plaintiff's subjective complaints, including the limitation of range of motion, were not supported by objective clinical findings from the exam.

Defendants also requested a neuro-radiologist, Audrey Eisenstadt, M.D., DABR, examine plaintiff's MRI films. Dr. Eisenstadt's review of the MRI examination performed one month, ten days following the accident and the MRI examination performed three and a half months following the accident, revealed evidence of degenerative disc disease on the initial examination performed. Dr. Eisenstadt found that the disc degeneration persists, but the disc herniation shows interval improvement and that an annular tear has developed at the L5-S1 intervertebral disc level, indicative of an acute disc rupture and not causally related to the initial accident in 2011, but indicating an intervening event, having not presented on the initial examination.

Defendants maintain that the sworn reports of defendants' physicians are sufficient to meet defendants' initial burden to establish a prima facie case that plaintiff's alleged injuries did not meet the serious injury threshold. *Gaddy v Eyler*, 79 NY2d 955 (2d Dept. 1992) ; *Holmes v Hanson*, 286 AD2d 750(2d Dept. 2001); *Itkin v. Devlin,* 286 AD2d 477(2d Dept. 2001). The reports of the physicians do establish sufficient basis to conclude that the initial burden of proof on the summary judgment motion has been met.

The burden now shifts to plaintiff to rebut defendants' prima facie showing. Michael Cushner, M.D. an orthopedic surgeon, examined plaintiff on February 1, 2011, July 26, 2011, April 30, 2013, November 20, 2013 and March 11, 2014. Dr. Cushner diagnosed plaintiff with cervical strain with radiculopathy, thoracic strain, lumbosacral strain with radiculopathy and right shoulder impingement syndrome as a direct result of the accident, based upon his physical examination, medical records and MRI films. Dr. Cushner measured plaintiff's range of motion with a goniometer, with plaintiff showing continued limited range of motion in her cervical spine, lumbar spine and right shoulder. Plaintiff engaged in physical therapy and Dr. Cushner discussed home range of motion stretching and strengthening with plaintiff on her July 26, 2011 visit.

The radiologist, Charles J. Blatt, M.D. submitted a report in support of plaintiff's claim of serious injury, based on his review of the MRI examinations on March 4, 2011 and May 7, 2013. Dr. Blatt reported marked straightening of the normal lordotic on flexion and extension views due to severe muscle spasm from pain secondary to soft tissue injury. He noted a degenerative disk at L5-S1 and an annular tear not present on the initial MRI, but noted that the disparity in the two MRI's was likely due to the lack of scanner resolution. Dr. Blatt noted that Dr. Eisenstadt, in diagnosing plaintiff with degenerative disc disease,

failed to take into account plaintiff's age at the time of the accident[2], noting that degenerative changes in lumbar spine occur much later in life and instead noted that the injury precipitated a structural change that mimicked circumstances that would have occurred many years later. Dr. Blatt noted that the MRI findings demonstrated an acute traumatic herniated disc at the level L5-S1 accompanied by an annular tear, a soft tissue injury, that resulted in loss to the normal lordotic lumbar curve with subsequent chronic back pain, which findings persisted and were confirmed by a follow up MRI two years later. He noted that the findings correlate and document the findings precipitated by the accident which occurred on January 25, 2011 and are directly related to plaintiff's symptoms caused by the accident.

The Court finds that, based on the physician reports provided, plaintiff has established a question of fact as to whether she sustained a serious injury. The medical records and diagnostic tests results are clearly in conflict with defendants' physicians' findings. Plaintiff provides admissible evidence of her claim that she suffers from permanent injuries, including a limitation of range of motion and pain to the present date. The presence of herniated discs have thwarted the attempts of defendants to achieve summary judgment. Evidence of said injury, as confirmed by physicians' affidavits and accompanied by a limitation of range of motion in the affected area, raises a triable issue of fact as to whether a serious injury was sustained. See *Rosmain v. Lamontanaro*, 238 AD2d 567 (2d Dept.1997); see also *Puma v. Player*, 233 AD2d 308 (2d Dept. 1996); *Evans v. Hahn*, 255AD2d (3d Dept. 1998).

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[2] Plaintiff was thirty one years old at the time of the accident.

In addition, evidence of radiculopathy as shown by plaintiff has also been held to satisfy the "serious injury" threshold requirement of the New York State Insurance Law. See *Spezia v. De Marco,* 173 AD2d 462 (2d Dept. 1991). Plaintiff has offered evidence of radiculopathy confirmed by testing, and supported by range of motion deficits. In addition, the range of motion deficits in and of themselves raise issues of fact as to the presence of a serious injury. *Stanavich v. Pakenas*,190 AD2d 184 (3rd Dept. 1993); see also *Kim v. Cohen*. 208 AD2d 807 (2nd Dept. 1994). Plaintiff's range of motion tests indicate abnormal limitations also support the conclusion that there is evidence of serious injury. *Holguin v. Howard*, 248 AD2d 1152 (1st Dept. 1998).

Defendants' physician Dr. Mills also noted limited range of motion, but simply noted that the limited range of motion was as allowed and that plaintiff's injuries have resolved, providing no explanation for such a conclusion or no objective evidence to substantiate such finding. Additionally, defendants argue in their reply affirmation that there was a gap in plaintiff's treatment, further indicating a lack of serious injury. However, defendants advance this argument for the first time in their reply affirmation, which is improper. *Forest River, Inc. v. Stewart*, 34 A.D.3d 474, 475 (2d Dept. 2009), *Burlington Ins. Co. v. Guma Const. Corp.*, 66 A.D.3d 622, 624 (2d Dept. 2009). Further, Dr. Cushner stated in his report that he discussed home range of motion stretching and strengthening with plaintiff and referred her for physical therapy, providing a possible explanation for any gap in treatment. It also is not clear that plaintiff did not seek treatment with other doctors during the gap suggested by defendants.

Plaintiff also moves for dismissal pursuant to CPLR § 3211(a)(7). Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:
(7) the pleading fails to state a cause of action..."

N.Y. Civ. Prac. L. & R. 3211(a)(1) and (a)(7) (McKinney 2012). In such motions, the facts alleged in the complaint are accepted as true, and the only determination is whether the facts alleged fit within any recognizable legal theory of recovery.

Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...". *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977). Defendants must show that a material fact in the pleading, is not a fact at all and that no significant dispute exists. *Id.* In the instant matter, when given the benefit of every possible inference (*see, R.H. Sanbar Projects, Inc. v. Gruzen Partnership,* 148 A.D.2d 316, 538 N.Y.S.2d 532 [1st Dept., 1989]), the complaint states a cause of action against the defendants.

Accordingly, the defendant's motion is DENIED.

To the extent any relief requested in motion sequence 1 was not addressed by the Court, it is hereby deemed denied. Attorneys for the parties shall appear before the Settlement Conference Part in Courtroom 1600 on September 4 at 9:15 am.

The foregoing is the Decision and Order of this Court.

Dated: White Plains, New York
July 22, 2014

Sam D. Walker

HON. SAM D. WALKER, JSC