SHORT FORM ORDER

COPY

INDEX No. 12-36405
CAL. No. 14-00050MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 11-14-14
ADJ. DATE 12-19-14
Mot. Seq. # 003 - MG; CASEDISP

MEGAN REIF,	:	THE SCHLITT LAW FIRM
	:	Attorney for Plaintiff
Plaintiff,	:	79 Wall Street
	:	Huntington, New York 11743
	:	
- against -	:	ABAMONT & ASSOCIATES
	:	Attorney for Defendants Calderaro
	:	200 Garden City Plaza, Suite 400,
	:	P.O. Box 9250
	:	Garden City, New York 11530-9250
ANDREW E. CALDERARO, THOMAS	:	
CALDERARO, TOWN OF HUNTINGTON and	:	GOLDBERG SEGALLA LLP
MICHAEL A. PASTORE,	:	Attorney for Defendants Town of Huntington
	:	& Pastore
Defendants.	:	200 Garden City Plaza, Suite 520
		Garden City, New York 11530

Upon the following papers numbered 1 to 11 read on this motion for leave to reargue ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 8 - 9 ; Replying Affidavits and supporting papers 10 - 11 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Andrew E. Calderaro and Thomas Calderaro for an order granting them leave to reargue their prior motion (001) for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102, which motion was denied by order of this Court dated August 6, 2014, is considered under CPLR 2221 and is granted. The Court grants leave to reargue so as to reconsider the contents of the report of defendants' examining orthopedic surgeon and to address the addendum to his report, which was not considered when rendering the prior determination. Upon granting leave to reargue, the Court vacates its prior order and substitutes this order in its stead.

RST

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Megan Reif, on February 10, 2012 in a motor vehicle accident which involved vehicles owned or operated by defendants. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including, severe headaches; cervical sprain; cervicalgia; herniated discs at C5-6 and C6-7; bilateral radicular pain in forearms and hands; muscle spasm; herniated discs at L4-5 and L5-S1; lumbar radiculitis; lumbosacral neuritis; and bilateral carpal tunnel syndrome. Plaintiff claims that she was confined to Huntington Hospital on the day of the accident and confined to Mather Memorial Hospital the following day. She also claims that she was confined to bed for one week and to her home for one month. Plaintiff was not employed at the time of the accident.

Defendants Andrew E. Calderaro and Thomas Calderaro ("Calderaro") now move (001) for summary judgment in their favor dismissing the complaint as against them on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d) as a result of the subject accident. Their submissions in support of the motion include the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, and the affirmed report and addendum of their examining orthopedic surgeon.

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]). A preexisting condition does not foreclose a finding that the injuries were causally related to the accident (*see* ***Rodgers v Duffy***, 95 AD3d 864, 944 NYS2d 175 [2d Dept 2012]).

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, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986], citing to ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]).

Plaintiff's deposition testimony from September 18, 2013 and her General Municipal Law § 50-h hearing testimony from July 17, 2012 reveals that at the time of the accident her vehicle was impacted on the driver's side and her air bags deployed, that she complained of pain in her back and hands at Huntington Hospital, and that she was discharged from Huntington Hospital with advice to see an orthopedist. The day after the accident, plaintiff went to the emergency room at Mather Memorial Hospital with complaints of extreme pain in her lower back. There, she underwent x-rays and received injections and was referred to orthopedists. Plaintiff was treated by Dr. Dowling at Long Island Spine Associates for six or seven months until her no-fault benefits ended. Thereafter, she had to switch doctors and pay using her own insurance. Plaintiff then began treatment with Dr. Sterling who gave her two epidural spinal injections. Plaintiff received physical therapy treatment for six months. She also had massage therapy. Plaintiff stated that prior to the subject accident she was going to a chiropractor because she was feeling "twinges," "little pains here and there," in her back. She also stated that she underwent an MRI just two weeks prior to the subject accident which showed pre-existing lower back herniations. Plaintiff currently takes Aleve twice a day for pain. Her current complaints include daily tingling, tightness of the muscles, and pain in her hands, pain in her entire back and sciatica, and migraine headaches. Plaintiff did not have any further appointments to see any physicians at the time of her deposition. She stated that she is limited in caring for her infant daughter who weighs 30 pounds, has trouble opening jars, and is having difficulty finding an office manager position since she cannot lift heavy boxes and other items.

Defendants' examining orthopedic surgeon, Robert L. Michaels, M.D., indicated in his affirmed report dated October 10, 2013 that he examined plaintiff on said date, and performed range of motion testing of plaintiff's right and left wrists, right and left hands, cervical spine, thoracic spine, and lumbar spine using a goniometer and normal range of motion values based on AMA 5th Edition-ROM guidelines. He reported range of motion measurements for plaintiff's right and left wrists, right and left hands, and cervical spine which he compared to normal values revealing that plaintiff's range of motion testing results were all normal. He also noted negative test results for Tinel's Median and ulnar nerve tests of both of plaintiff's wrists and for Spurling's maneuver during the cervical spine examination. However, Dr. Michaels reported the following restrictions in range of motion testing of plaintiff's thoracic spine: flexion 10 degrees (normal 45 degrees), and right and left lateral bending 35 degrees (normal 45 degrees). He also reported the following restrictions in range of motion testing of plaintiff's lumbar spine: flexion 20 degrees (normal 60 degrees), and right and left lateral bending 15 degrees (25 degrees normal). With respect to his examination of plaintiff's thoracic spine, Dr. Michaels found no vertebral tenderness and no paravertebral spasm and noted voluntary guarding. As for his examination of plaintiff's lumbar spine, Dr. Michaels indicated that there was moderate vertebral tenderness and no paravertebral spasm but that he noted voluntary guarding. He added that plaintiff was able to straight leg raise her bilateral lower extremities simultaneously to 90 degrees while reporting mild buttock pain. He stated that "[t]his equals full range of thoracolumbar flexion." Dr. Michaels diagnosed cervical and lumbar sprain, resolved, and EMG evidence of pre-existing carpal

tunnel syndrome. Among his conclusions were that plaintiff exhibited no disability, that her lower back condition was clearly pre-existing, that her voluntary guarding resulted in the decreased range of motion testing results of her thoracolumbar spine, and that the carpal tunnel syndrome on the EMG was an incidental finding that was not causally related to the subject accident.

By his affirmed addendum dated November 18, 2013, Dr. Michaels explained that a review of listed medical records concerning plaintiff's treatment prior to the subject accident revealed that plaintiff had significant pre-existing lower back disc disease comprised of disc herniations and neuro-compression. He opined that he did not find a significant causally related lower back injury. In addition, he explained that the bilateral straight leg raising test that plaintiff was able to perform was a distraction test that revealed that plaintiff voluntarily limited her range of motion testing results for both the thoracic and lumbar examinations such that the reported results are not objective.

Here, defendants Calderaro 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 by submitting their orthopedic surgeon's affirmed reports showing that plaintiff had full range of motion of her wrists, hands and spine and substantiating with objective medical evidence that plaintiff was voluntarily guarding her movements during range of motion testing of her thoracolumbar spine (*see* ***Master v Boiakhtchion***, 122 AD3d 589, 996 NYS2d 116 [2d Dept 2014]; *cf.* ***Farrah v Pinos***, 103 AD3d 831, 959 NYS2d 741 [2d Dept 2013]; ***Astudillo v MV Transp., Inc.***, 84 AD3d 1289, 923 NYS2d 722 [2d Dept 2011]). Defendants also submitted evidence demonstrating, prima facie, that plaintiff did not sustain a serious injury under the 90/180–day category of Insurance Law § 5102 (d) (*see* ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]).

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). Her submissions include her affidavit and the affirmation and reports of her treating physician, Mark Sterling, M.D., MRI reports, and hospital records.

Plaintiff did not raise a triable issue of fact in opposition to the motion (*see* ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]). Dr. Sterling indicates in his affirmation that he is board-certified in Physical Medicine and Rehabilitation and that plaintiff has been his patient since October 2012. He states that upon comparing the lumbar spine MRI from two weeks prior to the subject accident with the subsequent MRI, he noted a new disc herniation at L4/5 impinging on the nerve root and that the disc herniation at L5/S1 abutting the nerve root was now compressing and displacing the S1 nerve root. Dr. Sterling opines that the subject accident was the competent producing cause of the additional lumbar spine injuries shown in the MRI studies. He adds that he performed EMG and NCV studies on plaintiff in January 2013, that the findings were consistent with a left L5 lumbar radiculopathy, and opines that said radiculopathy was caused by the subject accident. The mere existence of a herniated disc, a bulging disc, or radiculopathy is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]). Dr.

Sterling does not provide any contemporaneous range of motion testing results in his affirmation, only the following results from a recent visit on December 4, 2013: lumbar flexion 45 degrees (normal 90 degrees) and lumbar extension 10 degrees (normal 30 degrees). Without contemporaneous findings, plaintiff is unable to raise a triable issue of fact as to whether she sustained a serious injury to her spine under the permanent consequential limitation of use or the significant limitation of use categories of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Resek v Morreale***, *supra*). In any event, given that Dr. Sterling first examined plaintiff approximately eight months after the subject accident, his range of motion testing findings from plaintiff's first visit would not be considered contemporaneous with the subject accident (*see id.*; ***Morris v Edmond***, 48 AD3d 432, 850 NYS2d 641 [2d Dept 2008]). Moreover, plaintiff's 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 [2d Dept 2013]). Furthermore, plaintiff failed to set forth any competent medical evidence sufficient to raise a triable issue of fact as to whether she sustained a medically determined injury of a nonpermanent nature which prevented her from performing her usual and customary activities for 90 of the 180 days following the subject accident (*see id.*). Therefore, the Court grants the motion of defendants Calderaro for summary judgment dismissing the complaint as against them on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d) as a result of the subject accident.

The Court searches the record and grants summary judgment dismissing the complaint insofar as asserted against defendants Town of Huntington and Michael A. Pastore on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* CPLR 3212 [b]; ***Lewars v Transit Facility Mgt. Corp.***, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]; ***McIntosh v O'Brien***, 69 AD3d 585, 893 NYS2d 154 [2d Dept 2010]).

Accordingly, the motion (001) by defendants Andrew E. Calderaro and Thomas Calderaro for summary judgment is granted and the complaint is dismissed in its entirety.

Dated: 6-12-15

Hon. Denise F. Molia
A.J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION