| **Rivera v Choy** |
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| 2015 NY Slip Op 31117(U) |
| July 1, 2015 |
| Supreme Court, Suffolk County |
| Docket Number: 5831/2013 |
| Judge: Paul J. Baisley |
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**SHORT FORM ORDER** **INDEX NO. 05831/2013**

**SUPREME COURT - STATE OF NEW YORK**
**DCM-J - SUFFOLK COUNTY**

**PRESENT:**
**HON. PAUL J. BAISLEY, JR., J.S.C.**

PAULA CANALES RIVERA,

Plaintiff,

-against-

SAMANTHA M. CHOY AND TINA CHOY,

Defendants.

**ORIG. RETURN DATE:** November 5, 2014
**FINAL RETURN DATE:** March 3, 2015
**MOT. SEQ. #:** 001 MG;CASEDISP

**ORIG. RETURN DATE:** December 4, 2014
**FINAL RETURN DATE:** March 3, 2015
**MOT. SEQ. #:** 002 MD

**PLTF'S ATTORNEY:**
DONALD LEO & ASSOCIATES, PC
100-1 PATCO COURT
ISLANDIA, NY 11749

**DEFT'S ATTORNEY:**
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Upon the following papers numbered 1 to 55 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 36 - 54 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 21 - 32 ; Replying Affidavits and supporting papers 33 - 35; 55 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motions (#001 and #002) by defendants Samantha Choy and Tina Choy for summary judgment in their favor are consolidated for purposes of this determination; and it is

***ORDERED*** that the motion (#001) by defendants for summary judgment dismissing the complaint is granted; and it is further

***ORDERED*** that the motion (#002) by defendants for summary judgment dismissing the complaint is denied, as moot.

Plaintiff Paula Canales Rivera commenced this action to recover damages for personal injuries she allegedly sustained in a motor vehicle accident that occurred in the Town of Islip on March 3, 2010. The accident allegedly happened when a vehicle owned by defendant Tina Choy and driven by defendant Samantha Choy, attempting to exit from the Southern State Parkway, collided with the front passenger side of plaintiff's vehicle as it was traveling west on G Road. By her bill of particulars, plaintiff alleges she suffered various injuries and symptoms due to the

accident, including herniated discs at levels T3-T4 and T11-T12; cervical and lumbar radiculopathy; sprains and strains in her cervical, thoracic and lumbar regions; post traumatic stress disorder; and depression. She further alleges that such injuries constitute "serious injury" within the "permanent loss of use," the "limitation of use" and the 90/180 categories of Insurance Law § 5102 (d).

Defendants now move for summary judgment dismissing the complaint, arguing plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings and the bill of particulars, the transcript of plaintiff's deposition testimony, and a sworn medical report prepared by Dr. Joseph Y. Margulies. At defendants' request, Dr. Margulies, an orthopedic surgeon, conducted a physical examination of plaintiff on March 17, 2014, and reviewed various medical records related to the injuries allegedly sustained by plaintiff in the subject accident. Plaintiff opposes the motion, arguing a triable issue exists as to whether she suffered injury within the "significant limitation of use" category or the 90/180 category. Plaintiff's submissions in opposition include a sworn report prepared by Todd Goldman, D.C., plaintiff's treating chiropractor, an MRI report regarding plaintiff's thoracic spine prepared by Excel Radiology Services, and a "physical performance test" report by Performance Chiropractic, P.C.

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]; *Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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."

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by 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.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., 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 also may 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]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692; *see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendants' submissions establish a prima facie case that plaintiff did not sustain serious physical or emotional injury as a result of the subject accident (*see Alves v Haque*, 125 AD3d 583, 3 NYS3d 82 [2d Dept 2015]; *Hayes v Vasilios*, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; *Kranis v Biederick*, 83 AD3d 903, 920 NYS2d 725 [2d Dept 2011; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *Rodriguez v Huerfano*, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]). The report of Dr. Margulies states plaintiff presented at the March 2014 independent examination complaining of pain in her neck, back and shoulder, nervousness, and difficult standing, bending, lifting and sleeping. The report states, in relevant part, that an examination of plaintiff's spine revealed no evidence of vertebral tenderness or paravetebral spasms; that plaintiff's gait, motor strength, and reflexes were normal; and that her sensation was intact. Moreover, the report states that range of motion testing revealed normal joint function in plaintiff's cervical and lumbar regions, and in her shoulders. It states that orthopedic tests to assess cervical and lumbar nerve root irritation were negative, as were tests to assess for rotator cuff tears and shoulder impingement. Dr. Margulies' report sets forth a diagnosis of cervical and lumbar sprains and left shoulder contusion, and concludes plaintiff does not suffer from any functional disability.

Furthermore, plaintiff's deposition testimony demonstrates that she did not suffer a physical or emotional injury within the 90/180 category (*see John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Frisch v Harris*, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; *Kranis v Biederbeck*, 83 AD3d 903, 920 NYS2d 725; *Ranford v Tim's Tree & Lawn Serv., Inc.*, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]). Significantly, plaintiff testified that she did not miss any work due to her injuries, that she only sought treatment from her chiropractor during the 1½ years after the accident, and that her primary physician, Dr. Jose Leo first prescribed anti-depressant medication sometime in 2013, when she sought treatment from him for pain. In fact, plaintiff testified that she did not seek any treatment for depression, and that it was Dr. Leo who suggested to her that she might be depressed.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence

showing the extent or degree of the limitation of movement 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]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or 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; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]).

The sworn report of Dr. Goldman, which only explains his findings during an examination of plaintiff conducted on December 16, 2014, after the making of the instant motion, is insufficient to defeat summary judgment. Although the Court of Appeals has held contemporaneous quantitative range of motion measurements are not a prerequisite to recovery under the "limitation of use" categories, it also recognized "[a] contemporaneous doctor's report is important to proof of causation" (*Perl v Meher*, 18 NY3d 208, 218, 936 NYS2d 655; *see Griffiths v Munoz*, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]). Here, there is no admissible medical proof of significant limitations in plaintiff's cervical or lumbar spine sufficiently contemporaneous with the subject accident (*see Lewars v Transit Facility Mgt. Corp.*, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]; *cf. Abreu v Metropolitan Transp. Auth.*, 117 AD3d 972, 986 NYS2d 557 [2d Dept 2014]; *Pantojas v Lajara Auto. Corp.*, 117 AD3d 577, 986 NYS2d 87 [1st Dept 2014]). Further, having stopped treating plaintiff in 2010, Dr. Goldman's conclusion that she currently suffers from restricted joint function due to the accident is speculative (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Islam v Makkar*, 95 AD3d 1277, 944 NYS2d 897 [2d Dept 2012]; *Lively v Fernandez*, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]; *Casco v Cocchiola*, 62 AD3d 640, 878 NYS2d 409 [2d Dept 2009])

In addition, the MRI report and the "physical performance report" by Performance Chiropractic presented with the opposition papers are not in admissible form and, therefore, fail to raise a triable issue of fact (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Balducci v Velasquez*, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; *Karpinos v Cora*, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; *Sorto v Morales*, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]). The certification of medical records and reports by the records custodian of a medical facility is insufficient to place the medical findings and conclusions of such records and reports before the court (*Irizarry v Lindor*, 110 AD3d 846, 847, 973 NYS2d 296 [2d Dept 2013]; *see* CPLR 2106; *Buntin v Rene*, 71 AD3d 938, 896 NYS2d 894 [2d Dept 2010]). In any event, the mere existence of herniated or bulging discs, and even radiculopathy, is not proof of serious injury absent objective evidence of the extent and duration of the alleged physical limitations resulting from

the disc injury (*see Pierson v Edwards*, 77 AD3d 642, 909 NYS2d 726; *Vilomar v Castillo*, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; *Washington v Mendoza*, 57 AD3d 972, 871 NYS2d 336 [2d Dept 2008]; *Sharma v Diaz*, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]), and the proffered MRI report does not address the issue of whether the disc condition observed in plaintiff's thoracic spine are causally related to the subject accident (*see John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Scheker v Brown*, 91 AD3d 751, 936 NYS2d 283; *Sorto v Morales*, 55 AD3d 718, 868 NYS2d 67; *Smeja v Fuentes*, 54 AD3d 326, 863 NYS2d 689 [2d Dept 2008]).

Plaintiff also failed to address the cessation of treatment for her alleged spinal injuries in 2010 (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380; *Lively v Fernandez*, 85 AD3d 981, 925 NYS2d 650). In fact, she testified at her deposition that her medical expenses were covered by insurance, and that she voluntarily stopped receiving seeking care for her alleged neck and back pain, because her chiropractor relocated his office and she believed the treatments were not effective. Finally, plaintiff failed to present any medical evidence substantiating her claim that she suffered a medically-determined, nonpermanent injury that rendered her unable to perform substantially all of her usual daily activities for at least 90 of the 180 days immediately following the accident (*see Strenk v Rodas*, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; *Roman v Fast Lane Car Serv., Inc.* 46 AD3d 535, 846 NYS2d 316 [2d Dept 2007]).

Accordingly, defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted. Defendants' second motion for the same relief is denied, as moot.

**Dated:** 7/1/15

**HON. PAUL J. BAISLEY, JR**

**HON. PAUL J. BAISLEY, JR., J.S.C.**