Short Form Order

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

COPY

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

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SHEILAH WILLIAMS and DONALD EVANS,

Plaintiffs,

-against-

MELISSA A. SCARLATA,

Defendant.

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INDEX NO.: 32062/12
CALENDAR NO.: 201500980MV
MOTION DATE: 9/30/15
MOTION SEQ. NO.: 004 CASEDISP

PLAINTIFFS' ATTORNEY:
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DEFENDANT'S ATTORNEY:
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Upon the following papers numbered 1 to 23 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-9 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10-21 ; Replying Affidavits and supporting papers 22-23 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 004) of defendant for summary judgment dismissing the complaint of plaintiff Sheilah Williams on the ground that she did not sustain a "serious injury" as defined in Insurance Law §5102(d) is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs when the vehicle in which they were passengers collided with a vehicle owned and operated by defendant. The accident allegedly occurred on March 20, 2012, at the intersection of Bayview Avenue and Sunrise Highway in Amityville, New York. By stipulation filed June 25, 2014, plaintiff Donald Evans discontinued his action against defendant. By the bill of particulars, plaintiff Sheilah Williams alleges that as a result of the subject accident, she sustained various serious injuries and conditions, including anterior superior patella traction spur at the insertion of the quadriceps tendon of the left knee, focal cartilage loss along the weight bearing aspect of the medial femoral condyle of the left knee, internal derangement of the left knee, cervical and lumbar strain/sprain, and aggravation and/or exacerbation of pre-existing degenerative asymptomatic condition of the right leg, ankle and foot.

Defendant now moves for summary judgment dismissing the complaint of plaintiff Sheilah Williams on the ground that she did not sustain a "serious injury" as defined in Insurance Law §5102(d).

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 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 (*see Perl v Meher*, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

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 defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see Moore v Edison*, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). 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, 853, 487 NYS2d 316 [1985]; *Boone v New York City Tr. Auth.*, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant made a *prima facie* showing that Williams did not sustain a serious injury within the meaning of Insurance Law §5102(d) through the affirmed report of the moving defendant's examining physician (*see Bailey v Islam*, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; *Sierra v Gonzalez First Limo*, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On October 2, 2014, approximately two years and six months after the subject accident, the moving defendant's examining orthopedist, Dr. Isaac Cohen, examined Williams and performed certain orthopedic and neurological tests, including McMurray's sign, Lachman test, Hawkins test, the apprehension sign, and the compression test. Dr. Cohen found that all the test results were negative or normal, and that hand grip, pinch and grasp were normal in both hands. Dr. Cohen also performed range of motion testing on Williams' cervical and lumbosacral spine, shoulders and left knee, using a goniometer to measure Williams' joint movement. Dr. Cohen found that Williams exhibited normal joint function in her cervical and lumbar regions, shoulders and left knee. Dr. Cohen learned that Dr. Katzman performed arthroscopic surgery on Williams' left knee sometime after the subject accident occurred. However, upon reviewing the images from an MRI examination of Williams' left knee performed on April 20, 2012, Dr. Cohen concluded that there was no meniscal tear or ligamentous damage but mild degenerative changes of a chronic nature with focal cartilage loss at the weight bearing aspect of the medial condyle. Dr. Cohen opined that he "cannot explain the need for a surgical arthroscopy on the left knee joint based on the MRI findings." He further opined that Williams had no orthopedic disability at the time of the examination and is capable of working without restrictions (*see Willis v New York City Tr. Auth.*, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at her deposition, Williams testified that immediately after the accident, she felt pain only in her left knee and did not have any bleeding, bruises, discoloration or swelling on her body. She testified that several days later, she felt pain in her neck, back and arm. She testified that at the time of the accident, she was not employed, and that as a result of the accident, she was confined to bed and home for about a month. Two days after the accident occurred, she went to the emergency room of Southside Hospital where she stayed for less than six hours and received painkillers, although she had no recollection as to whether she was given a prescription. Within two weeks after the accident occurred, she went to Dr. Perry's Physical Rehabilitation Center and received physical therapy treatment for almost one year. In June or July 2012, she went to see Dr. Barry Katzman, who performed surgery on her left knee. Williams testified she had a hard time sitting and standing for a long time, walking too far, and lifting heavy items. She also testified that she had difficulty performing house cleaning. She further testified that she was involved in several unrelated motor vehicle accidents in 2004, 2005, April 2011, and December 2012. Williams' deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see Burns v McCabe*, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; *Curry v Velez*, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendant met her initial burden of establishing that Williams did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law §5102(d) (*see Gonzalez v Green*, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiffs to raise a triable issue of fact (*see Gaddy v Eyler, supra*). 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, supra*; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Rovelo v Volcy*, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott, supra*; *Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (*Pommells v Perez*, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see Vasquez v John Doe #1*, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Williams opposes the motion, arguing defendant's expert report is insufficient to meet her burden on the motion. Williams also argues that the medical reports prepared by her treating physicians raise a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law §5102(d). In opposition, Williams submits her own affidavit and the sworn medical reports of Dr. Nunzio Saulle and Dr. Barry Katzman.

The sworn reports of Dr. Saulle are insufficient to defeat summary judgment. Here, Dr. Saulle's March 26, 2012 report sets forth Williams' initial complaints and the findings, including the limitations in her left knee joint function measured during range of motion testing, obtained during her initial examination at Perry Physical Medicine and Rehabilitation on March 26, 2012. Dr. Saulle's other reports also set forth the findings made during follow-up examinations of Williams conducted from April 2012 through November 2012, as well as the findings of MRI examinations of her left knee performed on April 20, 2012. According to Dr. Saulle's report, Williams exhibited left knee sprain with restriction, 45 degrees of flexion (130 degrees normal), which was measured at her examination on March 26, 2012. Dr. Saulle's reports further state that during follow-up examinations, Williams' left knee exhibited 45 degrees of flexion in April 2012, 50 degrees of flexion in May 2012, 90 degrees of flexion in July 2012, 90 degrees of flexion in August 2012, 95 degrees of flexion in September 2012, and 50 degrees of flexion in November 2012. However, Dr. Saulle failed to state how he measured the joint function in Williams' left knee. The Court can only assume that Dr. Saulle's tests were visually observed with the input of Williams. The failure to state and describe the tests used will render the opinion insufficient (*see Harney v Tombstone Pizza Corp,* 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; *Herman v Church*, 276 AD2d 471 [2d Dept 2000]).

Moreover, Dr. Saulle's April 13, 2015 report states that Dr. Katzman performed surgery on Williams' left knee on April 23, 2013, and that, according to the operative report, the postoperative diagnosis included medial meniscus tear, while the April 20, 2012 MRI examinations of Williams' left knee revealed no meniscal tear. The Court notes that Dr. Saulle does not offer competent medical evidence revealing the existence of meniscus tear in Williams' left knee that was contemporaneous with the subject accident (*see Joseph v A & H Livery*, 58 AD3d 688, 871 NYS2d 663 [2d Dept 2009]; *Leeber v Ward*, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]; *Ferraro v Ridge Car Serv.*, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]). Furthermore, according to the April 13, 2015 report, Dr. Saulle had treated Williams from March 2012 to November 2012 and opined that Williams sustained injuries to her neck, back, shoulders and left knee as a result of the subject accident. However, Dr. Saulle did not perform range of motion testing on Williams' shoulders until August 2012, at which time she exhibited 50 degrees of abduction (180 degrees normal) and 60 degrees of flexion (180 degrees normal) in her left and right shoulders. The Court also notes that Dr. Saulle does not offer competent medical evidence revealing the existence of Williams' shoulder injuries that was contemporaneous with the subject accident. Furthermore, although Dr. Saulle states, in the April 13, 2015 report, that "[d]espite a consecutive course of treatment and the passage of more than 3 years, [Williams] continues to experience significant pain as well as severe limitation of range of motion," he does not discuss the fact that Williams was involved in an unrelated motor vehicle accident in December 2012 where she allegedly sustained injuries.

The sworn report of Dr. Katzman is also insufficient to defeat summary judgment. According to Dr. Katzman's August 12, 2015 report, he examined Williams and performed range of motion testing on her left knee on May 19, 2012. Dr. Katzman found that Williams exhibited restricted range of motion in her left knee, 90 degrees of flexion (135 degrees normal), and that the MRI examinations of her left knee showed no meniscal tear. On June 10, 2012, Williams' left knee function was measured at 110 degrees of flexion. On June 23, 2012, Williams' shoulder function was measured at 80 degrees of flexion. However, Dr. Katzman failed to state how he measured Williams' ranges of motion. Dr. Katzman further states that the MRI examinations of Williams' shoulders showed tendinosis. However, the unaffirmed MRI examination reports regarding Williams' left knee and left shoulder is insufficient to raise a triable issue of fact, as they are not in admissible form (*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]). According to his report, Dr. Katzman continued to treat Williams, and she was involved in an unrelated accident on December 18, 2012, in which she allegedly re-injured her lumbar and cervical spine area. Dr. Katzman opined that Williams did not re-injure her left knee in the December 2012 accident. However, Dr. Katzman failed to state how long he treated Williams or to explain his finding that Williams did not re-injure her left knee as a result of the December 2012 accident. Moreover, Dr. Katzman failed to provide any evidence demonstrating that Williams' left knee injury was causally related only to the subject accident (*see Baez v Rahamatali*, 6 NY3d 868, 817 NYS2d 204 [2006]; *Larkin v Goldstar Limo Corp.*, 46 AD3d 631, 848 NYS2d 254 [2d Dept 2007]; *Hernandez v Almanzar*, 32 AD3d 360, 361, 821 NYS2d 30 [1st Dept 2006]).

As to Williams' shoulder injuries, as discussed above, the unaffirmed MRI examination reports regarding Williams' shoulders are insufficient to raise a triable issue of fact, as they are not in admissible form (*see Grasso v Angerami*, *supra*; *Balducci v Velasquez*, *supra*). The unaffirmed medical reports of Dr. Yuehei An, submitted by plaintiffs, also are insufficient to raise a triable issue of fact, as they are not in admissible form. Williams failed to provide any medical evidence concerning her shoulder condition contemporaneous to the subject accident (*see Perl v Meher*, *supra*; *Camilo v Villa Livery Corp.*, 118 AD3d 586, 987 NYS2 164 [1st Dept 2014]).

Finally, Williams failed to offer competent evidence that she sustained nonpermanent injuries that left her unable to perform her normal daily activities for at least 90 of the 180 days immediately following the accident (*see John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]), and her self-serving affidavit, which contradicts her deposition testimony, is insufficient to raise a triable issue of fact (*see Robinson-Lewis v Grisafi*, 74 AD3d 774, 902 NYS2d 170 [2d Dept 2010]; *Shvartsman v Vildman*, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]).

Accordingly, defendant's motion for summary judgment dismissing the complaint based on plaintiff Sheilah Williams' failure to meet the serious injury threshold is granted.

Dated: July 20, 2016

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