SHORT FORM ORDER

PUBLISH

INDEX No. 16-618468
CAL. No. 17-01704MV

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

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice Supreme Court

MOTION DATE 12-1-17
ADJ. DATE 3-30-18
Mot. Seq. # 001 - MG; CASEDISP

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ELIZABETH BARKER,

Plaintiff,

- against -

AHRC NASSAU, NASSAU COUNTY CHAPTER NYSARC, INC., NYSARC, INC., AND JOHN DOE (whose true name is unknown and is used herein to designate the operator of a motor vehicle),

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers dated October 31, 2017; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers dated March 14, 2018; Replying Affidavits and supporting papers dated March 28, 2018; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Nassau County Chapter NYSARC, Inc. for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for injuries sustained by plaintiff when her vehicle was rear-ended by a vehicle owned by defendant Nassau County Chapter NYSARC, Inc. and operated by defendant John Doe. The accident allegedly occurred on May 13, 2016 at the intersection of Merritts Road and Hempstead Turnpike in Farmingdale, New York. By the bill of particulars, plaintiff alleges that, as a result of the accident, she sustained various serious injuries and conditions, including bulging discs in the lumbar region, cervical and lumbar radiculopathy, and cervical and lumbar sprain/strain.

Moving defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff 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]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

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.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of defendant's examining physicians (*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 August 17, 2017, approximately 15 months after the subject accident, defendant's examining orthopedist, Dr. Jay Eneman, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test. Dr. Eneman found that all the test results were negative or normal, and that there was no spasm in plaintiff's cervical and lumbar regions, although there was minimal tenderness in her lumbar region. Dr. Eneman also performed range of motion testing on plaintiff's cervical and lumbar regions, using a goniometer to measure her joint movement. Dr. Eneman found that plaintiff exhibited normal joint function in her lumbar region. He found that plaintiff exhibited minor to mild limitation of use of her cervical region: extension was 50 degrees (normal 60 degrees), right and left lateral bending were 40 degrees (normal 45 degrees), and right and left rotation were 70 degrees (normal 80 degrees). Plaintiff's minor to mild limitation in range of motion noted by Dr. Eneman is considered insignificant within the meaning of the no-fault statute

(*see* ***Licari v Elliott***, *supra*; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Trotter v Hart***, 285 AD2d 772, 728 NYS2d 561 [3d dept 2001]). On September 6, 2017, defendant's examining neurologist, Dr. Richard Lechtenberg, examined plaintiff and performed certain orthopedic and neurological tests. Dr. Lechtenberg found that all the test results were negative or normal. Dr. Lechtenberg also performed range of motion testing on plaintiff's cervical, thoracic and lumbar regions, shoulders, knees, ankles, elbows, wrists, and hip using a goniometer to measure her joint movement. Dr. Lechtenberg found that plaintiff exhibited normal joint function in those regions. Dr. Lechtenberg opined that plaintiff had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at her deposition, plaintiff testified that the subject accident happened during a lunch hour, and that after the accident, she returned back to work. She testified that following the accident, she did not miss any time from work, and that she has not been confined to her bed or home. She testified that there is no activity that she is unable to perform because of the accident, although she had difficulty in walking for a long period. Plaintiff's 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, the moving defendant met its initial burden of establishing that plaintiff 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 plaintiff 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***, *supra*). 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]).

Plaintiff opposes the motion, arguing defendant's expert reports are insufficient to meet its burden on the motion. Plaintiff also argues that the medical reports prepared by her treating physician, Dr. Glen Ross, and her treating chiropractor, Dr. Daivd Suesserman, raise a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the unsworn MRI report of Dr. Eliyahu Engelsohn, the uncertified records from Huntington Medical and Rehabilitation, including the unsworn medical report of Dr. Ross, the uncertified records from Suesserman Chiropractic, P.C., including the unsworn medical report of Dr. Suesserman, the affirmed medical affirmation, dated March 12, 2018, of Dr. Ross, and the affirmation of Dr. Suesserman. The unsworn or uncertified medical reports, submitted by plaintiff, are 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]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]).

Here, Dr. Ross's March 12, 2018 affirmation set forth plaintiff's complaints of the cervical and lumbar region pain and the findings, including sprain/strain, spasm and contusion in those areas at his initial consultation on May 19, 2016. Although Dr. Ross states that he found a significant restriction to the range of motion in plaintiff's cervical and lumbar regions at his May 19, 2016 consultation, he offered no range of motion testing results (*see* ***Barrett v Jeannot***, 18 AD3d 679, 795 NYS2d 727 [2d Dept 2005]). In any event, even assuming that Dr. Ross's unsworn medical report, included in the records of Huntington Medical and Rehabilitation, is admissible, it is insufficient to raise a triable issue of fact since Dr. Ross failed to state how he measured the joint function in plaintiff's cervical and lumbar regions. The Court can only assume that Dr. Ross's tests were visually observed with the input of plaintiff. 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, 714 NYS2d 87 [2d Dept 2000]).

In his affirmation, Dr. Suesserman states that "Dr. David Suesserman, a chiropractor, licensed to practice chiropractic services in the State of New York, affirms the following to be true under the penalties for perjury under the CPLR." Dr. Suesserman's affirmation is insufficient to raise a triable issue of fact because it was not submitted in the proper form (*see* ***Paul-Austin v McPherson***, 111 AD3d 610, 974 NYS2d 281 [2d Dept 2012]; ***Vejselovski v McErlean***, 87 AD3d 1062, 1063, 929 NYS2d 760 [2d Dept 2011]).

Finally, plaintiff 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.***, *supra*).

Thus, the motion by defendant Nassau County Chapter NYSARC, Inc. for summary judgment dismissing the complaint on the ground that plaintiff's injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is granted.

Dated: MAY 21, 2018

A.J.S.C.

X FINAL DISPOSITION ____ NON-FINAL DISPOSITION