SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

SHANTAL NATASHA LARGIE,

Plaintiff,

-against-

PAUL J. VOGEL,

Defendant.

TRIAL PART 25
NASSAU COUNTY

MOTION # 01, 02 MG, MOD
INDEX # 601136/17
MOTION SUBMITTED:
SEPTEMBER 21, 2018

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The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1, 2
Cross Motion/Answering Affidavits.....3, 4
Reply Affidavits.....5, 6

Plaintiff seeks damages for personal injuries allegedly sustained as a result of an automobile accident that occurred on December 6, 2015.

Defendant moves for summary judgment pursuant to CPLR 3212 dismissing the complaint on the grounds that the plaintiff did not sustain serious injuries within sections 5102 and 5104 of the NYS Insurance Law.

Serious Injury

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the showing has been made, 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 (*Zuckerman v. City of New York, supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, (*Garcia v. J.C. Dugga, Inc.*, 180 AD2d 579 [1st

Dept. 1992]), and it should only be granted when there are no triable issues of fact (*Andre v. Pomeroy*, 35 NY2d 361 [1974]).

Within the context of a summary judgment motion seeking dismissal of a personal injury action for the alleged failure of the plaintiff to sustain a "serious injury" within the meaning of Insurance Law §5102(d), the defendant bears the burden of establishing a *prima facie* case that the plaintiff's injuries do not meet the threshold requirements of that statute (*Gaddy v. Eyler*, 79 NY2d 955 [1992]). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence, in admissible form, to demonstrate the existence of a question of fact on the issue (*Id.*). The court must then decide whether the plaintiff has established a *prima facie* case of sustaining a "serious injury" (*Licari v. Elliot*,57 NY2d 230 [1983]).

Pursuant to Article 51 of the New York State Insurance Law serious injury as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of body organ or member, function, or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute his usual and customary daily activity for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury (*See McKinney's Consolidated Law of New York*, Insurance Law § 5102(d)). The defendant is not required to disprove any category of serious injury that has not been pled by the plaintiff (*Melino v. Lauster,* 82 NY2d 828 [1993]). Whether the plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity, and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 [1st Dept. 2002]). In the verified bill of particulars the plaintiff sets forth the nature and extent of her injuries: cervical spine sprain/strain; cervicalgia; radiculopathy, cervical region; lumbar sprain/strain; L2-3 and L3-4 disc herniations; bilateral L4-L5 radiculopathy; discectomy and annuloplasty L3-4.

In order to satisfy the serious injury threshold, plaintiff must submit objective proof of serious injury. In *Toure v. Avis Rent-A-Car Systems*, 98 NY2d 345 (2002), the Court of Appeals held that a plaintiff's proof of injury must be supported by objective medical evidence in admissible form, such as sworn MRI or CT scan tests. These sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Even when there is ample proof of plaintiff's injury, certain factors may override a

plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem, or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 NY3d 566 [2005]). A plaintiff is required to provide, inter alia, objective medical evidence which demonstrates the extent and degree of the alleged physical limitation resulting from disc injury and its duration (*Perl v. Meher*, 18 NY3d 208 [2011]; *Ifrach v. Neiman*, 306 AD2d 380 [2nd Dept. 2003]; *Jason v. Danar*, 1 AD3d 398 [2nd Dept. 2003]; *Felix v. New York City Tr. Auth.*, 32 AD3d 529 [2nd Dept. 2006]; *Garcia v. Sobles*, 41 AD3d 426 [2nd Dept. 2007]; *Bestman v. Seymour*, 41 AD3d 629 [2nd Dept. 2007]).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler, supra; Licari v. Elliot, supra*). A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute (*Licari v. Elliot, supra*). A claim raised under the permanent consequential limitation of use or a body organ or member" or "significant limitation of use of a body function or system" categorizes can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of physical limitation (*Toure v. Avis, supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis; and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose, and use of the affected body organ, member, function, or system (*Id.*).

On March 8, 2018, Dr. Frank Oliveto, a Board Certified Orthopedic Surgeon performed an orthopedic examination of the plaintiff. Dr. Oliveto used a goniometer to objectively assess the plaintiff's range of motion with normal values obtained from the AMA Guidelines to the Evaluation of Permanent Impairment (5th Edition). Dr. Oliveto examined plaintiff's cervical spine and found limitations in the ranges of motions. Defendant contends that plaintiff manipulated and skewed the examination in her favor and such is proven by the results of Dr. Oliveto's neurological examination which found no sensory deficits in the upper extremities, deep tendon reflexes of the biceps and triceps, muscle strength in each range was 5/5, no atrophy of intrinsic muscles and the Cervical Compression Test was negative with no radiation of pain to

the back on axial bending. As to the examination of the lumbar since, Dr. Oliveto found no evidence of muscle spasm and no tenderness noted over the paraspinal musculature on palpation. There were limitations of the range of motion of the plaintiff's lumbar spine. Again, defendant contends that plaintiff manipulated and skewed the examination. Based on the orthopedic examination, Dr. Oliveto rendered a diagnosis of resolved cervical spine sprain/strain and status post lumbar discectomy, clinically healed from an object standpoint. Dr. Oliveto noted, that there was obvious malingering noted on the part of the plaintiff during the examination.

In support of the motion, defendant submitted the affidavit of Dr. Kevin K. Toosi along with his curriculum vitae. It was Dr. Toosi's opinion with a reasonable degree of biomechanical engineering certainty that the loads and mechanisms requires to compromise the plaintiff's spine were not present in the incident of December 6, 2015. It was Dr. Toosi's opinion that the plaintiff's lumbar spine disc herniations and her cervical and lumbar radiculopathies could not be attributed to the subject accident. It was Dr. Toosi's opinion that this accident provided no mechanism to exceed physiological range of motion of the plaintiff's cervical or lumbar spine.

Defendant also submitted the affirmed reports of Dr. Audrey Eisenstadt, a Board Certified Radiologist who reviewed the MRIs of the plaintiff's cervical spine conducted on January 8, 2016 and of the plaintiff's lumbar spine performed on January 11, 2016 at Metro Radiology. Overall it was Dr. Eisenstadt's opinion that this MRI film revealed no evidence of any osseous, ligamentuous or intervertebral disc changes posttraumatic in origin or causally related to the incident of December 6, 2015 with no post traumatic changes seen. As to the lumbar spine, after reviewing the MRI films Dr. Eisenstadt's opinion premised on her objective evaluation that the herniations in the lumbar spine were degenerative, pre-dated the incident which forms the basis of this action and are not causally related to the underlying accident.

Defendant also points out a gap in treatment. Plaintiff ceased all treatment in 2016 and has not sought any other treatment following the accident. While a cessation of treatment is not totally dispositive since it is not required that the plaintiff continue needless treatment in order to survive a summary judgment motion, the Court of Appeals held that a plaintiff who terminates therapeutic measures following the accident, while claiming serious injury, must offer some reasonable explanation for having done so (*Pommells v. Perez*, 4 NY3d 566; *see also Mahabir v. Ally*, 26 AD3d 314; *Mohamed v. Siffrain*, 19 AD3d 661). Plaintiff is required to submit appropriate evidence as to why he or she ended therapy more than three years ago. The

explanation of the plaintiff and medical experts for the lapse in treatment must be supported by the record (*Pommells v. Perez, supra*). Any subjective complaints of pain and limitation of motion by a plaintiff must be substantiated by valid certified objective medical findings based on a recent examination of the plaintiff for the purpose of the application of the no-fault tort threshold (*Young v. Russell*, 19 AD3d 688). The evidence submitted, including plaintiff's self serving affidavit is insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury (*see Mahabir v. Ally, supra*). Here, neither the plaintiff nor her treating or examining physicians ever offered an explanation for the two (2) year gap in treatment.

In addition, there is no medical determination before this Court that plaintiff was prevented from performing substantially all of the material acts constituting his usual and customary activities for not less than 90 days during the first 180 days immediately following the accident (*McLoyd v. Pennypacker*, 178 AD2d 277 app denied 79 NY2d 754; *Wright v. Melendez*, 140 AD2d 337: *see also Taylor v. Jerusalem, Inc.* 280 AD2d 466).

Defendants proved *prima facie* that plaintiff's injuries do not satisfy the threshold requirements of Insurance Law §5102(d).

In response to defendants' *prima facie* showing, plaintiff submitted the affirmation of Dr. Leon Reyfman, her pain management doctor; physical therapy notes January 4, 2016- June 13, 2016; Rose Chiropractic treatment notes from December 29, 2015- May 12, 2016; Range of motion testing and records of Clifton Burt, MD; affidavit of plaintiff; Acupuncture notes; MRI Report.

Based upon the evidence submitted, plaintiff has failed to demonstrate that she sustained a serious injury and the case must be dismissed.

Motion Seq. No. 2 to vacate the note of issue and strike this case from the trial calendar is now moot.

This constitutes the decision and order of the court.

ENTER

DATED: December 13, 2018

HON. JACK L. LIBERT
J.C.

ENTERED
DEC 18 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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