Johnson v Neblett
2019 NY Slip Op 33944(U)
January 3, 2019
Supreme Court, Nassau County
Docket Number: 606729/17
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

KATRINA JOHNSON,

Plaintiff,

- against -

FANNIE E. NEBLETT,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 606729/17
Motion Seq. No.: 01
Motion Date: 09/28/18
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	**1**
Affirmation in Opposition and Exhibits	**2**
Reply Affirmation	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant moves, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting summary judgment dismissing plaintiff's Complaint on the ground that plaintiff did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d). Plaintiff opposes the motion.

The above entitled action stems from personal injuries allegedly sustained by plaintiff as a result of an automobile accident that occurred on April 19, 2016, at approximately 10:50 a.m., on Fairview Boulevard, at or near its intersection with Gertrude Street, Hempstead, County of Nassau, State of New York. The subject accident involved two (2) vehicles - a 2016 Mazda CS5,

owned and operated by plaintiff, and a 2013 Nissan, owned and operated by defendant. *See* Plaintiff's Affirmation in Opposition Exhibit H.

Plaintiff commenced the action with the filing of a Summons and Complaint on or about July 11, 2017. *See* Defendant's Affirmation in Support Exhibit A. Issue was joined on or about August 9, 2017. *See* Defendant's Affirmation in Support Exhibit B.

As a result of the accident, plaintiff claims that she sustained the following injuries and/or aggravation of pre-existing conditions:

> L5-S1 disc herniation causing displacement of the left S1 nerve root extending into the epidural fat nearly abutting the thecal sac and the right S1 encroaching into the foramen bilaterally (MRI dated 5/24/15 (*sic*));
>
> L4-L5 disc bulging (MRI dated 5/24/16);
>
> L2/3 disc bulging (MRI dated 5/24/16);
>
> Pain upon movement of the lumbar spine;
>
> Restriction of motion of the lumbar spine:...;
>
> Plaintiff underwent lumbar epidural injections;...
>
> C6/C7 disc herniation and radial annular tear with ventral cord abutment (MRI dated 5/24/16);
>
> C2/C3 disc herniation with thecal sac impression (MRI dated 5/24/16);
>
> C3/C4 disc herniation with thecal sac impression (MRI dated 5/24/16);
>
> C4/C5 disc herniation with thecal sac impression (MRI dated 5/24/16);
>
> C5/C6 disc bulge;
>
> Pain upon movement of the cervical spine;
>
> Restriction of motion of the cervical spine:...;

> Left sided C5-C7 cervical radiculopathy (EMG dated 6/14/16);... *See* Defendant's Affirmation in Support Exhibit C ¶ 6.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212(b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals, in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination

of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a 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. *See Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiff claims that, as a consequence of the above described automobile accident with defendant, she has sustained serious injuries, as defined in New York State Insurance Law § 5102(d), and which fall within the following statutory categories of injuries:

1) permanent loss of a body organ, member, function or system; (Category 6)

2) a permanent consequential limitation of use of a body organ or member; (Category 7)

3) a significant limitation of use of a body function or system; (Category 8)

4) 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.(Category 9). *See* Defendant's Affirmation in Support Exhibit C ¶ 19.

For a permanent loss of a body organ, member, function or system to qualify as a "serious injury" within the meaning of No-Fault Law, the loss must be total. *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001); *Amata v. Fast Repair Incorporated*, 42 A.D.3d 477, 840 N.Y.S.2d 394 (2d 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. *See Gaddy v. Eyler*, *supra*; *Licari v. Elliot*, *supra*. A minor, mild or slight limitation will be deemed insignificant within the meaning of the statute. *See Licari v. Elliot*, *supra*. A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories 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 the physical limitation. *See Toure v. Avis Rent-a-Car Systems*, *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. *See id.*

Finally, to prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102(d)) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott*, *supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct. Bronx County 2005).

With these guidelines in mind, the Court will now turn to the merits of defendant's motion. In support of her motion, defendant submits the pleadings, plaintiff's Verified Bill of

Particulars, the transcript of plaintiff's Examination Before Trial ("EBT") testimony and the affirmed report of Howard Levin, M.D., who performed an independent orthopedic examination of plaintiff on April 3, 2018.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler, supra.* Within the scope of the movant's burden, defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Howard Levin, M.D. ("Dr. Levin"), a board certified orthopedic surgeon, reviewed plaintiff's medical records and conducted a physical examination of her on April 3, 2018. *See* Defendant's Affirmation in Support Exhibit E. Dr. Levin evaluated the range of motion of plaintiff's cervical spine and lumbar spine. The range of motion testing was conducted by way of a goniometer and the results indicated no deviations from normal. *Id.* Dr. Levin's diagnosis was "1. Cervical spine sprain, resolved. 2. Lumbar spine sprain, - resolved." *Id.* Dr. Levin indicates that, "Ms. Johnson has the following pre-existing condition: Degenerative joint disease of the spine. Based upon the objective physical examination findings as well as my review of the available medical records I find no orthopedic disability with respect to the accident on April 19, 2016. All opinions expressed are based upon a reasonable degree of medical certainty." *Id.*

Counsel for defendant submits that plaintiff testified at her EBT, in pertinent part, that "**[s]he drove from the scene and went home; she called her sister, then brought her vehicle to the dealership for repair**.... After dropping her vehicle off at the dealer, her sister picked her up and **she went out to lunch with her sister, then picked up her daughter from school**.... She never went to a hospital after this accident; she informed her primary care physician of the accident, and she did not recommend any treatment.... ***Before seeking any medical treatment whatsoever*, she contacted her attorney within one (1) or two (2) days** of this accident; her attorney referred her to Dr. Guy at Gramercy Park Physical Medicine & Rehabilitation.... She then made an appointment with Dr. Guy.... She went to Dr. Guy with complaints solely of neck and lower back pain.... Dr. Guy provided her with a back brace and told her to wear it for two (2) hours per day; she used the brace for two (2) months.... She was also given a brace for her wrist, to be worn at night.... He prescribed a cream for her back, and provided her with two (2) epidural injections for her back, and one (1) trigger point injection to her neck.... Her physical therapy at Dr. Guy's office included stretches, massage, and hearing pads.... **She ceased physical therapy treatment in Summer 2017**.... After a gap in treatment of unknown *months*, in January 2018 she went to Dr. Lipetz, in Dr. Lane's office.... She saw Dr. Lipetz only once, and has no future plans to see him.... In February 2018, *nine (9) months after this accident*, she first saw orthopedist, Dr. Lane.... Dr. Lane gave her a steroid injection in her right hand.... The pain in her hand allegedly began *one to two (1-2) months after the accident*.... Dr. Lane gave her a brace **'because it wasn't that bad of a pain'**.... She saw Dr. Lane just once after this accident.... She then conceded that **she treated with someone in Dr. Lane's office 'maybe a year or so' *before this accident* for numbness and tingling in her hand**.... **She received a steroid injection in her hand *before this accident***.... [Plaintiff notably does not allege any wrist complaints or injury related to this (*sic*) accident;...] She went for one (1) acupuncture treatment in February.... She

has been employed as a Phlebologist/Phlebotomist at Northwell Laboratory for five (5) years.... **She missed only one (1) day of work**.... **She was never confined to her bed or home following this accident**.... She alleges limitation when drawing blood on children or elders; due to the numbness and tingling in her finger [***which pre-existed this accident and which plaintiff concedes is not causally related to the accident***...].... No doctor ever told her she should be limited in drawing blood.... She alleged difficultly with heavy lifting and walking in the mall and 'that is all'; however, she conceded **in the first six (6) months after this accident, she was able to perform all activities**.... **She previously injured her back** in a *prior* motor vehicle accident in 2000.... She was transported to Winthrop Hospital, and underwent physical therapy for injuries sustained in that accident.... She also treated with Dr. Gregorace for this accident.... **She brought a 'serious injury' lawsuit for that *prior* accident; she received a sum in settlement of that lawsuit**...." *See* Defendant's Affirmation in Support Exhibit D.

Based upon this evidence, the Court finds that defendant has established a *prima facie* case that plaintiff did not sustain serious injuries within the meaning of New York State Insurance Law § 5102(d).

The burden now shifts to plaintiff to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that serious injuries were sustained. *See Pommells v. Perez*, *supra*; *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000).

To support her burden, plaintiff submits her Verified Bill of Particulars, her Response to Combined Demands, the affirmed report of Ali E. Guy, M.D., her certified records from Gramercy Park Physical Medicine and Rehabilitation, her certified records from Jason Lipetz, M.D., of Long Island Spine Rehabilitation Medicine, P.C., and the affirmations of Steven Winter, M.D., of Stand-Up MRI of Carle Place.

Ali E. Guy, M.D. ("Dr. Guy"), a board certified physician in physical medicine and rehabilitation with Gramercy Park Physical Medicine & Rehabilitation, P.C., first examined plaintiff on April 26, 2016, seven (7) days after the subject automobile accident. *See* Plaintiff's Affirmation in Opposition Exhibits C and D. Dr. Guy evaluated the range of motion of plaintiff's neck and back. The range of motion testing results indicated deviations from normal. Dr. Guy's assessment/plan was, "1. Multiple traumatic injuries. 2. Rule out cervical/lumbar disc bulge versus herniation. 3. Rule out cervical/lumbar radiculopathy. 4. Traumatic myofascial pain syndrome. 5. P.T.S.S.... The medical necessity and the goals for the rehabilitation therapy treatments are to diminish pain and spasm, improve range of motion, improve motor deficit, make the patient as pain free as possible in ADL and/or work and/or until the patient reaches maximum medical improvement.... The patient was advised to abstain from heavy work and gym activities till (*sic*) further progress sets in and until medical clearance is given." *See* Plaintiff's Affirmation in Opposition Exhibit D. Dr. Guy treated plaintiff over the course of approximatley two (2) years. *See id.* On September 4, 2018, Dr. Guy again evaluated the range of motion of plaintiff's neck and back. The results of the range of motion testing, done with the use of a goniometer, indicated deviations from normal. *See id.* Dr. Guy's diagnosis was, "1. C2 through C5 disc herniations. 2. C5 though C7 disc bulges. 3. L5-S1 disc herniation. 4. L2 through L5 disc bulges. 5. Left C5 through C7 cervical radiculopathy. 6. Right L4 through S1 radiculopathy. 7. Moderate bilateral carpal tunnel syndrome. 8. Status post left carpel tunnel surgical release.... 9. Permanent scarring to left wrist. 10. Traumatic myofascial pain syndrome." *See id.* Dr. Guy asserted that, "[t]he patient needs continued physical therapy treatments due to medical necessity and the goal is to diminish pain and spasm and restore range of motion deficits. The patient needs continued pain management procedures. The patient remains partially disabled. Based upon the history obtained, clinical examination findings and review of the medical records, it is my

professional opinion that this patient has clearly sustained a permanent partial disability causally related to the accident of April 16, 2016. These injuries are permanent and progressive. Therefore, the patient will need lifetime medical care as medically and clinically indicated. The patient will need periodic physical therapy sessions, periodic trigger point injection and the patient will need periodic cervical and lumbar epidural injections. If all fails, the patient will need eventual surgical evaluation for anterior cervical discectomy with fusion and lumbar discectomy and laminectomy.... The patient's overall prognosis must therefore remain guarded." *See id.*

As to the affirmations of Steven Winter, M.D. ("Dr. Winter"), of Stand Up MRI of Carle Place, P.C., pertaining to the MRIs taken of plaintiff's cervical spine and lumbar spine, in order to constitute competent medical evidence, a radiologist is required to have the MRI taken under his or her supervision and he or she also has to be the physician to read the MRI. *See Sayas v. Merrick Transportation*, 23 A.D.3d 367, 804 N.Y.S.2d 769 (2d Dept. 2005); *Fiorillo v. Arriaza*, 24 Misc.3d 1215(A), 897 N.Y.S.2d 669 (Sup. Ct. Nassau County 2007). Under these circumstances, while the radiologist need not pair the findings of the MRI films with a physical examination, he or she, as the radiologist performing the MRI, must nevertheless also report an opinion as to the causality of the findings. *See Collins v. Stone*, 8 A.D.3d 321, 778 N.Y.S.2d 79 (2d Dept. 2004); *Betheil-Spitz v. Linares*, 276 A.D.2d 732, 715 N.Y.S.2d 435 (2d Dept. 2000).

Here, Dr. Winter is the performing radiologist and also the physician interpreting the examination findings. However, Dr. Winter's failure to report an opinion as to causation is insufficient to constitute competent medical evidence herein.

The Court further notes that, with respect to the findings on plaintiff's range of motion measurements, Dr. Guy failed to identify the authoritative guideline for the standard of normal ranges upon which s/he allegedly based her/his comparisons. *See* Plaintiff's Affirmation in Opposition Exhibits C and D. Dr. Guy also failed to set forth what objective testing was done to

support the determinations, thus rendering Dr. Guy's determinations conclusory. *See id.*; *Cedillo v. Rivera*, 39 A.D.3d 453, 835 N.Y.S.2d 238 (2d Dept. 2007); *Chiara v. Dernago*, 70 A.D.3d 746, 894 N.Y.S.2d 129 (2d Dept. 2010).

Furthermore, as previously stated, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a 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. *See Pommells v. Perez*, *supra*. Dr. Guy failed to make any mention plaintiff's 2000 motor vehicle accident. Therefore, Dr. Guy's conclusions are speculative in light of the fact that s/he failed to address or even acknowledge the fact that plaintiff had previously injured her back in a prior car accident. *See Cervino v. Gladysz-Steliga*, 36 A.D.3d 744, 829 N.Y.S.2d 169 (2d Dept. 2007); *Moore v. Sarwar*, 29 A.D.3d 752, 816 N.Y.S.2d 503 (2d Dept. 2006); *Bennett v. Genas*, 27 A.D.3d 601, 813 N.Y.S.2d 446 (2d Dept. 2006); *Allyn v. Hanley*, 2 A.D.3d 470, 767 N.Y.S.2d 885 (2d Dept. 2003).

Counsel for plaintiff further contends that, "plaintiff has articulated her limitations in her EBT.... Plaintiff testified she is a phlebotomist.... She testified her employer has made accommodations for her at work ... where she now works primarily at a desk, allowing her to avoid drawing blood from children and the elderly because bending hurts her back. Plaintiff also testified that her ability to walk distances has been reduced by half or more.... For exercise and social activity, plaintiff enjoyed walking the mall which has now been severely restricted." *See* Defendant's Affirmation in Support Exhibit D.

Plaintiff has not sustained her burden under the 90/180 day category (Category 9) which requires a plaintiff to submit objective evidence of a "medically determined injury or

enforcement of a non-permanent nature which prevents the injured person from performing substantially all of the natural acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury." *See* Insurance Law § 5102(d).

"When construing the statutory definition of a 90/180 day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extend, rather than some slight curtailment." *See Thompson v. Abbasi*, 15 A.D.3d 95, 788 N.Y.S.2d 48 (1st Dept. 2005); *Gaddy v. Eyler, supra.*

Plaintiff's EBT testimony does not establish that she was unable to perform substantially all of the material acts that constitute her customary and daily activities for no less than ninety (90) out of the first one hundred eighty (180) days following the subject accident.

Accordingly, based upon the above, defendant's motion, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting summary judgment dismissing plaintiff's Complaint on the ground that plaintiff did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d), is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
January 3, 2019

ENTERED
JAN 04 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE