SHORT FORM ORDER

INDEX No. 17-602318
CAL. No. 18-01947MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 1-8-19
ADJ. DATE 3-26-19
Mot. Seq. # 001 - MG
002 - MG; CASEDISP
003 - MD

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SIERRA PAGE and JOHNATHON STACKHOUSE,

Plaintiffs,

- against -

KATRINA LEWIS,

Defendant.

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motions/Order to Show Cause and supporting papers dated November 13, 2018, November 30, 2018, and December 20, 2018 ; Notice of Cross-Motion and supporting papers ___; Answering Affidavits and supporting papers dated March 20, 2019 ; Replying Affidavits and supporting papers dated March 25, 2019 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant for summary judgment dismissing the complaint on the ground that plaintiff Sierra Page did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion by defendant for summary judgment dismissing the complaint on the ground that plaintiff Johnathon Stackhouse did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion (improperly denominated as a cross motion) by plaintiff/defendant on the counterclaim, Johnathon Stackhouse, for summary judgment dismissing the counterclaim against him on the ground that plaintiff Sierra Page did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied, as moot.

This is an action to recover damages for personal injuries sustained by plaintiffs when their vehicle collided with a vehicle owned and operated by defendant. The accident allegedly occurred on June 14, 2016, at the intersection of William Floyd Parkway and McGraw Street, in the Town of Brookhaven, New York. At the time of the accident, Sierra Page was a passenger in the vehicle owned and operated by Johnathon Stackhouse. By the bill of particulars, Page alleges that, as a result of the accident, she sustained various serious injuries and conditions, including "derangement" of the left shoulder and the cervical and lumbar regions, post-concussion syndrome, anxiety, and post-traumatic headaches. Stackhouse alleges that, as a result of the accident, he sustained various serious injuries and conditions, including "derangement" of the right arm and the cervical and lower lumbar regions.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiffs 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 "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 Page did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of her 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 June 6, 2018, approximately two years after the subject accident, defendant's examining orthopedist, Dr. Gary Kelman, examined Page and performed certain orthopedic and neurological tests, including the foraminal compression test, the straight leg raising test, the impingement sign, and the O'Brien test. Dr. Kelman found that all the test results were negative or normal, and that there was no spasm or tenderness in Page's cervical and lumbar regions. Dr. Kelman found that there was no tenderness or effusion in Page's shoulders. Dr. Kelman also performed range of motion testing on cervical and lumbar regions and shoulders, using a goniometer to measure her joint movement, and found that Page exhibited normal joint function. Dr. Kelman opined that Page 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, Page testified that at the time of the accident, she had two part-time jobs with a marketing company and Dunkin' Donuts. She testified that following the accident, she missed approximately two weeks of work with the marketing company and one week with Dunkin' Donuts. While she returned to work at Dunkin' Donuts and was assigned to light duty, she resumed to work on her regular schedule at the marketing company. She testified that there is no activity that she is unable to perform because of the accident, except for exercising at a gym, and that her headaches and neck injuries were completely resolved at the time of the deposition. Page'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, defendant met her initial burden of establishing that Page 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 Page 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 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]).

Page opposes the motion, arguing moving defendant's expert report is insufficient to meet her burden on the motion. Page 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, Page submits, *inter alia*, the uncertified medical records of Brookhaven Memorial Hospital, the uncertified medical records of Eastern Island Medical Care, an affirmation of her treating physician, Dr. Daniel Korman, the affirmed report of Dr. Korman, the unaffirmed magnetic resonance imaging (MRI) examination reports of Dr. Marc Katzman, Dr. Ronald Wagner, and Dr. Lisa Corrente, the unaffirmed reports of Dr. Gregory Mallo and Dr. Morgan Chen, the unsworn neuropsychological evaluation reports of Heather Hankell, Ph.D. and Brian Lebowitz, Ph.D., the uncertified medical records of Medihealth Medical, including two unaffirmed reports of Dr. Ahmed Elfiky. The uncertified records and unsworn physician reports submitted by Page 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. Korman's affirmation set forth Page's complaints and the findings at his initial consultation on June 20, 2016, six days after the subject accident. On June 23, 2016, Dr. Korman re-examined Page and performed a computerized muscle testing on her shoulders, which revealed her left and right shoulder impairment level of negative 13% and negative 14% respectively. On July 28, 2016, Dr. Korman performed a computerized muscle testing on Page's left shoulder and lumbar and cervical regions. The July 28, 2016 testing revealed that Page had a "limited range of motion of negative 6% in the left shoulder, 20% in the lumbar [region], and 6 to 33% in the cervical [region]." However, Dr. Korman offered no range of motion testing results for Page's shoulders and lumbar and cervical regions (*see* ***Barrett v Jeannot***, 18 AD3d 679, 795 NYS2d 727 [2d Dept 2005]). Dr. Korman's affirmation, therefore, is insufficient to raise a triable issue of fact.

Dr. Korman's report indicates that he re-examined Page on December 1, 2016 and performed range of motion testing on left shoulder and cervical and lumbar regions. Dr. Korman found that Page exhibited full joint function in her left shoulder and cervical and lumbar regions. Moreover, Page failed to submit any medical evidence of significant restrictions in shoulders and cervical and lumbar joint function based on a recent examination (*see* ***Santos v Perez***, 107 AD3d 572, 574, 968 NYS2d 43 [1st Dept 2013]; ***Vega v MTA Bus Co.***, 96 AD3d 506, 946 NYS2d 162 [1st Dept 2012]; ***Sham v B&P Chimney Cleaning & Repair Co.***, 71 AD3d 978, 900 NYS2d 72 [2d Dept 2010]).

In any event, even assuming that Page was entitled to rely on the unaffirmed MRI reports prepared by Dr. Katzman, Dr. Wagner, and Dr. Corrente, such reports are insufficient to warrant denial of defendant's motion for summary judgment. Dr. Katzman's MRI report demonstrated no brain injury. The MRI reports of Dr. Katzman and Dr. Wagner revealed bulging discs in Page's spine. Dr. Corrente's MRI report showed supraspinatus tendon tear of the left shoulder. The mere existence of a herniated or bulging disc or tear, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see* ***Acosta v Alexandre***, 70 AD3d 735, 894 NYS2d 136 [2d Dept 2010]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***Byrd v J.R.R. Limo***, 61 AD3d 801, 878 NYS2d 95 [2d Dept 2009]).

Moreover, Page failed to offer competent evidence that she sustained nonpermanent injuries that left her unable to perform substantially all of 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 for summary judgment dismissing the claim of Page on the ground that her injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is granted. Stackhouse's motion for summary judgment dismissing the counterclaim against him on the ground that Page did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), therefore, is denied, as moot.

Likewise, defendant made a prima facie showing that Stackhouse did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of her examining physician (*see* ***Bailey v Islam***, *supra*; ***Sierra v Gonzalez First Limo***, *supra*; ***Staff v Yshua***, *supra*). On June 6, 2018, Dr. Kelman examined Stackhouse and performed certain orthopedic and neurological tests, including the foraminal compression test, the straight leg raising test, the impingement sign, and the O'Brien test. Dr. Kelman found that all the test results were negative or normal, and that there was no spasm or tenderness in Stackhouse's cervical and lumbar regions. Dr. Kelman found that there was no tenderness or effusion in Stackhouse's shoulders. Dr. Kelman also performed range of motion testing on cervical and lumbar regions and shoulders, using a goniometer to measure her joint movement, and found that Stackhouse exhibited normal joint function. Dr. Kelman opined that Stackhouse had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, *supra*).

Further, at his deposition, Stackhouse testified that at the time of the accident, he attended a college and had a part-time job. He testified that following the accident, he missed two days from work and from college respectively. When he returned to work, he resumed on his regular schedule and his regular duties. He testified that following the accident, he was not confined to his bed or house, and that there is no activity

that he is unable to perform because of the accident, except for playing basketball and sitting for a long time. Stackhouse's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, *supra*; ***Curry v Velez***, *supra*).

Stackhouse opposes the motion, arguing moving defendant's expert report is insufficient to meet her burden on the motion. Stackhouse also argues that the medical reports prepared by his treating physicians raise a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d).

In opposition, Stackhouse submits, *inter alia*, the uncertified medical records of Brookhaven Memorial Hospital, the uncertified medical records of Eastern Island Medical Care, an affirmation of his treating physician, Dr. Korman, the affirmed reports of Dr. Korman, and the MRI examination reports of Dr. Lisa Corrente. The uncertified records and unsworn physician reports submitted by Stackhouse are insufficient to raise a triable issue of fact, as they are not in admissible form (*see* ***Grasso v Angerami***, *supra*; ***Scheker v Brown***, *supra*; ***Karpinos v Cora***, *supra*).

Here, Dr. Korman's affirmation set forth Stackhouse's complaints and the findings at his initial consultation on June 16, 2016, two days after the subject accident. On August 9, 2016, Dr. Korman re-examined Stackhouse and performed a computerized muscle testing on his cervical region, which revealed his neck flexion impairment level of negative 17%. However, Dr. Korman offered no range of motion testing results for Stackhouse's cervical region (*see* ***Barrett v Jeannot***, *supra*). Dr. Korman's affirmation, therefore, is insufficient to raise a triable issue of fact.

Dr. Korman's reports set forth Stackhouse's complaints and the findings, including significant limitations in his cervical and lumbar joint function measured during range of motion testing performed at his initial consultation on June 16, 2016. On August 11, 2016, Dr. Korman re-examined Stackhouse and performed range of motion testing on his spine, and found significant range of motion restrictions in his cervical and lumbar regions. However, Dr. Korman failed to state how he measured the joint function in Stackhouse's spine. The Court can only assume that Dr. Korman's tests were visually observed with the input of Stackhouse. 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]). Moreover, Stackhouse failed to submit any medical evidence of significant restrictions in cervical and lumbar joint function based on a recent examination (*see* ***Santos v Perez***, *supra*; ***Vega v MTA Bus Co.***, *supra*; ***Sham v B&P Chimney Cleaning & Repair Co.***, *supra*). Dr. Korman's reports, therefore, are insufficient to raise a triable issue of fact.

In any event, even assuming that Stackhouse was entitled to rely on the unaffirmed MRI reports prepared by Dr. Corrente, such reports are insufficient to warrant denial of defendant's motion for summary judgment. The MRI reports revealed herniated and bulging discs in Stackhouse's cervical and lumbar regions. The mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see* ***Pierson v Edwards***, *supra*; ***Byrd v J.R.R. Limo***, *supra*).

Finally, Stackhouse failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform substantially all of his normal daily activities for at least 90 of the 180 days immediately following the accident (*see* ***John v Linden***, *supra*; ***Il Chung Lim v Chrabaszcz***, *supra*; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*). Thus, the motion by defendant for summary judgment dismissing the claim of Stackhouse on the ground that his injuries failed to meet the serious injury threshold of Insurance Law § 5102 (d) is granted.

Dated: June 26, 2019

Martha L. Luft
A.J.S.C.
HON. MARTHA L. LUFT

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION