SHORT FORM ORDER

INDEX No. 15-609493
CAL. No. 18-00560MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 6-27-18 (001)
MOTION DATE 8-2-18 (002)
ADJ. DATE 10-24-18
Mot. Seq. # 001 - MG; CASEDISP
002 - MD

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TANYA KARPF and ANDREW KARPF,

Plaintiffs,

- against -

ALEX MARK,

Defendant.

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Attorney for Plaintiffs
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Woodbury, New York 11797

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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 by defendant, dated May 7, 2018 ; by plaintiffs, dated July 17, 2018 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiffs, dated October 17, 2018 ; by defendant, dated July 19, 2018 ; Replying Affidavits and supporting papers by defendant, dated October 23, 2018 ; by plaintiffs, dated October 23, 2018 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by the defendant Alex Mark, and the motion (#002) by the plaintiffs Tanya Karpf and Andrew Karpf are consolidated for the purposes of this determination; it is further

ORDERED that the motion by the defendant for an Order granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion by the plaintiffs for an Order granting them partial summary judgment on the issue of liability is denied as moot.

This is an action to recover damages for injuries allegedly sustained by the plaintiff Tanya Karpf as a result of a motor vehicle accident which occurred on September 7, 2012, near the Pulaski Road exit

ramp of the Sunken Meadow Parkway, in the Town of Huntington. The accident allegedly happened when a vehicle owned and operated by the defendant Alex Mark struck plaintiff's stopped vehicle in the rear. By her complaint, as amplified by her bill of particulars, the plaintiff alleges that, as a result of the accident, she suffered serious injuries, namely bulging and herniated discs of the cervical spine and bursitis of the left shoulder. The plaintiff Andrew Karpf also claims derivatively for loss of consortium and services.

The defendant now moves for summary judgment dismissing the complaint, alleging that Insurance Law §5104 precludes Mrs. Karpf from pursuing a personal injury claim because she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support, the defendant submits, among other things, transcripts of the plaintiff's deposition testimony, and the affirmed reports of orthopedic surgeon Harvey Manes, M.D., and radiologist Marc Katzman, M.D. At the defendant's request, Dr. Manes conducted an examination of the plaintiff and reviewed medical records related to the injuries alleged in this action, and Dr. Katzman conducted an independent review of the images from magnetic resonance imaging (MRI) examinations of the plaintiff's cervical spine and left shoulder, which were taken before and after the subject accident. The plaintiffs oppose the motion, arguing that, as a result of the accident, Mrs. Karpf sustained a "serious injury" as defined by the statute because she suffers from, among other things, restrictions of range of motion in her cervical spine and cervical radiculopathy. The plaintiffs further allege that these restrictions and radiculopathy permanently and significantly limit the use of these areas. In opposition, the plaintiff submits an affirmation of her attorney, and the affirmed report of Cecily Anto, M.D., her treating neurologist. The Court notes that it will consider the plaintiffs' untimely opposition papers, as the defendant submitted responsive papers thereto, and thus, he was not prejudiced thereby (*see* CPLR 2004, 2214 [b]; ***Bakare v Kakouras***, 110 AD3d 838, 972 NYS2d 710 [2d Dept 2013]; ***Hsu v Shields***, 111 AD3d 674, 974 NYS2d 800 [2d Dept 2013]).

The plaintiffs also move for partial summary judgment on the issue of liability, arguing that the defendant's negligence was a proximate cause of the subject accident. In support, the plaintiffs submit, among other things, transcripts of the parties' deposition testimony and an affidavit of Mrs. Karpf. In opposition, the defendant submits several documents, including an affirmation of his attorney.

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98

AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692, 694 [2d Dept 1992]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute 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* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). 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 the plaintiff's limitations, with an objective basis, correlating the 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]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 756, 25 NYS3d 672, 675 [2d Dept 2016]). Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380, 384 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). Further, a plaintiff seeking to recover damages under the "90/180" category must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*).

Here, the defendant's submissions establish a prima facie case that the alleged injuries to Mrs. Karpf's cervical spine do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). The defendants have presented competent medical evidence that none of Mrs. Karpf's alleged injuries fall under the "permanent consequential limitation" or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*). The affirmed medical report of Dr. Manes states, in relevant part, that during his examination, no spasm was detected in the neck, back, or shoulders. It states that Mrs. Karpf exhibited normal joint function during range of motion testing of her spine and both shoulder, and that there were no neurological deficits in her lower extremities (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Pagano v Kingsbury***, *supra*). Dr. Manes notes that Mrs. Karpf underwent cervical spine fusion in July 2016. Dr. Manes diagnoses Mrs. Karpf as being status post cervical spine fusion, and as having suffered sprains of the left shoulder and thoracolumbar spine, concluding that these conditions have resolved.

In addition, by his affirmed reports, Dr. Katzman finds that Mrs. Karpf's MRI of the cervical spine, taken approximately 3 months after the subject accident, showed disc herniations at the C5 to C6 and C6 to C7 levels, which appeared to be chronic, degenerative, and pre-existing due to degenerative

arthritic changes of the facet joints with no evidence of fracture, subluxation, or other recent post-traumatic injury. Further, Dr. Katzman finds that the MRI images of Mrs. Karpf's cervical spine, obtained over 3 years after the subject accident and about 4 months prior to her cervical spine fusion surgery, show that the disc herniations seen on the prior films have slightly increased in size, and a new minimal degenerative disc bulge at the C4 to C5 level. Dr. Katzman also finds that the MRI images taken of Mrs. Karpf's left shoulder about 18 months prior to the subject accident, show mild chronic degenerative arthropathy of the acromioclavicular joint, and mild chronic degenerative tendinosis of the supraspinatus tendon, both of which contribute to internal derangement and impingement of the left rotator cuff. In addition, Dr. Katzman finds that the MRI images of Mrs. Karpf's left shoulder, obtained around 4 months after the subject accident, show no evidence of recent post-traumatic injury, and that the trace subdeltoid and subacromial bursitis is a pre-existing condition. Dr. Katzman opines that Mrs. Karpf's cervical spine showed chronic, pre-existing degenerative disc disease, that her left shoulder and rotator cuff showed pre-existing degenerative changes, and that none of these conditions were related to the subject accident (*see* ***Perl v Meher***, *supra*, at 218-219; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, 127 AD3d 811, 6 NYS3d 607 [2d Dept 2015]). Moreover, through Mrs. Karpf's own deposition testimony that she was not confined to her bed or home at all immediately following the accident, and that she missed only 10 to 30 days of work from September 2012 to July 2015, the defendant established, prima facie, that Mrs. Karpf did not suffer injury within the "90/180" category of the statute (*see* ***Pryce v Nelson***, *supra*; ***Strenk v Rodas***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

The defendant having met his initial burden on the motion, the burden shifted to the plaintiffs to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). In opposition, the plaintiff submits the affirmed report of Dr. Anto, who concludes, among other things, that Mrs. Karpf suffers from disc herniations in her cervical spine, and that she exhibited loss of range of motion in this area during a recent examination (*see* ***Perl v Meher***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, *supra*). Although Dr. Anto found restrictions of range of motion in Mrs. Karpf's cervical spine during a recent examination, she fails to account for Dr. Katzman's findings that the disc herniations at the C4 to C5, C5 to C6, and C6 to C7 levels are due to degenerative disc disease, and not casually related to the subject accident (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, *supra*). As the plaintiffs' submissions are insufficient to demonstrate that these alleged limitations are causally related to the subject accident, they fail to rebut the defendant's prima facie showing that Mrs. Karpf did not suffer a "serious injury" within the meaning of the statute (*see* Insurance Law § 5102 [d]; ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***McLoud v Reyes***, *supra*). Therefore, the defendant's motion is granted.

As the defendant's motion for summary judgment dismissing the complaint based on the plaintiff's failure to meet the serious injury threshold is granted, the plaintiffs' motion is denied, as moot.

Dated: April 22, 2019
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION