SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
----------X
DIANA B. WILLIAMS,

Plaintiff,

-against -

EMIL YEDOWITZ LANDSCAPING CORP. and JOSEPH YEDOWITZ,

Defendants.
----------X
HON. SHERRI L. EISENPRESS, A.J.S.C.

DECISION/ORDER

Index No. 032049/2018

(Motion #1)

The following papers, numbered 1-5, were read in connection with Defendants EMIL YEDOWITZ LANDSCAPING CORP. and JOSEPH YEDOWITZ' (collectively "Defendants") Notice of Motion for summary judgment and dismissal of the Complaint against them on the ground the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d):

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A"-"O"	1-2
PLAINTIFF'S AFFIRMATION IN OPPOSITION/PLAINTIFF'S AFFIDAVIT EXHIBITS "A-J"	3-4
AFFIRMATION IN REPLY	5

Plaintiff commenced the instant action to recover damages for personal injuries arising out of an automobile accident which occurred on March 5, 2018, on Route 303 northbound at or near its intersection with Route 59, in the Town of Clarkstown, County of Rockland. At the time of the subject occurrence, Plaintiff's stopped vehicle was struck in the rear by Defendants' vehicle. Plaintiff, a 50 year old woman at the time, alleges that as a result of the accident, she sustained the following injuries: C4-C5 midline disc herniation; cervical radiculopathy; L4-L5 disc herniation; and lumbar radiculopathy. In a supplemental

Bill of Particulars, Plaintiff alleges that as a result of the accident, she underwent a surgical procedure in the nature of an anterior cervical discectomy at C4-C5; lumbar laminectomy and discectomy at L4-L5 and L5-S1.

In support of their summary judgment, Defendants submit Plaintiff's Nyack Hospital records; Atlas Spine Medical Records; MRI report of the cervical spine taken on March 12, 2018 which found degenerative spondylosis at C4-C5 through C6-C7 and a small midline disc herniation at C4-C5; and MRI report of the lumbar spine dated March 12, 2018, which found a small midline disc herniation at L4-L5. Additionally, Defendants submit a lumbar EMG report dated August 13, 2018, which notes the following finding: "the above electrical findings are suggestive of a left ongoing, active upon chronic lumbar radiculopathy at L5 root level. The lumbar EMG of the same date notes: "[T]he above electrical findings are suggestive of a left ongoing, active upon chronic cervical radiculopathy at C5 root level. Both referrals for the EMG note the onset of pain related to the accident of March 5, 2018. Defendants also submit Plaintiff's medical records from Gramercy Pain Management[1]; Advanced Orthopaedic and Plaintiff's employment records.

Defendants also submit the affirmed medical reports of neurologist, Rene Elkin M.D., who examined Plaintiff on March 2, 2019, and then again after Plaintiff's surgery, on October 12, 2019. Upon initial examination, approximately one year after the accident, Dr. Elkin noted significant restriction of motion in Plaintiff's cervical spine including flexion of 40 degrees (normal 50); retroflexion of 30 degrees (normal 60); lateral rotation of both sides to 50 degrees (normal 80). She also noted tenderness to palpation of the cervical spine and

[1]Defendants' submission of the Gramercy Pain Management records commences with the date of March 21, 2018 and neglects to include the entries from March 7, 2018, as included in Plaintiff's submission of the records. As Dr. Elkin relied upon and reviewed the Gramercy Pain Management records, the entirety of the medical records are properly considered by the Court.

cervical musculature and in the left upper extremity extending into the forearm. Examination of Plaintiff's lumbar spine also revealed limitations as to forward flexion of 20 degrees (normal 60). Dr. Elkin noted tenderness to palpation of the lumbar spine and paralumbar muscles more on the left than the right side. Additionally, Dr. Elkin noted that examination of the shoulders revealed elevation to 90 degrees (normal 180) and abduction to 120 degrees (normal 180), as well as tenderness to palpation. Notwithstanding these limitations, Dr. Elkin concludes that there is no objective findings for a neurological injury resulting from the accident; that the radiological studies reveal nonspecific age-related degenerative changes and there are no objective findings for cervical or lumbar radiculopathy to corroborate the electrodiagnostic studies as reported. Upon re-examination after surgery, Dr. Elkin finds normal ranges of motion except with respect to her shoulder wherein Dr. Elkin notes Plaintiff was unable to elevated or abduct or raise her left arm.

In opposition to the motion, Plaintiff points out that Plaintiff saw Dr. Gottlieb from Gramercy Pain Management on March 7 2018, two days post-accident, at which time he notes a positive Sperling sign on the left and a positive straight leg raising test on the left at 30 degrees bilaterally. He further notes restricted external rotation and external rotation to the shoulders. Follow up visits on March 21, 2018 and April 11, 2018 further noted diminished rage of motion in her neck, lower back and shoulder. On June 7, 2018, Plaintiff presented to Dr. Steven Waldman at Atlas Spin and Interventional Medicine and was noted to have radicular symptoms in the upper and lower extremities since the accident. On July 26, 2018, Plaintiff presented to the Nyack Hospital emergency room with complaints of worsening numbness and pain radiating from the neck to the fingers on the left arm. EMG testing revealed evidence of radiculopathy at C5 and L5 nerve roots. Plaintiff came under the care of Dr. Gerard Remy in October 2018 who reported objective evidence of severe functional limitation in cervical spine range of motion related to the subject accident. Eventually, Plaintiff came under the care of Dr. Scott Katzman at Advanced Orthopedics who performed a lumbar

laminotomy and discectomy at L4-L5, left to right laminoforaminotomy at L5-S1 and an anterior discectomy at C4-C5 and C6-C7 with discogram and discectomy at C5-C6 on April 11, 2019.

Plaintiff submits the affirmation of Dr. Katzman, her treating physician, who outlines Plaintiff's treatment, his consultation and the surgery he performed. He notes that she did not have a history of pain related symptoms to her cervical and lumbar spine until the subject motor vehicle accident and opines that it is his opinion with a reasonable degree of medical certainty that the injuries to the cervical and lumbar spine are directly and causally related to the accident of March 5, 2018. It is also Dr. Katzman's opinion that Plaintiff has undergone permanent changes to her lumbar spine with removal of the disc with cervical discectomy; that the partial impairment of her spine will always result in early onset of arthritis and a flare up of her condition and that she will never regain full range of motion.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance

Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). Precedent in the Second Department holds that where a defendant relies upon the affirmed medical report of its examining physician in support of its motion for summary judgment which notes a significant limitation of motion in a body part, the defendant has failed to meet his prima facie burden and the Court need not consider the sufficiency of the plaintiff's opposition papers. Robinson v. Yeager, 62 A.D.3d 684, 880 N.Y.S. 88 (2d Dept. 2009); Locke v. Buksh, 58 A.D.3d 698; 872 N.Y.S.2d 148 (2d Dept. 2009); Bentivegna v. Stein, 42 A.D.3d 555; 841 N.Y.S.2d 316 (2d Dept. 2007); Zamaniyan v. Vrabeck, 41 A.D.3d 472; 835 N.Y.S.3d 903 (2d Dept. 2007); Kovalenko v. General Electric Capital Auto Lease Inc., 37 A.D.3d 664; 831 N.Y.S.2d 438 (2d Dept. 2007).

In Meyer v. Gallardo, 260 A.D.2d 556; 688 N.Y.S.2d 624, 625 (2d Dept. 1999), the Second Department affirmed a denial of summary judgment where one of the physicians who examined the injured plaintiff on behalf of the defendant stated that the lateral rotation of his cervical spine was 80 degrees to the right and 50 degrees to the left. The Court found that this alone raised an issue of fact as to whether the injured plaintiff suffered a "significant limitation of use of a body function or system." Id. See also Rodriguez v. Ross, 19 A.D.3d 395, 396; 796 N.Y.S.2d 398 (2d Dept. 2005)(since defendants' own examining physician recorded some significant limitations in the plaintiff's movement of his cervical and lumbar spines, and his right shoulder, he did not make a prima facie showing of entitlement to summary judgment.); Korpalski v. Lau, 17 A.D.3d 536; 793 N.Y.S.2d 195 (2d Dept. 2005)(dismissal of complaint reversed because defendant failed to make prima facie showing that plaintiff did not sustain a serious injury where defendant's experts reported finding a limitation of motion in plaintiff's left shoulder and lower back.); Alam v. Karim, 61 A.D.3d 904, 879 N.Y.S.2d 1151 (2d Dept. 2009); Bagot v. Singh, 59 A.D.3d 368; 871 N.Y.S.2d 917 (2d Dept. 2009); Colon v. Chu, 61 A.D.3d 805; 878 N.Y.S.2d 127 (2d Dept. 2009).

In the instant matter, upon examination, Dr. Elkin found significant physical limitations in Plaintiff's cervical and lumbar spine, as well as her shoulders. As such, Defendants have failed to sustain their prima facie burden upon summary judgment and the Court need not address the sufficiency of Plaintiff's opposition papers. Nor have Defendants met their burden with respect to whether Plaintiff states a claim for serious injury under the 90/180 day category. Defendant submits the work records for Plaintiff that notes her last day of work was April 12, 2018, and she testified that she was unable to return to work and conduct her normal work activities until approximately August 2018, when she worked at the Tap House for one month, which would have been a sufficient amount of time to have been incapacitated for 90 out of the first 180 days after the accident.

Even if Defendants had met their burden, Plaintiff has established a triable issue of fact sufficient to require denial of summary judgment. A plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Id. By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident. Bonner v Hill, 302 AD2d 544, 756 N.Y.S.2d 82 (2d Dept 2003); O'Neill v O'Neill, 261 AD2d 459, 690 N.Y.S.2d 277 (2d Dept 1999).

In the instant matter, Plaintiff has demonstrated a triable issue of fact requiring denial of the summary judgment motion based upon her medical records documenting contemporaneous limitation of motion and permanent injuries as set forth in Dr. Katzman's expert affirmation. Where conflicting medical evidence is offered on the issue as to whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury. Martinez v Pioneer Transportation Corp., 48 A.D.3d 306, 851 N.Y.S.2d 194 (1st Dept 2008). Further, when discrepancies between the competing reports of the physicians create issues of credibility, those issues of fact should not be resolved on summary judgment and require a trial. Francis v Basic Metal, Inc., 144 AD2d 634 (2d Dept 1981); Cassagnol v Williamsburg Plaza Taxi, 234 AD2d 208, 651 N.Y.S.2sd 518 (1st Dept 1996). As such, the triable issues of fact require denial of Defendants' summary judgment motion with respect to the categories of significant limitation of use and permanent consequential limitation of use.

ORDERED that Defendants Emil Yedowitz Landscaping Corp. and Joseph Yedowitz' motion (#2) for summary judgment, pursuant to CPLR § 3212, is DENIED in its entirety; and it is further

ORDERED that this matter is scheduled for an appearance in the Trial Readiness Part on **Wednesday, June 24, 2020 at 9:30 a.m.**

The foregoing constitutes the Opinion, Decision & Order of the Court on Motion #2.

Dated: New City, New York
April 8, 2020

/s/ Hon. Sherri L. Eisenpress, A.J.S.C.
HON.SHERRI L. EISENPRESS, A.J.S.C.

TO:
All Parties (by e-file)