SHORT FORM ORDER

INDEX No. 624487/2017
CAL. No. 201902099MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 1/9/20 (001)
MOTION DATE 3/5/20 (002)
ADJ. DATE 7/16/20
Mot. Seq. # 001 MD
 # 002 MG; CASEDISP

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ANGELA M. AMICO,

Plaintiff,

- against -

STACEY L. REED and CHRISTOPHER REED,

Defendants.

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Upon the following papers read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, dated November 27, 2019; by defendants, dated February 3, 2020 : Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by defendants, dated February 27, 2020; by plaintiff, dated July 2, 2020 ; Replying Affidavits and supporting papers by plaintiff, March 5, 2020; by defendants, dated July 15, 2020 ; Other ___; it is

ORDERED that the motion (#001) by plaintiff Angela Amico and the motion (#002) by defendants Stacey Reed and Christopher Reed hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff Angela Amico seeking summary judgment in her favor on the issue of negligence is denied, as moot; and it is further

ORDERED that the motion by defendants Stacey Reed and Christopher Reed seeking summary judgment dismissing the complaint is granted.

Plaintiff Angela Amico commenced this action to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Round Swamp Road and the Northern State Parkway in the Town of Huntington on January 7, 2015. It is alleged that the accident occurred when the vehicle operated by defendant Stacey Reed and owned by defendant Christopher Reed struck the front left side of the vehicle operated and owned by plaintiff when it made a left turn directly into the path of plaintiff's vehicle. At the time of the accident, plaintiff was traveling straight on northbound Round Swamp Road, and Stacey Reed was attempting to make left turn onto the ramp of the Northern State Parkway from the southbound lane of Round Swamp Road. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject collision, including multilevel cervical spine disc herniations, cervical and lumbosacral radiculitis, and exacerbation of pre-existing degenerative condition of the cervical spine.

Defendants now move for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit, among other things, copies of the pleadings, plaintiff's deposition transcripts, uncertified copies of plaintiff's medical records regarding the injuries at issue, and the sworn medical reports of Dr. Dorothy Scarpinato and Dr. Jean-Robert Desrouleaux. At defendants' request, Dr. Scarpinato conducted an independent orthopedic examination of plaintiff on August 23, 2019. Also at defendants' request, Dr. Desrouleaux conducted an independent neurologic examination of plaintiff on September 16, 2019. Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, plaintiff submits her own affidavit, the sworn medical reports of Dr. Salvatore Corso, Dr. Adam Wilner and Dr. Fabien Bitan, and uncertified copies of her medical records regarding the injuries at issue.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "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 under 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.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on 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 (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment, using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants, through the submission of competent medical evidence and plaintiff's deposition transcript, established their prima facie entitlement to summary judgment as a matter of law, that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*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]; ***Davis-Hassan v Siad***, 101 AD3d 932, 957 NYS2d 205 [2d Dept 2012]). Defendants' examining orthopedist, Dr. Scarpinato, used a goniometer to test the ranges of motion in plaintiff's spine, and compared her respective findings to the normal range of motion values for each region (*see e.g.* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2d Dept 2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Desulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Scarpinato states that an examination of plaintiff reveals full range of motion in her spine, that plaintiff complains of tenderness upon palpation of the cervical paraspinal muscles, although no evidence of swelling was observed, and that there was no evidence of tenderness, muscle spasms, or trigger points upon palpation of the lumbar paraspinal muscles. She states that there was no evidence of sensory deficits or neurotrophic changes, and that plaintiff's muscle strength is good with no atrophy. Dr. Scarpinato states that the straight leg raising test is negative, and that plaintiff is able to stand on toes and heels without difficulty. Dr. Scarpinato opines that the strains to plaintiff's spine that she sustained as a result of the accident have resolved. Dr. Scarpinato further states that plaintiff does not have an orthopedic disability, that there is no medical necessity for additional orthopedic treatment or physical therapy, and that plaintiff is capable of working full time and

performing all of her daily living activities with no restrictions (*see e.g.* ***Cabrera v Apple Provisions, Inc.***, 151 AD3d 594, 57 NYS3d 471 [1st Dept 2017]; ***Watt v Eastern Investigative Bureau, Inc.***, 273 AD2d 226, 708 NYS2d 472 [2d Dept 2001]; *compare* ***Marshall v Institute for Community Living, Inc.***, 50 AD3d 975, 856 NYS2d 660 [2d Dept 2008]).

Likewise, Dr. Desrouleaux, defendants' examining neurologist, states in his medical report that an examination of plaintiff reveals that she has full range of motion in her spine, that her muscle strength is 5/5, and that there was no evidence of muscle spasm or tenderness upon palpation of the paraspinal muscles. He states that plaintiff does not have a limp or antalgic gait, that the straight leg raising test is negative, that there was no evidence of atrophy of the intrinsic muscles, and that there is no evidence of dysmetria. Dr. Desrouleaux opines that the myofasciitis plaintiff sustained to her cervical spine has resolved, and that the examination of plaintiff's lumbar spine was normal. Dr. Desrouleaux further states that plaintiff does not have a neurological disability, and that she is capable of performing her normal activities of daily living and maintaining full employment without restrictions.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that she sustained injuries within the limitations of use categories and within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d dept 2015]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Rico v Figueroa***, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified at an examination before trial that at the time of the accident she was enrolled in her last semester as a pharmacist student at St. John's University, that following the accident, she missed approximately two weeks from school at the direction of her treating physician, Dr. Corso, that she used a handicapped pass for parking for the rest of the semester, and that she graduated with a doctorate from the pharmacy program on time. She testified that upon graduation, she immediately enrolled as a pharmacy resident in at Winthrop University Hospital, and that, although she missed time from her residency for pain in her neck, it was not at the direction of a physician. Plaintiff testified that she began attending physical therapy on April 2, 2015, but stopped on April 30, 2015, because she did not think it was helping and she became overwhelmed with graduating, studying for her pharmacy board examinations, and starting her pharmaceutical residency. However, plaintiff testified that in August 2016, she began attending physical therapy once again for the injuries she sustained in the subject accident, because she started having intense headaches, and that when her No-Fault benefits were discontiuned, she continued receiving treatment using her private health insurance. She testified that she does not remember when she stopped attending physical therapy, but that she still receives acupuncture treatments to help alleviate her headaches and cervical spine muscle spasms. Plaintiff further testified that she was in motor vehicle accident in 2004, but she did not sustain any injuries in the accident, that she fractured her lower back in a boat accident while vacating in Lake George in 2013, and that she was not a member of a gym prior to the accident, but became a member of Orangetheory gym in 2017 and then transferred her membership to LA Fitness gym in 2019.

Therefore, defendants shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with

objective medical evidence showing the extent or degree of the limitation 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]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***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*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, the evidence submitted by plaintiff failed to raise a triable issue of fact as to whether she sustained an injury to her spine within the limitations of use categories of the Insurance Law (*see* ***Dutka v Odierno***, 145 AD3d 661, 43 NYS3d 409 [2d Dept 2016]; ***Boettcher v Ryder Truck Rental, Inc.***, 133 AD3d 625, 19 NYS3d 86 [2d Dept 2015] ***Krerimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102(d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Plaintiff has submitted the medical report of Dr. Salvatore Corso, which concludes that plaintiff sustained significant range of motion limitations that are causally related to the subject accident, that she did not have any prior injuries to her cervical spine, and that she will require spinal fusion surgery in the future. However, Dr. Corso, in deriving his conclusions, impermissibly relied upon the unsworn medical records and reports of other physicians (*see* ***Villeda v Cassas***, 56 AD3d 762, 871 NYS2d 167 [2d Dept 2008]; ***Vishnevsky v Glassberg***, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]; ***Magarin v Kropf***, 24 AD3d 733, 870 NYS2d 398 [2d Dept 2005]). Consequently, Dr. Corso's report fails to raise a triable issue of fact.

Additionally, the affirmation of Dr. Adam Wilner, the radiologist who reviewed the magnetic resonance images of plaintiff's cervical spine, which states that plaintiff has multilevel disc herniations in her cervical region, fails to opine as to causation, and, therefore, is insufficient to rebut defendants' prima facie showing (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2d Dept 2009]]). "The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (***Stevens v Sampson***, 72 AD3d 793, 794, 898 NYS2d 657 [2d Dept 2010]; *see* ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d

Dept 2012]). Moreover, plaintiff's self-serving affidavit failed to raise a triable issue of fact as to whether she sustained a serious injury under the no-fault statute (*see* ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]). The remaining submissions of plaintiff's were without probative value in opposing the motion, because they were either unsworn, unaffirmed, or uncertified (*see* ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]).

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited her usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). The fact that plaintiff is unable to perform a few enumerated tasks for a lengthy period without pain does not constitute a curtailment from performing substantially all of her usual activities to a great extent (*see* ***Lanzarone v Goldman***, 80 AD3d 667, 915 NYS2d 144 [2d Dept 2011]; ***Rodrgiuez v Virga***, 24 AD3d 650, 808 NYS2d 373 [2d Dept 2005]; ***Crane v Richard***, 180 AD2d 706, 579 NYS2d 736 [2d Dept 1992]). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Having determined that plaintiff failed to sustain a serious injury within the meaning of Insurance Law § 5102 (d), plaintiff's motion for summary judgment in her favor on the issue of negligence is denied, as moot.

Dated: August 25, 2020
Riverhead, New York

WILLIAM G. FORD, J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION