SHORT FORM ORDER

INDEX No. 16-615892
CAL. No. 201902340MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 5-10-19
ADJ. DATE 10-3-19
Mot. Seq. # 002 - MD

MARIA MARLENIS ALVARENGA-PAZ,

Plaintiff,

- against -

CAMERON G. KOHLER and PETER KOHLER,

Defendants.

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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 by defendants, dated April 10, 2019; Notice of Cross-Motion and supporting papers __; Answering Affidavits and supporting papers by plaintiff, dated August 22, 2019; Replying Affidavits and supporting papers by defendants, dated September 26, 2019; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries sustained by plaintiff when her vehicle was struck in the rear by a vehicle owned by defendant Peter Kohler and operated by defendant Cameron Kohler. The accident allegedly occurred on November 25, 2015, on Oakwood Road, near West 19st Street, in the Town of Huntington, New York. By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained serious injuries and conditions, including a herniated disc at level C6-C7.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff 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 a "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, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of defendants' examining physicians (*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 16, 2018, approximately two years and seven months after the subject accident, defendants' examining orthopedist, Dr. Dorothy Scarpinato, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, the Phalen's test, and the Tinel's sign. Dr. Scarpinato found that all the test results were negative or normal. Dr. Scarpinato also performed range of motion testing on plaintiff's spine, shoulders, wrists, elbows, left knee, and left ankel, using a goniometer to measure her joint movement. Dr. Scarpinato found that plaintiff exhibited normal joint function in those regions. Dr. Scarpinato opined that plaintiff 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]). On June 25, 2018, defendants' examining neurologist, Dr. Mathew Chacko, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test. Dr. Chacko found that all the test results were negative or normal. Dr. Chacko also performed range of motion testing on plaintiff's cervical and lumbar regions, using a goniometer to measure her joint movement. Dr. Chacko found that plaintiff exhibited normal joint function in those regions. Dr. Chacko opined that plaintiff had no orthopedic disability at the time of the examination (*see id.*).

Further, at her deposition, plaintiff testified that following the accident, she missed approximately a week from work. She testified there is no activity that she is unable to perform because of the accident, except for sitting, standing, and walking for a long period of time. Plaintiff'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, defendants met their initial burden of establishing that plaintiff 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 plaintiff 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]).

Plaintiff, in opposition, argues that the reports of defendants' examining physicians are insufficient to meet their burden on the motion. She also argues that the affirmations of her treating physicians, Dr. Jordan Sudberg, Dr. Michele Rubin, and Dr. Jerry Ellstein, raise a triable issue as to whether she suffered injury within the "permanent consequential limitation of use" category, the "significant limitation of use" category, and the "fracture" category of Insurance Law § 5102 (d). Plaintiff contends that a supplemental bill of particulars alleging a non-union ulnar styloid fracture in her left wrist was served in December 2017 by a prior counsel. Although the Court's e-file system has not recognized the existence of the supplemental bill of particulars until plaintiff filed the opposition on August 22, 2019, paragraph 24 of plaintiff's bill of particulars indicates that she "suffered a fracture." Moreover, at her deposition, plaintiff testified that she made a complaint to the ambulance attendant that her left hand hurt at the scene of the accident. Plaintiff also testified that following the accident, she had received a physical therapy for her injuries, including her hand, for approximately a year. The Court finds that plaintiff's allegation of the non-union ulnar styloid fracture in her left wrist is neither a new injury nor a new category of damages.

In his affirmation, Dr. Ellstein states that he first examined plaintiff on April 14, 2016, approximately four and a half months after the subject accident, and during the examination, an x-ray examination was performed on plaintiff's left wrist and revealed a non-union ulnar styloid fracture. Dr. Ellstein opines that plaintiff's non-union ulnar styloid fracture was causally related to the subject accident.

In his affirmation, Dr. Sudberg states that he first examined plaintiff on December 17, 2015, 22 days after the subject accident. During the initial consultation, plaintiff complained of pain in her neck, back, left wrist, and shoulders. Dr. Sudberg reviewed Dr. Ellstein's affirmation and opines that plaintiff's non-union ulnar styloid fracture was causally related to the subject accident. Dr. Sudberg reviewed plaintiff's medical records and opines that plaintiff suffered a partial orthopedic and neurological disability which was causally related to the subject accident. During his first examination, Dr. Sudberg did not provide any range of motion testing results, although he states that plaintiff exhibited the significant limitations in the range of motion in her neck, back, and shoulders. On May 8, 2019, more than three years five months after the subject accident, Dr. Sudberg administered range of

motion testing on plaintiff's cervical and lumbar regions, using a goniometer to measure her joint movement and found that there were significant range of motion restrictions in those regions.

Here, plaintiff submitted competent medical evidence raising a triable issue of fact as to whether she sustained a fracture constituting a serious injury as defined by Insurance Law § 5102 (d) (*see* ***Perl v Meher***, *supra*; ***Gooden v Joseph***, 137 AD3d 1215, 27 NYS3d 393 [2d Dept 2016]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: Riverhead, New York
February 13, 2020

VINCENT J. MARTORANA, J.S.C.

____ **FINAL DISPOSITION** _X_ **NON-FINAL DISPOSITION**