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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MG

HERLANDE BEAUBRUN,

Plaintiff,

-against-

WHILELM FRANCOIS,

Defendant.

Motion Sequence #1
Submitted September 9, 2011
XXX

INDEX NO: 3084/10

The following papers were read on this motion for summary judgment

Notice of Motion and Affs.....1-5
Affs in Opposition.....6-12
Affs in Reply.....13&14
Memorandum of Law.....15

Upon the foregoing, it is ordered that this motion by defendant, Whilelm Francois, for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff, Herlande Beaubrun's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d), is granted.

This action arises out of a motor vehicle accident that occurred on November 14, 2009 at approximately 7:00 p.m. at the intersection of Elmont Road and Freeman Avenue in Nassau County, New York. Plaintiff alleges that her vehicle was rear ended by the vehicle being operated by the defendant.

Plaintiff claims that she sustained, *inter alia*, the following serious injuries as a result of the subject accident: bursitis/synovitis in the right shoulder; C4-C5 disc space narrowing, disc desiccation, broad based disc protrusion creating a moderate central and moderate bilateral neuraforaminal stenosis; disc space narrowing, desiccation and a mid line disc herniation at C3-C4 excluding mass effect on the spinal as well as the existing bilateral nerve root; decreased range of motion of the lumbar and cervical spine; cervical radiculopathy; contusion of the right shoulder; lumbar spine sprain and strain; thoracic spine pain; cervicalgia; lumbalgia; cervical, thoracic and lumbar joint dysfunction; cervical, thoracic and lumbar spine strain and sprain; cervical and lumbosacral radiculopathy; and TMJ disorder.

Plaintiff testified at her examination before trial that she was employed as a home health aide. She missed four days from work and upon her return, she resumed the same schedule and duties as a home attendant including dressing, bathing and feeding her patients. Plaintiff testified that there is nothing that she can no longer do as a result of this accident; none of her daily activities have been effected.

The 38-year old plaintiff claims that her injuries fall within the following four categories of the serious injury statute: to wit, 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; and 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.

Inasmuch as the plaintiff has, however, failed to allege and claim that she has sustained a "total loss of use" of a body organ, member, function or system, it is plain that her injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295).

Similarly, plaintiff's claims that her injuries satisfy the 90/180 category of Insurance Law §5102(d) are also unsupported and contradicted by her own testimony wherein she states that she only missed four days of work and that there is nothing that she can no longer do as a result of this accident. Thus, she has failed to otherwise provide any evidence that she was "medically" impaired from doing any activities as a result of this accident for 90 days within the first 180 days following this accident. Therefore, this Court determines that plaintiff has effectively abandoned her 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion (*Joseph v Forman*, 16 Misc. 3d 743 [Sup. Ct. Nassau 2007]).

Accordingly, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, permanent consequential limitation of use of a body organ or member; and, significant limitation of use of a body function or system.

Pursuant to the no-fault statute, in order to meet the threshold of significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v Eyler*, 79 NY2d 955;

Scheer v Koubeck, 70 NY2d 678; *Licari v Elliot*, 57 NY2d 230). A minor, mild or slight limitation is deemed "insignificant" within the meaning of the statute (*Licari v Elliot*, *supra*; *Grossman v Wright*, 268 AD2d 79, 83).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 3450). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id*).

With these guidelines in mind, this Court will now turn to the merits of defendant's motion.

In support of his motion, defendant submits the affirmed to report of Dr. Salvatore Corso, M.D., an orthopedist who performed an orthopedic physical examination of the plaintiff on February 15, 2011, and the affirmed to report of Dr. Roy M. Shanon, M.D., a neurologist, who also performed a neurological physical examination of the plaintiff on February 15, 2011.

Based thereon, the defendant has established his *prima facie* entitlement to judgment as a matter of law.

Specifically, Dr. Salvatore Corso and Dr. Shanon, both examined the plaintiff, performed quantified range of motion testing on her cervical spine, right shoulder, and

thoracolumbar spine with a goniometer, compared their respective findings to normal range of motion values and each physician concluded that the ranges of motion measured were normal. Both, Dr. Corso and Dr. Shanon, also performed motor and sensory testing and found no deficits, and based on their clinical findings and medical records review, concluded that the plaintiff has a resolved cervical and thoracolumbar strain and a resolved right shoulder sprain with no evidence of an orthopedic or a neurological disability (*Staff v Yshua*, 59 AD3d 614; *Cantave v Gelle*, 60 AD3d 988).

Having made a *prima facie* showing that the injured plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v Perez, supra*; *see also Grossman v Wright*, *supra*).

In opposition, plaintiff submits the affidavit of Mark S. Snyder, D.C., a chiropractor who first examined the plaintiff on August 16, 2011, approximately 21 months following the date of the accident; the affirmed to report of Dr. Tatyana Gabinskaya, M.D., who evaluated the plaintiff on November 20, 2009; the affirmation of Bill Akpinar, M.D., a dentist who first examined the plaintiff on July 14, 2011, approximately 20 months following the date of the accident; and, the plaintiff's own affidavit.

Initially, it is noted that the affirmed to report of Dr. Tatyana Gabinskaya, wherein she documents her evaluation of the plaintiff on November 20, 2009, falls short of presenting a triable issue of fact. Dr. Gabinskaya fails entirely to report the quantified results of her range of motion testing. Dr. Gabinskaya claims to have performed range

of motion testing of plaintiff's upper and lower extremities, cervical spine, thoracic spine and lumbosacral spine; yet, she never quantifies her results, compare her results to normal values, or even identifies any objective tests used to ascertain the range of motion limitations. Thus, all of her opinions are conclusory and do not create an issue of fact (*Bennett v Genas*, 27 AD3d 601; *Kouvaras v Hertz Corp.*, 27 AD3d 529).

The balance of plaintiff's proof, while competent medical evidence, falls short of presenting a triable issue of fact. Both Dr. Akpinar and Mr. Snyder's respective reports post date the accident by approximately 20 months. Thus, there is no proof on this record showing any initial range of restrictions in her spine, shoulder or mouth (*Li v Woo Sung Yun*, 27 AD3d 624). Failure to proffer any competent medical evidence that is contemporaneous with the subject accident showing any initial range of motion restrictions is fatal to plaintiff's case.

Further, while Dr. Akpinar finds that the plaintiff had restricted range of motion of her mouth at that time, he baldly, concludes that her "pain and unresolved tissue injury [are] secondary to the trauma of November 14, 2009". Notably, there is no mention of the subject accident in his account of the plaintiff's medical history. In addition, although Dr. Akpinar appears to rely upon the results of a tomography study dated February 2, 2010, there is no indication whatsoever that that study causally relates the findings therein to the subject accident (*Colon v Vargas*, 27 AD3d 512).

Therefore, in the absence of any competent or admissible evidence supporting a claim for serious injury under any one of the nine categories of Insurance Law §5102(d), defendant's motion seeking summary judgment dismissal of Herlande Beaubrun's complaint is herewith granted (*Licari v Elliot*, *supra*).

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

Therefore, defendant's motion is granted and the plaintiff's complaint is dismissed.

Dated: NOV 30 2011

UTE WOLFF LALLY, J.S.C.

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