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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

BERNADETTE MASSEY,

Plaintiff,

-against-

ROSA M. GUZMAN,

Defendant.

Motion Sequence #1
Submitted September 19, 2011
XXX

INDEX NO: 21427/09

The following papers were read on this motion for summary judgment

Notice of Motion and Affs.....1-6
Affs in Opposition.....7-10
Affs in Reply.....11-14

Upon the foregoing, it is ordered that this motion by defendant, Rosa M. Guzman, for an Order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the plaintiff, Bernadette Massey'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 May 29, 2009 at approximately 7:16 a.m. on West Merrick Road at its intersection with Elm Place in Nassau County, New York. The accident allegedly occurred as the defendant attempted to exit a parking lot onto West Merrick Road.

In bringing this action, plaintiff Bernadette Massey claims in her Bill of Particulars that she sustained the following serious injuries as a result of the subject accident: small central disc herniation C7-T1; broad based central disc herniation C6-C7; tiny central disc protrusion C4-C5; moderate central disc herniation C2-C3; and cervical radiculopathy. In her Supplemental Bill of Particulars, plaintiff alleges that she also sustained the following: central disc herniation at C2-3 indenting the thecal sac; central disc herniation at C4-5; broad based central disc herniation at C6-7 flattening the ventral thecal sac; central disc herniation at C7-T1 with anterior subluxation; disc bulge at C4-5; loss of disc height and bilateral disc/ridge complexes at C5-6 with bilateral neural foraminal encroachment; left cervical radiculopathy with post traumatic occipital headaches and dizziness and paresthesias; restricted range of motion and movement of the cervical spine; tenderness of the paracervical muscles; muscle spasms in the bilateral trapezius muscles which required trigger point injections; decreased sensation in the left C5 and C6 dermatomes; and cervical myofascitis.

Plaintiff testified at her examination before trial, that she refused medical attention on the date of the accident and that it was not until a week later that she received any medical treatment for her alleged injuries.

Plaintiff states that she was not confined to her bed or home following the accident; rather she was confined to her bed two weeks later for three days and to her home, two weeks later for eight weeks. She claims that two weeks following the date of this accident, she was completely disabled for three days and remains partially disabled to date.

Further, Massey claims that she was not employed at the time of the accident. Rather, she testified that she was a student attending class three times a week for a course in medical billing and coding in Manhattan. She testified that she missed five to six classes as a result of this accident.

Plaintiff also testified that she was previously involved in a motor vehicle accident in April 2004 in which she injured her lower back, neck and shoulders.

Massey states that as a result of the subject 2009 accident, she can no longer run, lift heavy objects or back her car out of her driveway without difficulty. She also testified that she could also no longer do housework, go grocery shopping, or lift her textbook, without being in pain.

Plaintiff, who was 47-years old at the time of the subject accident, 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 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 two weeks worth of classes and that, while with pain and difficulty, there is nothing that she can no longer do as a result of this accident. Thus, it is clear that plaintiff 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 prove a 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*, *Id.*; *Grossman v Wright*, 268 AD2d 79, 83).

When, as here, 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 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 her motion, the defendant submits the affirmed to report of Dr. S. Murthy Vishnubhakat, M.D., a neurologist who performed a neurological physical examination of the plaintiff on April 6, 2011; the unsworn plaintiff's emergency room report from South Nassau Communities Hospital documenting her visit as a result of the April 2, 2004 accident; additional unsworn medical records documenting plaintiff's prior April 2004 accident; the affirmed to report of Dr. A. Robert Tantleff, M.D., a radiologist who performed an independent MRI review of plaintiff's cervical spine from an examination dated July 9, 2009.

With this evidence, the defendant has established a *prima facie* entitlement to judgment as a matter of law.

Specifically, Dr. Vishnubhakat, a neurologist, examined the plaintiff, performed quantified range of motion testing on her cervical spine and lumbar spine with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal. Dr. Vishnubhakat also performed motor

and sensory testing and found no deficits, and based on his clinical findings and medical records review, concluded that plaintiff did not have any neurological or any musculoskeletal symptoms related to the subject accident. He also concluded that she did not have any permanent or residual 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 the existence of a triable issue of fact, that a "serious injury" was sustained (*Pommels v Perez,* 4 NY3d 566; *see also Grossman v Wright*, *supra*).

In opposition, plaintiff submits the sworn affirmation of Dr. David Benatar, M.D., a physician who first examined the plaintiff on June 22, 2009 with respect to the subject accident but had also treated the plaintiff with reference to her prior April 2004 accident; the affirmation of Dr. Elizabeth Maltin, M.D., a radiologist who performed an MRI of plaintiff's cervical spine on July 9, 2011; the unsworn report of Dr. Mark Shapiro, M.D., a Board Certified Radiologist; and the plaintiff's own affidavit.

Initially it is noted that the sworn report of Dr. Elizabeth Maltin does not constitute competent medical evidence in opposition to defendant's *prima facie* showing of entitlement to judgment as a matter of law. While Dr. Maltin appears to have had the MRI of plaintiff's cervical spine taken under her supervision and is also the physician interpreting said MRI study, she fails to report an opinion as the causality of her findings. This is fatal to plaintiff's opposition (*Collins v Stone*, 8 AD3d 321; *Betheil-Spitz v Linares*, 276 AD2d 732).

In addition the report of Dr. Mark Shapiro, M.D. does not constitute competent medical evidence in that he fails to explain whether he is reading the actual MRI films or the report of another physician (*Dioguardi v Weiner*, 288 AD2d 253; *Beyel v Console,* 25 AD3d 636). In any event, Dr. Shapiro fails to express an opinion on a causal relation of his findings or pair his findings with a recent physical examination (*Silkowski v Alvarez*, 19 AD3d 476).

The balance of plaintiff's proof consists of the affirmed report of Dr. Benatar wherein he states that, with respect to the subject accident, he first examined the plaintiff on June 22, 2009 at which point he did cervical spine range of motion testing; then again on November 5, 2009, March 4, 2011 and finally on July 14, 2011.

While at first blush, it appears that Dr. Benatar's sworn report precludes an award of summary judgment in defendant's favor, upon closer examination, this Court finds that the unexplained 16 month gap in plaintiff's treatment is fatal to her claim of serious injury. More specifically, reading Dr. Benatar's report suggests to this Court that the 16 month gap in treatment was, in reality, a cessation of all treatment. The Court of Appeals held in Pommells v. Perez, supra:

> While a cessation of treatment is not dispositive * * * a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so.

This, the plaintiff has failed to do. Therefore, given the fact that the plaintiff has failed to proffer any explanation for the lack of treatment in the 16 month period, this Court deems Dr. Benatar's report stale and insufficient to present an issue of fact (*Moore v Sarwar*, 29 AD3d 752; *Caracci v Miller*, 34 AD3d 515).

Therefore, defendant's motion for an order granting summary judgment dismissing Bernadette Massey's complaint is granted. (*Licari v Elliot*, *supra*).

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

Dated: NOV 30 2011

UTE WOLFF LALLY, J.S.C.

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