SHORT FORM ORDER

INDEX No. 09-40217
CAL. No. 11-00190MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 6-17-11
ADJ. DATE 7-28-11
Mot. Seq. # 001 - MD

---X

CHRISTA WARD and MICHAEL WARD,

Plaintiffs,

- against -

PATRICIA ABAMONTE,

Defendant.

---X

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Upon the following papers numbered 1 to 18 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-10 ; Notice of Cross-Motion and supporting papers_; Answering Affidavits and supporting papers 11-18 ; Replying Affidavits and supporting papers _; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant Patricia Abamonte pursuant to CPLR 3212 and Insurance Law § 5102 (d) for summary judgment dismissing the complaint on the basis that the plaintiff, Christa Ward, has failed to meet the serious injury threshold, is denied.

This is an action to recover damages for the personal injuries allegedly sustained by the plaintiff, Christa Ward, when she was involved in a motor vehicle accident on October 14, 2008, on the Long Island Expressway, at or near Exit 56 in Suffolk County, New York, when the vehicle being operated by the defendant Patricia Abamonte struck the plaintiff's vehicle in the rear. A derivative claim has been asserted by the plaintiff's spouse, Michael Ward.

Christa Ward claims in her bill of particulars that as a result of the accident, she sustained cervical radiculopathy; cervical sprain/strain; permanent consequential limitation of the cervical spine; loss of range of motion of the cervical spine; decreased cervical core stabilization; numbness down the left arm; tingling sensation in the right arm to the fingers; severe and debilitating migraine headaches; suboccipital headaches; and extra segmental right forearm and digital decreased sensation.

The defendant now seeks summary judgment on the basis that the plaintiff's claimed injuries fail to meet the threshold imposed by Insurance Law §5102 (d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center,*** *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 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 "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 (***Toure v Avis Rent A***

Car Systems, Inc., 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** , *supra*).

In support of this motion, the defendant has submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's bill of particulars; an unsigned, partial copy of the transcript of the examination before trial of the plaintiff dated September 7, 2010; an uncertified copy of the plaintiff's medical record from Stony Brook University Hospital emergency department; uncertified copies of insurance billing forms; and the sworn report of Michael J. Katz, M.D. dated January 18, 2011 concerning his independent orthopedic examination of the plaintiff. The unsigned deposition transcript of the plaintiff is not in admissible form (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), is not accompanied by an affidavit or proof of service pursuant to CPLR 3116, and is not considered on this motion. The plaintiff's hospital record and the billing statements are not certified and, therefore, are not in admissible form (***Friends of Animals v Associated Fur Mfrs.***, supra).

Although the plaintiff has claimed radiculopathy and numbness and tingling in her arms and fingers in her bill of particulars, movant has not submitted a report from an examining neurologist to rule out the claimed neurological injury or to address the plaintiff's claim of migraine headaches related to the accident (*see,* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). These omissions create factual issues which preclude the granting of summary judgment.

In Dr. Katz's report concerning his orthopedic examination of the plaintiff, he has set forth the objective method employed to obtain such range of motion measurements of the plaintiffs' cervical spine, right elbow, right wrist and forearm, right hand, left upper extremity, and lower extremities by the use of a goniometer (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]), and has reported normal findings when compared to the normal ranges of motions for the respective areas. Dr. Katz has set forth the records, x-ray reports, CT scan report of the head dated 10/14/08, CT scan report of the cervical spine dated 10/14/08, CT scan of the brain dated 11/02/08, CT scan report of the pelvis and abdomen dated 11/02/08, MRI report of the lumbar spine dated 1/13/09, MRI report of the cervical spine dated 1/13/09, upper extremity EMG/NCV report dated 1/27/09, and MRI report of the brain dated 8/31/09, which he reviewed, however, he has not submitted these reports, leaving it to the court to speculate as to the findings set forth in the various reports. He does not comment on whether or not he agrees with those findings and does not rule out causation related to the within accident. His diagnosis is that of cervical strain with radiculitis, resolved; chest contusion, resolved; and lumbosacral strain with radiculitis, resolved. Dr. Katz offers a conclusory and unsupported opinion that the MRI reports of the cervical and lumbar spine indicate degenerative changes, however, he does not state what those changes are, and what he bases his opinion on, raising factual issues which leave it to the court to speculate as to the findings set forth on the MRI reports.

Defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the affidavit insufficient to demonstrate movant's entitlement to summary judgment on the issue of whether plaintiff was able to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see*,

Uddin v Cooper, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and he offers no opinion relative to this statutory period, thus precluding summary judgment on this issue as well.

These factual issues raised in defendant's moving papers preclude summary judgment. The defendant failed to satisfy her burden of establishing prima facie that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).

Inasmuch as moving party failed to establish her prima facie entitlement to judgment as a matter of law on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motion (001) by defendant for summary judgment dismissing of the complaint is denied.

Dated: 7/22/11

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION