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SHORT FORM ORDER

INDEX No. 10-3208
CAL. No. 11-01409-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 10-17-11
ADJ. DATE 1-4-12
Mot. Seq. # 001 - MD
002 - MD

MARINA NUNEZ Plaintiff, - against - BARTHOLO DEFRANCO and FRANCISCO ORTEZ, Defendants.	BORDA, KENNEDY, ALSEN & GOLD, LLP Attorneys for Plaintiff 1805 Fifth Avenue Bay Shore, New York 11706 SHONDEBARE & KORCZ Attorneys for Defendant DeFranco 3555 Veterans Memorial Highway, Suite P Ronkonkoma, New York 11779 ANDREA G. SAWYERS Attorney for Defendant Ortez 3 Huntington Quadrangle, Suite 102S P.O. Box 9028 Melville, New York 11747

Upon the following papers numbered 1 to 19 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 9 ; Notice of Cross-Motion and supporting papers (002) 10-15 ; Answering Affidavits and supporting papers 16-17 ; Replying Affidavits and supporting papers 18-19 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant, Francisco Ortez, pursuant to CPLR §3212 for summary judgment dismissing the complaint because the plaintiff, Marina Nunez, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that motion (002) by the defendant, Bartholo DeFranco, pursuant to CPLR §3212 for summary judgment dismissing the complaint because the plaintiff, Marina Nunez, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

The plaintiff, Marina Nunez (hereinafter Nunez), seeks damages for personal injuries and property damage to her vehicle arising from an automobile accident which occurred on February 21, 2009 on Route 27A at its intersection with Howard Avenue, Babylon, New York.

Nunez was a passenger in the vehicle which she owned, and which was being operated by Francisco Ortez (hereinafter Ortez), when it was struck by the vehicle operated by Bartholo DeFranco (hereinafter DeFranco).

The defendants seek summary judgment because the plaintiff did not sustain a serious injury as defined 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 evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]). The proponent has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 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 (*id.*). Once a prima facie showing is made, the burden shifts to the opponent of the motion who, in order to defeat summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact or demonstrate an acceptable excuse for his failure to do so (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1989]). The opponent must assemble, lay bare and reveal her proof in order to establish that the matters set forth in her pleading are real and capable of being established at a trial (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Summary judgment shall be granted when the cause of action or defense is established sufficiently to warrant a court as a matter of law to direct judgment in favor of any party (CPLR §3212 [b]).

In support of motion (001), defendant Ortez has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, answer and bill of particulars; a copy of the transcript of the examination before trial of Nunez, dated November 30, 2010; and the sworn reports of Bert A. Heyligers, M.D. (hereinafter Heyligers) concerning his independent radiological review of Nunez's MRI of the cervical spine on March 31, 2009, and Arthur M. Bernhang, M.D. (hereinafter Bernhang) concerning his independent orthopedic examination of Nunez on April 22, 2011. In support of motion (002), the defendant DeFranco has submitted an attorney's affirmation wherein counsel incorporates by reference all the arguments and exhibits proffered in motion (001); and a copy of the summons and complaint and the answer, various discovery demands, and the plaintiff's verified bill of particulars.

Insurance Law § 5102(d) defines " '[s]erious injury'[to mean] 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).

On a motion for summary judgment to dismiss a complaint for failure to state 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 [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 [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 [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 [1990]).

In order to recover under the "permanent loss of use" category, the 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 the plaintiff's limitations, with an objective basis, correlating the 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 her verified bill of particulars, Nunez alleges that as a result of this accident, she sustained injuries consisting of straightening of the upper cervical spine with loss of normal lordosis; C3-4 and C4-5 posterior disc bulges; C5-6 posterior disc herniation slightly favoring the left side; C5-6 posterior disc herniation slightly favoring the right side; transitional limbos junction with some lumbarization of the upper sacrum with well formed S1-S2 disc; L1-2 through L3-4 posterior disc bulges; joint effusion including fluid pooling in the subcoracoid space of the left shoulder; C4-5, C5-6, and C6-7 radiculopathy on the right; L4-5 radiculopathy; cervical myofacial derangement; cervical radiculopathy, lumbar myofacial derangement, lumbar radiculopathy, and left shoulder effusion; post trauma cervical and lumbar sprain/strain; thoracic derangement; pain in neck, lower back, left shoulder and right leg; right leg contusion; and sprain of the left shoulder.

The defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint because Nunez did not sustain a serious injury.

The defendants have not submitted copies of Nunez's medical reports and records referred to by Bernhang, or copies of the MRI reports generated by the examining radiologists, upon which Bernhang and Heyligers in part base their opinions. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and the expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Supreme Court, Tompkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]).

Although Nunez has asserted in her bill of particulars that she sustained lumbar and cervical disc radiculopathies as a result of this accident, the defendants have not submitted a report from a neurologist who examined Nunez ruling out the claimed neurological injuries (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Also Nunez has alleged she sustained a contusion to her right leg. Upon examination, Bernhang noted a 3/4" scar on her right calf; however he did not comment on whether or not this was caused by this accident. He further noted a burn mark which he stated is from an unrelated accident. No report from a plastic surgeon evaluating the scar has been submitted by the defendants.

Heyligers states in his impression that there are small posterior disc bulges at C3-4 and C5-6. He does not comment on the findings of the MRI of Nunez's lumbar spine or shoulder, leaving this Court to speculate as to those findings. While disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2nd Dept 2002]), Heyligers does not comment on these findings and does not rule out whether these injuries were causally related to the accident herein.

Bernhang has stated his range of motion findings upon clinical examination of Nunez's cervical spine, lumbar spine, and shoulders. Although Bernhang used a goniometer/tape measure to determine range of motion values, he compared his findings with the average ranges of joint motion rather than the normal ranges of motion (*see,* ***Frey v Fedorciuc***,36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 602 [2d Dept 2006]; ***Disla v Murillo***,17 Misc3d 1114A, 851 NYS2d 63 [Supreme Court, Queens County 2007]). Because he has not stated the age group, sex, or other variable factors in determining an average range of motion, this Court must speculate under what circumstances the average range of motion is determined, and as to what is meant by "average" (*see*, ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]).

Although Bernhang's examination revealed range of motion deficits in cervical rotation, and active shoulder forward flexion, he did not state an opinion concerning whether these deficits, and the injuries claimed by Nunez in her bill of particulars were causally related to the accident herein.

Since the defendants have failed to establish their entitlement to judgment as a matter of law, the Court need not consider whether Nunez's opposition is sufficient to raise a triable issue of fact (*see*, ***Agathe v Tun Chen Wang***, supra; ***Walters v Papanastassiou***, supra).

Accordingly, the respective motions (001) and (002) by the defendants for summary judgment dismissing the complaint are denied.

Dated: FEB 29 2012

Peter Fox Cohalan

J.S.C.

HON. PETER FOX COHALAN

____ FINAL DISPOSITION __X___ NON-FINAL DISPOSITION