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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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MI OK KIM,

Plaintiff(s),

Index No. 7302/10

Motion Submitted: 1/6/12
Motion Sequence: 001

-against-

FRANTZI HONORE,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant moves this Court for an Order granting summary judgment in his/her favor on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff opposes the requested relief.

The subject accident giving rise to this action occurred on September 4, 2009. The verified complaint states, in sum and substance, that defendant's vehicle "rear-ended" plaintiff's vehicle. Plaintiff's Bill of Particulars states that she sustained injuries to her left and right shoulders, including tendon tears, and injuries to her cervical and lumbar spine areas, including disc herniations and bulges. Plaintiff claims also that the subject accident exacerbated or aggravated pre-existing and/or asymptomatic cervical and lumbar spine conditions.

Plaintiff is asserting claims of permanent consequential and significant limitation of use of a body function or system, and a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of her customary daily activities for not less than 90 days during the 180 days immediately following the accident ("90/180") claim.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York Univ. Med. Center,*** 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Here, the defendant must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident (***Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]).

In support of his/her motion, defendant has submitted, *inter alia*, plaintiff's bill of particulars,[1] plaintiff's deposition testimony, and the affirmed reports of defendants' examining orthopedic surgeon and radiologist.

On or about May 25, 2011, defendant's examining radiologist, Stephen W. Lastig, M.D., reviewed the MRI studies of plaintiff's cervical and lumbar spine areas, as well as of plaintiff's right and left shoulders performed between September 21, 2009 and October 13, 2009. Dr. Lastig also reviewed an MRI study of plaintiff's lumbar spine performed on September 9, 2005.

With respect to plaintiff's lumbar and cervical spines, despite noting certain bulges and a disc protrusion, Dr. Lastig set forth his impressions that plaintiff suffers from multi-

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[1]Plaintiff's bill of particulars has not been verified by plaintiff herself as required by CPLR § 3044. Defendant has not moved this Court to declare the bill of particulars a nullity, or to require plaintiff to verify it.

level degenerative disc disease in both her cervical and lumbar spine areas, and that the findings on the MRI are not causally related to the reported accident of September 4, 2009. Plaintiff's earlier lumbar spine MRI was essentially similar to the October 2009 study; however, in the 2009 study, the previously seen disc protrusion at L3-L4, as well as a tear at L4-L5, were not seen. The new smooth bulge at the L5-S1 level is characterized as degenerative. In addition, Dr. Lastig did not find any evidence of fracture, subluxation or focal disc herniation in either of those areas of plaintiff's spine.

Dr. Lastig's review of the left shoulder MRI study led him to conclude that there are no tears, fractures, or bone contusions, and that the findings are not causally related to the subject accident. Dr. Lastig drew the same conclusions upon review of the right shoulder MRI study.

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from injury and its duration (***Little v. Locoh***, 71 A.D.3d 837, 897 N.Y.S.2d 183 [2d Dept., 2010]). Thus, whether or not any of plaintiff's MRI studies exhibit any of the foregoing, plaintiff must still exhibit physical limitations in order to sustain a claim of serious injury within the meaning of the Insurance Law.

Plaintiff was examined by Michael J. Katz, M.D., defendant's examining orthopedic surgeon, on June 3, 2011. Dr. Katz reviewed a number of plaintiff's medical records, including the bill of particulars, MRI and nerve study reports, physical therapy notes, and the reports of plaintiff's doctor, Sung J. Pahng, M.D., in addition to records related to plaintiff's 2005 accident. Dr. Katz measured range of motion in plaintiff's shoulders and cervical and lumbar spine areas, with a goniometer. Dr. Katz also conducted various other tests, including reflex, Adson's, Babinski, O'Brien's, Hawkins's Kennedy, and Patrick tests, which were negative. Dr. Katz set forth his specific findings, comparing those findings to normal range of motion, and he concluded that plaintiff's cervical radiculopathy, lumbosacral strain, and bilateral shoulder derangement are resolved. According to Dr. Katz, plaintiff does not exhibit any objective evidence of a disability, or symptoms of permanence. Additionally according to Dr. Katz, plaintiff is capable of full time, full duty work as a security monitor, and is capable of carrying on her activities of daily living, including "pre-loss" activities. Dr. Katz further noted that the MRI reports reviewed indicate findings which are degenerative in nature.

Examining the reports of defendant's physicians, there are sufficient tests conducted set forth therein to provide an objective basis so that their respective qualitative assessments of plaintiff could readily be challenged by any of plaintiff's expert(s) during cross

examination at trial, and be weighed by the trier of fact (***Toure v. Avis Rent A Car Systems, Inc.,*** 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002); ***Gaddy v. Eyler,*** 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

Thus, defendant has met his/her burden with respect to the permanent consequential and significant limitation of use categories of injury.

As to the 90/180 claim, neither of defendant's affirmed reports addresses plaintiff's 90/180 claim.

As to whether or not defendant has sustained his/her burden on the 90/180 claim, the Court considers plaintiff's deposition testimony submitted with the instant motion.

A defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature, which prevented plaintiff from performing substantially all of the material acts, which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (***Kuperberg v. Montalbano***, 72 A.D.3d 903, 899 N.Y.S.2d 344 (2d Dept., 2010); ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 A.D.3d 664, 852 N.Y.S.2d 287 [2d Dept., 2008]).

Moreover, a plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the accident (***Omar v. Goodman***, 295 A.D.2d 413, 743 N.Y.S.2d 568 (2d Dept., 2002); ***Lauretta v. County of Suffolk***, 273 A.D.2d 204, 708 N.Y.S.2d 468 [2d Dept., 2000]).

Plaintiff's deposition testimony establishes that she is currently helping her husband at his beauty supply store by watching the security camera monitors. According to plaintiff, she began helping her husband in that capacity in January 2009, some nine months prior to the subject accident. Plaintiff is not paid by her husband. Plaintiff also worked at a beauty salon from approximately March 2009 until the time of the subject accident. According to plaintiff, she was unable to work at the beauty salon after the subject accident, but could not recall whether or not any doctor said that she could not work there.

Plaintiff was treated and released from the hospital emergency room without any assistive devices. The accident occurred on a Friday, and plaintiff sought further medical treatment on the following Monday, complaining of pain in her neck, back and shoulders. Plaintiff was never prescribed any medical devices such as braces, crutches or slings.

Plaintiff received physical therapy for approximately eight months, received some injections for pain, some acupuncture, massage and perhaps chiropractic treatment. Plaintiff was also prescribed pain medication. During the course of plaintiff's deposition, she also claimed injuries to her knees and feet as a result of the subject accident, which injuries had not been previously noticed to defendant.

Plaintiff testified that, during the period from the date of the accident through the spring of 2010, she could not go to work because she could not drive. Plaintiff did not specify to which job she was referring, whether it was at the beauty salon or at her husband's store. Plaintiff also testified that she could not go to her gym, open a cola bottle, rub her children's back, use her heavy cooking pots, or "look up to places in a high position." According to her testimony, her gym attendance prior to the accident was sporadic, and she switched to cooking in her lightweight pots.

Plaintiff also testified that she was restricted in her ability to wear flat shoes, carry a big bag, wear anything other than a lightweight necklace, wipe the floor in her home by getting on her knees, or perform work as a beautician. Plaintiff never testified that she was unable to perform her duties as a security monitor in her husband's beauty supply store. Plaintiff stated that she woke up in the middle of the night during the period from September 4, 2009 through spring 2010, at least two or three times, in pain. Plaintiff sometimes slept in a seated position, with four pillows propping her up.

Plaintiff returned to the gym in the summer of 2010, and she made a two to three-week trip to Korea during the period of time she was treating with Dr. Pahng immediately after the subject accident.

Thus, defendant's submission of plaintiff's deposition testimony (***Jackson v. Colvert***, 24 A.D.3d 420, 805 N.Y.S.2d 424 (2d Dept., 2005); ***Batista v. Olivo***, 17 A.D.3d 494, 795 N.Y.S.2d 54 [2d Dept., 2005]) and affirmation of defendant's physicians are sufficient herein to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (***Paul v. Trerotola***, 11 A.D.3d 441, 782 N.Y.S.2d 773 [2d Dept., 2004]), under permanent consequential limitation and significant limitation categories of the applicable law, nor under the 90/180 category of the law.

Plaintiff is now required to come forward with viable, valid objective evidence to verify her complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 A.D.3d 458, 802 N.Y.S.2d 706 [2d Dept., 2005]). Plaintiff has failed to meet her burden.

In opposition to defendant's motion, plaintiff has submitted, *inter alia*, the MRI reports previously referred to above and relied upon by defendant's examining physicians,

emergency room records, and affirmed reports from her treating health care providers, Yong S. Tak, M.D. and Sung J. Pahng, M.D.[2]

Dr. Tak's affirmed reports contained in Exhibit C do not compare the measured ranges of motion in plaintiff's cervical and lumbar spine areas, and in her shoulders, to normal ranges of motion for those areas. Thus, those reports are insufficient to defeat defendant's summary judgment motion.

Dr. Tak's affirmed final narrative and physical examination report dated October 28, 2011 reveals some restricted range of motion in the claimed affected areas of plaintiff's body (lumbar, cervical spine, bilateral shoulders), but, in the "prognosis" section of his report, Dr. Tak did not conclude with any degree of certainty that plaintiff's injuries are permanent (plaintiff's Exhibit F). Instead, he discusses generally these types of "soft tissue" injuries occurring in motor vehicle accidents, and how muscles, tendons and ligaments "may never be as flexible or elastic as the original counterparts . . . ." Dr. Tak further states that "this injury *may* result in a permanent reduction in the normal range of motion of the aforementioned areas of the neuromuscular system of this patient . . . ." (emphasis added). Also, Dr. Tak's statement that "the injuries suffered have resulted in degenerative changes that may amplify [plaintiff's] discomfort over time" is so vague as to be without probative value. Dr. Tak does not describe the degenerative changes, or state specifically where these degenerative changes have taken place. Moreover, the fact that Dr. Tak acknowledges that there are degenerative changes somewhere in the claimed affected areas of plaintiff's body supports defendant's examining physicians, who opined that plaintiff's lumbar and cervical spine issues are due to degenerative disease, and not the subject accident.

The affirmation of plaintiff's radiologist regarding the 2009 MRI studies of the claimed affected areas of plaintiff's body does not causally relate the findings therein to the subject accident (plaintiff's Exhibit D) (*see* ***Knox v. Lennihan***, 65 A.D.3d 615, 884 N.Y.S.2d 171 (2d Dept., 2009); ***Munoz v. Koyfman***, 44 A.D.3d 914, 844 N.Y.S.2d 111 (2d Dept., 2007); ***Collins v. Sheridan Stone***, 8 A.D.3d 321, 778 N.Y.S.2d 79 [2d Dept., 2004]). Without more, the radiologist's findings are not evidence of a serious injury (*see* ***Knox, supra; Kearse v. New York City Transit Authority***, 16 A.D.3d 45, 789 N.Y.S.2d 281 [2d Dept., 2005]).

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[2]The Court will consider all reports on plaintiff's motion which were listed as being relied upon by defendant's experts (*see* ***Williams v. Clark***, 54 A.D.3d 942, 864 N.Y.S.2d 493 (2d Dept., 2008); ***Barry v. Valerio***, 72 A.D.3d 996, 902 N.Y.S.2d 97 [2d Dept., 2010]).

The emergency room records are not certified, and will not be considered in the determination of this motion.

Dr. Pahng's affirmed reports reflect that he/she treated plaintiff from on or about October 24, 2009 through May 20, 2010. The initial examination report dated October 24, 2009 fails to state how plaintiff's ranges of motion were measured, or how those measurements compare to normal ranges of motion, which were not set forth therein. Dr. Pahng's subsequent reports dated November 11, 2009 through May 20, 2010 suffer from the same infirmities (plaintiff's Exhibit E). Thus, they are insufficient to overcome defendant's summary judgment motion.

Furthermore, neither of plaintiff's treating physicians has accounted for the gap in treatment from May 20, 2010 (Dr. Pahng) until plaintiff's "final" physical examination by Dr. Tak on October 28, 2011. Although plaintiff testified in April 2011 that the insurance company would not pay anymore, and that is the reason that she stopped treating with Dr. Pahng, plaintiff also testified that she obtained private health insurance approximately one month prior to her deposition. Despite having obtained private health insurance, plaintiff apparently made no attempts to contact Dr. Pahng's office, even to inquire about payment for continued treatment.

Plaintiff has submitted nothing further regarding her 90/180 claim aside from her deposition testimony, which was submitted by defendant.

Based on the foregoing, plaintiff has failed to raise a triable issue of fact sufficient to defeat defendant's summary judgment motion.

Defendant's summary judgment motion is granted.

The foregoing constitutes the Order of this Court.

Dated: March 5, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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