SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 17**

MARGUERITE CARMODY,

Plaintiffs,

- *against* -

ESTHER BALD and ZEV BALD,

Defendants.

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Index No. 014319/10
Mot. Seq. # 3 + 4
Mot. Date 1/4/11
Submit Date 2/1/12
XXX

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Cross Motion Affidavits (Affirmations, Exhibits Attd).....1,2
Answering Affidavit 3
Reply Affidavit.....4,5

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Motion by defendants, Esther Bald and Zev Bald, for an order, awarding them summary judgment dismissing the plaintiff Marguerite Carmody's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d), is **GRANTED**.

Cross motion by plaintiff Marguerite Carmody, for an order, pursuant to CPLR 3212, granting her summary judgment on the grounds that her injuries satisfy "serious injury" threshold requirement of Insurance Law §5102(d) is **DENIED**.

Initially, it is noted that by short form order dated August 26, 2011, this court previously granted plaintiff's motion for summary judgment on the issue of liability. Upon the instant applications, the parties seek summary judgment on the issue of whether the plaintiff sustained a "serious injury" within the meaning of the Insurance Law.

Briefly, this action arises out of an automobile accident that occurred on February 15, 2009 at the intersection of Nassau Expressway and Burnside Avenue in Lawrence, New York. The plaintiff, who was stopped at a red light, was struck by the defendant Esther Bald who drove the vehicle owned by defendant Zev Bald, into the rear of plaintiff's vehicle.

Plaintiff claims that, as a result of the collision, she sustained injuries to her back. Specifically, she alleges, *inter alia*, the following serious injuries: disc herniations at C4-5 and C5-6; limited range of motion of the cervical and lumbar spine; cervicolumbar strain; straightening of the normal cervical lordosis; lumbar spasms; suspected mid or lower lumbar levoscoliosis versus the torticollis with the apex toward the left and centered at approximately L4; midline annular tear at L5-S1, with central disc herniation indenting the dural sac; and, transitionalized intervertebral disc segment, which is deemed S1-S2.

Plaintiff claims that following this accident, she was confined to her bed and home for approximately two weeks (Bill of Particulars, ¶9[a] and [b]). She testified that at the time of this accident, she was employed as a "records and information manager" but that in June 2009, she took a medical leave of absence for psychiatric conditions including depression and anxiety, unrelated to this accident. She testified that as a result of this accident, she missed "less than a week" of non-consecutive days after this accident. As to activities, plaintiff testified that she can no longer bowl or do kick boxing. She testified that following this accident, her roommate has

been progressively doing more of the housework. She also testified that following this accident, she has leisurely traveled to Maryland, Florida, Mexico and St. Martin.

Plaintiff, who was 33 years old at the time of the accident, claims that her injuries fall within the following five categories of the serious injury statute: to wit, a fracture; 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 (*Id.*, ¶12).

Based upon a reading of the papers submitted herein, however, it is plain that the plaintiff did not fracture any bone as a result of this accident. Her injuries therefore do not satisfy the statutory definition of a "fracture" (*Catalan v. Empire Storage Warehouse*, 213 AD2d 366 [2nd Dept 1995]).

Further, 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 clear that her injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance,* 96 NY2d 295 [2001]).

Similarly, any claims that plaintiff's injuries satisfy the 90/180 category of Insurance Law § 5102(d) are also contradicted by her own testimony wherein she states that she was only confined to her bed and home for two weeks as a result of this accident. Further, nowhere does the plaintiff claim that as a result of her alleged injuries, she was "medically" impaired from

performing any of her daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]), or that she was curtailed "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]; *Sands v. Stark*, 299 AD2d 642 [3rd Dept. 2002]). In light of these facts, this court determines that plaintiff has effectively abandoned her 90/180 claim for purposes of defendants' initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Thus, 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.

Under the no-fault statute, to meet the threshold 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 (*Licari v. Elliot*, supra; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

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,* 98 NY2d 345, 353 [2002]). 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*).

Having said that, recently, the Court of Appeals in *Perl v. Meher*, 2011 NY Slip Op. 08452, held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v. Meher*, 2011 NY Slip Op. 08452 [2011]).

This court notes at the outset, however, that while the overwhelming bulk of summary judgment motions based upon the Insurance Law serious injury threshold are filed by defendants seeking the dismissal of complaints, nothing prevents the plaintiffs, including Marguerite Camody, from affirmatively seeking summary judgment on serious injury on the basis of their claimed serious injuries as supported by proper and adequate evidence (*Damas v. Valdes*, 84 AD3d 87 [2nd Dept. 2011]; *Refuse v. Magloire*, 83 AD3d 685 [2nd Dept. 2011]). In such instances, the plaintiff, as the movant, is required to demonstrate his/her entitlement to judgment as a matter of law by establishing, prima facie, that he/she sustained a serious injury within the meaning of the statute (*Rasporskaya v. New York City Tr. Auth.*, 73 AD3d 727 [2nd Dept. 2010]). Once this is established, the burden shifts to the defendants to come forward with evidence to overcome the plaintiff's submissions by demonstrating a triable issue of fact that a "serious injury" was *not* sustained (*cf. Lewis v. John*, 81 AD3d 904, 905 [2nd Dept. 2011]; *Mugno v. Juran*, 81 AD3d 908 [2nd Dept. 2011]).

With these guidelines in mind, this court will now turn to the merits of the motion and cross motion at hand.

Dealing first with the defendants' motion, in support thereof, the defendants rely upon, *inter alia*, the unsworn report of plaintiff's doctor David Zelefsky, M.D., dated May 27, 2010; the unsworn records of the plaintiff's primary care physician, Christine Jankowski, M.D., who, per the records submitted, most recently examined the plaintiff on July 23, 2009 but who has consistently treated the plaintiff since December 14, 2006; the unsworn physical therapy evaluation report from New York Physical & Occupational Therapy, PLLC dated September 14, 2009; the affirmed report of Dr. Alan J. Zimmerman, M.D., an orthopedist who performed an independent examination of the plaintiff on May 11, 2011; and, the sworn report of Dr. Issac Cohen, MD, an orthopedic surgeon who performed an independent orthopedic examination of the plaintiff on October 21, 2009.

Initially, it is noted that the unsworn report of plaintiff's doctor David Zelefsky, M.D. and the unsworn physical therapy evaluation report from New York Physical & Occupational Therapy, PLLC are insufficient to establish defendants' entitlement to judgment as a matter of law. That is, Dr. Zelefsky fails entirely to set forth the objective medical testing he performed to support his conclusions (*Vasquez v. Basso*, 27 AD3d 728 [2nd Dept. 2006]; *Walters v. Papanastassiou*, 31 AD3d 439 [2nd Dept. 2006]). Failure to indicate which objective test was performed to measure the loss of range of motion is contrary to the requirements of *Toure v. Avis Rent a Car Systems*, supra. It renders the expert's opinion incompetent, and the Court cannot consider such (*Id*; *Powell v. Alade*, 31 AD3d 523 [2nd Dept. 2006]).

Similarly, the physical therapy questionnaire, based entirely upon the plaintiff's subjective complaints (*Licari v. Elliot*, supra; *Grasso v. Angerami*, 79 NY2d 813 [1991]), visual

inspections of the range of motion, and manual muscle therapy testing (*Vasquez v. Basso*, supra; *Walters v. Papanastassiou*, supra), is clearly, wholly insufficient.

Further, Dr. Cohen's affirmation also falls short of constituting objective medical evidence because Dr. Cohen also fails to set forth the objective medical testing he performed to support his conclusions; rather, Dr. Cohen relies upon his "visual examination" to quantify the range of motion measurements of plaintiff's cervical and lumbar spine (*Id*).

The defendants' remaining proof, however, establishes that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d). Specifically, the affirmed report of Dr. Alan J. Zimmerman, M.D., who examined the plaintiff and performed quantified range of motion testing on her cervical 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, defendants' medical evidence sufficiently demonstrates that the plaintiff did not sustain a "serious injury" as a result of this accident. Taken together with the unsworn records of the plaintiff's primary care physician, Christine Jankowski, M.D., who notes a significant pre-existing history of depression and anxiety, the defendant's medical proof confirms that despite extensive motor and sensory testing, there were no deficits, and based on the clinical findings and medical records review, the plaintiff sustained a cervical and lumbar strain all of which have since resolved (*Staff v. Yshua*, 59 AD3d 614 [2nd Dept. 2009]; *Cantave v. Gelle*, 60 AD3d 988 [2nd Dept. 2009]).

Having made a prima facie showing that the 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,* 4 NY3d 566 [2005]; *Grossman v. Wright, supra*). Here, the plaintiff's proof in opposition also is proffered as support for her own cross motion for summary judgment on the issue of "serious injury."

That is, counsel for plaintiff submits the affirmation of Dr. Alan B. Greenfield, M.D., a radiologist who read and interpreted the MRI results of plaintiff's cervical and lumbar spine which were taken on October 23, 2009 and June 1, 2010, respectively; the unsworn reports of David Zelefsky, M.D., dated May 27, 2010, July 27, 2010, August 24, 2010, and October 5, 2010; the unsworn report of Michael Pickney, DPT, a physical therapist; the unsworn reports of Dr. Aron D. Rovner, M.D.; the sworn report of Dr. David Zelefsky, M.D., dated September 27, 2011; and the sworn report of Dr. Edward S. Rubin, M.D.

Plaintiff's proof is wholly insufficient to present a triable issue of fact herein.

First, the unsworn reports of David Zelefsky, M.D., dated May 27, 2010, July 27, 2010, August 24, 2010, and October 5, 2010, as well as the unsworn reports of Dr. Aron D. Rovner, M.D. are insufficient to defeat summary judgment. Said reports are neither sworn nor affirmed; accordingly, they are presented in inadmissible form and are devoid of any probative value (*Grasso v. Angerami*, supra; *Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept. 1992]).

To the extent that the defendants relied upon Dr. Zelefsky's unsworn report dated May 27, 2010 in support of their motion, and in so doing, opened the door for the plaintiff to rely upon the same report and records in opposition to the motion (*Pech v. Yael Taxi Corp.*, 303 AD2d 733 [2nd Dept. 2003]), this court notes that the only report that would be considered under this analysis would be the May 27, 2010 report; Dr. Zelefsky's July, August and October reports

would nonetheless be precluded. However, for the reasons stated above, the May 27, 2010 report, would in any event fail to constitute admissible evidence herein.

Indeed, the plaintiff's reliance upon Dr. Zelefsky's *sworn* report is also misplaced. Again, while sworn, his findings are not based upon any objective medical testing (*Vasquez v. Basso*, supra; *Walters v. Papanastassiou*, *supra)*, thereby rendering his opinion as to any purported loss incompetent (*Toure v. Avis Rent A Car Systems*, supra; *Powell v. Alade*, *supra*).

Further, plaintiff's attempt to submit the unsworn reports of Dr. Aron D. Rovner, M.D. into evidence with the submission of an undated affidavit of Michelle Levine, who identifies herself as being an "authorized custodian of records" for South Island Orthopedic Group, P.C., of which Dr. Rovner is a member, is unavailing. Levine does not represent that she has any personal knowledge of the facts stated in said reports (*Washington v. Mendoza*, 57 AD3d 972 [2nd Dept. 2008]). Finally, said reports are also precluded from being considered by this Court on the grounds that they are business records under CPLR 4518. Medical reports including interpretations of examinations and testing, as opposed to day to day business entries of a treating physician, cannot be properly considered by this court as business records (*Komar v. Showers*, 227 AD2d 135 [1st Dept. 1996] *citing Rodriguez v. Zampella*, 42 AD2d 805 [3rd Dept. 1973]).

The unsworn report of plaintiff's physical therapist, Michael Pickney, DPT, is equally insufficient. Not only is this court precluded from considering any unsworn reports proffered by the plaintiff, but CPLR 2106 is also very clear that only attorneys, physicians and dentists, admitted to practice in the state, may affirm, under the penalties of perjury, their statements with respect to an action in which they are not parties (CPLR 2106). Physical therapists do not come within scope of statute allowing affirmations by certain persons to be given the same force and

effect as an affidavit; to make a competent, admissible affirmation, the physical therapist, like most other persons, must first appear before a notary or other such official and formally declare the truth of the contents of the document (*Doumanis v. Conzo*, 265 AD2d 296 [2nd Dept. 1999]; *Casas v. Montero*, 48 AD3d 728 [2nd Dept. 2008]). Mr. Pickney has failed to do this.

Finally, the sworn report of Dr. Edward S. Rubin, M.D. is also inadmissible. Although Mr. Rubin sets forth range of motion of the plaintiff's cervical and thoraco-lumbar spine, he also nonetheless fails to set forth what objective testing was used to determine such measurements, contrary to the requirements of *Toure v. Avis Rent a Car Systems*, *supra*. Moreover, he fails to compare the findings of his range of motion testing to a normal range of motion (*Abraham v. Bello*, 29 AD3d 497 [2nd Dept. 2006]; *Forlong v. Faulton*, 29 AD3d 856 [2nd Dept. 2006]). This is clearly insufficient.

Thus, the only competent and admissible evidence proffered by the plaintiff is the sworn report of Dr. Alan B. Greenfield, M.D. It is clear from Dr. Greenfield's affirmation that not only did he read the actual MRI films, but he also reported an opinion as to the causality of his findings, to wit, "the herniations observed on the above examinations, are causally related to the auto accident of Feb. 15, 2009" (*Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]; *Gabanelli v. Gerardi*, 175 AD2D 468 [3rd Dept. 1991]).

However, Dr. Greenfield's affirmation, standing alone, in the absence of any other admissible evidence presented by the plaintiff, fails to raise an issue of fact as to whether the plaintiff sustained a serious injury 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 of

Insurance Law §5102(d). Among other things, the mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury, as well as its duration (*Bleszcz v. Hiscock*, 69 AD3d 890 [2nd Dept. 2010]; *Chanda v. Varughese*, 67 AD3d 947 [2nd Dept. 2009]).

Therefore, in the absence of any competent or admissible evidence supporting a claim for serious injury, defendants' motion for summary judgment dismissal of plaintiff's complaint is **GRANTED** and the plaintiff's cross motion for summary judgment is **DENIED**.

The complaint is dismissed in its entirety.

Settle judgment on notice.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, NY
March 21, 2012

ENTER:

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