SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 14

_____X

MONIQUE TOLLIVER,

Plaintiff,

-against-

MTA-LONG ISLAND BUS and "JOHN DOE",

Defendants.

_____X

Index No. 002921/09
Motion Sequence...03
Motion Date...01/13/12
XXX

Papers Submitted:
Notice of Motion.....x
Amended Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendant, MTA Long Island Bus (hereafter MTA), seeking an order awarding it summary judgment dismissing the Plaintiff, Monique Tolliver's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), and as such, the Plaintiff has no cause of action, is determined as hereinafter provided.

This action arises out of a motor vehicle accident that occurred on June 23, 2008, at approximately 4:20 p.m. at the Roosevelt Field Bus Transfer Station in the County of Nassau, State of New York.

The Plaintiff, Monque Tolliver, claims that she sustained, *inter alia*, the following serious injuries as a result of the subject accident: exacerbated abdominal pain; chest pain; low back pain; neck, upper back, mid back, lower back, bilateral legs, bilateral hips; pulmonary embolus in the right main pulmonary artery; herniated disc at L5-S1 midline to the right with nerve root compression which may require future surgery; and lumbar radiculopathy or lower limb compression neuropathy (Bill of Particulars, ¶ 9).

At her 50-h examination and her oral Examination Before Trial, the Plaintiff described her medical history and the alleged injuries that have resulted from the subject accident. The Plaintiff first required the assistance of a wheelchair following a 2005 car accident resulting in a collapsed lung (50-h Transcript at pp. 21-22). The Plaintiff underwent at least two surgeries for her lungs after the 2005 accident (*Id.* at pp. 29-30). The Plaintiff thereafter suffered a condition known as spontaneous pneumothorax, wherein her lung could collapse at any time, and according to the Plaintiff, has collapsed four or five times (EBT Transcript at pp. 59-60).

The Plaintiff's need for a wheelchair as a result of her 2005 accident was temporary, but the Plaintiff was again confined to a wheelchair after a hysterectomy five days prior to the subject accident (*Id.* at p. 15). The Plaintiff had also suffered injuries to her neck and back in a car accident at some point in the 1980's (50-h Transcript at pp. 89-90). In addition, the Plaintiff was a passenger in a motor vehicle accident a month or two before the subject accident (EBT Transcript at pp. 87-88).

The Plaintiff testified that following the accident, she took a cab home from the bus station (50-h Transcript at p. 72). The Plaintiff did not seek medical attention for two or three days (*Id*). When the Plaintiff went to the hospital a few days later, her chief complaints were difficulty breathing, chest pain and leg pain (*Id.* at p. 73). The Plaintiff made no mention of the incident on the bus in the course of her treatment at Nassau University Medical Center or Winthrop Hospital (EBT Transcript at p. 75). When asked by the emergency room doctor if she was experiencing head trauma, the Plaintiff responded she "didn't think to tell him [the doctor] I was on the bus and got hurt" (*Id.* at p. 74). The Plaintiff received a CAT scan which revealed a blood clot in her lung (*Id.* at p. 74). Other than the blood clot, the Plaintiff could not recall being diagnosed with any other conditions during her stay at the hospital (EBT Transcript at p. 77). The Plaintiff did not have, nor was she recommended to have, any surgeries while at the hospital (*Id.* at p. 78). The Plaintiff remained in the hospital for three weeks to a month (50-h Transcript at p. 82). The Plaintiff continued taking blood thinning medication for her lung condition until approximately February, 2009, when the blood clot in her lung disappeared (*Id.* at pp. 100-101).

The Plaintiff claimed to be "okay as far as that" with regard to activities she could no longer do as a result of her bus accident (*Id.* at p. 101). The Plaintiff stated she had to be careful not to cut herself while on blood thinners for her lung, but was able to resume her regular activities when she no longer needed the medication (*Id.* at pp. 100-101).

However, the Plaintiff claims that a hernia in her back has caused her to have

persistent difficulty doing work at the gym, walking, standing, and playing with her grandchild (EBT Transcript at pp. 93-94). The Plaintiff claimed that her back was an area where she was experiencing pain after the incident on the bus (*Id.* at p. 50), but also admitted that she was not treated for any back injury at either of the two hospitals she went to following the accident (50-h Transcript at p. 30). The Plaintiff was not diagnosed with a hernia until after she was released from the hospital for her lung clot (EBT Transcript at pp. 78-9). The Plaintiff resumed her use of a wheelchair following her release from the hospital "until I was able to walk again from the hysterectomy" (50-h Testimony at p. 88).

The Plaintiff, who was 38 years old at the time of the subject accident, claims that her injuries fall within the following six categories of the serious injury statute: to wit, a significant disfigurement; 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 nonpermanent nature which prevents the Plaintiff from performing substantially all of the material acts which constitute the Plaintiff'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.

Based on the Plaintiff's testimony and medical evidence, there is no indication that she sustained a significant disfigurement, fracture, or permanent loss of an organ, member, function or system (*Lynch v. Iqbal*, 56 A.D.3d 621 [2nd Dept. 2008]; *Bojorquez v.*

Sanchez, 65 A.D.3d 1179 [2nd Dept. 2009]; *Oberly v. Bangs Ambulance, Inc.* 96 N.Y.2d 295 [2001]). None of these types of serious injuries were specifically discussed by the Plaintiff or addressed by the Plaintiff's opposition papers.

Additionally, the Plaintiff's claims that her injuries satisfy the 90/180 category of Insurance Law § 5102 (d) are unsupported and contradicted by the Plaintiff's deposition testimony where she stated that she was released from the hospital after three weeks to a month and was not confined to her home or bed or limited aside from being cautious for her pre-existing lung condition and continuing recovery from her hysterectomy. The Plaintiff does not provide any evidence that she was "medically" impaired from doing any daily activities for 90 days within the first 180 days following the accident, particularly in light of the fact that she failed to seek any medical attention or treatment for the injuries alleged to have been sustained by the subject accident for more than ninety days. In fact, the Plaintiff's visit to a doctor on September 22, 2008, where she was first examined for pain stemming from the bus accident, took place ninety-one days after the June 23, 2008 accident, at which point she was told she could return to work in two or three days. Thus, this Court determines that the Plaintiff has effectively abandoned her 90/180 claim for purposes of the 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."

Under the no-fault statute, to meet the threshold for significant limitation of use of a body function or system or permanent consequential limitation of use of a body organ or member, 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 N.Y.2d 955 [1992]; *Scheer v. Koubeck*, 70 N.Y.2d 678 [1987]; *Licari v. Elliot*, 57 N.Y.2d 230 [1982]). A minor, mild or slight limitation is deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 A.D.2d 79, 83 [2nd Dept. 2000]).

When, as in the instant 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 a plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345, 353 [2002]). Additionally, 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*).

Recently, the Court of Appeals 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]).

With these guidelines, the Court now turns to the merits of the Defendant's motion.

In support of their motion, the Defendant relies on the Plaintiff's 50-h and Examination Before Trial testimony; the Plaintiff's medical records and physical therapy records; the affirmation of Dr. Howard Levin, an orthopedic surgeon who performed an orthopedic examination of the Plaintiff on June 28, 2011; and the affirmation of Dr. Maria Dejesus, a neurologist who performed a physical examination of the Plaintiff on June 30, 2011.

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

Specifically, Dr. Levin examined the Plaintiff, 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. Based on his clinical findings and medical records review, Dr. Levin concluded that the Plaintiff had no orthopedic disability at the time of the examination. Further, Dr. Levin concluded that there were no objective findings to substantiate the Plaintiff's subjective complaints, and therefore the Plaintiff did not have any permanent or residual disability (*Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept. 2009]).

Additionally, Dr. Dejesus performed a neurological examination, including physical, cranial nerve, motor and sensory examinations, and concluded that there was no objective evidence of any disability or permanency. Dr. Dejesus added that the Plaintiff is capable of performing all activities of daily living and occupational duties without any limitation or restriction.

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 Defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, supra).

In opposition, Plaintiff relies on an affidavit by the Plaintiff herself, sworn to on December 20, 2011; the affirmation of Dr. Engracia Lazatin, a medical doctor who first saw the Plaintiff with regard to her injuries from the subject accident and who treated the Plaintiff from September 22, 2008, through February 10, 2009, and examined the Plaintiff again on December 1, 2011; and the affirmation of Dr. Harvey Lefkowitz, a physician who performed an MRI of the Plaintiff on October 3, 2008.

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

First, the Plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact, as there is no objective medical evidence in support of it (*Washington v. Mendoza*,

57 A.D.3d 972 [2nd Dept. 2008]; *Sealy v. Riteway-1, Inc.*, 54 A.D.3d 1018 [2nd Dept. 2008]).

Dr. Lazatin relied on a report from an MRI taken of the Plaintiff on October 3, 2008, which revealed a disc herniation. Dr. Lazatin opined that the injury was "of a permanent nature in that herniated discs do not lend themselves to resolution and are therefore permanent." The mere application of the word "permanent" from a doctor's medical perspective does not correlate to the permanence of an injury necessary to qualify as a "serious injury" under Insurance Law § 5102 (*Pommels v. Perez*, supra).

Additionally, the Plaintiff has failed to provide objective evidence of the extent or degree of physical limitations resulting from such injuries and their durations. While Dr. Lazatin performed range of motion testing on the Plaintiff, she neglected to include her method of testing Plaintiff's range of motion. Thus, no objective evidence exists that the Plaintiff's range of motion was limited (*Toure v. Avis Rent A Car Systems*, supra).

Finally, as the Plaintiff's counsel states in his Affirmation in opposition to the Defendant's motion, the only purpose of Dr. Lefkowitz's affirmation is to re-state the results of the MRI. Since these results reveal no injuries that, standing alone, fall under the "serious injury" category of Insurance Law § 5102, Dr. Lefkowitz's affirmation shows only a minor injury for which he is not competent to add any conclusions.

Accordingly, it is hereby

ORDERED, that the motion by the Defendant, MTA, interposed pursuant to CPLR § 3212, seeking an order dismissing the Plaintiff's complaint on the basis that she did

not sustain a serious injury is **GRANTED**.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
March 27, 2012

Hon. Randy Sue Marber, J.S.C.
XXX