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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. George J. Silver , Justice PART 22

SHUI K. LAI and HAYLEY YEE

vs.

ANDREW A. CASTAGLIOLA, ANNA T. CASTAGLIOLA and DENNIS J. MANGAN

INDEX NO. 107481/2008

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for SUMMARY JUDGMENT

	Papers Numbered
Notice of Motion/Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	2
Replying Affidavits, Cross Motion	

Cross-Motion: ☐ Yes ■ No

Upon the foregoing papers, it is ordered that this motion

Defendants Andrew Castagliola and Anna Castagliola (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing Plaintiffs Shui Lai and Hayley Yee's (collectively "Plaintiffs") complaint on the grounds that Plaintiffs did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Under New York Insurance Law §5102(d), a "serious injury" is defined as 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 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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "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 within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate:.. MOTION IS ☐ GRANTED ■ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE

Plaintiff Shui Lai

Plaintiff Shui Lai alleges in her Verified Bill of Particulars that, as a result of the May 13, 2007 accident, she sustained a serious injury including traumatic brain injury with cognitive dysfunction, amnesia, cervical strain, cervical spondylosis and stenosis, L4-L5 disc herniation, carpal tunnel syndrome, lumbar strain and left meniscal capsular separation. In support of his motion, Defendant submits the independent orthopedic examination of Dr. Robert Israel conducted on July 24, 2009. He conducted range of motion testing on Plaintiff's cervical spine, lumbar spine, shoulders, left wrist and left knee. Dr. Israel found no loss in Plaintiff's range of motion when compared to normal. He concluded that Plaintiff had resolved strains and no orthopedic disability.

Dr. Maria Audrie DeJesus conducted a neurological examination of Plaintiff on August 24, 2009. She evaluated Plaintiff's mental status, cranial nerves and motor system. Dr. DeJesus conducted range of motion testing using a goniometer and found no limitations in Plaintiff's range of motion of her cervical and lumbar spine when compared to normal. She concluded that Plaintiff was status post cervical and lumbar sprains, which had resolved, had cerviogenic headaches and a normal neurological examination. Defendants also submit Plaintiff's radiological reports. The cervical spine MRI, taken on July 20, 2007, revealed a questionable minimal retrolisthesis at C4-C5 and C3-C4 through C5-C6 disc narrowing and desiccation, spinal stenosis and spondylosis. Plaintiff's lumbar spine MRI revealed minimal spurring at L4-L5, mild degenerative marrow signal endpoint changes, mild degenerative disc bulge with a superimposed tiny midline herniation. Plaintiff's left knee MRI taken on August 6, 2007 revealed no evidence of meniscal tear, small amount of joint effusion, mild osteoarthritic changes of the patellofemoral joint and grade I meniscal capsular separation. Plaintiff's brain MRI was taken on July 20, 2007. It revealed no abnormal findings and Dr. William Louie concluded that it was a normal MRI. Defendants have satisfied their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In opposition, Plaintiff submits Wilson Memorial Hospital records. The records are unsworn. It is well settled that a plaintiff may not rely upon unsworn medical evidence to defeat a defendant's summary judgment motion (*see Migliaccio v Miruku*, 56 AD3d 393, 394 [1st Dept 2008]; *DeJesus v Paulino*, 61 AD3d 605, 607 [1st Dept 2009] [unsworn emergency room records and other reports had no probative value]). Plaintiff argues that Defendants' experts referenced these records in their reports and thus, these inadmissible records are properly before the court. Although Defendants' expert, Dr. DeJesus, indicates that she reviewed the unsworn emergency room records, such cursory review does not open the door to Plaintiff's reliance upon these same records to raise a genuine issue of fact. Defendant's expert did not attach copies of the unsworn records in her submissions. Nor did she discuss the results of the prior examinations, or rely upon such results (*see Hernandez v Almanzar*, 32 AD3d 360, 361 [1st Dept 2006] [defense experts' review of unaffirmed reports "did not open the door to plaintiffs' reliance on them, since defendants did not submit such reports in support of the motion, nor did their experts rely on them in forming their conclusions"]. Therefore, the Wilson Memorial Hospital records are inadmissible.

Plaintiff also submits the expert report of Dr. Anand Lalaji, who personally reviewed and interpreted Plaintiff's cervical spine MRI film. Dr. Lalaji states that there is a posterior disc osteophyte complex with focal disc protrusion at C3/C4, C4/C5 and C5/C6 producing mild

spinal canal narrowing. Further, Plaintiff submits the expert report of Dr. Tejal Lalaji, who personally reviewed and interpreted Plaintiff's brain MRI film. She concluded that the film revealed mild cerebral atrophy, no acute intracranial abnormality and needed clinical correlation for mild chronic ethmoid and maxillary sinusitis with superimposed acture component on the right. However, Dr. Anand Lalaji and Dr. Tejal Lalaji did not opine as to the causation of

these findings and as such their reports are insufficient to rebut Defendants' *prima facie* case (*Nieves v Castillo*, 74 AD3d 535, 902 NYS2d 91 [1st Dept 2010]; *Gibbs v Hee Hong*, 63 AD3d 559, 559, 881 NYS2d 415 [2009]).

Plaintiff also submits the expert report of Dr. Tsao Chao. Dr. Chao treated Plaintiff on May 28, 1998 until July 15, 2006 for neck, bilateral shoulders and lower back pain. He reported that prior to the present accident, Plaintiff had some range of motion limitations of her cervical spine but that her range of motion for her shoulders and lumbar spine were within functional limits. Dr. Chao conducted range of motion testing after the present accident and found limitations in Plaintiff's range of motion. He concluded that Plaintiff had sustained a cervical sprain/strain, a bilateral shoulder sprain/strain, a lumbar sprain/strain, left knee contusion with internal derangement and right ankle sprain/strain.

Additionally, Plaintiff submits certified records from Wellcare Medical. She was first treated at Wellcare Medical on December 14, 2007. At that time, range of motion testing was conducted and revealed limitations in Plaintiff's range of motion for her cervical and lumbar spine. Dr. Randolph Rosarion also noted cervical spasm and diagnosed Plaintiff with post traumatic cervical and lumbar disc dysfunction amd post traumatic stress disorder. He recommended Plaintiff attend physical therapy and use a lidodem 5% patch. Dr. Rosarion also noted tenderness over the shoulder area. He further examined Plaintiff on January 25, 2008 and diagnosed Plaintiff with cervical and lumbosacral spine derangement. Plaintiff also submits records from Downtown Physical Medicine and Rehabilitation. However, only the report of Dr. Douglas Schottenstein is affirmed. Dr. Schottenstein examined Plaintiff on April 1, 2008. He found straight leg raising in the sitting position to be positive, bilaterally. Dr. Schottenstein also reviewed the radiological studies and diagnosed Plaintiff with cervical spondylosis, cervical C7 radiculitis, lumbosacral S1 radiculitis, lumbar degenerative disc disease and possible lumbar facet osteoarthritis.

Dr. Xiao-Ke Gao also treated Plaintiff for her neurological injuries. He performed nerve conduction studies and concluded that Plaintiff suffered from acute right S1 radiculopathy on September 25, 2007. On October 5, 2007, Dr. Gao conducted an electrodiagnostic study, which revealed evidence consistent with Carpal Tunnel Syndrome. Plaintiff also submits medical records from Dr. Simon Lee. Dr. Lee examined Plaintiff on June 22, 2008 and conducted range of motion testing using a goniometer. He found limitations in Plaintiff's range of motion for her cervical and lumbar spine and bilateral shoulders. He concluded that Plaintiff suffered from a cervical sprain, bilateral shoulder sprain and postraumatic headaches. Dr. Lee suggested further examination to rule out cervical and lumbar disc displacement or radiculopathy. Dr. Ira Rashbaum examined Plaintiff on the request of her no-fault provider on December 5, 2007. He concluded that Plaintiff sustained a traumatic brain injury with cognitive dysfunction, cervical strain, lumbar strain, bilateral carpal tunnel syndrome and right S1 radiculopathy. Dr. Rashbaum additionally states that Plaintiff's headaches are either related to her brain injury, her cervical strain or both.

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyler*, 79 NY2d 955 [1992]). Plaintiff's submissions are sufficient to rebut Defendants' *prima facie* case.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars indicates that she was confined to bed for three weeks and intermittently thereafter and confined to home for twelve months and intermittently thereafter. Plaintiff also testified that she still experiences pain from her injuries. However, Plaintiff does not submit any evidence to show that any of her alleged limitations in activity or confinements were medically determined. Therefore, this evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

Plaintiff Hayley Yee

Plaintiff Hayley Yee alleges in her Verified Bill of Particulars that, as a result of the May 13, 2007 accident, she sustained a serious injury including multiple facial lacerations resulting in scarring, cervical spine straightening, cervical sprain/strain and myofascial pain of shoulders. Defendants submit the expert report of Dr. Robert Israel. Dr. Israel examined Plaintiff on April 17, 2009. He conducted range of motion testing using a goniometer and found no limitations in Plaintiff's range of motion for her cervical and lumbar spine, bilateral shoulders, bilateral wrists and bilateral knees. Dr. Israel concluded that Plaintiff had no orthopedic disability.

A disfigurement may be considered "significant" and thus constitutes a "serious injury" if a reasonable person would view the physical alteration as " 'unattractive, objectionable, or ... the subject of pity and scorn' " (*Siegle v County of Fulton*, 174 AD2d 930, 931, *quoting Caruso v Hall*, 101 AD2d 967, 968, *affd* 64 NY2d 843; *see also Abdulai v Roy*, 232 AD2d 229, 647 NYS2d 778 [1st Dept 1996]). Defendants submit color photographs of Plaintiff's alleged disfigurement. In opposition, Plaintiff submits the uncertified emergency department records from Wilson Memorial Regional Medical Center, Dr. Douglas Monasebian's report and color photographs of Plaintiff's scar. Dr. Monasebian examined Plaintiff on November 22, 2010. He states that Plaintiff's first scar is three centimeters in length over her left eyebrow in a "L" shape with palpable firmness. Dr. Monasebian describes her other scar as under the right lower eyelid, about .5 centimeter in length and hypopigmented and curvilinear. He further opines that the scars are permanent and that scar revisional surgery will improve the appearance of the scars, but

not eliminate them. Plaintiff has sufficiently raised a question of material fact as to whether the disfigurement of her face is "significant." As such, Defendants' motion for summary judgment as to serious injury is denied.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that she was confined to bed for two weeks and intermittently thereafter and confined to home for approximately three months and intermittently thereafter. However, Plaintiff does not submit any evidence to show that her limitations were medically determined. Therefore, the evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

ORDERED that Defendants' motion for summary judgment is denied as to Plaintiffs' claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiffs' claims under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

FILED

This constitutes the decision and order of the court.

MAY 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAY 4 2012
New York, New York

George J. Silver, J.S.C.
George J. Silver, J.S.C.

GEORGE J. SILVER