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

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NOREEN BOCCIO,

Plaintiff,

-against-

FERNANDO E. DAPONTE,

Defendant.

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TRIAL/IAS PART 17

INDEX # 2656/11

Motion Seq. 1
Motion Date 4.20.12
Submit Date 5.7.12

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

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Upon the foregoing papers, the defendant's motion seeking an order granting summary judgment pursuant to CPLR § 3212 and dismissal of the complaint of the plaintiff, on the grounds that the plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is determined as hereinafter provided.

The plaintiff commenced this lawsuit by filing a summons and complaint wherein the plaintiff claimed personal injuries resulting from a motor vehicle accident, which occurred on June 27, 2008. Issue was then joined by service of the defendant's answer.

The incident occurred on the Southern State Parkway when the vehicle plaintiff was operating was struck in the rear by the vehicle defendant was operating. As a result of the accident plaintiff alleges to have sustained the following injuries, as per her verified bill of particulars:

"Cervical sprain/strain, cervical derangement, cervical myofascitis with radiculapathy and nerve root compression with an MRI finding of subligamentous posterior disc herniations at C4-5, C5-6 and C6-7 impinging on the anterior aspect of the spinal canal

Thoracic sprain/strain, thoracic derangement, thoracic myofascitis with radiculapathy and nerve root compression

Post concussion syndrome with post-traumatic headaches

Anxiety, depression, insomnia"

At the time of the accident, plaintiff was employed full time by New York Home Health Care. Following the accident, plaintiff did not miss any time from work; nor was she confined to her bed and/or home; nor was she confined to a hospital. Plaintiff claims that she is restricted in many physical activities, is no longer able to sit for long periods of time, and has difficulty using a computer. She additionally claims that she cannot turn her head very far in either direction and has difficulty driving and reading.

The plaintiff contends that the above injuries, due to the subject motor vehicle accident, qualify as "serious injuries," pursuant to Article 51 of the New York State Insurance Law. Under this law, "serious injury" is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of body organ or member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute his usual and customary daily activity for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury. *See McKinney's Consolidated Laws of New York*, Insurance Law § 5102 (d).

Based upon a plain reading of the papers submitted herein, the plaintiff is not claiming that her injuries fall within the first five categories of "serious injury": to wit, death; dismemberment; significant disfigurement; a fracture; or loss of a fetus. Also, 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 did not miss any time from her full time employment 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 of 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]).

With these guidelines in mind, the court turns to the motion at bar.

In support of the application, defendant relies on the verified bill of particulars, the deposition testimony of plaintiff, and an independent medical examination of Dr. John C. Killian, an orthopedist who examined plaintiff on December 14, 2011.

The defendant's proof establishes that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102(d). Specifically, the affirmed report of Dr. John C. Killian., who examined the plaintiff and performed quantified range of motion testing on her cervical spine with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal. Therefore, defendant's medical evidence sufficiently demonstrates that the plaintiff did not sustain a "serious injury" as a result of this accident.

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 defendant's 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).

Counsel for plaintiff submits the following documentation in opposition to the motion: a sworn report of chiropractor Robert Gelman, D.C., dated March 29, 2012; a sworn affidavit of Dr. Robert Gelman dated April 17, 2012; a sworn report of Joseph Gregorace, D.O., dated July 1, 2008; unsworn physical therapy notes; and an MRI report of the cervical spine taken at All County MRI dated September 13, 2008, thereafter affirmed by Dr. Richard J. Rizzuti, on March 22, 2012.

The court notes that the unsworn physical therapy notes are insufficient to defeat summary judgment. Said notes are neither sworn nor affirmed; accordingly, they are presented in inadmissible form and are devoid of any probative value (*Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept. 1992]).

The sworn report of Dr. Joseph Gregorace is also inadmissible as he fails to set forth what objective testing was used to determine his findings 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.

The court notes that the MRI report of the cervical spine was not sworn by Dr. Rizzuti until March 22, 2012, almost 3 ½ years after the examination. Moreover, the MRI report as well as the affirmation of Dr. Rizzuti fail to causally link the injuries to the instant accident. Therefore, any reliance upon the MRI report by plaintiff's chiropractor in his initial diagnosis is misplaced as the report was not duly affirmed nor did it show causality.

However, the court determines that the plaintiff has successfully raised a triable issue of fact based upon the sworn report and affidavit of Dr. Gelman. As a result of Dr. Gelman's objective testing, he found a decreased range of motion in her cervical spine and states, with a reasonable degree of medical certainty, that the motor vehicle accident of June 27, 2008 is competent cause of plaintiff's ongoing neck pain and headaches.

Accordingly, it is

ORDERED, that the application is **DENIED**.

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

Dated: Mineola, New York
May 30, 2012

ENTER:

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