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SHORT FORM ORDER

INDEX No. 10-9549

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY



***PRESENT:***

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3-2-12 (#002)
MOTION DATE 2-23-12 (#003)
MOTION DATE 4-13-12 (#004)
ADJ. DATE 4-13-12
Mot. Seq. # 002 - MG
# 003 - MD
# 004 - XMD

---X

MARY ELIZABETH DOWLING,

Plaintiff,

- against -

DONFRED VALEUS,

Defendant.

---X

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Upon the following papers numbered 1 to 50 read on this motion for summary judgment; this motion to strike defendant's answer; and this cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 11 - 21 ; Notice of Cross Motion and supporting papers 22 - 42 ; Answering Affidavits and supporting papers 43 - 48; Replying Affidavits and supporting papers 49 - 50 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (#002) by defendant Donfred Valeus seeking summary judgment dismissing plaintiff's complaint, the motion (#003) by plaintiff Mary Dowling seeking to strike defendant's answer, and the cross motion (#004) by plaintiff Mary Dowling seeking partial summary judgment in her favor on the issue of whether she sustained a "serious injury" within the meaning of Insurance Law § 5102(d) hereby are consolidated for the purposes of this determination; and it is

***ORDERED*** that the motion by defendant Donfred Valeus seeking summary judgment dismissing plaintiff's complaint on the ground that she failed to sustain a "serious injury" within the meaning of the Insurance Law is granted; and it is

***ORDERED*** that the motion by plaintiff Mary Dowling seeking to strike defendant's answer is denied, as moot; and it is further

***ORDERED*** that the cross motion by plaintiff Mary Dowling seeking partial summary judgment in her favor on the issue of whether she sustained a "serious injury" within the meaning of Insurance Law § 5102(d) is denied.

Plaintiff Mary Dowling commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred in front of the premises known as Eddie's 24 Hour Towing Service, located at 924 Long Island Avenue, approximately 400 feet from its intersection with Carll's Path in the Town of Babylon on March 23, 2009. At the time of the accident, plaintiff was a pedestrian standing on the sidewalk in front of the aforementioned premises when she was struck in the right leg by the rear of the vehicle operated and owned by defendant Donfred Valeus while it was in the process of reversing. Plaintiff, by her bill of particulars, alleges, among other things, that she sustained various personal injuries as a result of the subject accident, including herniated discs at levels C4 through C7; bulging discs at level C5/C6 and levels L1 through L5; cervical radiculopathy; and bilateral shoulder strain. Plaintiff further alleges that as a result of the injuries she sustained in the accident she was confined to her bed and home for several months.

Defendant now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident fail to meet the "serious injury" threshold requirement of § 5102(d) of the Insurance Law. In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Isaac Cohen and Dr. Mathew Chacko. At defendant's request, Dr. Cohen conducted an independent orthopedic examination of plaintiff and Dr. Chacko conducted an independent neurological examination of plaintiff in August 2011. Plaintiff cross-moves for summary judgment on the ground that she sustained a "serious injury" within the meaning of the Insurance Law as a result of the subject accident. In particular, plaintiff asserts that she sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law. In support of the motion, plaintiff submits copies of the pleadings, her own deposition transcript and affidavit, an uncertified copy of the police accident report, the sworn medical reports of Dr. James Sarno, Dr. Harold Tice, Dr. Arthur Thompson, and Dr. John Himelfarb. Plaintiff also submits unsworn copies of her physical therapy records and uncertified copies of her medical records.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]).

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622

NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" 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 plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

Initially, the Court notes that the uncertified copies of plaintiff's medical records and the physical therapy records submitted by plaintiff in support of her cross motion were not considered in this determination, because they are not affirmed and, therefore, lack probative value (*see* CPLR 2106; ***Ly v Holloway***, 60 AD3d 1006, 876 NYS2d 482 [2d Dept 2009]; ***Casa v Montero***, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]; ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]).

Based upon the adduced evidence, plaintiff failed to establish, prima facie, that she sustained a serious injury within the meaning of § 5102(d) of the Insurance Law as a result of the subject accident

(*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). Plaintiff has submitted conflicting medical evidence in support of her motion to establish that she sustained a serious injury as a result of the subject collision (*see* ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]). Dr. Thompson, who began treating plaintiff one week after the subject accident, states in his medical report that plaintiff complained of pain in her left shoulder and thoracolumbosacral spine, and that he diagnosed her with cervical derangement, bilateral shoulder strain and impingement tendonpathy, low back disc syndrome and strain, and right knee contusion. However, Dr. Thompson also states that plaintiff exhibited "good" range of motion, full extension and "good" flexion in her spine, and that she has degenerative and osteoarthritic changes in her right knee and lumbar spine. He further states that the pain in plaintiff's lumbar spine is activity related and is not radicular in nature, and that her convalescent course was complicated by gall bladder disease, which required surgery and removal.

In his report, Dr. Sarno, who began treating plaintiff approximately five months after the subject accident, states that plaintiff has limited range of motion in her cervical and lumbar regions, that she has moderate limitation of motion in her left shoulder, and that she does not have any gross muscle weakness. Dr. Sarno states that plaintiff has cervical and lumbar osteoarthritis, cervical stenosis, and neural foraminal encroachment at levels C3 through C6, left side. In addition, Dr. Sarno states that the degenerative changes observed in plaintiff's cervical and lumbar regions of her spine were asymptomatic prior to the subject accident, and that the subject accident aggravated those pre-existing conditions. Dr. Sarno states that the injuries plaintiff sustained in prior accidents were unrelated to the areas of her body that were injured in the subject accident, and that her symptomology is permanent due to her age and unrelated medical conditions, although the pain and limitations in her spine may increase and decrease at times. Dr. Sarno further states that plaintiff has suffered from sciatic nerve pain problems in her back and lower extremity in the past, but that such problems have been asymptomatic. However, Dr. Sarno has not provided any objective medical evidence to substantiate his assertion that plaintiff was asymptomatic prior to the subject collision (*see* ***Seck v Minigreen Hacking Corp***, 53 AD3d 608, 863 NYS2d 218 [2d Dept 2008]). Furthermore, contrary to plaintiff's assertions, her medical evidence failed to give any objective basis for Dr. Sarno's conclusion that her alleged limitations are the result of the subject accident, rather than from her pre-existing degenerative or osteoarthritic conditions in her lumbar spine (*see* ***Nieves v Castiollo***, 74 AD3d 535, 902 NYS2d 91 [1st Dept 2010]; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Montgomery v Pena***, 19 AD3d 288, 798 NYS2d 17 [1st Dept 2005]).

In addition, plaintiff's submission of the medical reports of Dr. Tice, who reviewed the magnetic resonance imaging ("MRI") film of plaintiff's cervical spine performed on June 22, 2009, and Dr. Himelfarb, who reviewed the MRI film of plaintiff's lumbar spine performed on April 29, 2009, failed to establish that plaintiff sustained a serious injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Pommell v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). Dr. Himelfarb in his medical report states that plaintiff suffers from hypertrophic changes in her cervical spine at levels C4 through C7, and that she sustained disc bulges and herniations to her cervical spine. Dr. Tice in his medical report states that plaintiff suffers from discogenic degenerative and osteoarthritic changes throughout her lumbar spine, right convex lumbar scoliosis, and disc bulges at levels L1 through L4 with hypertrophic changes. However, neither Dr. Himelfarb nor Dr. Tice expressed an opinion as to

causation and, therefore, the reports are insufficient to establish that the disc bulges and herniations were the result of the subject accident (*see* ***Nieves v Castillo***, *supra*; ***Gibbs v Hee Hong***, 63 AD3d 559, 881 NYS2d 415 [1st Dept 2009]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]). The mere existence of herniated or bulging discs 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 (*see* ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Casco v Cocchiola***, 62 AD3d 640, 878 NYS2d [2d Dept 2009]).

As to plaintiff's "90/180" claim, the Court notes that a plaintiff must submit competent medical evidence that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see* ***Ly v Holloway***, 60 AD3d 1006, 876 NYS2d 482 [2d Dept 2009]). Aside from plaintiff's own deposition testimony, wherein she states that she is unable to walk long distances, garden, volunteer at her church, and that she has to make more than one trip per week into her son's business to do his bookkeeping, plaintiff has failed to submit any competent medical evidence demonstrating that she was restricted from performing such tasks or heavy lifting (*see e.g.* ***Rasporskaya v New York City Tr. Auth.***, 73 AD3d 727, 899 NYS2d 665 [2d Dept 2010]). Plaintiff also has not provided any medical evidence recommending that she remain confined to her home or bed for any period of time immediately following the subject accident. Accordingly, plaintiff's cross motion for summary judgment in her favor on the issue of whether she sustained a serious injury within the meaning of the Insurance Law is denied.

Regarding defendant's motion for summary judgment on the grounds that plaintiff failed to sustain a serious injury under § 5102(d) of the Insurance Law as a result of the subject collision, a defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, defendant has established, prima facie, his entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Oginsky v***

***Rasporskaya***, 85 AD3d 990, 928 NYS2d 638 [2d Dept 2011]; ***Al-Khilewi v Turman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]). Defendant's orthopedist, Dr. Cohen, states in his medical report that an examination of plaintiff reveals that despite the noted limitations in her spinal range of motion, that she has full range of motion in her cervical and thoracolumbosacral spine, and that those limitations were degenerative in nature and consistent with her age. Dr. Cohen states that palpation of the paravertebral muscles throughout plaintiff's spine did not reveal any evidence of muscle spasm or trigger points, that the straight leg raising test was negative bilaterally, and that her gait is normal. Dr. Cohen states that plaintiff has full range of motion in her shoulders and right knee, and that there are no signs of impingement. Dr. Cohen opines that the soft tissue contusions that plaintiff sustained as a result of the subject accident have resolved, that her examination is unremarkable, that there are no objective findings of an orthopedic disability, and that her ranges of motion are "age-appropriate" and within normal limits.

Likewise, defendant's neurologist, Dr. Chacko, states in his medical report that an examination of plaintiff reveals that she has full range of motion in her spine, that there were no muscle spasms upon palpation of the paraspinal muscles, and that her motor examination is normal. Dr. Chacko opines that the cervical and lumbar strains that plaintiff sustained as a result of the subject accident have resolved, that there is no muscle weakness, reflex asymmetry, or focal sensory changes related to the accident, and that her diminished sensation in the left superficial radial nerve distribution and weakness of handgrip are pre-existing conditions, and are unrelated to the subject accident. Dr. Chacko notes that although he observed limitations in plaintiff's cervical range of motion, significant degenerative changes in her spine contributed to such limitations. Dr. Chacko further states that plaintiff does not exhibit any neurological disability as a result of the subject accident, and that she is capable of performing her normal daily living activities. In addition, the limitations noted by Dr. Cohen and Dr. Chacko during their examinations of plaintiff were not significant within the meaning of the Insurance Law (*see* ***Licari v Elliott***, *supra*; ***Johnson v Cristino***, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]; *cf.* ***McLaughlin v Rizzo***, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]). Moreover, the medical evidence submitted by plaintiff in her cross motion is insufficient to defeat defendant's prima facie showing. Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is granted.

Having determined that plaintiff failed to establish that she sustained a serious injury within the meaning of the Insurance Law and that defendant established that plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject collision, plaintiff's motion to strike defendant's answer is rendered moot, and is denied as such.

Dated: 7/3/12

THOMAS F. WHELAN, J.S.C.