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SHORT FORM ORDER

INDEX No. 10-7640
CAL No. 12-20056MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-18-12 (#002)
MOTION DATE 6-15-12 (#003)
ADJ. DATE 6-15-12
Mot. Seq. # 002 - MD
003 - MD

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SORIBELKIS OVALLES and ESQUIDANIA RODRIGUEZ,

Plaintiffs,

- against -

CHRISTOPHER L. STATON, JAYQUAN STINES and JOSE A. COHEN,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by defendant Jose A. Cohen, dated April 9, 2012, and supporting papers (1-8); (2) Notice of Cross Motion (003) by amended notice of motion by the defendant Jose A. Cohen, dated May 8, 2012 ,supporting papers (9-19); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (002) by the defendant, Jose A. Cohen, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Soribelkis Ovalles, did not sustain a serious injury as defined by Insurance law § 5102 (d) has been rendered academic by the submission of motion (003), as amended, and is denied as moot; and it is further

ORDERED that motion (003) by the defendant, Jose A. Cohen, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiffs, Soribelkis Ovalles and Esquidania Rodriquez, did not sustain a serious injuries as defined by Insurance law § 5102 (d), is denied.

In this negligence action, the plaintiffs seek damages for personal injuries which Soribelkis Ovalles and Esquidania Rodriquez allege to have sustained on June 28, 2009 when they were involved in an automobile accident south of the intersection of Grand Boulevard and Riddle Street, Town of Islip, Suffolk County, New York. Soribelkis Ovalles and Esquidania Rodriquez were passengers in a vehicle operated by the defendant Christopher L. Staton. A cross claim has been asserted in the answer served by defendant Jose A. Cohen against Christopher Staton and Jayquan Stines for judgment over against them for indemnification and/or contribution. Christopher Staton and Jayquan Stines have asserted a cross claim against defendant Jose A. Cohen for judgment over against him. It is noted that the answer served by Staton and Stines has not been signed or notarized by them and bears no attorney verification.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On this motion for summary judgment on the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the moving party to present evidence in competent form, showing that the plaintiff did not sustain a serious injury as a result of the accident (see ***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met the burden, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does exist (see ***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must

be viewed in a light most favorable to the non-moving party (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** , supra).

In support of motion (003), the defendant Cohen has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendants' answers and demands, and plaintiffs' bill of particulars; the unsigned but certified, transcripts of the examinations before trial of Soribelkis Ovalles dated February 11, 2011, and Esquidania Rodriguez dated February 11, 2011; the report of Jeffrey Guttman, M.D. dated April 7, 2011 concerning his independent orthopedic examination of the plaintiff Ovalles; and the report of Isaac Cohen, M.D. dated June 23, 2011 concerning his independent orthopedic examination of plaintiff Rodriguez.

By way of the bill of particulars, Soribelkis Ovalles alleges that as a result of this accident, she sustained a disc herniation at L4-5 with mass effect upon the thecal sac with foramina compromise and stenosis; C5-6 disc herniation with mass effect upon the thecal sac and spinal cord, with stenosis; loss of normal cervical lordosis; and internal derangement of the right shoulder. She alleges she was disabled for six months following the accident.

The moving defendant has submitted the sworn report of his expert, Jeffrey Guttman, M.D. who performed an independent orthopedic examination of Soribelkis Ovalles. Dr. Guttman set forth that he reviewed the medical records from Southside Hospital and the records from Dr. Martin however, such notes and records have not been submitted to this court as required pursuant to ***Friends of Animals v Associated Fur Mfrs***., *supra*. Expert testimony is limited to facts in evidence. (*see also* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]). Thus Dr. Guttman may testify only as to his examination of the plaintiff.

Dr. Guttman determined range of motion values of the plaintiff Ovalles' cervical spine and compared those findings to the normal range of motion values. His impression is that of status post cervical strain and lumbar strain. Dr. Guttman does not address the injuries claimed by Ms. Ovalles, namely disc herniation at L4-5 with mass effect upon the thecal sac, disc herniation at C5-6 with mass effect upon the thecal sac and spinal cord, thus raising a factual question as to whether these alleged

injuries were caused by the accident. No report from an examining neurologist has been submitted concerning the asserted effect of the said herniations on the thecal sac and/or spinal cord (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Although the plaintiff alleges internal derangement of her right shoulder, Dr. Guttman did not examine the plaintiff's shoulder, thus raising a factual question as to whether the alleged derangement of the right shoulder was caused by the accident. Such factual issues further preclude summary judgment.

Based upon the foregoing, it is determined that defendant Cohen has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the issue of whether plaintiff Ovalles sustained a serious injury within the meaning of Insurance Law § 5102 (d) as to the first category of injury.

By way of the bill of particulars, Esquidania Rodriguez alleges that as a result of this accident, she sustained a cervical sprain, cervical derangement, lumbar sprain, and lumbar derangement. She alleges that she was disabled for two months following the accident.

The moving defendant has submitted the report of Isaac Cohen, M.D. concerning his independent orthopedic examination of plaintiff Esquidania Rodriguez who was approximately twenty weeks pregnant at the time of the subject accident. Although Dr. Cohen set forth that he reviewed her labor and delivery "instructions" and outpatient obstetric observations and evaluations, as well as the records of Dr. Martin, chiropractic records, and neurological evaluation by Dr. Steiner, M.D., the same have not been submitted in support of Dr. Cohen's opinion. Nor has a report concerning an independent neurological examination by the defendants been submitted in support of this application (*see* ***Browdame v Candura***, *supra*); leaving this court to speculate as to any findings by either Dr. Steiner or an independent examining neurologist.

There are factual issues concerning how Dr. Cohen determined the range of motion values he ascertained upon examination of the plaintiff's cervical spine and lumbar spine in that he reports that measurements were taken with a goniometer and/or bubble inclinometer and/or by visual examination, as his wording leaves this court to speculate as to which method he employed. It is further noted that the normal range of motion values set forth by Dr. Guttman in his report concerning plaintiff Ovalles, and the normal range of motion values set forth by Dr. Cohen differ, leaving this court to speculate as to which of the moving defendant's examining physicians has set forth the correct range of motion value. It is Dr. Cohen's opinion that plaintiff Rodriguez sustained mild soft tissue complaints to her neck and back which have resolved uneventfully with the passage of time without evidence of permanency or sequelae. His diagnosis is that of cervical and lumbosacral spine strains.

Based upon the foregoing, it is determined that the moving defendant has not demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis that plaintiff Rodriguez did not sustain a serious injury on the first category of serious injury defined in Insurance Law § 5102 (d).

Defendant Cohen's examining physicians did not examine either of the plaintiffs during the statutory period of 180 days following the accident to establish whether either plaintiff was incapacitated from substantially performing the usual and customary activities of daily living for a period of ninety

days in the 180 days following the accident (see ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; see ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). and the experts offer no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

In view of the foregoing, it is determined that the moving defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint as to either plaintiff on the basis that they did not suffer an injury within the definition of the second category of injury as defined by Insurance Law § 5102 (d).

Accordingly, this unopposed motion (003) by defendant Cohen for dismissal of the complaint as asserted by Soribelkis Ovalles and Esquidania Rodriquez on the basis that neither plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d) is denied.

Dated: 5/9/12

PETER H. MAYER, J.S.C.