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SHORT FORM ORDER

INDEX No. 10-13515
CAL. No. 11-02313MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-29-12 (#001)
MOTION DATE 4-19-12 (#002)
ADJ. DATE: 6-14-12
Mot. Seq. # 001 - MG; CASEDISP
002 - MD

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IVELISSE JAMES,

Plaintiff,

- against -

ROLAND WILLIAMS,

Defendant.

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Upon the following papers numbered 1 to 41 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 25 - 33 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14 - 24; 34 - 37 ; Replying Affidavits and supporting papers 38 - 39; 40 - 41 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment and the motion by plaintiff for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (001) by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion (002) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor on the complaint on the issue of liability is denied as moot.

This is an action to recover damages for injuries allegedly sustained by plaintiff on October 7, 2009 in a motor vehicle accident. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including, herniated disc at L5-S1 causing mass effect on the right and left S-1 nerve roots, lumbar radiculopathy requiring multiple interlaminar epidural steroid injections (L5-S1) under fluoroscopic guidance, lumbosacral spine sprain, aggravation and/or exacerbation of spondylolisthesis L5-

S1, lumbago, cervical spine sprain, aggravation and/or exacerbation of degenerative changes in the cervical spine, and left wrist sprain requiring wrist immobilization. Also plaintiff alleges that following said accident she was treated at and then released from the emergency room of Good Samaritan Hospital in West Islip, New York, and that she was confined to bed from October 7, 2009 to October 9, 2009 and confined to home from October 7, 2009 to October 12, 2009. Plaintiff also alleges that as a result of the subject accident she sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendant now moves for summary judgment in his favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of his motion, defendant submits, among other things, the pleadings, plaintiff's bill of particulars, plaintiff's emergency room records, plaintiff's deposition transcript, and the affirmed reports of defendant's examining orthopedic surgeon and radiologist.

Insurance Law § 5102 (d) defines "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."

In order to recover under the "permanent loss of use" category, 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 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 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*, ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Plaintiff testified at her deposition on May 23, 2011 that following the accident she complained of pain in her back, neck, head, and left hand, and that she was given a brace for her wrist and pain medications at the hospital. In addition, plaintiff testified that after the accident she first saw her primary care physician and saw him about three or four times between 2009 and 2010, and that she began receiving physical therapy three times a week in October 2009 then stopped at the end of November 2009 at which time she began pain management therapy together with physical therapy at another facility. Plaintiff also testified that the physical therapy continued until April 2010, and that she received six epidural injections to her lower back by December 2010. Her last scheduled medical appointment was in January 2011. Plaintiff stated that she missed about four or five days of work immediately after the accident and after returning to work she missed eight days intermittently, that she did not lose any income or promotional opportunities and that her duties and schedule remained the same after the accident. According to plaintiff, since the accident she can no longer bicycle, which she used to do three or four times a year. Her walking for recreation is now limited, which she used to do four or five days a week for 30 to 45 minutes a day, and her husband has increased his help with household chores.

Defendant's examining orthopedic surgeon, Dr. Katz, indicated in his affirmed report dated September 6, 2011 that he examined plaintiff on that date and that he measured her range of motion using a goniometer. Dr. Katz reported that the examination of plaintiff's cervical spine showed no tenderness and no paravertebral muscle spasm, and revealed range of motion testing results of flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right-sided lateral flexion to 45 degrees (normal 45 degrees) and left-sided lateral flexion to 45 degrees (normal 45 degrees), and right-sided rotation to 80 degrees (normal 80 degrees) and left-sided rotation to 80 degrees (normal 80 degrees). He noted that sensation was intact in the C5-T1 innervated dermatomes, that biceps, triceps and brachioradialis reflexes were 2+ and symmetric, and that the Adson's test was negative. With respect to the lumbosacral spine, Dr. Katz found that plaintiff's gait was normal, there was no paravertebral muscle spasm, and that active range of motion testing revealed forward flexion to 90 degrees (normal 90 degrees), extension to 30 degrees (normal 30 degrees), and lateral and side bending to 30 degrees (normal 30 degrees). He added that the straight leg raising test was negative and that reflexes of the quadriceps, tibialis posterior, and Achilles tendon were 2+ and symmetric bilaterally. Dr. Katz also reported that Babinski was negative with no demonstrable clonus and that Patrick was negative.

Regarding plaintiff's left wrist, Dr. Katz reported that there were no gross deformities, no tenderness about the joint line, no erythema, swelling or induration, and that there was no anterior or posterior instability. His range of motion testing results indicated dorsiflexion 70 degrees (normal 70 degrees), and palmar flexion 80 degrees (normal 80 degrees). He also found that radial deviation was present to 20 degrees (normal 20 degrees) while ulnar deviation was present to 30 degrees (normal 30 degrees). Dr. Katz further noted that Tinel's sign was negative at the wrist, there was no tenderness at the extensor compartments, no cystic masses were present, and that there was no tenderness at the Triangular Fibrocartilage complex. Dr. Katz indicated that pulses were 2+ radial and 2+ ulnar and that there was an intact vascular arch as evidenced by a normal compression test. In conclusion, Dr. Katz diagnosed cervical strain with radiculitis, resolved; lumbosacral strain with radiculitis, resolved; and left wrist contusion, resolved. He opined that plaintiff's injuries have resolved and that her prognosis is excellent, that she currently shows no signs or symptoms of permanence relative to the musculoskeletal system and to the subject accident, and that she is capable of full-time, full-duty work as an office worker without restrictions.

Dr. Katz noted the significance of the MRI report of the lumbar spine and the x-ray report of the cervical spine indicating changes that are degenerative in nature.

The affirmed report of defendant's examining radiologist, Dr. Greenfield, indicates that he reviewed the MRI images of plaintiff's lumbar spine from November 2009 and concluded that there were no findings that could be attributed to an accident occurring on October 7, 2009 with a reasonable degree of medical certainty.

Here, defendant met his prima facie burden of demonstrating his entitlement to judgment as a matter of law by showing, through the affirmed reports of his medical experts and plaintiff's deposition testimony, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Seongho Choi v Guerrero***, 82 AD3d 1080, 918 NYS2d 897 [2d Dept 2011]; *see also* ***Jenson v Brooke***, 97 AD3d 539, 947 NYS2d 328 [2d Dept 2012]). The Court initially notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see*, ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Defendant's submissions established, prima facie, that none of the injuries plaintiff allegedly sustained to the cervical and lumbar regions of her spine and to her left wrist constituted a serious injury under the permanent consequential limitation of use or the significant limitation of use categories of Insurance Law § 5102 (d) (*see* ***Quintana v Arena Transport, Inc.***, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]). Defendant's examining orthopedic surgeon performed objective tests showing full range-of-motion in the cervical and lumbosacral regions of plaintiff's spine and her left wrist (*see* ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Defendant also established prima facie that plaintiff did not sustain a serious injury under the 90/180 category of Insurance Law § 5102 (d) (*see* ***Estaba v Quow***, 74 AD3d 734, 902 NYS2d 155 [2d Dept 2010]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Kaminski v Kawamoto***, 49 AD3d 501, 853 NYS2d 588 [2d Dept 2008]; ***Oberly v Bangs Ambulance Inc.***, 271 AD2d 135, 710 NYS2d 676 [3d Dept 2000], *affd* 96 NY2d 295, 727 NYS2d 378 [2001]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see*, ***Moran v Palmer***, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

The burden then shifted to plaintiff to show, by admissible evidentiary proof, the existence of a triable issue of fact (*see* ***Marietta v Scelzo***, 29 AD3d 539, 815 NYS2d 137 [2d Dept 2006]).

In opposition to the motion, plaintiff submits her own affidavit and the affirmation of her treating pain management physician, Dr. Yadegar, with his attached office notes and records, plaintiff's bill of particulars, plaintiff's deposition transcript, the report of the MRI of her lumbar spine from November 2, 2009, the unaffirmed reports dated November 9, 2009, April 30, 2010, and June 4, 2010 of treating physicians from Dr. Yadegar's practice, insurance records, and the affirmed report dated December 29, 2009 of an orthopedic surgeon, Dr. Polavarapu, based on his examination on said date.

Here, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the permanent loss, the permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law § 5102 (d) (*see* ***Valera v Singh***, 89 AD3d 929, 932 NYS2d 530 [2d Dept

2011]). Plaintiff's treating pain management physician, Dr. Yadegar chronicles her lumbar back pain and plaintiff proffers his reports as evidence of serious injury. However, a plaintiff's complaints of subjective pain are insufficient to raise a triable issue of fact regarding serious injury (*see* ***Calabro v Petersen***, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]; *see also* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). In addition, Dr. Yadegar failed to quantify, on the basis of objective testing, the limitations that he found in plaintiff's back which he described as "[r]ange of motion shows diminished flexion, diminished extension and diminished lateral bending," and with respect to his findings of "modified straight leg raise to 70 degrees is positive on the LEFT," he failed to compare said limitation to what would be considered normal (*see* ***Tinyanoff v Kuna***, ___ AD3d ___, 2012 N.Y. Slip Op. 05815 [2d Dept 2012]; ***Quintana v Arena Transport, Inc.***, 89 AD3d 1002, 933 NYS2d 379).

The unaffirmed medical reports of the other physicians could not be considered inasmuch as they are not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). Although Dr. Polavarapu noted significant limitations in range of motion of plaintiff's lumbar spine of flexion 50 degrees (90 degrees normal), extension 15 degrees (30 degrees normal), and right and left lateral bending 20 degrees (30 degrees normal) on December 29, 2009, more than two months after the accident, plaintiff failed to submit any recent medical evidence regarding any range-of-motion limitations in her spine (*see* ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). In the absence of recent findings of range-of-motion limitations, plaintiff failed to meet her burden in opposing defendant's showing of prima facie entitlement to judgment as a matter of law (*see id.*). Thus, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the permanent loss, the permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law § 5102 (d) (*see* ***Valera v Singh***, 89 AD3d 929, 932 NYS2d 530 [2d Dept 2011]; ***Lively v Fernandez***, 85 AD3d 981, 925 NYS2d 650 [2d Dept 2011]).

Moreover, plaintiff failed to establish economic loss in excess of basic economic loss (*see* ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]). Finally, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d) (*see* ***Siew Hwee Lim v Dan Dan Tr., Inc.***, 84 AD3d 1213, 923 NYS2d 677 [2d Dept 2011]).

Therefore, defendant's motion for summary judgment in his favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted. In light of the foregoing, plaintiff's motion for summary judgment in her favor on the complaint on the issue of liability is denied as moot.

Dated: August 31, 2012

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION