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SHORT FORM ORDER

INDEX No. 11-2066
CAL. No. 12-00095MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

COPY

Mot. Seq. # 001 - MG; CASE DISP

SHANNON M. MALONEY,	:	CHARLES G. EICHINGER & ASSOCIATES
	:	Attorney for Plaintiff
Plaintiff,	:	1601 Veterans Memorial Highway
	:	One Suffolk Square, Suite 510
- against -	:	Islandia, New York 11749
	:	
	:	CARCAGNO & ASSOCIATES
JEFF A. SCACCIO and JEFFREY A. SCACCIO,	:	Attorney for Defendants
	:	59 Maiden Lane, Suite 610
Defendants.	:	New York, New York 10038

Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 15; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted.

In this action, the plaintiff seeks to recover damages for personal injuries which she purportedly sustained in a motor vehicle accident which occurred on September 2, 2010 on the westbound Long Island Expressway in the Town of Brookhaven, New York. The accident purportedly occurred when a vehicle owned by defendant Jeff A. Scaccio and operated by defendant Jeffrey A. Scaccio collided with the rear of the vehicle being operated by the plaintiff, causing her to lose control of her vehicle and crash into another vehicle. In her complaint, the plaintiff alleges that she sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, by way of the bill of particulars, she alleges that she sustained serious and permanent injuries including, *inter alia*, disc herniation at C4/5; disc bulge at C5/6, disc bulge at C6/7; disc bulge at C3/4; straightening of the cervical curvature from C2 through C5; disc hydration loss at C2/3; disc hydration loss at C3/4; cervical radiculopathy; lumbar radiculopathy; acute L5/S1 sprain/strain; headaches; anxiety; depression; fluid in the subacromial/ subdeltoid bursa indicating bursitis with low lying and laterally downsloping Type II acromial configuration; synovial fluid at the glenohumeral articulation; and rotator interval capsule. By way of the supplemental bill of particulars, she further alleges, that she sustained bilateral C5/6 radiculopathy; limited

range of motion of the cervical spine; and limited range of motion of the lumbar spine. She alleges that the injuries sustained constituted a permanent loss and/or impairment and/or significant limitation and prevented her from performing all those natural acts which constituted her usual and customary daily activities for a period in excess of 90 days following the occurrence. She further alleges that she was confined to her bed and home for approximately one week as a result of the accident.

The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury as defined by 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 constitutes 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" (Insurance Law § 5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008] *affd* 12 NY3d 750, 876 NYS2d 700 [2009]).

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 demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant may satisfy this burden 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, 707 NYS2d 233 [2d Dept 2000]). Once this showing has been made the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient 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 (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Grossman v Wright***, *supra*; ***Pagano v Kingsbury***, *supra*; *see also* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of the motion for summary judgment, the defendants submit, *inter alia*, the affirmed independent orthopedic examination report of Robert Israel, M.D., the affirmed independent neurologic examination report of Edward M. Weiland, M.D., the affirmed independent radiology review reports of Sheldon P. Feit, M.D., the plaintiff's treatment records from Elite Physical Therapy & Sports Medicine, and the plaintiff's deposition testimony. As is relevant to this motion, Dr. Israel avers that he examined the plaintiff on July 26, 2011. He performed examinations of, *inter alia*, her cervical spine, thoracic spine, lumbar spine and shoulders. He measured the range of motion of these areas, compared his findings to

normal values, and found the plaintiff's range of motion to be normal in all respects. He performed objective testing and obtained negative results. Based on his examination, he found that the plaintiff had resolved sprains of the cervical spine, thoracic spine, lumbar spine, right and left shoulder and left arm. He found that she had no disability as a result of these injuries, that no further treatment was medically necessary and that she was capable of working and performing activities of daily living without restriction.

Dr. Weiland affirms that he examined the plaintiff on July 28, 2011. He performed a neurological examination and examined the plaintiff's cervical spine, lumbar spine, thoracic spine and shoulders. He performed objective tests and obtained negative results. He measured the range of motion of the plaintiff's cervical spine, lumbar spine, thoracic spine and shoulders, compared them to normal values, and found them to be normal in all respects. He found the plaintiff's neurologic examination was "normal," that there was no evidence of any neurological deficits and that further neurological investigational studies and treatment modalities were not warranted. He concluded that the plaintiff had no primary neurologic disability and could perform activities of daily living without restriction.

Dr. Feit performed an independent radiological review of the MRIs performed of the plaintiff's cervical spine and left shoulder on November 17, 2010. He concluded that the cervical spine MRI depicted a normal study depicting no discernible abnormalities. He concluded that the left shoulder MRI depicted essentially a normal study with no discernible abnormalities.

During her deposition, the plaintiff testified that following the accident she experienced pain in her neck, shoulders and lower back. She was examined in the emergency room and discharged shortly thereafter with pain medication. The following day she treated with her family practitioner for her injuries. She was referred to an orthopedist, Dr. Mango, with whom she treated on approximately three occasions. She stopped seeing Dr. Mango because insurance would not pay for her treatment. She was referred to physical therapy, and received physical therapy two times a week for approximately two months for a period commencing approximately one month after the accident. She stopped treating with the physical therapist when the insurance stopped paying for it. She treated with a neurologist, Dr. Mendelsohn, who referred her for a nerve test. Dr. Mendelsohn told her she had a pinched nerve in her neck and sent her for massage therapy. The plaintiff testified that, as a result of the injuries she sustained in the accident, she was confined to her bed and home for the weekend immediately following the accident. She was a full time student at the time of the accident and did not miss any school as a result of the accident. When she returned to school immediately following the accident she was unable to participate in gym class for approximately two weeks. She, thereafter, participated in gym, except on a few occasions when she was not feeling well. The plaintiff testified that, at the time of her deposition, she still had pain. The pain was not severe but annoying and the amount of pain varied day to day. She took Ibuprofen approximately three times a week. When asked how her usual and customary physical activities had changed as a result of her injuries, the plaintiff testified that she could no longer run five days a week, but could only walk. She testified that there was nothing that she could not do, or could only do in a diminished physical capacity, as a result of the accident.

The evidence submitted was sufficient to establish the defendants' *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating 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* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, *supra*; ***Kreimerman v***

Stunis, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Euvino v Rauchbauer***, 71 AD3d 820, 897 NYS2d 196 [2d Dept 2010]; ***Casella v New York City Transit Auth.***, 14 AD3d 585, 787 NYS2d 883 [2d Dept 2005]; ***Hodges v Jones***, 238 AD2d 962, 661 NYS2d 159 [2d Dept 1997]; ***Pagano v Kingsbury***, *supra*). Contrary to the plaintiff's contention, the evidence submitted by the defendants established that she did not sustain a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury (*see* ***Lewars v Transit Facility Mgt. Corp.***, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]; ***Kolodziej v Savarese***, 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; *cf.* ***Valera v Singh***, 89 AD3d 929, 932 NYS2d 530 [2d Dept 2011]; ***Amato v Fast Repair Inc.***, 42 AD3d 477, 840 NYS2d 394 [2d Dept 2007]). Indeed, the plaintiff's own deposition testimony was sufficient for this purpose.

In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether she sustained such an injury as a result of the subject accident (*see*, ***Toure v Avis Rent A Car Sys.***, *supra* at 350). The plaintiff failed to meet this burden.

In opposition to the motion, the plaintiff relies on the affidavit of Steven Winter, M.D. and her own affidavit. The affidavit of Steven Winter, M.D. was insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury as a result of the subject accident. Dr. Winter concluded that the MRI performed on the plaintiff's cervical spine depicted, *inter alia*, bulging and herniated discs. He concluded that the MRI performed on the plaintiff's left shoulder depicted fluid in the subacromial/subdeltoid bursa indicating bursitis, low lying and laterally downsloping Type II acromial configuration and synovial fluid at the glenohumeral articulation and rotator interval capsule. However, it is well settled that such findings, including the existence of a herniated or bulging disc, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Bamundo v Fiero***, *supra*; ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Caraballo v Kim***, 63 AD3d 976, 882 NYS2d 211 [2d Dept 2009]; ***Sealy v Riteway-1, Inc.***, 54 AD3d 1018, 865 NYS2d 129 [2d Dept 2008]; ***Kilakos v Mascera***, 53 AD3d 527, 862 NYS2d 529 [2d Dept 2008]; ***Waring v Guirguis***, 39 AD3d 741, 834 NYS2d 290 [2d Dept 2007]). The plaintiff has failed to present such objective evidence.

The plaintiff has also failed to submit any competent medical evidence to support a claim that she was unable to perform substantially all of her daily activities for not less than 90 of the 180 days immediately following the subject accident (*see* ***Bamundo v Fiero***, *supra*; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Husbands v Levine***, 79 AD3d 1098, 913 NYS2d 773 [2d Dept 2010]; ***Posa v Guerrero***, 77 AD3d 898, 911 NYS2d 82 [2d Dept 2010]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Collado v Abouzeid***, 68 AD3d 912, 890 NYS2d 326 [2d Dept 2009]; ***Vickers v Francis***, 63 AD3d 1150, 883 NYS2d 77 [2009]; ***Amato v Fast Repair Inc.***, 42 AD3d 477, 840 NYS2d 394 [2d Dept 2007]; *see also* ***Valera v Singh***, 89 AD3d 929, 932 NYS2d 530 [2d Dept 2011]; ***Sainte-Aime v Suwai Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

The plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*see* ***Toure v Avis Rent a Car Sys.***, *supra*; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Villante v Miterko***, 73 AD3d 757, 901 NYS2d 311 [2d Dept 2010]; ***Maffei v Santiago***, 63 AD3d 1011, 886 NYS2d 29 [2009]; ***Luna v Mann***, 58 AD3d 699, 872 NYS2d 467 [2d Dept 2009]; ***Joseph v A & H Livery***, 58 AD3d 688, 871 NYS2d 663 [2009]; *see also* ***Calabro v Petersen***, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]).

Based on the foregoing, the motion by the defendants for summary judgment dismissing the complaint is granted.

Dated: August 16, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION