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SHORT FORM ORDER

INDEX No. 14-5960
CAL. No. 16-00336MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PUBLIC

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-14-16
ADJ. DATE 9-15-16
Mot. Seq. # 002 - MG; CASEDISP

JEANNIXSA SERRANO,

Plaintiff,

- against -

MICHAEL J. FREDERICKS,

Defendant.

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-13 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14-17 ; Replying Affidavits and supporting papers 21-22 ; Other Plaintiff's memorandum of law 19-20 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Michael Fredericks for summary judgment dismissing plaintiff's complaint is granted.

Plaintiff Jeannixsa Serrano commenced this action to recover damages for injuries she allegedly sustained as the result of a motor vehicle accident that occurred at the intersection of Route 27 and North Monroe Avenue in the Town of Babylon on March 20, 2011. It is alleged that the accident occurred when the vehicle operated and owned by defendant Michael Fredericks struck the rear of plaintiff's vehicle while it was stopped at red traffic light in the left lane of westbound Route 27. By her bill of particulars, plaintiff alleges, among other things, to have sustained cervical trauma and pain, right shoulder pain and trauma, thoracolumboscral pain and trauma, and headaches as a result of the subject accident.

Defendant now moves for summary judgment on the basis that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical records regarding the injuries at issue, and the sworn medical report of Dr. Gary Kelman. At defendant's request, Dr. Kelman conducted an independent orthopedic examination of plaintiff on January 25, 2016. Plaintiff opposes the motion on the grounds that defendant failed to meet his prima facie burden to show that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and that the evidence submitted in opposition to the motion demonstrates that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits her own affidavit and the affidavit of Dr. Beth Cohen.

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 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 through the submission of plaintiff's deposition transcript and competent medical evidence established a prima face case that plaintiff did not sustain an 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***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendant's examining orthopedist, Dr. Kelman, used a goniometer to test plaintiff's ranges of motion in her spine and shoulders, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Kelman states in his medical report that an examination of plaintiff revealed she has full range of motion in her spine and shoulders, that there was no paraspinal tenderness, muscle spasm, or trapezii tenderness upon palpation of the paraspinal muscles, that there was no tenderness to palpation of the right or left shoulder, that there was no effusion or muscle atrophy observed, and that the impingement sign and O'Brien's test were negative. Dr. Kelman further states that plaintiff ambulates without a limp or antalgic gait, that her muscle strength is 5/5, and that her sensory responses were intact throughout her upper and lower extremities. Dr. Kelman opines that the strains plaintiff sustained to her spine and shoulders as a result of the subject accident have resolved, and that she does not have any objective evidence of an orthopedic disability.

Moreover, plaintiff's own medical records from Good Samaritan Hospital's emergency room demonstrate that plaintiff did not sustain a serious injury (*see* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Estaba v Quow***, 74 AD3d 734, 902 NYS2d 155 [2d Dept 2010]). Significantly, the records state that plaintiff did not have any back pain, weakness, numbness, or other complaints of pain, besides the complaint of pain to the back of her head, and that her examination was without any acute findings, except for an incidental finding of pregnancy. Indeed, plaintiff stated to the triage nurse that following the accident she was able to "get out of her car, walk without difficulty, and that she sat down to wait for the ambulance." While these records may not have been certified, a defendant is allowed to rely upon the uncertified and unsworn medical reports of an injured plaintiff to establish the lack of a serious injury by a plaintiff (*see* ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Itkin v Devlin***, 286 AD2d 477, 729 NYS2d 537 [2d Dept 2001]).

Furthermore, plaintiff's deposition testimony demonstrates that "substantially all" of her daily activities were not curtailed (*see e.g.* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [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]). Plaintiff at an examination before trial testified that at

the time of the subject accident she was employed as a pharmacist assistant at Target Pharmacy, working approximately 30 hours per week, that she missed approximately one day from her employment as a pharmacist assistant, and that her duties were modified to the extent that she no longer assisted with guest services and lifting boxes due to the pain in her back, but her duties as a pharmacist assistant remained the same. Plaintiff also testified that while at the emergency room following the subject accident she was informed that she was pregnant and needed to immediately follow-up with an obstetrician-gynecologist. Plaintiff testified that she did not continue physical therapy or any treatment once her No-Fault benefits were terminated after she received physical therapy for about six months, because she did not have private medical insurance. Plaintiff further testified that she continues to be employed with Target Pharmacy, working approximately 32 hours per week, and, that, although she began her studies at Suffolk County Community College in Brentwood in 2005, she was not enrolled at the time of the accident, but after the accident she re-enrolled in classes as a full-time student.

Therefore, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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***, *supra*). 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]).

In opposition, plaintiff failed to raise a triable issue of fact to refute defendant's prima facie showing that she did not sustain a serious injury as a result of the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Cherry v Jones***, 62 AD3d 742, 879 NYS2d 170 [2d Dept

2009]; ***Tudisco v James***, 28 AD3d 536, 813 NYS2d 482 [2d Dept 2006]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102(d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Plaintiff has proffered insufficient medical evidence to demonstrate that her alleged injuries meet the serious injury threshold requirement of the Insurance Law (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]). Plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact as to whether she sustained a serious injury, since there is no objective medical evidence supporting the allegation of significant joint restriction in her spine or shoulders that is causally related to the subject accident (*see* ***Ferber v Madorran***, 60 AD3d 725, 875 NYS2d 518 [2d Dept 2008]; ***Smeja v Fuentes***, 54 AD3d 326, 863 NYS2d 689 [2d Dept 2008]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]).

In addition, plaintiff has submitted the affidavit of her treating chiropractor, Beth Cohen, who states that "there is no question that plaintiff's injuries are completely and solely causally related to the accident of March 20, 2011," that plaintiff sustained significant range of motion limitations to her spine due to the accident, and that despite intensive treatment using different modalities, plaintiff did not have a full recovery and continued to have restrictions in her range of motion, as well as, residual inflammatory pathology to the muscular and supportive structures of her cervical and thoracic region. Dr. Cohen further states that as a result of the injuries plaintiff sustained to her spine during the subject accident, plaintiff has been rendered partially, permanently disabled, and will require continued care in the future. Despite plaintiff having submitted the affidavit of Dr. Cohen, she failed to submit any objective admissible medical proof demonstrating the existence of such limitations based upon a recent examination (*see* ***Estrella v GEICO Ins. Co.***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Calabro v Petersen***, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]; ***Nesci v Romanelli***, 74 AD3d 765, 902 NYS2d 172 [2d Dept 2010]; ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]). Of significance, Dr. Cohen's affidavit does not actually state the exact date she began treating plaintiff or when her treatment of plaintiff terminated, thus, leaving the Court to speculate as to whether plaintiff has even presented evidence of a contemporaneous examination. "The absence of a contemporaneous medical report invites speculation as to causation" (***Griffiths v Munoz***, 98 AD3d 997, 999, 950 NYS2d 787 [2d Dept 2012]). Instead, Dr. Cohen in her affidavit perfunctory states that "I treated plaintiff for over one year for injuries sustained in an automobile accident occurring on March 20, 2011. Following the accident, [plaintiff] presented herself for an examination."

More importantly, the only quantifiable range of motion testing of plaintiff's spine by Dr. Cohen that she reports in her affidavit occurred on May 5, 2011, approximately two months after the subject accident, which shows plaintiff had decreased range of motion in her spine. Indeed, Dr. Cohen's entire affidavit, including her findings and conclusions, appears to be based upon that one testing date of May 5, 2011. As a result, Dr. Cohen is unable to substantiate the extent or degree of the limitations to plaintiff's spine caused by the alleged injury and its duration (*see* ***Wong v Cruz***, 140 AD3d 860, 32 NYS3d 641 [2d Dept 2016]; ***Caliendo v Ellington***, 104 AD3d 635, 960 NYS2d 471

[2d Dept 2013]; ***Bacon v Bostany***, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]). Moreover, Dr. Cohen's report fails to address the fact that during her treatment of plaintiff, plaintiff was pregnant, and how plaintiff's pregnancy may have affected her range of motion limitations or the treatment she received (*see* ***La Rue v Tucker***, 247AD2d 702, 668 NYS2d 745 [3d Dept 1988]; *see also* ***Jackson v Willis***, 2000 NY Misc. LEXIS 184 [2000]).

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited her usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: APR 05 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**