SHORT FORM ORDER

INDEX No. 14-2457
CAL. No. 16-00650MV

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

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 11-16-16
ADJ. DATE 11-16-16
Mot. Seq. # 003 - MG; CASEDISP

JACALYN GONZALEZ,

Plaintiff,

- against -

JENNIFER M. LONGO,

Defendant.

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15-23 ; Replying Affidavits and supporting papers 24-25 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Jennifer Longo for summary judgment dismissing the complaint is granted.

Plaintiff Jacalyn Gonzalez commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Express Drive South and Veterans Memorial Highway in the Town of Islip on July 14, 2012. It is alleged that the accident occurred when the vehicle owned and operated by defendant Jennifer Longo struck the rear of the vehicle owned and operated by plaintiff while it was stopped at a red traffic light in the left lane of eastbound Express Drive South. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject collision, including herniated disc at level C6-C7, cervical radiculopathy, and cervical arthropathy.

Defendant now moves for summary judgment on the basis that the injuries allegedly sustained by plaintiff as a result of the subject accident do not come within the meaning of 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 the 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 July 27, 2015. Plaintiff opposes the motion on the grounds that defendant failed to meet her prima facie burden demonstrating that she did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition shows that she sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, plaintiff submits her own deposition transcript, uncertified copies of plaintiff's medical records concerning the injuries at issue, and the sworn medical reports of Dr. Marco Palmieri and Dr. Paul Miller.

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; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345). 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; ***Porcano v Lehman***, 255 AD2d 430; ***Nolan v Ford***, 100 AD2d 579).

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). 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). 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; ***Grossman v Wright***, 268 AD2d 79; ***Vignola v Varrichio***, 243 AD2d 464; ***Torres v Micheletti***, 208 AD2d 519]). Once defendant has met this burden, 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; ***Pagano v Kingsbury***,182 AD2d 268). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360; ***Rich-Wing v Baboolal***, 18 AD3d 726; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851).

Here, defendant, by submitting competent medical evidence and plaintiff's deposition transcript, has demonstrated, prima facie, that plaintiff did not sustain a serious injury within the meaning of Section 5102(d) of the Insurance Law as a result of the subject collision (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Green v Canada Dry Bottling Co. of N.Y., L.P.***, 133 AD3d 566). Defendant's orthopedic expert, Dr. Kelman, in his report states that an examination of plaintiff reveals she has full range of motion in her cervical spine, shoulders, elbows, wrists, hands and fingers. Dr. Kelman states that the examination did not reveal any evidence of spasms or tenderness upon palpation of plaintiff's paraspinal muscles, that she does not have an antalgic gait, that there is no crepitus or atrophy of plaintiff's muscles, and that there was no swelling in her hands or elbows. Dr. Kelman opines that the strains/sprains plaintiff sustained to her cervical region and the pain that radiated from her neck to her left upper extremity have resolved. Dr. Kelman further states that plaintiff does not have an orthopedic disability as a result of the subject accident.

Furthermore, plaintiff's deposition testimony establishes that she did not sustain an injury within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859; ***Knox v Lennihan***, 65 AD3d 615; ***Rico v Figueroa***, 48 AD3d 778). Plaintiff testified at an examination before trial that following the accident she missed approximately three to four days from her employment as a nursing station clerk at Stony Brook University Hospital as a result of the injuries she sustained to her neck, and that when she returned to work she returned in her normal capacity, although she placed restrictions on her ability to lift heavy items. Plaintiff testified that she was not provided with a disability note restricting her work requirements or stating that she was not able to lift heavy objects. Plaintiff testified that she voluntarily terminated her employment with Stony Brook University Hospital in 2015 due to personal reasons and not as a result of the injuries she sustained in the subject accident. Plaintiff further testified that she modeled as a hobby prior to the subject accident, but that she stopped modeling because of personal reasons, including the fact that the "modeling was sporadic," that she did not receive compensation for modeling, and that her injuries prevented her from "holding the poses."

Defendant shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557). 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; ***Mejia v DeRose***, 35 AD3d 407; ***Laruffa v Yui Ming Lau***, 32 AD3d 996; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45). "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; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929; ***Rovelo v Volcy***, 83 AD3d 1034). 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).

In opposition, plaintiff has failed to raise a triable issue of fact as to whether she sustained a serious injury within the limitations of use categories or the 90/180 category of the Insurance Law (*see* ***Boettcher v Ryder Truck Rental, Inc.***, 133 AD3d 625; ***Posa v Guerrero***, 77 AD3d 898; ***Wallace v Adam Rental Transp., Inc.***, 68 AD3d 857). 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). The medical evidence proffered by plaintiff was insufficient to establish a serious injury or to defeat defendant's prima facie showing. Notwithstanding the fact that plaintiff has submitted the affirmed medical report of Dr. Paul Miller, showing that plaintiff sustained range of motion limitations in her cervical spine with radiating pain into her left arm contemporaneous with the subject accident, 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; ***Nesci v Romanelli***, 74 AD3d 765; ***Sharma v Diaz***, 48 AD3d 442). In fact, the limitations noted by Dr. Miller in his most recent report, dated January 28, 2013, are insignificant within the meaning of Section 5102(d) of the Insurance Law (*see* ***Lively v Fernandez***, 85 AD3d 981; ***Morris v Edmond***, 48 AD3d 432; ***Whitfield-Forbes v Pazmino***, 36 AD3d 901). Furthermore, Dr. Miller even states in his report that plaintiff's cervical strain/sprain is resolving, that she is capable of performing her normal daily activities, including working, without restrictions, and that she does not require any additional physical therapy.

Similarly, the sworn medical report of Dr. Marco Palmieri fails to raise a triable issue of fact as to whether plaintiff sustained a serious injury to her cervical region within the meaning of Insurance Law § 5102(d), since his examinations were not contemporaneous with the subject accident (*see* ***Bleszcz v Hiscock***, 69 AD3d 890; ***Husbands v Levine***, 79 AD3d 1098; ***Srebnick v Quinn***, 75 AD3d 637). Consequently, absent findings from a recent examination, Dr. Palmieri cannot substantiate the extent or degree of the limitations in plaintiff's cervical region caused by the alleged injury and its duration (*see* ***Wong v Cruz***, 140 AD3d 860; ***Schilling v Labrador***, 136 AD3d 884; ***Bacon v Bostany***, 104 AD3d 625). In fact, Dr. Palmieri states in his report that his initial examination of plaintiff was on January 29, 2013, that his final examination of her was on March 21, 2013, and that such examinations of plaintiff's cervical spine revealed she does not have any tenderness in her cervical spine and had minimally restricted ranges of motion in her cervical region.

Lastly, plaintiff failed to submit competent medical evidence demonstrating that the injuries she allegedly sustained as a result of the subject accident rendered her unable to perform substantially all of her usual and customary activities for not less than 90 days out of the first 180 days immediately following the accident (*see* ***Posa v Guerrero***, *supra*; ***Nieves v Michael***, 73 AD3d 716; ***Shmerkovitch v Sitar***, 61 AD3d 843). The subjective complaints of pain and impaired joint function expressed by plaintiff during her deposition are insufficient to raise a triable issue of fact (*see* ***Sheer v Koubek***, 70 NY2d 678; ***Rovelo v Volcy***, 83 AD3d 1034, 1035; ***Young v Russell***, 19 AD3d 688, 689; ***Sham v B&P***

Chimney Cleaning & Repair, Co., Inc., 71 AD3d 979, 979). Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: May 26, 2017

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

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION