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SHORT FORM ORDER

INDEX No. 12-37120
CAL. No. 16-00407OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 4-15-16 (003)
MOTION DATE 7-28-16 (004)
ADJ. DATE 2-3-17
Mot. Seq. # 003 - WDN
004 - MD

---X

IRIS LAZO AND ROSA LAZO,

Plaintiffs,

- against -

JAMES K. BACHER, JR,

Defendant.

---X

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Upon the following papers numbered 1 to 18 read on these motions to vacate the note of issue and 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 12-18 ; Replying Affidavits and supporting papers ____; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (#003 and #004) by defendant James Bacher hereby are consolidated for the purposes of this determination; and it is

ORDERED that the unopposed motion by defendant James Bacher for an order vacating the note of issue is permitted to be withdrawn in accordance with correspondence received from defense counsel dated May 26, 2017; and it is further

ORDERED that the motion by defendant James Bacher for summary judgment dismissing the complaint is denied.

Plaintiff Irisi Lazo 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 Spur Drive North and Illinois

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Avenue in the Town of Islip on March 31, 2010. It is alleged that the accident occurred when the vehicle owned and operated by defendant James Bacher crossed the double yellow line and struck the rear of the vehicle operated by plaintiff. By her bill of particulars, plaintiff alleges, among other things, that she sustained various personal injuries due the subject accident, including disc bulges at level C4-C5 and level L4-L5; a disc herniation at level L5-S1; and cervical and lumbar radiculopathy. Plaintiff further alleges that she was incapacitated from her employment as a dental assistant for approximately four to six weeks as a result of the injuries she sustained in the collision. In addition, Rosa Lazo, plaintiff's mother and owner of the vehicle plaintiff was operating at the time of the accident, brought a claim for property damages allegedly sustained as a result of the subject collision.

Defendant now moves for summary judgment on the basis 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 accident. 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 examination of plaintiff on October 21, 2015. Plaintiff opposes the motion on the grounds that defendant failed to make a prima facie case 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 the affidavit of Dr. Robert Buurma, uncertified copies of her medical reports concerning the injuries at issue, and the sworn medical report of Dr. Alan Greenfield.

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 Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Lim v Flores***, 96 AD3d 723, 946 NYS2d 183 [2d Dept 2012]; ***Rodrguez v Huerfano***, 46 AD3d 794, 849 NYS2d 275 [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, shoulders, knees, and hips, and that the straight leg raising test was negative. Dr. Kelman states 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 crepitus observed, and that the impingement sign was negative. He states that there was no tenderness upon palpation of the right or left knee, that there was no effusion or atrophy of the quadriceps, that the anterior drawer sign, McMurray's and Lachman's tests were negative, and that there was no patella-femoral crepitus noted in either the right or left knee. Dr. Kelman further states that plaintiff was able to arise on heels and toes with good balance, that she does not have a limp or antalgic gait, and that her muscle strength is 5/5. Dr. Kelman opines that the strains plaintiff sustained to her spine, shoulders, left hip, and right knee, and the contusions to her chest wall 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 Southside 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 ambulates without assistance, and that the radiological studies performed on plaintiff's chest, and upper extremities were normal studies, not showing any evidence of soft tissue swelling or any fractures. 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 enrolled as a full-time student at Suffolk County Community College and working full-time as a dental assistant. She states that she missed approximately one-and-a-half months from her employment as a dental assistant following the accident, and that when she returned to work her duties were modified to the extent that she no longer lifted "anything over and up to 10 pounds." Plaintiff also testified that she returned to work as a dental assistant the day following the accident and that she worked for approximately three to four hours, which was her entire shift, with an assistant, but she did not return to work after that day. She testified that she also stopped attending school, because she had to work and she was unable to keep up with the class work. Plaintiff testified that she did not continue physical therapy or any treatment once her No-Fault benefits were terminated after she received chiropractic and physical therapy for about three to four months, and that even though she had private medical insurance she did not attempt to use it for any additional treatment. Plaintiff further testified that the injuries she sustained to her right hand, upper back, left knee and left shoulder were resolved within a month after the accident.

Therefore, defendant has 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, 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 to the defendant's prima facie showing, plaintiff has submitted competent medical evidence raising a triable issue of fact as to whether she sustained serious injuries to her spine under the

limitations of uses categories of the Insurance Law (*see* ***Garafano v Alvarado***, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; ***Stanley v Caddie Serv. Co., Inc.***, 110 AD3d 711, 971 NYS2d 886 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Compass v GAE Transp.,*** inc., 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]), and as to whether such injuries were causally related to the subject accident (*see* ***Windisch v Fasano***, 105 AD3d 1039, 963 NYS2d 401 [2d Dept 2013]; ***Jilani v Palmer***, 83 AD3d 786 [2d Dept 2011]). Although disc bulges and herniations, standing alone are not evidence of a "serious injury" under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [1st Dept 2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Plaintiff primarily relies upon the affidavit of her treating chiropractor, Dr. Robert Buurma, who began treating her on April 2, 2010, and re-examined her on January 16, 2017. In his affidavit, Dr. Buurma opines, based upon his contemporaneous and recent examinations, that plaintiff sustained cervical and lumbosacral derangement and radiculopathy, which resulted in significant range of motion limitations in the cervical and lumbar regions of her spine, and that such restrictions are permanent and directly related to the subject motor vehicle accident (*see* ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Tai Ho Kang v Young Sun Cho***, 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]; ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2d Dept 2010]).

Consequently, the affirmed medical reports of plaintiff's expert conflicts with that of defendant's expert, who found that there were no significant limitations in plaintiff's range of motion in her spine and that she did not have an orthopedic disability causally related to the subject collision. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1998]; *see* ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Thus, plaintiff has submitted sufficient evidence to raise a triable issue of fact as to whether her injuries are causally related to the subject accident (*see* ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2d Dept 2010]; ***Paula v Natala***, 61 AD3d 944, 879 NYS2d 153 [2d Dept 2009]; ***Azor v Torado***, 59 AD3d 367, 873 NYS2d 655 [2d Dept 2009]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: 6-21-17

Hon. Denise F. Molia

A.J.S.C.

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