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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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GENA QUATTROCHI,

Plaintiff,

-against-

RONALD A. SORTO and JOSE MARQUEZ,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 25714/09
Motion Seq. No.: 02

DECISION AND ORDER

Papers Read on this Motion:

Defendants' Notice of Motion	02
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Defendants, Ronald A. Sorto and Jose Marquez, move pursuant to CPLR §3212, for an order granting summary judgment dismissing the plaintiff's complaint, together with any and all cross-claims asserted against them.

The underlying action was commenced by the plaintiff, Gena Quattrochi, to recover for injuries she sustained as a result of an automobile accident, which occurred on July 26, 2009, when the vehicle she was operating was struck by the vehicle owned by defendant, Ronald A. Sorto and operated by defendant, Jose Marquez (*see* Profita Affirmation in Support at Exh. A at ¶¶4,5,24,25). The plaintiff claims that a consequence thereof, she has sustained serious injuries as defined in Article 51 of the New York State Insurance Law (*id.* at ¶¶ 32, 33, 34).

As recited in the Verified Bill of Particulars, the plaintiff alleges that the following injuries were proximately caused by the subject accident: Disc herniations at C3-4, C4-5 and C5-6 impinging on the anterior aspect of the spinal canal centrally; cervical myofasciitis; cervical radiculopathy; cervical sprain/strain; disc herniations at L4-5 and L5-S1 impinging on the anterior aspect of the spinal canal

and on the nerve roots bilaterally at L4-5; lumbar myofasciitis; lumbar radiculopathy; lumbar sprain/strain (*id.* at Exh. F at ¶9).

In support of the instant application, the defendants provide the affirmed medical reports of Dr. Sharma, M.D., a neurologist, Dr. Robert Israel, M.D., an orthopedist and Dr. Robert Tantleff, M.D., a radiologist (*see* Profita Affirmation in Support at Exhs, G, H, I).

Dr. Sharma conducted a neurologic examination of the plaintiff on November 22, 2010, at which time he reviewed various medical records including an MRI of the plaintiff's cervical spine done on September 8, 2009, which revealed "posterior disc herniations at * * * C3-4, C4-5, and C5-6," as well as an MRI of the lumbar spine conducted on September 9, 2009, which revealed "posterior disc herniations at * * * L4-5 and L5-S1" (*id.* at Exh. H). Dr. Sharma's examination included an evaluation of the following: mental status, cranial nerves, motor system, reflexes, sensory, gait and coordination, as well as the skull and spine (*id.*). Dr. Sharma noted normal findings throughout the course of his examination and with particular respect to his sensory evaluation he stated that "[t]he Tinel's sign and Phalen's sign [were] negative" (*id.*). Range of motion testing of the cervical and lumbar spines also revealed normal findings and Dr. Sharma opined that "[t]here is no neurological disability" and "no neurological limitations with regard to continuation of usual work and activities of daily living" (*id.*).

Dr. Israel conducted an orthopedic examination of the plaintiff on November 23, 2010 (*id.* at Exh. I). Range of motion testing of the cervical spine revealed normal findings and Dr. Israel noted the Cervical Compression Test, the Valsava Test, the Spurling test, as well as the Soto-Hall test were all negative (*id.*). As to the lumbar spine, range of motion testing again revealed normal findings and Dr. Israel noted the absence of either tenderness or paraspinal muscle spasm and that straight leg raising was negative at 75 degrees, which Dr. Israel stated was "normal" (*id.*). Dr. Israel further noted that "[t]he Bechterew, Hubert and Kernig tests were all negative" and ultimately concluded that the plaintiff had sustained "sprain/strains of the cervical spine and lumbar spine," which had resolved and that there

was no "objective orthopedic disability as a result of this alleged injury" (*id.*).

Dr. Tantleff conducted an independent radiologic review with respect to the two aforementioned MRI studies conducted as to the plaintiff's cervical and lumbar spines (*id.* at Exh. G). As to the cervical MRI, Dr. Tantleff opined that same "reveals longstanding chronic degenerative discogenic disc changes and cervicothoracic spondylosis" (*id.*). Dr. Tantleff further stated that "[t]he findings are consistent with the individual's age and are not causally related to the incident of 7/26/09 * * * as the findings are chronic longstanding processes requiring years to develop as presented and are consistent with wear-and-tear of the normal aging process" (*id.*). As to the MRI of the lumbar spine, Dr. Tantleff similarly opined that said test revealed "longstanding chronic degenerative disc disease and thoracolumbar spondylosis with advanced changes at L4/5" and that the findings "are consistent with the individual's age and not causally related to the date of incident of 7/26/09" (*id.*).

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient proof, in admissible form, sufficient to warrant the Court to direct judgment in the movant's favor (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York,* 49 NY2d 557 [1980]). It is incumbent upon the non-moving party to lay bare all of the facts which relate to the issues raised in the motion (*Mgrditchian v Donato*, 141

AD2d 513 [2d Dept 1998]). When considering a motion for summary judgment, the function of the court is not to resolve factual issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247 [1980]).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears the specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law §5102[d] (*Gaddy v Eyler*, 79 NY2d 955 [1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient admissible evidence to raise an issue of fact as to the existence of a "serious injury"(*Licari v Elliott*, 57 NY2d 230 [1982]).

Within the scope of the defendant's burden, the defendants' medical experts must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part under evaluation (*Black v Robinson,* 305 AD2d 438 [2d Dept 2003]; *Minlionica v Shahabi,* 296 AD2d 569 [2d Dept 2002]; *Junco v Ranzi,* 288 AD2d 440 [2d Dept 2001]; *Qu v Doshna*, 12 AD3d 578 [2d Dept 2004]; *Mondi v Keahan*, 32 AD3d 506 [2d Dept 2006]; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]; *Dufel v Green*, 84 NY2d 795 [1995]).

In the instant matter, the plaintiff is alleging that her injuries fall within the following enumerated categories as defined in Insurance Law §5102[d]: "permanent consequential limitation of use of a body organ or member"; "significant limitation of use of a body function or system," and; "a medically determined injury or impairment 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 and eighty days immediately following the

occurrence of the injury or impairment" [hereinafter the "90/180 category"] (*see* Ferrante Affirmation in Opposition at ¶¶4, 20).

Having carefully reviewed the record, the Court finds that the moving defendants have established their *prima facie* case entitling them to judgment as a matter of law (*Gaddy v Eyler,* 79 NY2d 955 [1992], *supra*). A review of affirmed medical reports of Dr. Sharma and Dr. Israel indicates that said experts recited the specific tests upon which their respective medical opinions were predicated and compared the plaintiff's range of motion measurements to those which are deemed normal (*Black v Robinson,* 305 AD2d 438 [2d Dept 2003], *supra; Qu v Doshna*, 12 AD3d 578 [2d Dept 2004], *supra*; *Mondi v Keahan*, 32 AD3d 506 [2d Dept 2006], *supra*; *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], *supra*; *Dufel v Green*, 84 NY2d 795 [1995], *supra*).

Additionally, with particular respect to the 90/180 category, the Court notes that Ms. Quattrochi clearly testified she did not lose any time from work as a result of the subject accident (*Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dept 2008]; *Geliga v Karibian*, 56 AD3d 518 [2d Dept 2008]; *Cantave v Gelle*, 60 AD3d 988 [2d Dept 2009]; *Berson v Rosada*, 62 AD3d 636 [2d Dept 2009]). Thus, the burden now shifts to the plaintiff to demonstrate a triable issue of fact with respect to the existence of a "serious injury" (*Licari v Elliott*, 57 NY2d 230 [1982], *supra*).

In opposing the instant application, in addition to proffering the plaintiff's medical records, counsel strenuously challenges the medical evidence submitted by the defendants (*see* Ferrante Affirmation in Opposition at ¶¶12-17). Initially, counsel asserts that the while each of the defendants' examining experts opine that the plaintiff exhibited full range of motion, there is a discrepancy in relation to that which each expert considers a normal measurement, thus warranting denial of the instant application (*id.* at ¶13). With particular respect to the report of Dr. Israel, counsel posits that same should be summarily disregarded (*id.* at ¶14). To this point, counsel contends that while Dr. Israel

recites herein what he deems to be normal ranges of motion, said ranges are markedly different from those upon which he has alternatively recited in medical reports submitted within the context of other actions (*id.* at ¶14).

In addition to the foregoing, counsel for the plaintiff contends that even assuming the moving defendants have demonstrated their entitlement to judgment as a matter of law, the plaintiff has raised a triable issue of fact by the submission of various medical reports authored by her treating physicians (*id.* at ¶20). The medical evidence provided by the plaintiff herein includes an Affidavit of Dr. Robert Gelman, D.C., together with his accompanying medical reports, an affirmation from Dr. Richard Rizzuti, M.D., an affirmation from Dr. Bradley Cohen, D.O., and an affirmation of Dr. David Benatar, M.D. (*id.* at Exhs. A, B, C, D, E).

Dr. Gelman initially examined the plaintiff on July 27, 2009 at which time range of motion testing was accomplished by use of a goniometer and revealed restrictions in the plaintiff's cervical and lumbar spines (*id.* at Exhs. A, B). Dr. Gelman noted that Kemp's test, Ely's test and the Yoeman's test were each positive bilaterally (*id.*). Thereafter, Dr. Gelman continued to treat the plaintiff and recently reevaluated her physical condition on April 26, 2011, the results of which again revealed restrictions in the plaintiff's cervical and lumbar spines (*id.*). At this recent examination, Dr. Gelman stated that "digital palpation revealed severe tenderness and marked myospasm in the cervical and lumbar regions" and that the Jackson's Foraminal Compression test, the Shoulder Compression test, Kemp's test, Ely's test and Yoemans's test, were all positive (*id.*). Dr. Gelman ultimately concluded that the plaintiff "has suffered a permanent injury to her neck and low back" and that such injury was causally related to the subject accident (*id.*). Dr. Rizzuti has submitted three affirmations, two of which are dated October 18, 2010 and the third of which is dated April 2011 (*id.* at Exh. C). As to those affirmations dated October

18, 2010, Dr. Rizzuti avers that he "personally read" the MRI's taken of the plaintiff's cervical and lumbar spines and attests "to the accuracy of the information inscribed on the attached MRI including all the diagnosis, impressions and findings" (*id.*). As to the affirmation dated April 2011, Dr. Rizzuti states that he has reviewed the reports of Dr. Tantleff and upon said review, "disagree[s] with his opinion that a longstanding chronic degenerative discogenic disc disease exists in plaintiff's cervical and lumbar spine" (*id.*).

Dr. Bradley Cohen affirms that on April 28, 2010, he conducted "Electrodiagnosis and Electromyography" in relation to the plaintiff's upper and lower extremities, the results of which revealed "bilateral C5-C6 radiculopathy," as well as "bilateral radiculopathy within bilateral L4-L5 lumbar segments," both of which are "associated with a mild to a moderate degree of denervation" (*id.* at Exh. D).

When alleging a serious injury which falls within the ambit of Insurance Law §5102[d], a plaintiff is required to provide, *inter alia*, objective medical evidence contemporaneous with the subject accident, which demonstrates the extent and degree of the alleged physical limitation resulting from the injury (*see Ifrach v Neiman,* 306 AD2d 380 [2d Dept 2003]; *Jason v Danar,* 1 AD3d 398 [2d Dept 2003]; *Felix v New York City Tr. Auth.*, 32 AD3d 527 [2d Dept 2006]; *Garcia v Sobles*, 41 AD3d 426 [2d Dept 2007]; *Bestman v Seymour*, 41 AD3d 629 [2d Dept 2007]). Further, in addition to providing medical proof contemporaneous with the subject accident, the plaintiff must also provide competent medical evidence containing verified objective findings, which are based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury (*Kauderer v Penta*, 261 AD2d 365[2d Dept 1999]; *Constantinou v Surinder*, 8 AD3d 323 [2d Dept 2004]; *Barzey v Clarke,* 27 AD3d 600 [2d Dept 2006]).

The Court has carefully reviewed the medical submissions provided by the plaintiff herein, and

applying the foregoing principles thereto, finds that the plaintiff has raised a triable issue of fact as to those categories denominated "permanent consequential limitation of use of a body organ or member" *and* "significant limitation of use of a body function or system" (*Licari v Elliott*, 57 NY2d 230 [1982], *supra*). In the matter *sub judice*, the medical records of Dr. Gelman are contemporaneous with the subject accident and specifically set forth the initial range of motion restrictions as to the plaintiff's cervical and lumbar spines (*Ifrach v Neiman,* 306 AD2d 380 [2d Dept 2003], *supra*). Moreover, in rendering his assessment, Dr. Gelman set forth the objective tests upon which his medical conclusions were based and properly compared his findings to those which are deemed normal for the particular body parts under evaluation (*Morris v Edmund*, 48 AD3d 432 [2d Dept 2008]; *Johnson v Tranquille*, 70 AD3d 645 [2d Dept 2010]; *Berson v Rosada Cab Corp*., 62 AD3d 636 [2d Dept 2009], *supra*; *Peri v Meher*, 74 AD3d 930 [2d Dept 2010]).

Further, in addition to providing medical evidence contemporaneous to the subject accident, the plaintiff has proffered the above-referenced medical report of Dr. Gelman of April 26, 2011, wherein the plaintiff's treating chiropractor clearly noted that upon reexamination, the plaintiff exhibited restricted ranges of motion in the cervical and lumbar spines (*Kauderer v Penta*, 261 AD2d 365[2d Dept 1999], supra; *Constantinou v Surinder*, 8 AD3d 323 [2d Dept 2004], *supra*).

However, with respect to the 90/180 category, the Court finds that the plaintiff has failed to raise a triable issue of fact (*Licari v Elliott*, 57 NY2d 230 [1982], *supra*). In order to establish an injury in this category, the plaintiff must demonstrate that he or she "has been curtailed from preforming his [or her] ususal activities to a great extent rather than some slight curtailment" (*id.* at 236; *Gaddy v Eyler*, 79 NY2d 955 *supra* at 958). Here, the record herein contains an opposing affidavit proffered by the plaintiff wherein she avers that "during the first six months post-accident [she] was limited in many

activities but was able to work because my employer was flexible with hours and the type of work I did"(*see* Ferrante Affirmation in Support at Exh. F at ¶2). However, even fully crediting the plaintiff's assertions as true, same do not establish that she was prevented from performing "substantially all" of her "ususal activities to a great extent" (*id.*; Insurance Law §5102[d]). Moreover, as noted above, the plaintiff testified that she did not lose any time from work as a result of the subject accident (*Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664 [2d Dept 2008], *supra*; *Geliga v Karibian*, 56 AD3d 518 [2d Dept 2008], *supra*; *Cantave v Gelle*, 60 AD3d 988 [2d Dept 2009], *supra*; *Berson v Rosada*, 62 AD3d 636 [2d Dept 2009], *supra*).

Therefore, based upon the foregoing law and analysis, the application interposed by defendants, Ronald A. Sorto and Jose Marquez, which seeks an order granting summary judgment dismissing the plaintiff's complaint is hereby **DENIED** as to those categories denominated "permanent consequential limitation of use of a body organ or member" *and* "significant limitation of use of a body function or system" and **GRANTED** as to the 90/180 category.

All applications not specifically addressed are **DENIED**. It is hereby

ORDERED, that the parties are directed to appear in DCM for trial on August 17, 2011 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

DATED: August 15, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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