SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

ALICIA CAPUTO,

Plaintiff,

-against-

JACKI B. GUTMAN,

Defendant.

INDEX NO.: 007352/09

MOTION SEQ. NO.: 001

MOTION DATE: 7/20/11

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

The motion by defendant JACKI B. GUTMAN for summary judgment pursuant to **CPLR §3212**, is determined as follows.

Plaintiff ALICIA CAPUTO, age 32, alleges that on June 1, 2008, at approximately 12:00 a.m., she was the owner and operator of a motor vehicle which came into contact with a motor vehicle owned and operated by defendant. The accident occurred on Mutton Town Lane at its intersection with Route 25A in East Norwich in the Town of Oyster Bay. Defendant moves for an order dismissing plaintiff's complaint pursuant to **CPLR §3212** on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**. The motion is determined as follows.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7), significant limitation of use of a body function or system (8), or a medically determined injury which prevented plaintiff from performing all of the material acts constituting her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of her motion for summary judgment, defendant submits (1) an affirmed report of orthopedist Joseph Stubel, MD, dated October 18, 2010, covering an examination of that date; and (2) an affirmed report of examination, dated December 2, 2010, of neurologist Mathew M. Chacko, MD, covering an examination of that date.

Using a goniometer, Dr. Stubel reported that physical examination of plaintiff's cervical spine, revealed normal range of motion results, comparing the results to norms. Dr. Stubel also found normal reflexes, normal motor strength in the upper extremities "except for minimal decrease in pinprick sensation in the C6 area on the right side." Dr. Stubel diagnosed neck sprain and opined that although plaintiff "has minimal residual decreased sensation into the right hand, she has no signs of disability." Dr. Chacko found that physical examination of the cervical spine, revealed normal range of motion results comparing the results to norms. Dr. Chacko also reported "no muscle weakness, reflex asymmetry or focal sensory changes." Dr. Chacko concluded that "there is no clinical evidence of any permanent neurological injuries" and that plaintiff is not disabled.

In addition, defendant submits the deposition testimony of plaintiff conducted on June 29, 2010. Plaintiff testified that she missed two weeks of work intermittently as a teacher and thereafter reduced her hours as she no longer stayed at work after the school day ended at approximately 2:30 to 3:00 p.m. [Motion Exh. D pp. 66, 73-74]. Plaintiff complained of neck pain and insomnia only, and testified that the two weeks she missed work and her shorter hours thereafter were due to insomnia (which began the day after the accident), and not neck pain [Motion Exh. D pp. 67-69, 73]. Plaintiff testified that she resumed her regular hours in September 2009 [Motion Exh. D pp. 74-75]. Plaintiff stated that her insomnia was sporadic as it occurred once every two weeks [Motion Exh. D p. 69].

The Court notes that plaintiff provided inconsistent testimony about her activities subsequent to the accident. She testified that for the two months following the accident (July and August 2008), after the school year ended, she stayed at home and in bed [Motion Exh. D pp. 69-70] but also testified that she traveled to New Hampshire where she stayed in July and August of 2008. Plaintiff testified that while in New Hampshire, she went to a lake and shopping [Motion Exh. D pp. 79-80].

Plaintiff testified that she saw multiple medical providers most of whom she last saw one to one and one half years prior to the deposition, with the exception of chiropractor Douglas B. Wright, DC ("Wright") with whom she was still treating [Motion Exh. D pp. 55-56]. Plaintiff also stated that she was also still treating with acupuncturist Joseph Giacona but that she began treatment with him more than one year after the accident [Motion Exh. D pp. 61-63].

The Court finds that the reports of defendant's physicians are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations to satisfy the Court that an "objective basis" exists for their opinions. Accordingly, the Court finds that defendant has made a *prima facie* showing, that plaintiff ALICIA CAPUTO did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiff argues that defendant has failed to make a *prima facie* showing that she did not sustain a serious injury on the basis that defendant's medical examiners failed to comment on plaintiff's alleged right shoulder injury as claimed in plaintiff's original Bill of Particulars. The Court finds that there is no admissible evidence to indicate that plaintiff suffered from a shoulder injury. At her deposition, plaintiff testified that the accident resulted in insomnia and injuries to her cervical spine. In fact, in plaintiff's own affidavit, sworn to one and one-half months after the filing of the within motion, she fails to mention any injury to her shoulder. The only reference to a shoulder injury was in the affidavit of plaintiff's chiropractor, Wright, in his review of a December 4, 2010 examination of plaintiff, two and one-half years after the accident. Consequently, in this case, the defendant's failure to address plaintiff's alleged shoulder injury does not change the Court's determination that defendant has made a *prima facie* showing that plaintiff did not sustain a serious injury.

Defendant argues that the Court should disregard any new injuries alleged in plaintiff's Supplemental Bill of Particulars and Second Supplemental Bill of Particulars on grounds that, without leave of the Court, plaintiff served these Bills of Particular several months after the Notice of Issue was filed and the within motion for summary judgment was served. Pursuant to **CPLR §3042(b)**, a party is entitled to serve an amended bill of particulars once as of right prior to filing the note of issue. Subsequent to filing a note of issue, a party may serve a supplemental bill of particulars at any time but no less than thirty days prior to trial. **CPLR §3043(b)**. However, "it is well settled that a supplemental bill of particulars may be used for purposes of updating 'claims of continuing special damages and disabilities' but may not be used for adding new injuries or damages (*internal citations*

omitted)" **Kraycar v. Monahan**, 49 AD3d 507. In plaintiff's original Bill of Particulars, plaintiff claims injuries to her cervical spine and right shoulder. In plaintiff's Supplemental Bill of Particulars, in addition to claiming further injuries to those areas, plaintiff asserts new injuries, including aches and spasms in her lower back, and subluxation syndrome and biomedical failure in certain areas of plaintiff's thoracic and lumbar spines, and ligament pathology in certain areas of plaintiff's lumbar spine. Further non-cervical injuries claimed in plaintiff's Second Supplemental Bill of Particulars include lumbar radiculopathy and insomnia. The Court finds that only plaintiff's claimed insomnia, can be considered, although barely, "continuing consequences" of injuries to plaintiff's cervical spine as set forth in her original Bill of Particulars. Any injuries to plaintiff's lumbar and thoracic spines claimed in Bills of Particulars served after the Note of Issue was filed, are new injuries which do not qualify for an as of right post note of issue supplemental bill of particular filing under **CPLR §3043(b)**. *See* **Barrera v. City of NY**, 265 AD2d 516; *Cf* **Witherspoon v. Surat Realty Corp.**, 82 AD3d 1087; **Maraviglia v. Lokshina**, 68 AD3d 1066.

In opposition, plaintiff submits (1) an affidavit of chiropractor Wright, sworn to on March 28, 2011, covering examinations of July 23, 2008, December 4, 2010 and March 10, 2011. The Court notes that to the extent that Wright describes and relies on reports of medical providers or studies, such as EMG and MRIs, which are not in the record, and therefore unsworn, they cannot be considered. *See generally* **Ayala v. Katsionis**, 67 AD3d 836; **Giannini v. Cruz**, 67 AD3d 638; **Ferber v. Madorran**, 60 AD3d 725; **Sorto v. Morales**, 55 AD3d 718; **Gonzales v. Fiallo**, 47 AD3d 760; **Phillips v. Zilinsky**, 39 AD3d 728; **Sammut v. Davis**, 16 AD3d 658; **Friedman v. U-Haul Truck Rental**, 216 AD2d 266.

At his examination of plaintiff conducted on July 23, 2008, the Court finds Wright's range of motion results to be conclusory and incomplete. While Wright noted a "decreased" range of motion in plaintiff's cervical spine, he failed to provide the range of motion results compared against a normal range, leaving the Court to speculate as to plaintiff's actual extent of range of motion and how it compared to normal. *See* **Lewars v. Transit Facility Management Corp.**, 84 AD3d 1176; **Perl v. Meher**, 74 AD3d 930. Likewise, Wright stated that straight leg raising was "mildly positive at 50 degrees" without comparing said finding to what is considered normal. *See* **Calabro v. Petersen**, 82 AD3d 1030; **Sainnoval v. Sallick**, 78 AD3d 922; **Frasca-Nathans v. Nugent**, 78 AD3d 651; **Leopold v. New York City Transit Authority**, 72 AD3d 906. The earliest quantified range of motion results were from an examination performed on December 4, 2010. Consequently, Wright's affidavit does not constitute competent medical evidence sufficiently contemporaneous with the accident. *See* **Lewars v. Transit Facility Management Corp.**, 84 AD3d 1176; **Lippman v. Flaherty**, 83 AD3d 668; **D'Orsa v. Bryan**, 83 AD3d 646; **Capriglione v. Rivera**; 83 AD3d 639; **Foley v. Liloia**, 82 AD3d 832; **Husbands v. Levine**, 79 AD3d 1098; **Torchon v. Oyezole**, 78 AD3d 929; **Posa v. Guerrero**, 77 AD3d 898; **Srebnick v. Quinn**, 75 AD3d

637; **Delarosa v. McLedo**, 74 AD3d 1012; **Simanovsky v. Barbaro**, 72 AD3d 930. In addition, plaintiff fails to proffer any other affirmed medical reports contemporaneous with the accident. "Without admissible evidence of quantified range-of-motion limitations contemporaneous with the accident, [plaintiff] could not have established the duration of [her] injuries." Id. at 932. *See* **Kuchero v. Tabachnikov**, 54 AD3d 729; **Ferraro v. Ridge Car Service**, 49 AD3d 498; **King v. Islam**, 43 AD3d 1001.

The Court also finds that the "gap in treatment" is fatal to plaintiff's claim that the evidence submitted is sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. "Even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury–such as a gap in treatment, an intervening medical problem or a pre-existing condition–summary dismissal of the complaint may be appropriate." **Pommells v. Perez**, 4 NY3d 566 at 572. The only competent medical evidence in the record consists of Wright's report of results covering examinations conducted on July 23, 2008 and an examination conducted on December 4, 2010, leaving a two and one half year gap in treatment. Given the lack of other competent medical evidence, Wright's claim that plaintiff's injuries are causally related to the accident is insufficient to demonstrate a causal connection between the accident and plaintiff's injuries. *See* **Pommells v. Perez**, Id.

Further, there is insufficient evidence that plaintiff's alleged injuries are permanent **§5102(d)**((7)). Wright's assertion that plaintiff's injuries are permanent' is conclusory as he fails to offer any evidence of permanency. "Mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury' and [summary judgment] should be granted for defendant where plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements." **Lopez v. Senatore**, 65 NY2d 1017, 1019. *See* **Gaddy v. Eyler**, 79 NY2d 955; **Lincoln v. Johnson**, 225 AD2d 593; **Orr v. Miner**, 220 AD2d 567. Plaintiff's claims of the permanency of her injuries are conclusory and not supported by the record.

Plaintiff has also failed to submit competent medical evidence that the injuries that she sustained rendered her unable to perform all of her usual and customary daily activities for ninety days of the first one hundred eighty days following the accident. *See* **Lewars v. Transit Facility Management Corp.**, *supra*; **McCloud v. Reyes**, 82 AD3d 848; **Posa v. Guerrero**, 77 AD3d 898; **Riley v. Randazzo**, 77 AD3d 647; **Baena v. Almonte**, 74 AD3d 1262; **Vasquez v. John Doe #1**, 73 AD3d 1033; **Casimir v. Bailey**, 70 AD3d 994; **Pacheco v. Connors**, 69 AD3d 818; **Sainte-Aime v. Ho**, 274 AD2d 569. The Court notes that plaintiff testified at her deposition that she missed intermittently only two weeks of work.

Further, the Court finds plaintiff's affidavit is self serving and insufficient to raise an

issue of fact. *See* **Riley v. Randazzo**, *supra*; **Villante v. Miterko**, 73 AD3d 757; **Lozusko v. Miller**, 72 AD3d 908; **Stevens v. Sampson,** 72 AD3d 793; **Keith v. Duval**, 71 AD3d 1093; **Singh v. City of New York**, 71 AD3d 1121; **Larson v. Delgado**, 71 AD3d 739; **Acosta v. Alexandre**, 70 AD3d 735. In the absence of competent medical evidence, plaintiff's statement in her affidavit that she has "difficulty sitting and standing for long periods of time, driving, looking at [her] baby because of pain in [her] neck, reading, bike riding, watching movies, skiing and sleeping", is self serving and insufficient to demonstrate a serious injury. *See* **Friscia v. Mak Auto, Inc.**, 59 AD3d 492; **Duke v Saurelis**, 41 AD3d 770. Plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. *See* **Scheer v. Koubek**, 70 NY2d 678; **Rovello v. Volcy**, 83 AD3d 1034; **Calabro v. Petersen**, 82 AD3d 1030; **Catalano v. Kopmann**, 73 AD3d 963; **Sham v. B&P Chimney Cleaning & Repair Co., Inc.**, 71 AD3d 978; **Ambos v. New York City Transit Authority**, 71 AD3d 801.

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**.

Based on the foregoing, it is

ORDERED, that the motion by defendant JACKI B. GUTMAN, for summary judgment pursuant to **CPLR §3212** dismissing the complaint of plaintiff ALICIA CAPUTO on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**.

This constitutes the Order of the Court

Dated: September 30, 2011

J.S.C.

ENTERED
OCT 21 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE