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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Susan Halladay and Christina Halladay,

Plaintiffs,

-against-

Joseph Cicero,

Defendant.

Motion Sequence No.: 001; MOT.D
Motion Date: 5/6/11
Submitted: 8/26/11

Index No.: 00472/2009

Attorney for Plaintiff:

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Attorney for Defendant:

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Clerk of the Court

Upon the following papers numbered 1 to 55 read upon this motion by defendant for summary judgment: Notice of Motion and supporting papers, 1 - 29; Answering Affidavits and supporting papers, 30 - 49; 50 - 53; Replying Affidavits and supporting papers, 54 - 55.

Plaintiffs Susan Halladay and Christina Halladay commenced this action against defendant Joseph Cicero to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred in the High Occupancy Vehicle ("HOV") lane of the eastbound Long Island Expressway ("LIE"), near Exit 51, in the Town of Huntington on October 30, 2007. The accident allegedly occurred when the vehicle owned and operated by Joseph Cicero struck the rear of the vehicle operated by Susan Halladay while it was stopped in traffic. At the time of the accident, Christina Halladay was riding as a front seat passenger in the Halladay vehicle.

By her bill of particulars, Susan Halladay alleges that she sustained various personal injuries as a result of the subject accident including disc bulges at level C6/C7 and level L4/L5, a disc

protrusion at level C4/C5, hemangioma of the L3 vertebral body and an intradural extramedullay lesion posterior to the T6 vertebral body. Susan Halladay further alleges that as a result of the injuries she sustained in the accident she has been incapacitated from her employment as a waitress since the date of the accident and that she missed approximately 17 days from her employment as a teacher's assistant. Christina Halladay, by her bill of particulars, also alleges that she sustained various personal injuries as a result of the subject accident including disc herniations at levels L4 through S1, cervical strain syndrome, thoracolumbosacral strain syndrome and posterior spondylosis at level T11/T12. Christina Halladay further alleges that as a result of the injuries she sustained in the accident she missed approximately one month from school and work.

Defendant now moves for summary judgment on the asserted basis that the injuries plaintiffs allege to have sustained as a result of the subject accident do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In particular, defendant contends that the injuries Susan Halladay claims she sustained due to the subject accident were caused by a prior slip and fall accident which occurred in July 2005. Defendant also asserts that the alleged injuries sustained by Christina Halladay to her neck and back are not causally related to the subject accident. In support of the motion, defendant submits copies of the pleadings, plaintiffs' deposition transcripts and uncertified copies of plaintiffs' medical records. Defendant also submits the sworn medical reports of Richard Lechtenberg, M.D., and Edward Toriello, M.D. At defendant's request, Dr. Lechtenberg conducted an independent neurological examination of Susan Halladay on October 18, 2010, and he conducted an independent neurological examination of Christina Halladay on October 19, 2010. At defendant's request, Dr. Toriello conducted independent orthopedic examinations of Susan Halladay and Christina Halladay on October 26, 2010. In addition, defendant submits copies of the pleadings and a deposition transcript from an action brought by Susan Halladay against Coram Country Lanes, LLC in 2006.

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 [1995]; see also, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [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 [1982]; Porcano v. Lehman, 255 AD2d 430 [2nd Dept., 1988]; Nolan v. Ford, 100 AD2d 579 [2nd Dept., 1984], aff'd 64 NY2d 681[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., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [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" (Pagano v. Kingsbury, 182 AD2d 268, 270 [2nd Dept., 1992]) to demonstrate entitlement to judgment as a matter of law. 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 [2nd Dept., 2001]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Vignola v. Varrichio, 243 AD2d 464 [2nd Dept., 1997]; Torres v. Micheletti, 208 AD2d 519 [2nd 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, 84 NY2d 795 [1995]; Tornabene v. Pawlewski, 305 AD2d 1025 [4th Dept., 2003]; Pagano v. Kingsbury, 182 AD2d 268, 270 [2nd Dept., 1992]). 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 [2nd Dept., 2006]; Rich-Wing v. Baboolal, 18 AD3d 726 [2nd Dept., 2005]; see generally, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Based upon the evidence adduced, defendant failed to establish, *prima facie*, his entitlement to judgment as a matter of law on the ground asserted, to wit, that Susan Halladay did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Licari v. Elliott, 57 NY2d 230 [1982]). Despite the fact that defendant's examining neurologist, Dr. Lechtenberg, concludes that Susan Halladay does not have any neurological deficits, he states in his medical report that the extension of Susan Halladay's cervical spine is 10 degrees (normal is 60 degrees) and that the lateral flexion in her lumbar spine is 20 degrees on the right and 10 degrees on the left (normal is 25 degrees). Additionally, defendant's examining orthopedist, Dr. Toriello, states in his medical report that the injuries Susan Halladay sustained to her neck as a result of the subject accident are "an acute exacerbation of a pre-existing condition." Thus, the findings of defendant's experts failed to show that the aggravation of a pre-existing cervical condition and the limitations noted in Susan Halladay's cervical and lumbar regions were not caused by the subject accident but, instead, were the result of a prior accident (see, Pero v. Transervice Logistics, Inc., 83 AD3d 681 [2nd Dept., 2011]; Keenum v. Atkins, 82 AD3d 843 [2d Dept., 2011]; Rabinowitz v. Kahl, 78 AD3d 678 [2nd Dept., 2010]; Pfeiffer v. New York Cent. Mut. Fire Ins. Co., 71 AD3d 971 [2nd Dept., 2010]). In addition, while Dr. Lechtenberg opines that Susan Halladay voluntarily restricted her range of motion in her cervical and lumbar spine, he failed to explain or substantiate, with objective medical evidence, the basis for his conclusion that the noted limitations were self-imposed (see, Astudillo v. MV. Transp., Inc., 84 AD3d 1289 [2nd Dept., 2011]; Iannello v. Vasquez, 78 AD3d 1121 [2nd Dept., 2011]; Reitz v. Seagate Trucking, Inc., 71 AD3d 975 [2nd Dept., 2010]; Hi Ock Park-Lee v. Voleriaperia, 67 AD3d 734 [2nd Dept., 2009]). As a result, the proof submitted by defendant failed to objectively demonstrate that Susan Halladay did not suffer a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see, Abraham v. Bello, 29 AD3d 497 [2nd Dept., 2006];

Jones v. Jacob, 1 AD3d 485 [2nd Dept., 2003]). Having determined that defendant failed to establish his initial burden, it is unnecessary for the court to consider whether Susan Halladay's opposition papers were sufficient to raise a triable issue of fact (see, Bright v. Moussa, 72 AD3d 859 [2nd Dept., 2010]; Kouros v. Mendez, 41 AD3d 786 [2nd Dept., 2007]; Alma v. Samedy, 24 AD3d 398 [2nd Dept., 2005]).

However, defendant did establish his *prima facie* entitlement to judgment as a matter of law that Christina Halladay did not sustain a did not sustain a "serious injury" as required by Insurance Law §5102(d) as a result of the subject accident (see Toure v. Avis Rent a Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Hasner v. Budnik, 35 AD3d 366 [2nd Dept., 2006]). The Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law §5102(d) (see, Catalano v. Kopmann, 73 AD3d 963 [2nd Dept., 2010]; Caraballo v. Kim, 63 AD3d 976 [2nd Dept., 2009]; Kilakos v. Mascera, 53 AD3d 527 [2nd Dept., 2008]). Dr. Toriello states in his medical report that an examination of Christina Halladay reveals that she has full range of motion in her spine's cervical and thoracolumbosacral regions, and in her right and left shoulders. Dr. Toriello opines that the cervical hyperextension injury and the strains to Christina Halladay's lower back and thoracolumbosacral region that she sustained in the subject accident have all resolved. Dr. Toriello concludes his report by stating that Christina Halladay is capable of performing the duties of her occupation and that she has no evidence of an orthopedic disability as a result of the accident. Likewise, Dr. Lechtenberg states in his report that Christina Halladay sustained spine strains as a result of the accident, that she currently has no objective neurological deficits and that there is no need for any further neurologic treatment. Dr. Lechtenberg states that Christina Halladay is not disabled and is capable of performing any job for which she is qualified.

Furthermore, reference to Christina Halladay's own deposition testimony sufficiently refutes the "90/180" category under Insurance Law § 5102(d) (see, Jack v. Acapulco Car Serv., Inc., 72 AD3d 646 [2nd Dept., 2010]; Bleszcz v. Hiscock, 69 AD3d 890 [2nd Dept., 2010]; Lopez v. Abdul-Wahab, 67 AD3d 598 [1st Dept., 2009]; Kuchero v. Tabachnikov, 54 AD3d 729 [2nd Dept., 2008]).

In that defendant met his initial burden of proof, the burden shifted to Christina Halladay 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 [2005]; see generally, Zuckerman v. City of New York, 49 NY2d 557 [1980]). To recover under the "limitation of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (see, Magid v. Lincoln Servs. Corp., 60 AD3d 1008 [2nd Dept., 2009]; Laruffa v. Yui Ming Lau, 32 AD3d 996 [2nd Dept., 2006]; Cerisier v. Thibiu, 29 AD3d 507 [2nd Dept., 2006]; Meyers v. Bobower Yeshiva Bnei Zion, 20 AD3d 456 [2nd Dept., 2005]). 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 may also suffice (see, Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002]; Dufel v. Green, 84 NY2d 795 [1995]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see Licari v. Elliott, 57 NY2d 230 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical

evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (see, Scheer v. Koubek, 70 NY2d 678 [1987]). Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (see, Caulkins v. Vicinanzo, 71 AD3d 1224 [3rd Dept., 2010]; Ayzen v. Melendez, 299 AD2d 381 [2nd Dept., 2002]).

Christina Halladay opposes the motion on the ground that defendant failed to demonstrate that she did not sustain an injury within the "limitation of use" categories or the "90/180" category of Insurance Law § 5102(d) as a result of the subject accident. In support of the motion, Christina Halladay submits the sworn medical report of Frank Oliveto, M.D., an uncertified copy of the police accident report, the unsworn medical report of Robert Galler, M.D., and her own affidavit.

In opposition to defendant's *prima facie* showing, Christina Halladay failed to raise a triable issue of fact as to whether she sustained a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Licari v. Elliott, 57 NY2d 230 [1982]; Ali v. Khan, 50 AD3d 454 [1st Dept., 2008]). Christina Halladay's examining orthopedist, Dr. Oliveto, states in his medical report that she has full range of motion in her cervical and thoracolumbosacral regions, that there is no causally related evidence of a disability as a result of the subject accident and that she is capable of performing all of her daily living activities without restrictions. Dr. Oliveto states that although there were subjective limitations of motion in Christina Halladay's thoracolumbosacral area, there were no significant objective findings, such as palpable muscle spasm. Dr. Oliveto opines that the cervical and thoracolumbosacral strain syndrome that Christina Halladay sustained as a result of the accident has resolved and that there is no indication for any further orthopedic treatment or testing. Additionally, the medical report of Dr. Robert Galler is insufficient to raise a triable of issue of fact since it is unaffirmed and, therefore, in inadmissible form (see, Grasso v. Angerami, 79 NY2d 813 [1991]; Lively v. Fernandez, 85 AD3d 981 [2nd Dept., 2011]). In any event, even if the Court were to consider Dr. Galler's report, Dr. Galler states that Christina Halladay's low back pain "may be related to her disc dessication at L5/S1," and that despite her having a left-sided disc herniation at level L5/S1, she does not have any radicular-type symptoms. Consequently, Christina Halladay has proffered insufficient medical evidence to demonstrate that she sustained an injury within the "limitation of use" categories (see Licari v. Elliott, 57 NY2d 230 [1982]; Pierson v. Edwards, 77 AD3d 642 [2nd Dept., 2010]), or within the "90/180" category (see, Jack v. Acapulco Car Serv., Inc., 72 AD3d 646 [2nd Dept., 2010]; Bleszcz v. Hiscock, 69 AD3d 890 [2nd Dept., 2010]; Nguyen v. Abdel-Hamed, 61 AD3d 429 [1st Dept., 2009]; Sainte-Aime v. Ho, 274 AD2d 569 [2nd Dept., 2000]). The term "significant" limitation must be construed as more than a minor limitation of use (see, Licari v. Elliott, 57 NY2d 230 [1982]; Leschen v. Kollarits, 144 AD2d 122 [3rd Dept., 1988]; Gootz v. Kelly, 140 AD2d 874 [3rd Dept., 1988]). Lastly, Christina Halladay's affidavit was insufficient to raise a triable issue of fact as to whether she sustained an injury within the meaning of Insurance Law §5102(d) (see, Villante v. Miterko, 73 AD3d 757 [2nd Dept., 2010]; Singh v. City of New York, 71 AD3d 1121 [2nd Dept., 2010]; Luna v. Mann, 58 AD3d 699 [2nd Dept., 2009]).

Accordingly, it is

ORDERED that this motion by defendant for summary judgment is granted to the extent that Christina Halladay's cause of action is dismissed, but it is denied as to Susan Halladay's cause of action.

Dated: 12/15/2011

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**