SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

ARIS P. GRANT,

Plaintiff,

-against-

REEL ELECTRIC, INC. and JOSEPH BARTNICKI,

Defendants.

MOTION DATE: 10/05/11

MOTION SEQ. NO.: 001

INDEX NO.: 2680/10

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

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

Motion by defendants REEL ELECTRIC, INC. and JOSEPH BARTNICKI for summary judgment on grounds that plaintiff ARIS P. GRANT failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is determined as follows.

Plaintiff alleges that on August 5, 2008 at approximately 5:02 p.m., she was the owner and operator of a motor vehicle which came into contact with a vehicle operated by defendant JOSEPH BARTNICKI and owned by defendant REEL ELECTRIC, INC. The accident occurred on Peninsula Boulevard at or near its intersection with Stevensun Road, Town of Hempstead.

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), a 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 their motion for summary judgment, defendants submit (1) an affirmed report of examination, dated February 18, 2011, of orthopedist Michael J. Katz, MD, covering an examination conducted on that date [Motion Exh. G]; (2) an affirmed report, dated May 9, 2011, of radiologist Melissa Sapan Cohn, MD, covering a review of an MRI of plaintiff's cervical spine performed on August 20, 2008 [Motion Exh. Ex. H]; (3) an affirmed report, dated May 9, 2011, of radiologist Dr. Cohn, covering a review of an MRI of plaintiff's lumbosacral spine performed on August 21, 2008 [Motion Exh. Ex. I]; and (4) uncertified hospital records covering plaintiff's emergency room visit to Franklin Hospital on the date of the accident, including x-ray reports of plaintiff's left knee and pelvis [Motion Exh. F].

Dr. Katz reported that physical examination of plaintiff's cervical and lumbar spines, and left shoulder, arm and left knee revealed normal range of motion results, comparing the results to norms. Dr. Katz's other reported findings, which specified the tests performed, also revealed normal findings. Dr. Katz diagnosed resolved sprains of the cervical and lumbosacral spines, resolved left shoulder and right knee contusions and stated that plaintiff "shows no signs or symptoms of permanence relative to the muscoloskeletal system and relative to 8/05/08." Dr. Katz opined that the MRI of plaintiff's cervical and lumbar spines revealed "multi-level prexisting degenerative changes." Dr. Katz also reported that plaintiff stated she had been involved in several prior motor vehicle accidents. Dr. Sapan Cohn opines that disc herniations found on the MRIs of plaintiff's cervical and lumbosacral spines are due to degenerative changes.

The defendants also submit the deposition testimony of plaintiff conducted on January 19, 2011. The day of the accident, plaintiff was taken by ambulance to the emergency room of Franklin Hospital and was released that day. Plaintiff testified that she first sought medical treatment two to three days after the accident with her orthopedist, Dr. Chase and underwent treatment with him until April 2010, which included an injection into her left knee. Plaintiff also testified that in 2008, Dr. Chase sent her for MRIs and to chiropractor Dr. Iozzio whom she treated with for approximately six months and to physical therapy which she received for approximately six to seven months. Plaintiff testified that prior to the accident she had treated with Dr. Chase for

carpal tunnel syndrome and soreness of her right shoulder, and had also received physical therapy for her neck. At the time of the accident, plaintiff was not working. Plaintiff testified that for approximately two weeks after the accident, she was unable to do anything at all around the house, and that three weeks after the accident, she stopped using a cane given to her by the hospital. Plaintiff testified that at present, she is unable to garden, and is limited in her ability to do certain movements in pilates class at a gym where she belongs, clean, grocery shop and has difficulty picking up her one year granddaughter.

The Court finds that the report of defendants' examining physician, and the reports of Dr. Sapan Cohn, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination and review, to satisfy the Court that an "objective basis" exists for their opinions. Furthermore, although not covered by Dr. Katz's examination report, the Court finds that, defendants' motion papers have adequately addressed plaintiff's claim asserted in her bill of particulars that she suffered a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the August 5, 2008 accident. In making a determination with respect to this category of serious injury, the Court notes that the Second Department has considered a totality of a defendants' motion papers, including sworn deposition testimony. *See* **Karpinos v. Cora**, 2011 WL 5865813; **Bamundo v. Fiero**, 88 AD3d 831; **Lewars v. Transit Facility Management Corp.**, 84 AD3d 1176. Plaintiff testified at her deposition that she was not able to do anything for only two weeks after the accident. Plaintiff's complaints that she cannot garden, is limited in her ability to do certain movements in pilates class, clean and grocery shop, and that she has difficulty picking up her one year granddaughter, do not qualify as substantially all of the material acts which constituted her usual and customary activities. *See* **Grant v. New York City Transit Authority**, 2011 WL 5985957 *citing* **Pacheco v. Connors**, 69 AD3d 818.

Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff ARIS P. GRANT 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.

In opposition, plaintiff submits (1) uncertified hospital records from Franklin Hospital covering plaintiff's emergency room visit on the date of the accident [Plaintiff's Opposition Exh. A]; (2) affirmation of radiologist Dr. Charles H. Pfaff, dated August 1,

2011(incorrectly referred to as an affidavit) affirming and partially summarizing his MRI study of plaintiff's cervical spine conducted on August 20, 2008 and his MRI study of plaintiff's lumbosacral spine conducted on August 21, 2008, also attached [Plaintiff's Opposition Exh. B]; (3) an affirmation of orthopedist Ronald Chase, MD, dated September 15, 2011, certifying attached medical records and covering examinations of August 14, 2008, September 11, 2008, October 16, 2008, November 25, 2008 and March 12, 2009 [Plaintiff's Opposition Exh. C].

In his affirmation, Dr. Chase only provides results of range of motion testing of plaintiff's cervical and lumbar spines arising from plaintiff's initial visit of August 14, 2008 finding deficits. Dr. Chase affirms that he last examined plaintiff on March 12, 2009 when "she reached maximum medical improvement and was discharged from our care." This assertion belies plaintiff's deposition testimony of January 19, 2011 wherein she claims that she treated with Dr. Chase until April 2010, and Dr. Chase's own progress notes of March 12, 2009 which advise plaintiff "to RTC 2 mos" (the Court presumes RTC refers to 'return to clinic'). Dr. Pfaff's MRI reports of plaintiff's cervical and lumbar spines are purportedly affirmed by his affirmation of August 1, 2011. In his report, dated August 22, 2008, covering an MRI of plaintiff's lumbar spine, Dr. Pfaff found "1. multilevel degenerative disc disease (including small left lateral herniated disc at L2-3 and small central herniated disc at L5-S-1) and facet hypertrophy but without significant stenosis; 2. mild levoscoliosis of the lumbosacral spine." In his report, dated August 20, 2008, covering an MRI of plaintiff's cervical spine, Dr. Pfaff found a herniated disc at C4-5 "indenting the thecal sac but without significant stenosis" and several disc bulges without stenosis.

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)**. The Court notes at the outset that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, or a hospital record which is not certified, is not competent evidence. **CPLR 2106**; **Grasso v. Angerami**, 79 NY2d 814; **D'Orsa v. Bryan**, 83 AD3d 646; **McCloud v. Reyes**, 82 AD3d 848; **Husbands v. Levine**, 79 AD3d 1098; **Vasquez v. John Doe # 1**, 73 AD3d 1033; **Lozusko v. Miller**, 72 AD3d 908. However, the uncertified hospital records from Franklin General were submitted by defendants in support of their motion for summary judgment, and as such, may be considered by the Court. *See* **Kearse v. NYC Transit Authority**, 16 AD3d 45; **Meely v. 4G's Truck Renting Co., Inc.**, 16 AD3d 26; **Mantila v. Luca**, 298 AD2d 505; **Pagano v. Kingsbury**, 182 AD2d 268. However, the certification by Dr. Chase affirming all the medical records attached to his affirmation was insufficient to affirm the report of Pinar Atakent, MD. *See* **McCloud v. Reyes**,

supra; **Washington v. Mendoza**, 57 AD3d 972.

Plaintiff fails to proffer any findings from a recent examination thereby failing to raise an issue of fact under the "permanent consequential" or "significant limitation" categories of serious injury. *See* **Lively v. Fernandez**, 85 AD3d 981; **Jean v. Labin-Natochenny**, 77 AD3d 623; **Clarke v. Delacruz**, 73 AD3d 965; **Ciancio v. Nolan**, 65 AD3d 1273; **Byrd v. J.R.R. Limo**, 61 AD3d 801; **Kin Chong Ku v. Baldwin-Bell**, 61 AD3d 938. Plaintiff also failed to provide quantified range of motion results for areas of the body claimed injured other than the cervical and lumbar spines. *See generally* **Robinson-Lewis v. Grisafi**, 74 AD3d 774; **Ortiz v. Ianina Taxi Services, Inc.**, 73 AD3d 721; **Simanovskiy v. Barbaro**, 72 AD3d 930; **Friscia v. Mak Auto, Inc.**, 59 AD3d 492; **Duke v. Saurelis**, 41 AD3d 770.

"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. The Court finds that Dr. Chase's affirmation is "clearly tailored to meet the statutory requirements." **Knopf v. Sinetar**, 69 AD3d 809, 810. *See* **Lopez v. Senatore**, 65 NY2d 1017, 1019; **Picott v. Lewis**, 26 AD3d 319; **Lagois v. Public Administrator of Suffolk County**, 303 AD2d 644; **Sainte-Aime v. Ho**, 274 AD2d 569. Plaintiff's complaints of subjective pain without objective medical findings fail to satisfy the "serious injury" requirement of the no-fault law. *See* **Scheer v. Koubek**, 70 NY2d 678; **Calabro v. Petersen**, 82 AD3d 1030; **Catalano v. Kopman**, 73 AD3d 963.

The findings by Dr. Pfaff are also insufficient by themselves to establish that plaintiff suffered a serious injury. It is well established that the existence of a radiologically confirmed disc injury or a radiculopathy alone will not suffice to defeat summary judgment. *See* **Pommells v. Perez**, 4 NY3d 566 at 574; **Pierson v. Edwards**, 77 AD3d 642; **Catalano v. Kopmann**, 73 AD3d 963; **Vilomar v. Castillo**, 73 AD3d 758; **Ortiz v. Ianina Tax Services, Inc.**, 73 AD3d 721; **Stevens v. Sampson**, 72 AD3d 793; **Keith v. Duval**, 71 AD3d 1093; **Casimir v. Bailey**, 70 AD3d 994. In addition, Dr. Pfaff fails to express an opinion as to causation of plaintiff's alleged spine injuries. In fact, Dr. Pfaff concludes that the MRI of plaintiff's lumbar spine reveals degenerative changes.

Likewise, the Court finds that plaintiff has failed to raise an issue of fact as to whether she sustained a serious injury under the 90/180 category of **Insurance Law 5102(d)**. Dr. Chase's assertion in his affirmation that he ordered plaintiff to refrain from

certain activities for the first four months after the accident is conclusory in light of plaintiff's own deposition testimony that she was not able to do anything for two weeks after the accident, and at present cannot garden, is limited only in her ability to do certain movements in pilates class, clean, and grocery shop, and has difficulty picking up her one year old granddaughter.

We have examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, that the motion by defendants REEL ELECTRIC, INC. and JOSEPH BARTNICKI for summary judgment pursuant to **CPLR §3212** dismissing the complaint of plaintiff ARIS P. GRANT 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: November 22, 2011

J.S.C.