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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 6

JUDITH SMITH,

Plaintiff,

INDEX NO. 13069/10

-against-

MOTION DATE: 03/05/12
SEQUENCE NO. 001

JOSEPH ANDREO and ASHLEY ANDREO,

Defendants.

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Notice of Motion, Affs. & Exs.....1
Affirmation in Opposition & Exs.....2
Reply Affirmation.....3

Upon the foregoing papers, it is ordered that the motion by defendants, Joseph Andreo and Ashley Andreo, for summary judgment, pursuant to CPLR §3212, on the grounds that the plaintiff did not sustain a serious injury within the meaning of New York State Insurance Law §5102(d), is denied.

This is an action for personal injuries allegedly sustained by plaintiff Judith Smith in an automobile accident which occurred on May 10, 2010 on Rockaway Parkway at or near Morris Parkway in Nassau County, New York.

Movants contend that plaintiff's injuries fail to meet the "serious injury" requirements of Insurance Law §5102(d). In support of their motion, Movants submit the plaintiff's verified bill of particulars, plaintiff's deposition transcript, plaintiff's emergency room records, an examination report of orthopedic surgeon Michael J. Katz, M.D., and radiology reports of Melissa Sapan Cohn, M.D.

To begin, Movants contend that plaintiff testified at her deposition that she left the scene of the accident with the tow truck driver. Plaintiff testified that two days after the accident, in the evening of May12, 2010 at 9:00 p.m., she drove herself to the emergency room of New Island

Hospital complaining of back pain and abdominal pain. She was discharged from the emergency room after a few hours. Two days later, plaintiff sought treatment with a chiropractor, Dr. Amatulli. At that time, she complained of back pain and shoulder pain. She also sought treatment from a Dr. Parker on two occasions. Movants contend that plaintiff testified that she was working per diem as a nurse for New Island Hospital and was also working three nights a week as a nurse for Medford Multi-Care. Plaintiff testified that she did not miss any time from work as a result of the accident.

Movants submit the report of Dr. Michael J. Katz, a board certified orthopedic surgeon. Dr. Katz examined the plaintiff at defendant's request on August 5, 2011. Dr. Katz performed quantified and comparative range of motion tests upon the plaintiff using a goniometer and reported that plaintiff had normal ranges of motion in her cervical spine, lumbosacral spine, right shoulder, and left elbow. Dr. Katz reported that plaintiff showed no signs or symptoms of permanence relative to the musculoskeletal system and relative to the accident of May 10, 2010. He also opined that she is not currently disabled. Dr. Katz opined that plaintiff is capable of her full time work duty as a registered nurse without restrictions and that she is capable of her activities of daily living and pre-loss activities.

Movants also submit the radiology report of Dr. Melissa Sapan Cohn, who reviewed plaintiff's cervical spine MRI and lumbar spine MRI. With respect to plaintiff's cervical spine MRI, Dr. Cohn opined that plaintiff had disc desiccation and osteophytes, which she describes as degenerative findings. She reports that plaintiff had "mild multilevel degenerative changes" and that the disc desiccation at C2-3 through C6-7 showed the commencement of degenerative disc disease. She opined that the bone spur formation at C4-5 and the formation of osteophytes indicated that the condition is chronic in nature as it takes years to develop bone spurs and osteophytes. She also opined that the disc herniation seen at the C5-6 level is associated with significant underlying degenerative changes. With respect to plaintiff's lumbar spine MRI, Dr. Cohn found that plaintiff had disc desiccation at the L5-S1 level and that the disc bulging at the L5-S1 level is unrelated to trauma and is within the spectrum of degenerative disc disease.

Movants further contend that the emergency room records from new Island Hospital from May 13, 2010 indicate that based upon the attending physician's clinical findings, he found no

medical necessity to send the plaintiff for x-rays and diagnosed her with a shoulder sprain, airbag contact injury, and abdominal trauma.

Accordingly, contrary to plaintiff's contentions, Movants have demonstrated a prima facie showing of entitlement to summary judgment on the grounds that plaintiff's alleged injuries do not meet the serious injury threshold of Insurance Law §5102(d). The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movants have demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

In opposition, plaintiff submits the sworn reports of her treating chiropractor Frank V. Amatulli, D.C. Dr. Amatulli performed range of motion testing upon the plaintiff for the first time four days after the accident, on May 14, 2010. On May 14, 2010, Dr. Amatulli found that plaintiff had sustained decreased range of motion in her cervical and lumbar spines. He found that plaintiff had a 40% loss of range of motion in her cervical spine and a 30% loss of range of motion in her lumbar spine. Dr. Amatulli also conducted range of motion testing on September 22, 2010, January 19, 2011 and January 7, 2012, which similarly showed losses of ranges of motion in plaintiff's cervical and lumbar spines. At her latest examination by Dr. Amatulli on January 7, 2012, Dr. Amatulli found that plaintiff had a 31% loss of range of motion of her cervical spine, a 57% loss of range of motion of her lumbar spine, and a final whole person impairment of 23%. Additionally, plaintiff consistently made complaints to Dr. Amatulli of neck pain radiating to her right arm, lower back pain radiating to her right leg, right shoulder pain, and elbow pain.

In his affidavit of February 1, 2012, Dr. Amatullli attests that plaintiff's disc pathology was caused by the motor vehicle accident of May 10, 2010, and he opines that the losses in range of motion of the plaintiff's cervical and lumbar spine represent a permanent loss of function. He also attests that plaintiff's injuries have resulted in restriction of the use and activity of the

injured areas of plaintiff's spine and "limitations to the full range of motion of the spine from what is considered normal, resulting in definite, severe, and permanent injury." He opines that plaintiff has suffered a permanent injury to the cervical spine, lumbar spine, right shoulder and left elbow causally related to the accident.

Plaintiff has produced evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of this action. *(See, Adetunji v. U-Haul*, 250 A.D.2d 483, 672 N.Y.S.2d 869 (1st Dept. 1998); *Brown v. Achy*, 9 A.D.3d 30, 776 N.Y.S.2d 56 (1st Dept. 2004)). The sworn reports of Dr. Amatulli demonstrate objective evidence of the physical limitations in plaintiff's cervical and lumbar spines resulting from the within accident and warrant the denial of the defendants' motion. (*See, Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005)). In addition, while the Court of Appeals has held that submission of a doctor's report bearing contemporaneous numerical measurements of plaintiff's ranges of motion is not required to defeat a motion for summary judgment on threshold grounds, plaintiff's submission of Dr. Amatulli's reports demonstrates significant limitations contemporaneous with the accident sufficient to establish a causal relationship between the accident and the injuries alleged. (*See, Perl v. Meher*, 18 N.Y.3d 208, 960 N.E.2d 424 (2011)).

Accordingly, defendants' motion for summary judgment is denied. If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)).

Dated: April 11, 2012

Anthony L. Parga, J.S.C.

Cc: Falk & Klebanoff, P.C.
392 Woodfield Road
West Hempstead, NY 11552

Richard T. Lau & Associates
P.O. Box 9040
300 Jericho Quadrangle East, Suite 260A
Jericho, NY 11753-9040