Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12
Justice

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PAMELA ANDRADE,

Plaintiff,

-against-

BRYAN SCHIFFER and PERI SCHIFFER,

Defendants.

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Index No.: 30619/10

Motion Date: August 7, 2012

Cal. No.: 6
Seq. No.: 2

The following papers numbered 1 to 25 read on this motion by defendants for summary judgment and dismissal of plaintiff's complaint, pursuant to Insurance Law §5102(d) and §5104(a).

	Papers Numbered
Notice of Motion, Affirmation, Exhibits.....	1-12
Affirmation in Opposition, Exhibits.....	13-24
Reply Affirmation.....	25

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is a negligence action to recover money damages for injuries allegedly suffered as a result of a motor vehicle accident on July 20, 2010.

Defendants move for summary judgment on the ground that plaintiff did not sustain a serious injury and defendants have the initial burden of establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (see, Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 [2002]; Gaddy v Eyler, 79 N.Y.2d 955 [1992]).

In support of this motion on the issue of serious injury, defendants have submitted, inter alia, the pleadings, plaintiff's bill of particulars, the deposition transcript of plaintiff, and the affirmations of Drs. Robert M. Simon and Alan B. Greenfield. Plaintiff's bill of particulars (Ex. D) states that plaintiff

sustained, inter alia, "bulging discs at C3-C4 and C4-C5", "restriction, impairment and limitation of motion of the left arm", and "trochanteric bursitis of the left hip"(¶5). Said bill of particulars does not specifically allege any "aggravation" or "exacerbation" of any previous injuries. Exacerbation of a pre-existing injury is an element of damages which must be affirmatively pleaded and proved (see, Rodgers v. New York City Transit Authority, 70 A.D.3d 917 [2 Dept. 2010]). Plaintiff's deposition testimony (Ex. F) reveals that plaintiff had been treated for a previous knife wound injury to her left arm in 1998 (p. 46), saw Dr. Madan K. Raj, for examinations only, on July 22, 2010 and in February, 2011 (p. 45, 49) and that the only medical treatment she received for the alleged injuries sustained in the subject accident was approximately three months of physical therapy, commencing about two weeks after the accident (p. 46-48).

Defendants submitted the affirmation of Dr. Robert M. Simon, a physical medicine specialist, who examined plaintiff on July 25, 2011 on behalf of the defendants. As stated in his report (Ex. H), Dr Simon found normal ranges of motion in plaintiff's cervical and lumbar spines, and found no muscle spasm or atrophy of those areas or of plaintiff's hip, shoulders, arms, hands and lower extremities, and pronounced plaintiff's "cervical and lumbosacral strains" and "left hip strain/contusion" both "resolved". Dr. Simon found "no work related disability". Defendants submitted the affirmation of Dr. Alan B. Greenfield, a radiologist, dated June 20, 2011 (Ex. I & J), who examined the M.R.I films of plaintiff's cervical spine and left hip, dated July 22 and July 23, 2010. Dr. Greenfield opined that the cervical spine film shows "disc desiccation indicating degenerative disc disease ... associated with degenerative bone spur formation and mild degenerative disc bulging at C4-C5 and C5-C6" and the left hip film shows "degenerative osteoarthritis". Dr. Greenfiled opined that all these findings "are clearly longstanding and degenerative in origin, and ... clearly unrelated to the accident of 07/20/10".

Plaintiff opposes this motion, submitting, inter alia, affirmations of Dr. Raj, a pain management specialist (Opposition, Ex. F), Dr. Mark Decker, a radiologist (Opposition, Ex. G) and Dr. Hal S. Gutstein, a neurologist (Opposition, Ex. J). Dr. Opam treated plaintiff immediately following the subject accident, and reported range of motion testing which revealed decreased ranges of motion in plaintiff's cervical and lumbar

spines. Dr. Raj examined plaintiff on July 22, 2010, and found "limited range of movement" in plaintiff's head and neck, without any objective measurements of same; "limited range of movement due to the pain" in plaintiff's left arm, with a measurement, but no "normal" range noted; "mild tenderness in the left hip and trochanter region"; and "lumbar spine is nontender". Dr. Decker took the cervical spine and left hip MRI's of plaintiff on July 22 and 23, 2010 (Opposition, Ex. G), and found "[d]egenerative disc disease with straightening of lordosis. Mild bulge C3-C4 and C4-C5" in the cervical spine and "[d]egenerative change of the lumbar spine and pubic symphysis. Mild greater trochanteric bursitis". Dr. Gutstein examined plaintiff on March 30, 2012 (Opposition, Ex. J) and found decreased ranges of motion in plaintiff's cervical and lumbar spines and opined that such findings, based upon plaintiff's related history, were caused by the subject accident and are permanent in nature.

Under the No-Fault Law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (see, Licari v. Elliot, 57 N.Y.2d 230 [1982]). In moving for summary judgment, the proponent must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (see, Alvarez v. Prospect Hospital, 68 N.Y. 2d 320 [1986]; Winegrad v. New York Univ. V. Medical Center, 64 N.Y.2d 851 [1985]). In the instant matter, movants have the burden of proving, by submitting competent evidence in admissible form, that plaintiff has not suffered a "serious injury" (see, Lowe v. Bennett, 122 A.D. 2d 728 [1 Dept. 1986], affirmed, 69 N.Y.2d 701 [1986]). If movants' papers are sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon plaintiff to produce prima facie evidence, in admissible form, to support the claim of "serious injury" (see, Licari, supra; Lopez v. Senatore, 65 N.Y.2d 1017 [1985]). Plaintiff must present evidentiary facts or materials, "by affidavits or otherwise" demonstrating the existence of a triable fact regarding the claim of "serious injury" (see, Indig v. Finkelstein, 23 N.Y.2d 728 [1968]).

A defendant may establish his or her prima facie entitlement to summary judgment on the issue of serious injury by demonstrating that a plaintiff's alleged injuries are attributable to degenerative changes, as defendants have done in this matter with regard to plaintiff's alleged neck and hip injuries (see, Lardillo v. Xenakis, 31, A.D.3d 683 [2 Dept.

2006]; Faulkner v. Steinman, 28 A.D.3d 604 [2 Dept. 2006]). Plaintiff's submissions have failed to address movants' examining physicians' conclusion that plaintiff's alleged neck and hip injuries were caused by a pre-existing degenerative condition (see, Nicholson v. Allen, 62 A.D.3d 766 [2 Dept. 2009]; Chery v. Jones, 62 A.D.3d 742 [2 Dept. 2009]). Dr. Decker (Opposition, Ex. G), found degenertive changes in plaintiff's neck and hip. Dr. Gutstein (Opposition, Ex. J) agreed with the radiological findings of Dr. Decker and Dr. Greenstein. As such, Dr, Gutstein's opinion that plaintiff's condition was caused by the subject accident is merely speculative (see, Kaplan v. Vanderhans, 26 A.D.3d 468 [2 Dept. 2006]).

With regard to plaintiff's claims of left arm injury, plaintiff has acknowledged a previous injury to her left arm. Where there is a pre-existing injury that defendants have established as being relevant to the injury currently in litigation, plaintiff's medical expert must present objective evidence distinguishing between those injuries sustained in the previous accident and those sustained in the current accident (see, Pommells v. Perez, 4 N.Y.3d 566 [2005]; Sternberg v. Sipzner, 74 A.D.3d 1054 [2 Dept. 2010]). Here, the failure of plaintiff's medical proof to sufficiently address the previous injury leads to the conclusion that such physicians' opinions are fatally flawed and renders their conclusions speculative (see, Seck v. Minigreen Hacking Corp., 53 A.D.3d 608 [2 Dept. 2008]).

Defendants' medical evidence that plaintiff sustained no permanency, considered along with the medical evidence that plaintiff's MRIs did not demonstrate an injury, was sufficient to make a prima facie showing that plaintiff did not sustain "serious injury" (see, Pommels v. Perez, 4 N.Y.3d 566 [2005]; Hasner v. Budnik, 35 A.D.3d 366 [2 Dept. 2006]).

The burden thus shifted to plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a "serious injury" (see, Gaddy v. Eyler, 79 N.Y.2d 955 [1992]). In opposition, plaintiff's medical submissions are deficient and fail to rebut defendants' prima facie entitlement to summary judgment herein.

The admission by plaintiff, during her examination before trial, that she missed just a few days from work, undermined her claim that her injuries prevented her from performing substantially all of the material acts constituting his customary

daily activities during at least 90 out of the first 180 days following the accident (see, Sanchez v. Williamsburg Volunteer of Hatzolah, Inc., 48 A.D.3d 664 [2 Dept. 2008]; Kouros v. Mendez, 41 A.D.3D 786 [2 Dept. 2007]; Hasner v. Budnik, 35 A.D.3d 366 [2 Dept. 2006]).

Plaintiff's medical submissions failed to demonstrate restricted ranges of motion related to plaintiff's cervical spine, left hip and left arm based upon findings both recent and contemporaneous with the accident (see, Perl v. Meher, 18 N.Y.3d 208 [2011]; Lee v. McQueens, 60 A.D.3d 914 [2 Dept. 2009]). Further, plaintiff failed to proffer competent medical evidence that such recently found restrictions were "significant" (see, Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 [2002]; Damas v. Valdez, 84 A.D.3d 87 [2 Dept. 2011]), or that she was "medically determined" to have been unable to perform substantially all of her daily activities for not less than 90 of the first 180 days after the accident, as a result of the accident (see, Valera v. Singh, 89 A.D.3d 929 [2 Dept. 2011]; McCloud v. Reyes, 82 A.D.3d 848 [2 Dept. 2011]; West v. Martinez, 78 A.D.3d 934 [2 Dept. 2010]; Saetia v. VIP Renovations, Inc., 68 A.D.3d 1092 [2 Dept. 2009]; Geliga v. Karibian, Inc., 56 A.D.3d 518 [2 Dept. 2008]). The affirmation of Dr. Gutstein (Opposition, Ex. J) was replete with conclusory assertions couched in language designed to satisfy the statutory requirements, without any objective basis in fact (see, Lanzarone v. Goldman, 80 A.D.3d 667 [2 Dept. 2011]; Hamilton v. Rouse, 46 A.D.3d 514 [2 Dept. 2007]; Sainte-Aime v. Ho, 274 A.D.2d 569 [2 Dept. 2000]). The word "permanent" is by itself insufficient to prove that plaintiff sustained a "consequential", rather than minor, mild or slight, injury (Gaddy v. Eyler, supra).

As such, plaintiff's opposition has failed to raise a triable issue of fact as to whether plaintiff sustained a "serious injury" as a result of, or whether plaintiff's current medical problems are causally related to, the subject accident. Therefore, plaintiff has failed to rebut defendants' prima facie showing of entitlement to summary judgment as a matter of law.

Accordingly, defendants' summary judgment motion is hereby granted and plaintiff's complaint is hereby dismissed.

This Constitutes the Decision and Order of the Court.

Dated: September , 2012

Denis J. Butler, J.S.C.