SHORT FORM ORDER

INDEX No. 11-16686

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-29-12
ADJ. DATE 8-9-12
Mot. Seq. # 001 - MD

MARYJANE RICHARDSON,

Plaintiff,

- against -

WILLIAM BRADFORD,

Defendant.

LEWIS JOHS AVALLONE AVILES, LLP
Attorney for Plaintiff
425 Broad Hollow Road
Melville, New York 11747

RUSSO & TONER, LLP
Attorney for Defendant
33 Whitehall Street, 16th Floor
New York, New York 10004

Upon the following papers numbered 1 to 10 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-10; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers ___; Other ___; it is,

ORDERED that this motion (seq. #001) by defendant William Bradford, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

Maryjane Richardson seeks damages for serious injuries allegedly sustained as a result of a motor vehicle accident on April 18, 2010, on Montauk Highway at its intersection with Gazzola Drive, Brookhaven Town, Suffolk County, New York, when the vehicle in which she was a passenger, and the vehicle operated by defendant William Bradford, collided.

As a result of this accident, the plaintiff alleges that she sustained personal injury consisting of a right shoulder adhesive capsulitis with subacromial impingement, which required arthroscopic surgery of the right shoulder consisting of arthrolysis, capsulotomy, and subacromial decompression, resulting in scarring of the right shoulder. The defendant seeks summary judgment on the basis that the plaintiff did not sustain a serious injury as defined by 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 eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented

(***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a *prima facie* case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of this application, the defendant has submitted, *inter alia*, an attorney's affirmation; copies of the pleadings; plaintiff's verified bill of particulars; the reports of Stanley Sprecher, M.D. dated January 24, 2012 concerning his review of the MRI of the plaintiff's right shoulder dated September 22, 2010, Stuart N. Kandel, M.D. dated January 13, 2012 concerning his independent orthopedic examination of plaintiff, and Matthew M. Chacko, M.D. dated January 12, 2012 concerning his independent neurological examination of the plaintiff; and the transcript of the examination before trial of Maryjane Richardson dated November 23, 2011.

Upon review and consideration of the defendant's evidentiary submissions, it is determined that the defendant has not established *prima facie* entitlement to summary judgment dismissing the complaint on the basis that Maryjane Richardson did not sustain a serious injury as defined by Insurance Law § 5102 (d).

The defendant has failed to support this motion with the medical records and initial test results for the MRI and radiographic studies obtained by the plaintiff relative to her claimed injuries, thus leaving it to this Court to speculate whether the findings by Dr. Sprecher, concerning his review of the films, are consistent with the interpretation and impression of the plaintiff's radiologist who interpreted the films. Although Dr. Kandel and Dr. Chacko indicated in their respective reports the various medical records and MRI study they reviewed, the same have not been provided in support of their opinions. Expert testimony is limited to facts in evidence, and an expert cannot base an opinion on facts he did not observe and which were not in evidence (*see also* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

Dr. Kandel has set forth in his report that the plaintiff is a 54 year-old registered nurse who sustained an injury to her right shoulder on April 18, 2010, when the vehicle in which she was a passenger became involved in a motor vehicle accident. Due to continued pain in her right shoulder, her treating orthopedist, Dr. Kottmeier, after having obtained an MRI, performed an arthroscopic surgical procedure on her shoulder on February 24, 2011. She thereafter received physical therapy 2 to 3 times a week for approximately six months. He continued that she was out of work for approximately six weeks following the surgery and complained to him of a feeling of achiness in her shoulder with residual limitation in motion. Upon examination of the plaintiff, Dr. Kandel noted that she has three healed arthroscopic surgical portals, however, no report from a plastic surgeon who examined the scars has been submitted by the defendant (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issues concerning the size and appearance of these scars, and precluding summary judgment.

Dr. Kandel, in determining the plaintiff's range of motion in her right shoulder, compared his findings to a spectrum in the range of motion rather than a specific normal value. When the normal range of motion is set forth within a range or spectrum, it leaves it to this Court to speculate as to the actual normal ranges of motions without variations, and under which conditions such variations would be applicable (*see* ***Hypolite v International Logistics Mgt., Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Additionally, Dr. Kandel does not rule out that the injury to the right shoulder and subsequent surgery were not proximately caused by the within accident. Thus, Dr. Kandel's findings raise factual issues which preclude summary judgment.

While Dr. Chacko indicated in his report that the plaintiff did not have any other injuries from this accident, except for her right shoulder, he performed range of motion testing on her cervical spine, but failed to provide any range of motion findings relative to her right shoulder. Dr. Chacko does not indicate that he examined the plaintiff's shoulder, however, he opined that she was status post arthroscopy of the right shoulder with residual symptoms, and that her neurological examination was normal. He does not rule out that the injury for which she had surgery is not related to the accident.

Based upon the foregoing, it is determined that the defendant has failed to establish *prima facie* entitlement to summary judgment on this category of serious injury as defined by Insurance Law § 5102 (d).

It is noted that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the experts offer no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Additionally, the plaintiff testified to the extent that following the accident, she experienced pain in her right shoulder. The pain in her right shoulder continued to increase, so she received follow up care with Dr. Kottmeier, her orthopedist, who treated her with steroid injections into her shoulder. She also received physical therapy for her shoulder. She stated that Dr. Kottmeier performed surgery on her right shoulder on February 24, 2011, for which she was out of work for six to seven weeks. Prior to the subject accident, she never experienced pain in her right shoulder. Since the accident and surgery, she has difficulty extending her arm and rotating her shoulder. She cannot lift anything weighing more than five pounds. Based upon the foregoing, it is determined that the defendant has failed to demonstrate entitlement to summary judgment on this category of injury as well.

The factual issues raised in defendant's moving papers preclude summary judgment, as the defendant failed to establish that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). The plaintiff has not opposed this motion, however, inasmuch as the moving party has failed to establish *prima facie* entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" it is unnecessary to consider whether any opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, this motion by the defendant for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102 (d) is denied.

Dated: September 10, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**