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SHORT FORM ORDER

INDEX No. 10-1638
CAL. No. 12-00719MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 5-17-12
ADJ. DATE 8-23-12
Mot. Seq. # 006 - MD

IRMA HERNANDEZ, EDWIN CHAVEY and MIGUEL GUEVARA, Plaintiffs	PETER L. BLODNICK & ASSOCIATES, P.C. Attorney for Plaintiff Hernandez 316 Jackson Avenue Syosset, New York 11791
	MICHAEL G. LORUSSO, P.C. Attorney for Plaintiffs Chavey & Guevara 316 Jackson Avenue Syosset, New York 11791
- against -	
	BREEN & CLANCY Attorney for Defendants 1355 Motor Parkway, Suite 2 Hauppauge, New York 11749-5227
SEAN LAPHAM and ANNMARIE LAPHAM, Defendants	JOHN C. BURATTI & ASSOCIATES Attorney for Plaintiff Hernandez on Counterclaim 100 Duffy Avenue, Suite 500 Hicksville, New York 11801

Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (006) 1 - 10; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11-22; Replying Affidavits and supporting papers 23-24; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (006) by the defendants, Sean Lapham and Annmarie Lapham, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Irma Hernandez, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this action, the plaintiff, Irma Hernandez, seeks damages for personal injuries allegedly sustained on February 14, 2009, when she was traveling in the eastbound lane of Fulton Avenue at its intersection with Clinton Street in Hempstead Village, New York, and her vehicle was struck in the rear by the defendants' vehicle.

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]). 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" CPLR3212 [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 this motion for summary judgment, the initial burden is on the moving party to present evidence in competent form, showing that the plaintiff did not sustain a serious injury as a result of the accident (*see* ***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met the burden, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does exist (*see* ***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 (***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 motion (001), defendants have submitted exhibits consisting of, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answer and demands; plaintiff's verified bill of particulars; and the unsigned and uncertified transcript of the examination before trial of Irma Hernandez which is not in admissible form (*see* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), is not accompanied by an affidavit or proof of service pursuant to CPLR 3116, and is not considered on this motion. Movants also submit reports of plaintiff's physician at Huntington Chiropractic dated February 27, 2009; cervical MRI report dated March 24, 2009, lumbar MRI report dated March 26, 2009, right shoulder MRI dated March 18, 2009; and the report of Michael J. Katz, M.D. dated March 6, 2012 concerning his independent orthopedic examination of the plaintiff.

By way of the bill of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of straightening of the normal cervical lordosis; posterior disc bulges at C3-4 through C7-T1 which each encroach upon the ventral aspect of the thecal sac; straightening of the normal lumbar lordosis; posterior disc bulges at T10-11 through L4-5 which each encroach upon the ventral aspect of the thecal sac and lateral recesses bilaterally; posterior disc bulges at L1-2 through L4-5 each encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally; joint effusion including fluid pooling in the subcoracoid space; C5-6 and C6-7 radiculopathy on the right; L4-5 radiculopathy on the right; moderate to severe headaches; restricted cervical range of motion in all planes; cervical pain along the paracervical and trapezius muscles; cervical sprain/strain; cervical paravertebral tenderness; mild forward impingement sign in both shoulders; tenderness along the acromioclavicular joint of the shoulders; sharp shooting pain in the left shoulder; shoulder pain radiating into the right arm accompanied by paresthesia; tenderness at the left and right subacromial area; restricted range of motion in all directions in the shoulders secondary to pain; neck pain with radiation to the right shoulder; lower back pain with radiation to the right leg; middle back pain; bilateral shoulder pain; left shoulder sprain; trigger points in trapezius muscle bilaterally; tenderness over cervical paraspinal and bilateral trapezoid muscles; cervical paravertebral muscle spasm; decreased sensation of right C7 dematome; decreased sensory perception and pinprick in the right upper extremity; thoracic spine range of motion restricted in all directions secondary to pain; muscle spasms and tenderness at the thoracic paraspinal muscles; restricted lumbar spine range of motion in all directions secondary to pain; tenderness over the

lumbar paraspinal muscles and right quadratus lumborum and paravertebral muscle spasm; decreased sensation of the right L4 and L5 dermatomes; and decreased sensory perception and pinprick in the right lower extremity.

Based upon review and consideration of defendant's evidentiary submissions, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury.

Dr. Katz has set forth the materials and records which he reviewed. However, none of the medical records, including the EMG/NCV nerve studies conducted on the plaintiff, and the range of motion study of the upper and lower extremities dated April 15, 2009, except those mentioned above, have been submitted as required pursuant to ***Friends of Animals v Associated Fur Mfrs.***, supra. Expert testimony is limited to facts 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]) and these records and reports, with the exception of the aforementioned reports, are not in evidence. Thus, this court is left to speculate as to the contents and findings in those records.

Dr. Katz has set forth that the plaintiff's MRI reports of the cervical spine and lumbar spine and right shoulder indicate changes which are degenerative in nature. However, he does not set forth the basis for this conclusory opinion. His diagnosis is that of cervical strain with radiculopathy-resolved; thoracolumbosacral strain with radiculopathy-resolved; bilateral shoulder contusion-resolved. However, Dr. Katz does not comment upon the multiple bulging discs in the plaintiff's cervical, lumbar and thoracic spine, and does not rule out that they are not causally related to the accident. The normal cervical range of motion values to which Dr. Katz compared his cervical range of motion findings upon examination and measurement with a goniometer differ from those normal cervical range of motion values set forth in the report of Dr. Robert Buurma submitted by the plaintiffs. This raises factual issues concerning which normal range of motion values are correct and if, indeed, the plaintiff sustained any limitations.

Although Dr. Katz acknowledges that the plaintiff has cervical and thoracolumbosacral radiculopathy, no report concerning an independent neurological evaluation has been submitted by the defendants (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issues concerning whether the plaintiff's radicular claims have been ruled out. In addition, the results of the electrodiagnostic studies referenced by Dr. Katz have not been addressed by him. Thus, summary judgment is precluded on this basis as well.

Defendants' examining physician has not commented as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of 90 days in the 180 days following the accident, as he did not examine the plaintiff during that statutory period (*see* ***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 thus he offers 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]). It is additionally noted in plaintiff's opposing papers that the defendants had an independent chiropractic examination of the plaintiff performed on April 7, 2009, by Cirino Sesto, D.C., which report was not provided to this court by the defendants. Upon examination of the plaintiff, defendant's examining chiropractor found that the plaintiff had evidence of a mild disability at the time. Thus, there are factual issues concerning this finding of mild disability during the applicable statutory period.

Based upon the foregoing, it is determined that the defendants have failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain serious injury as defined by Insurance Law § 5102 (d) in either category.

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" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the plaintiff's 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]) as the burden has not shifted.

Dated: October 1, 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION