Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Margarita Hernandez,

Plaintiff,

-against-

Aimee A. Erskine,

Defendant.

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Index No.: 2014/11
Motion Date: 10/24/12
Motion Cal. No.: 14
Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §3212 and Insurance Law §5102, granting summary judgment to the defendant, Aimee Erskine on the grounds that plaintiff, Margarita Hernandez did not sustain a "serious injury" as a result of the November 21, 2010 accident.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendant Aimee Erskine ("Defendant" or "Erskine") moves for an order pursuant to CPLR 3212 and Insurance Law 5102, granting summary judgment on the grounds that plaintiff Margarita Hernandez ("Hernandez") did not sustain a serious injury as a result of the November 21, 2010 accident.. The Bill of Particulars alleges that as a result of the accident, Hernandez suffered injuries to her knees, cervical and lumbar spine.

Analysis

Defendant's motion for summary judgment pursuant to CPLR § 3212 dismissing Plaintiff's cause of action is granted as more fully set forth below.

Threshold

Defendant moves for summary judgment in its favor on the ground that Plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law § 5102(d). The statutory provision states, in pertinent part that a "serious injury" is defined as:

> A personal injury which results in...significant disfigurement;...permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured party from performing substantially all of the material acts which constitute such a person's customary daily activities for not less than ninety days during one hundred eighty days immediately following the occurrence of the injury or impairment.

Insurance Law § 5102(d)

It has been well established that in a motion for summary judgment the proponent must tender evidentiary proof in admissible form to eliminate any material issues of fact, and if the proponent succeeds, the burden then shifts to the party opposing the motion to submit evidentiary proof in admissible form. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].) Accordingly, when moving for summary judgment on threshold, the burden is on the defendant to make a prima facie showing that the injuries plaintiff sustained as a result of the subject

accident are not serious as defined within the meaning of Insurance Law § 5102(d). *(Toure v. Avis Rent A Car Sys*., 98 N.Y.2d 345 [Ct App. 1982]; *Lewis v. John*, 81 A.D.3d 905 [2nd Dept. 2011].) A Defendant may meet his or her prima facie burden by submitting affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious. (See *Magarin v. Kropf*, 24 A.D.3d 733 [2nd Dept. 2005]; *see also Gaddy v. Eyler*, 79 N.Y.2d 955, 956 [1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008].) Where the defendant fails to meet his or her prima facie burden, the motion will be denied, and the court need not review plaintiff's paper's in opposition. (*Cosica v. 938 Trading Corp*. 283 A.D.2d 538 [2nd Dept. 2001].)

Defendant met her initial burden of establishing that Hernandez did not sustain a serious injury to her knees, lumbar and cervical spine through the submission of the affirmation of Dr. Eial Fairman, an Orthopedic Surgeon. Dr. Fairman compared the results elicited from the goniometer testing to the normal range of motion testing and found that Hernandez's range of motion tests were within normal limits and Hernandez was not disabled as a result of the subject accident. Therefore, the moving defendant made a prima facie showing that Hernandez did not sustain a serious injury within the meaning of insurance law § 5102(D). The burden now shifts to Hernandez to demonstrate the existence of a triable issue of fact as to whether she sustained a serious injury. (*Matthews v. Cupie Transp. Corp.*, 302 A.D.2d 566, 567 [2nd Dept. 2003]; *see also Gaddy*, 79 N.Y.2d at 957; *Greene v. Miranda*, 272 A.D.2d 441 [2nd Dept. 2000]).

In opposition to the within motion, the plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury. Plaintiff, in opposition, submits the affidavit of Michael Abrankian, a Chiropractor and the affirmed report of David Neuman, an Orthopedic Surgeon

Abrankian treated Hernandez for pain in the neck and back regions from March 13, 2002 through April 3, 2009, ending more than one year prior to the subject accident. Plaintiff was examined and treated by Abrankian on November 24, 2010, just three days following the subject accident, where through objective medical testing in November of 2010, Abrankian established that the plaintiff sustained a loss of range of motion as a result of the subject accident.

However, Plaintiff failed to raise a triable issue of fact as to whether Hernandez sustained a serious injury under the permanent loss, the permanent consequential limitation of use, or the significant limitation of use categories of Insurance Law § 5102(d), because neither the affidavit of Abrankian nor the affirmed report of Dr. Neuman set forth any objective medical findings from a recent examination. (*see Valera v. Singh*, 89 A.D.3d 929 [2nd Dept 2011]; Diaz v. Wiggins, 271 A.D.2d 639 [2nd Dept 2000].) The affirmed report of Dr. Neuman merely states that on May 30, 2012, a cervical range of motion exam revealed that Hernandez continues to suffer limited range of motion with a finding of rotation to the left and right at 60 degrees bilaterally (normal 80 degrees.) However, Dr. Neuman fails to set forth what objective tests were used to determine plaintiff's alleged loss of range of motion. (*Rovelo v. Volcy*, 83 A.D.3d 1034 [2nd Dept 2011]; *Jean v. Labin-Natochenny*, 77 A.D.3d 623 [2nd Dept 2010].)

In addition, the plaintiff admitted during her deposition that she returned to work the Tuesday following the subject accident and, thus, was not prevented from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the first 180 days immediately following the accident. (See *Islam v. Makkar*, 95 A.D.3d 1277 [2nd Dept 2012]; *Jean v. Labin-Natochenny*, 77 A.D.3d 623 [2nd Dept 2010];

Accordingly, the plaintiff failed to raise a triable issue of fact under the 90/180–day category of Insurance Law § 5102(d).

Conclusion

For the reason set forth above, defendant's motion for summary judgment, pursuant to CPLR § 3121 dismissing Hernandez's cause of action is hereby granted and the complaint is dismissed.

Dated: December 17 , 2012

Bernice D. Siegal, J. S. C.