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SHORT FORM ORDER

COPY

INDEX No. 10-6160
CAL No. 12-00326MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 6-28-12
ADJ. DATE 9-19-12
Mot. Seq. # 001 - MG
002 - MG; CASEDISP

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MIRIAM HERNANDEZ,

Plaintiff,

- against -

CARLA A. SOLLO, ANTHONY M. MARCHESE and HECTOR A. CANELAS,

Defendants.

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Upon the following papers numbered 1 to 32 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 11 - 22 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 23 - 28 ; Replying Affidavits and supporting papers 29 - 30; 31 - 32 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by the defendant Hector Canelas and the motion (#002) by the defendants Carla Sollo and Anthony Marchese hereby are consolidated for purposes of this determination; and it is

ORDERED that the motion by the defendant Hector Canelas seeking summary judgment dismissing the plaintiff's complaint is granted; and it is further

ORDERED that the motion by the defendants Carla Sollo and Anthony Marchese seeking summary judgment dismissing the plaintiff's complaint is granted.

The plaintiff Miriam Hernandez commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of County

Road 87 and South Coleman Road in the Town of Brookhaven on June 23, 2008. It is alleged that the accident occurred when the vehicle operated by the defendant Anthony Marchese and owned by the defendant Carla Sollo struck the right passenger side of the vehicle operated by the defendant Hector Canelas as it attempted to move into the left lane of County Road 87. The plaintiff, at the time of the accident, was a backseat passenger in the Canelas vehicle. By her bill of particulars, the plaintiff alleges, among other things, that she sustained various personal injuries as a result of the subject accident, including cervical radiculitis, a disc bulge at level C7-T1, and lumbar myalgia and myositis. The plaintiff further alleges that as a result of the injuries she sustained in the collision she was confined to her bed for approximately three days and to her home for approximately one week.

The defendant Hector Canelas now moves for summary judgment on the basis that the injuries the plaintiff alleges to have sustained as a result of the subject accident do not meet the "serious injury" threshold requirement of § 5102 (d) of the Insurance Law. In support of the motion, the defendant Canelas submits copies of the pleadings, the plaintiff's deposition transcript, and the sworn medical reports of Dr. Michael Katz and Dr. Melissa Sapan Cohn. At the defendant Canelas's request, Dr. Katz conducted an independent orthopedic examination of the plaintiff on July 12,2011, and Dr. Sapan Cohn performed an independent radiological review of the magnetic resonance images ("MRI") film of the plaintiff's left wrist performed on November 13, 2009. Additionally, the defendants Carla Sollo and Anthony Marchese (hereinafter collectively referred to as the "Sollo defendants") move for summary judgment dismissing the plaintiff's complaint on the same basis as the defendant Canelas, and they rely on the same evidence that the defendant Canelas submitted on his motion for summary judgment.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "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 medically 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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in

admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, the defendants' submissions made a prima facie case that the plaintiff did not sustain an injury within the meaning of the serious injury threshold requirement of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Al-Khilewi v Turman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]). The defendants' examining orthopedist, Dr. Katz, tested the ranges of motion in the plaintiff's spine and left wrist using a goniometer, set forth his specific measurements, and compared the plaintiff's ranges of motion to the normal ranges (*see* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2d Dept 2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Dr. Katz states that an examination of the plaintiff reveals that she has full range of motion in her spine and in her left wrist. Dr. Katz states that the plaintiff's gait is normal without antalgic or Trendelenburg component, that there are no paravertebral muscle spasms elicited upon palpation of the paraspinal muscles, and that the straight leg raising test is negative. He states that upon examination of the plaintiff's left wrist there are no gross deformities observed, that the Tinel's test is negative, and that there is no tenderness, swelling, erythema or cystic masses present. Dr. Katz opines that the strains the plaintiff allegedly sustained to her cervical and lumbar regions have resolved, and that the plaintiff does not exhibit any signs or symptoms of disabling permanence to her musculoskeletal system. Dr. Katz further states that the plaintiff is not disabled and that she is capable of gainful employment and her usual activities of daily living.

In addition, Dr. Sapan Cohn in her medical report states that the plaintiff's left wrist MRI revealed that she had two ganglion cysts around her left wrist, but that these cysts are extremely common and occur "idiopathically," and are not induced by trauma. Dr. Sapan Cohn further states that the tendons, cartilage and bones in the plaintiff's left wrist are intact, and without evidence of an acute traumatic injury.

The defendants, by submitting the plaintiff's deposition transcript, also established that the plaintiff's alleged injuries did not prevent her from performing substantially all of the material acts constituting her customary daily living activities during at least 90 of the first 180 days following the subject accident (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Dunbar v Prahovo Taxi, Inc.***, 84 AD3d 862, 921 NYS2d 911 [2d Dept 2011]; ***Richards v Tyson***, 64 AD3d 760, 883 NYS2d 575 [2d Dept 2009]). Therefore, the defendants have shifted the burden to the plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797

NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

The plaintiff, in opposition to the motions, argues that the defendants failed to meet their prima facie burden on the motions and that the evidence submitted in opposition shows that she sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law as a result of the subject accident. In opposition, the plaintiff submits the affidavits of Richard Boganski and Gerard Piering, and the sworn medical reports of Dr. Barry Armandi and Dr. Jack Morgani.

The plaintiff, in opposition to the defendants' prima facie showing, has failed to raise a triable issue of fact as to whether the alleged injuries to her spine and left wrist constitute a "serious injury" within the meaning of Insurance Law § 5102(d) (*see* ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950; 944 NYS2d 236 [2d Dept 2012]; ***Quintana v Arena***, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Lea v Cucuzza***, 43 AD3d 882, 842 NYS2d 468 [2d Dept 2007]). The affidavits of the plaintiff's treating chiropractors, Dr. Boganski and Dr. Piering, are without probative value, since both doctors clearly relied upon unsworn reports of others in reaching their conclusions (*see* ***Cotto v JND Concrete & Brick, Inc.***, 41 AD3d 415, 837 NYS2d 728 [2d Dept 2007]; ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Merisca v Alford***, 243 AD2d 613, 663 NYS2d 853 [2d Dept 1997]). Indeed, Dr. Boganski and Dr. Piering each state in their affidavits that "the records were made by the personnel or staff of the business, or persons acting under [his] control." Moreover, the medical reports attached to Dr. Boganski's and Dr. Piering's affidavits are unsworn and, therefore, are inadmissible (*see* ***DeJesus v Paulino***, 61 AD3d 605, 878 NYS2d 29 [1st Dept 2009]; ***Singh v Mohamed***, 54 AD3d 933, 864 NYS2d 498]2d Dept 2008];

Migliaccio v Miruku, 56 AD3d 393, 869 NYS2d 24 [1st Dept 2008]). Furthermore, the affirmations of Dr. Armandi and Dr. Morgani failed to express any opinion as to whether the plaintiff's injuries were caused by the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Ferber v Madorran***, 60 AD3d 725, 875 NYS2d 518 [2d Dept 2009]; ***Luizzi-Schwenk v Singh***, 58 AD3d 811, 872 NYS2d 176 [2d Dept 2009]).

Finally, the plaintiff's submissions are insufficient to raise a triable issue of fact in regards to the 90/180 category. There is an absence of sufficient objective medical proof to support a 90/180 claim (*see* ***Haber v Ullah***, 69 AD3d 796 [2d Dept 2010]; ***Mora v Riddick***, 69 AD3d 591 [2d Dept 2010]; ***Collado v Abouzeid***, 68 AD3d 912 [2d Dept 2009]; ***Vickers v Francis***, 63 AD3d 1150 [2d Dept 2009])). The plaintiff's deposition testimony that she was unable to clean her home or babysit was not supported by objective medical evidence (*see* ***Nelson v Distant***, 303 AD2d 338, 764 NYS2d 258 [1st Dept 2003]; *see generally* ***Johnson v Tranquile***, 70 AD3d 645, 892 NYS2d 896 [2d Dept 2010]). Accordingly, the defendant Hector Canales's and the Sollo defendants' motions for summary judgment dismissing the plaintiff's complaint are granted.

Dated: 21 Dec. 2010

J.S.C.

_X_ FINAL DISPOSITION ___ NON-FINAL DISPOSITION