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SHORT FORM ORDER

INDEX No. 10-20914

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

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-13-12
ADJ. DATE 10-18-12
Mot. Seq.# 001 - MG; CASEDISP

ERIKA JIMENEZ,

Plaintiff,

- against -

MIGUEL A. CONDORI and ALL NATION LIMOUSINE,

Defendants.

CANNON & ACOSTA, LLP
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Upon the following papers numbered 1 to 22 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14 - 20; Replying Affidavits and supporting papers 21 - 22; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for an order granting summary judgment in their favor is granted.

Plaintiff Erika Jimenez commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on Straight Path in the Town of Babylon on November 1, 2006. The accident allegedly happened when a taxi cab driven by defendant Miguel Condori and owned by defendant All Nation Limousine collided with a vehicle driven by plaintiff's father as it was preparing to make a left turn at the intersection of Straight Path and Acorn Street. Plaintiff was riding as a front seat passenger in the vehicle operated by her father at the time of the collision. By her bill of particulars, plaintiff alleges that she suffered various injuries as a result of the accident, including a labral tear and internal derangement of the right shoulder, and cervical radiculopathy. She further alleges that surgery was required to repair the injuries to her right shoulder.

Defendants now move for an order awarding summary judgment in their favor on the ground plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, because she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings and the bill of particulars, a transcript of plaintiff's deposition testimony, and sworn medical reports prepared by Dr. Uriel Davis, Dr. Frank Oliveto, and Dr. Audrey Eisenstadt. At defendants' request, Dr. Davis, a neurologist, and Dr. Oliveto, an orthopedist, conducted independent medical examinations of plaintiff in August 2011 and reviewed various medical records relating to her alleged injuries. Dr. Eisenstadt, a radiologist, conducted an independent examination of a magnetic resonance imagine (MRI) scan of plaintiff's right shoulder that was performed shortly after the subject accident.

Plaintiff opposes the motion, arguing that defendants' medical evidence is insufficient to establish a prima facie case that she did not sustain a serious injury within the "significant limitation of use" or the 90/180 categories of Insurance Law § 5102 (d). Alternatively, plaintiff asserts the affirmed medical reports of Dr. Joseph Perez, Dr. Roberto Rivera, and Dr. Harshad Bhatt included with her opposition papers demonstrate a triable issue exists as to whether she suffers from a significant limitation of use in her right arm due to the shoulder injuries she allegedly sustained in the accident.

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). Insurance Law § 5102 (d) defines "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 by 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.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., 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 also may 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]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d

955, 582 NYS2d 990; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendants' submissions established a prima facie case that plaintiff did not sustain serious injury to her right shoulder as a result of the subject accident (*see* ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235[2d Dept 2012]; ***Bykova v Sisters Trans, Inc.***, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; ***Lim v Flores***, 96 AD3d 723, 946 NYS2d 183 [2d Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). Initially, the Court notes that the medical report of Dr. Eisenstadt, which was not signed, was not in admissible form and, therefore, was not considered in the determination of the motion (*see* ***Buonaiuto v Shulberg***, 254 AD2d 384, 679 NYS2d 89 [2d Dept 1998]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). The report of Dr. Oliveto states that plaintiff presented at the August 2011 orthopedic physical examination with complaints of mid-back pain and right shoulder pain. It states, in relevant part, that plaintiff demonstrated normal range of motion in her right shoulder, and in her cervical and lumbar regions. It further states that plaintiff exhibited normal reflexes, motor strength and sensation in her upper and lower extremities; that there was no evidence of muscle spasm or tenderness in plaintiff's spinal musculature or right shoulder; and that no crepitus or instability was detected in plaintiff's right shoulder. Dr. Oliveto diagnoses plaintiff as having sustained strains in the cervical and thoracic regions and a contusion to the right shoulder as a result of the accident. He concludes that plaintiff has made a full recovery from all of the orthopedic injuries to her neck, mid back and right shoulder.

Similarly, the medical report of Dr. Davis states, in part, that plaintiff walked with a normal gait, and that she exhibited normal motor strength, reflexes and sensation in her upper and lower extremities. Dr. Davis diagnoses plaintiff as having suffered cervical sprain and strain and right shoulder derangement, and concludes that there is no evidence of neurological disability and that plaintiff is capable of working and performing the her regular activities of daily living. It is noted that plaintiff's complaints of tenderness on percussion of her right shoulder and cervical region during Dr. Davis's examination do not demonstrate a triable issue as to whether she sustained a serious injury, nor does a positive finding for cervical nerve root compression.

Further, defendants made a prima facie showing that plaintiff did not suffer an injury within the 90/180 category through the plaintiff's own deposition testimony (*see* ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Lewars v Transit Facility Mgt. Corp.***, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]). Here, plaintiff testified that she was unemployed at the time of the accident, and that she was not confined to her home for any period of time due to her alleged injuries, except for " a month or two months" following arthroscopic surgery on her right shoulder. When questioned as to whether she suffers from any limitations due to her injuries, plaintiff testified only that she is unable to lift heavy items with her right arm. Plaintiff also testified that she had the arthroscopic procedure performed on her right shoulder in February 2010, and that, other than a follow-up examination with the surgeon, she did not receive any additional medical treatment for her shoulder.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation

of movement 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]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or 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.***, 98 NY2d 345, 746 NYS2d 865; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]).

The affirmed reports of Dr. Joseph Perez, who examined plaintiff on at least two occasions, specifically November 17, 2009 and April 14, 2010, are insufficient to defeat summary judgment. Significantly, while both reports state "[t]here is decreased range of motion of the right shoulder especially with flexion, internal rotation and abduction," neither one provides range of motion measurements for plaintiff's shoulder or indicates that range of motion or other objective tests were performed during the examinations (*see* ***Quintana v Arena Transport, Inc.***, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]; ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; ***Johnson v Tranquille***, 70 AD3d 645, 892 NYS2d 896 [2d Dept 2010]; ***Berson v Rosada Cab Corp.***, 62 AD3d 636, 878 NYS2d 189 [2d Dept 2009]; ***Fiorillo v Arriaza***, 52 AD3d 465, 859 NYS2d 699 [2d Dept 2008]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). Further, absent objective medical evidence of restricted movement in the spine or shoulder contemporaneous with the accident, Dr. Perez's conclusory statement in the April 2010 report that plaintiff is "totally disabled" fails to raise a triable issue of fact as to whether she sustained a medically-determined injury of a nonpermanent nature that prevented her from performing substantially all of usual daily activities for not less than 90 days of the 180 days immediately following the accident (*see* ***Conder v City of New York***, 62 AD3d 743, 879 NYS2d 169 [2d Dept 2009]; ***Sainte-Aime v Ho***, 274 AD3d 569, 712 NYS2d 133). Moreover, while Dr. Perez states that "[i]f the events described above are correct then the symptoms described are causally related to the accident of November 9, 2009," his April 2010 report does not indicate that plaintiff underwent arthroscopic surgery on her right shoulder in February 2010. In fact, such report contains a diagnosis of "pain and dysfunction of the right shoulder." Dr. Perez's conclusion that the decreased range of motion in plaintiff's shoulder allegedly observed during the April examination was caused by the subject accident, therefore, is speculative and without probative value (*see* ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235; ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]; ***Zinger v Zylberberg***, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; *see generally* ***Diaz v New York Downtown Hosp.***, 99 NY2d 542, 754 NYS2d 195 [2002]).

The report of Dr. Bhatt, who performed the arthroscopic surgery on plaintiff's shoulder, is without probative value, as it is not affirmed (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Sharma v Diaz***, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]; ***Patterson v NY Alarm Response Corp.***, 45 AD3d 656, 850 NYS2d 114 [2d Dept 2007]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). Finally, the report of Dr. Rivera, who conducted a physical examination of plaintiff on August 30, 2012, is insufficient to defeat summary judgment. Significantly, Dr. Rivera improperly relied on the unsworn report of Dr. Bhatt, as well as on reports of other unnamed physicians which were not included with the opposition

papers, in concluding that plaintiff suffered internal derangement and a labral tear due to the accident, and that such injuries caused significant limitations to her right shoulder (*see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Norton v Roder***, 65 AD3d 1317, 887 NYS2d 129 [2d Dept 2009]; ***Carrillo v DiPaola***, 56 AD3d 712, 869 NYS2d 135 [2d Dept 2008]; ***Uribe-Zapata v Capallan***, 54 AD3d 936, 864 NYS2d 118 [2d Dept 2008]). Having examined plaintiff on only one occasion, years after the subject accident and the arthroscopic procedure on her right shoulder, Dr. Rivera's findings as to the cause and duration of plaintiff's alleged limitation in shoulder joint function are rejected as speculative, conclusory and tailored to meet the statutory requirements (*see* ***Smith v Reeves***, 96 AD3d 1550, 946 NYS2d 750 [4th Dept 2012]; ***Vaughan v Baez***, 305 AD2d 101, 758 NYS2d 648 [1st Dept 2003]).

Accordingly, the motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: February 5, 2013

J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**