Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Alicja Wysocka,

Plaintiff,

-against-

Charles Neglia, Nouvea Elevator Industries, Inc.,
Edwaed Rosado,

Defendants.

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Index No.: 1645/11
Motion Date: 12/12/12
Motion Cal. No.: 8
Motion Seq. No.: 2

The following papers numbered 1 to 15 read on this motion and cross-motionfor an order pursuant to CPLR §3212 granting summary judgment in the favor of the defendants, dismissing the Summons and Complaint of the plaintiff Alicja Wysocka.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12
Reply Affirmation.....	13 - 15

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

Defendant, Edward Rosado ("Rosado"), moves for an order pursuant to CPLR 3212 granting summary judgment in favor of the moving defendant and dismissing the Summons and Complaint of the plaintiff, Alicja Wysocka ("plaintiff" or "Wysocka"). Defendants Charles Neglia ("Neglia") and Nouveau Elevator Industries Inc. (Nouveau Elevator") cross-move and joined in Rosado's motion for summary judgment.

Facts

This action arises from a motor vehicle incident on December 4, 2009, when two vehicles struck plaintiff Wysocka's vehicle in the rear at Greenpoint Avenue and Bradley Avenue in Queens, New York. Neglia operated one of the vehicles, owned by Nouveau Elevator, and Rosado owned and operated the other vehicle. (collectively referred to as "Defendants") Plaintiff alleges she sustained serious injuries to her neck and lower back as a result of the incident. Plaintiff received continuous physical therapy treatment until September 2010, when no-fault insurance would no longer cover the cost of further treatment. Defendants move for summary judgment pursuant to CPLR §3212 on the grounds that plaintiff did not sustain a serious injury under Insurance Law §5102.

On August 22, 2012, plaintiff underwent an anterior cervical discectomy interbody fusion. The court notes that the within procedure was performed after the motion for summary judgment was made.

Analysis

The motion and cross-motion for summary judgment pursuant to CPLR §3212 dismissing plaintiff's cause of action is granted as more fully set forth below.

Threshold

Motions for summary judgment are granted only when there are no material issues of fact to be resolved at trial. (*See Andre v. Pomeroy*, 35 N.Y.2d 361, 364 [Ct. App. 1974]). Since a motion for summary judgment is considered a drastic remedy, the motion's proponent must establish his cause of action "sufficiently to warrant the court as a matter of law in directing judgment in his favor and he must do so by tender of evidentiary proof in admissible form." (*See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [Ct. App. 1980]); *Pomeroy* at 364).

Defendants move for summary judgment on the grounds that plaintiff has not sustained a legally defined "serious injury." Insurance Law §5012(d) establishes nine categories for determining whether an injury is classified as a serious injury. The pertinent categories to this action define serious injury as a 1) "permanent loss of a use of a body organ, member function or system;" 2) "permanent consequential limitation of use of a body organ or member;"3) "significant limitation of use of a body function or system;" or 4) "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

The issue of whether plaintiff suffered a serious injury is a question to be determined in the first instance by the court as a matter of law. (*See Licari v. Elliot*, 57 N.Y. 2d 230, 237 [Ct. App. 1982]). The defendant has the initial burden of making a prima facie showing that plaintiff has not sustained a serious injury. (*See Gaddy v. Eyler,* 79 N.Y.2d 955, 977 [Ct. App. 1992]). Defendant can meet this burden through the admission of medical "expert's designation of a numeric percentage of a plaintiff's loss of range of motion," or qualitatively if the evidence contains an "objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." (*See Toure v. Rent A Car Sys.,* 98 N.Y.2d 345, 351 [Ct. App. 2002]) ("an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claim"). If defendant meets this burden, the burden shifts to the plaintiff to bring sufficient evidence of a serious injury within the meaning of the No-Fault Insurance Law. (*See Gaddy* at 977).

Here, Defendants met their initial burden of establishing that plaintiff has not sustained a serious injury through the submission of medical reports from Dr. Mariana Golden, a neurologist, Dr. Raghava R. Polavarapu, an orthopedic surgeon, Dr. Richard A. Heiden, a radiologist. Dr. Golden, whom evaluated plaintiff November 23, 2011, found "no evidence of a neurological disability or deficit." Dr. Polavarapu compared the results elicited from the goniometer testing to the normal range of motion and found that injuries relating to plaintiff's cervical spine, thoracic spine and lumbar spine had been resolved. Dr. Heiden, whom evaluated plaintiff shortly after the incident and reevaluated her on July 28, 2011, found evidence of degenerative spodyloarthropathy, a "process which takes years to develop" and "clearly preexisting at the time of the accident." In addition, defendant established that plaintiff failed to meet the 90/180 threshold. Plaintiff testified at her deposition that she missed "all together ... probably around thirty and forty days of work." (Wysocka Transcript pg. 105.) Accordingly, the burden has now shifted to the plaintiff to raise 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 957; *Greene v. Miranda*, 272 A.D.2d 441 [2nd Dept. 2000].)

In opposition, plaintiff failed to raise a triable issue to overcome Defendants' motion for summary judgment. Plaintiff submits affirmed medical reports from Dr. Steven Winter, a radiologist, Dr. Aron Rovner, an orthopedist, and Dr. Richard Parker, an orthopedist. These reports failed to provide an objective basis for their findings that plaintiff had suffered a decreased range of motion. Although Dr. Rovner and Dr. Parker listed specific numeric losses of range of motion for plaintiff's cervical and lumbar spine, they failed to state what objective tests were used to determine Wysocka's range of motion. (*Bacon v. Bostany*, 2013 WL 811784 [2nd Dept March 6, 2013]; *Catalano v. Kopmann*, 73 A.D.3d 963 [2nd Dept 2010]; *Alicea v. Troy*

Trans, Inc., 60 A.D.3d 521 [1st Dept 2009].)

The requirement for the submission of objective medical evidence to reveal significant limitations resulting from the accident exists even where there is surgery.*(Colon v. Vincent Plumbing & Mechanical Co.*, 85 A.D.3d 541 [1st Dept 2011][failure to identify or describe the objective medical tests employed in measuring the alleged restrictions in range of motion is fatal even when there is surgery]; *Soho v. Konate*, 85 A.D.3d 522 [1st Dept 2011]; *Jean v. Kabaya*, 63 A.D.3d 509 [1st Dept 2009]; *Byrd v. Limo*, 61 A.D.3d 801[2nd Dept 2009]; *Shtesl v. Kokoros*, 56 A.D.3d 544 [2nd Dept 2008].)

In addition, the plaintiff admitted during her deposition that she only missed "around thirty and forty days of work" and, thus, was not prevented from performing substantially all of the material acts which constituted her 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 reasons set forth above, Rosado's motion for summary judgment and Neglia and Nouvea's cross-motion are granted on the issue of "serious injury" and plaintiff's action is dismissed.

Dated: March 22 , 2013

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Bernice D. Siegal, J. S. C.