SHORT FORM ORDER

INDEX No. 10-2419
CAL No. 12-02311MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 1-22-13
ADJ. DATE 4-16-13
Mot. Seq. # 001 - MD

CAROL A. CARY,

Plaintiff,

- against -

DANIELLE M. BROWN,

Defendant.

THE SICURANZA LAW FIRM, LLC
Attorney for Plaintiff
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Melville, New York 11747

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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 (001) 1 - 9; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 10-20; Replying Affidavits and supporting papers 21-22; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant, Danielle M. Brown, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Carol A. Cary, did not sustain a serious injury as defined by Insurance Law 5102 (d) is denied.

This negligence action arises out of a motor vehicle accident wherein the plaintiff, Carol A. Cary, seeks damages for personal injuries claimed to have been sustained on September 7, 2009, on Route 112 at or near its intersection with Hallock Avenue, in Port Jefferson Station, New York, when the vehicle operated by the defendant, Danielle M. Brown, struck the plaintiff's vehicle in the rear while the plaintiff was yielding the right of way to an ambulance at the intersection.

The defendant seeks summary judgment dismissing the complaint on the basis that Carol A. Cary did not sustain a serious injury as defined by Insurance Law 5102 (d).

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]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d

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316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). 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" (CPLR 3212[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 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."

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 a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***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, here the plaintiff (***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*).

By way of her verified bill of particulars, the plaintiff alleges that she sustained injuries consisting of reversal of normal cervical lordosis, disc space narrowing with anterior osteophyte ridging most prominent at C4-5, C5-6; subluxation at C2-3 and C3-4; loss of height at the C5 and C6 vertebral bodies; bulging disc at C3-4 with osteophytic ridging of the right uncovertebral joint; hypertrophic degenerative changes of the right facet

joint with moderate right foramina narrowing and mild impingement upon the right ventral subarachnoid space; diffuse disc bulging associated with osteophytic riding at C4-5 with a small superimposed right parasagittal disc herniation with mild cord impingement and moderate formainal narrowing bilaterally; diffuse disc bulging at C5-6 associated with osteophytic ridging resulting in narrowing of the AP diameter of the spinal canal with mild cord flattening to the left side and significant bilateral narrowing; and diffuse disc bulging at C6-7 associated with osteophytic ridging and moderate foramina narrowing bilaterally with narrowing of the AP diameter of the spinal canal with slight cord impingement centrally.

In support of this application, the defendant has submitted, inter alia, an attorney's affirmation; copies of the pleadings; plaintiff's verified bill of particulars; the reports of Edward J. Toriello, M.D. concerning his independent orthopedic examination of plaintiff on June 14, 2011, Beatrice C. Engstrand, M.D. concerning her independent neurological examination of plaintiff on June 30, 2011, and Stephen W. Lastig, M.D. dated June 1, 2011 concerning his interpretation of the plaintiff's MRIs of her cervical spine dated September 21, 2009; and the transcript of the plaintiff's examination before trial dated May 11, 2011.

It is determined that the defendant has not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Carol A. Cary did not sustain a serious injury. The defendant failed to support this motion with the medical records and initial test results for the MRI studies of the plaintiff's cervical spine and right hip, CT of the cervical spine, as well as the medical and hospital records which the examining orthopedic and radiological expert physicians reviewed and upon which they base their expert opinions in part, leaving it to the court to speculate as to the contents of those records and MRI and CT scan reports. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that expert testimony is limited to facts in evidence (*see* ***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]).

Dr. Toriello stated that the plaintiff had a prior right total hip replacement with no past medical history and continues to complain of numbness and paraesthesis in the thumb, index finger, and middle fingers of both hands, right worse than left, and soreness in her neck. Upon examination, Dr. Toriello stated that the plaintiff had decreased bilateral rotation of the cervical spine to 45 degrees, whereas the normal is 80 degrees. Whereas Dr. Toriello set forth that the normal cervical flexion is 50 degrees and extension is 60 degrees, Dr. Engstrand has set forth the normal cervical flexion as 45 degrees and extension is 45 degrees, thus raising factual issues concerning which are the normal values, as the experts differ in their opinions. Dr. Toriello raises credibility issues by stating that the range of motion examination is a subjective test under voluntary control of the individual being tested and that there are no objective findings that support the subjective decrease range of motion in this case. However, the range of motion values are objectively determined with the use of a goniometer, thus raising factual issues as well as credibility issues to be determined by a jury (*see* ***Washington v Delossantos***, 44 AD3d 748, 843 NYS2d 186 [2d Dept 2007]; ***Lalla v Connolly***, 17 AD3d 322, 791 NYS2d 845 [2d Dept 2005]).

Moreover, defendant's examining orthopedic surgeon failed to address plaintiff's claimed injuries of bulging discs, subluxation, and flattening and impingement of the spinal cord as alleged in the plaintiff's bill of particulars (*see* ***Hughes v Cai***, 31AD3d 385, 818 NYS2d 538 [2d Dept 2006]), raising further factual issues with regard to causation. Dr. Engstrand does not address the plaintiff's claims of bulging discs or flattening and

impingement of the spinal cord as pleaded by the plaintiff, and she does not rule out that such injuries were caused by the subject accident. Nor does Dr. Engstrand address the plaintiff's complaints of numbness in her hands and whether such condition is causally related to the subject accident.

Dr. Lastig has submitted his review of the CT of the plaintiff's cervical spine of September 21, 2009 but has not reviewed the MRI films of the plaintiff's cervical spines. In that the defendant has not submitted copies of the original reports pertaining to the plaintiff's cervical CT and MRI studies, this court is left to speculate as to the contents of those reports, and if the defendant's expert is in agreement with the interpretation by the plaintiff's treating radiologist, precluding summary judgment. Dr. Lastig indicated that there is unequivocal evidence of advanced multilevel degenerative disc disease and degenerative spondylosis, however he does not indicate the duration of his findings upon reviewing the CT films. Dr. Lastig opined that the end-plate osteophytes and uncinate osteophytes indicate the presence of long standing degenerative hypertrophic bony process which pre-dates the accident as the accident occurred only two weeks prior to the study. He does not give any basis for his opinion that the multilevel disc pathology is degenerative in origin and does not indicate the duration of such condition, precluding summary judgment. Additionally, Dr. Lastig does not comment upon the cervical CT scan of November 8, 2011.

Based upon the foregoing factual issues and failure to support the application with the appropriate evidence, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment with regard to the first category of serious injury defined in Insurance Law §5102 (d).

It is noted that the defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; ***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 the experts offer 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]). The plaintiff testified that she was employed by Eastern Suffolk BOCES. Part of her duties involved moving the classroom around and carrying books and packing and unpacking yearly. Prior to the accident, she babysat an autistic child and did medical billing to supplement her income. After the accident, she was not able to perform those income supplementing jobs, as she had to attend physical therapy and attend to doctor's visits which took up time. Although she tried not to miss any time from work, she was late on occasion, as she was not doing well, and the situation was addressed by the principal. She cannot lift at work any more, especially on the left side and has to even keep her pocket book on her right side. She cannot maintain position at the computer for more than fifteen minutes due to sharp pains in her neck. It is noted in the plaintiff's opposing papers that she suffers from memory loss, fatigue, and discomfort in her neck with significant loss of range of motion in her neck and numbness in her fingers, dizziness and nausea. Thus, the defendant failed to demonstrate entitlement to summary judgment on this category of injury as well.

The factual issues raised in defendant's moving papers preclude summary judgment. The defendant failed to satisfy his burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the

moving party 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 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]).

Accordingly, motion (001) by the defendant for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

The foregoing constitutes the Order of this Court.

Dated: May 16, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**