SHORT FORM ORDER

INDEX No. 10-44934
CAL. No. 12-01625MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 12-19-12
ADJ. DATE 4-4-13
Mot. Seq. # 001 - MD

LYNN GREEN and STEPHEN R. GREEN,

Plaintiffs,

- against -

STEVEN W. BUTTON and ELIZABETH BUTTON,

Defendants.

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 -13; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 14-21; Replying Affidavits and supporting papers 22-23; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants, Steven W. Button and Elizabeth Button, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Lynn Green, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

This is an action by the plaintiff, Lynn Green, to recover damages for personal injuries allegedly sustained in a motor vehicle accident on June 4, 2008, on Pulaski Road, in Suffolk County, New York when the vehicle operated by the defendant, Steven W. Button, and owned by Elizabeth Button, struck the plaintiff's vehicle. A derivative claim has been asserted on behalf of plaintiff's spouse, Stephen R. Green.

The defendants seeks summary judgment on the basis that Lynn Green did not sustain a serious injury as defined by Insurance Law §5102 (d). The plaintiffs oppose the defendant's application.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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 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*).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendants' answer, and plaintiff's verified bill of particulars; the curriculum vitae and expert report of Naunihal Sachdev Singh, M.D. dated March 22, 2012 concerning the independent neurological examination of the plaintiff; the curriculum vitae and expert report of Edward Toriello, M.D. dated April 23, 2012 concerning the independent orthopedic examination of the plaintiff; and the curriculum vitae and report of David A. Fisher, M.D. dated October 17, 2012 concerning his independent radiology review of the MRI of the plaintiffs lumbar spine dated April 9, 2009.

By way of the plaintiff's verified bill of particulars, Lynn Green alleges that, as a result of the subject accident, injuries were sustained consisting of precipitation and/or aggravation of bulging discs at L2-3 and L3-4 causing thecal sac compression; a bulging disc at L4-5; neck pain/strain; shoulder pain/strain; lower back pain/strain; right buttock pain; right hand pain; right hip pain; right calf and foot pain; post-traumatic headaches; EMG revealing abnormal findings and NCV study revealing neuropathy of peroneal nerve/possible compression of S1; and loss of sleep.

Based upon a review of the foregoing evidentiary submissions, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment on the issue of whether the plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d).

The defendants' neurology expert, Naunihal Sachdev Singh, M.D., and orthopedic expert, Edward Toriello, M.D., set forth the materials and records which they reviewed, including MRI studies of Lynn Green's lumbar spine dated March 6, 2007 and April 9, 2009, and nerve conduction studies, which the defendants have not submitted in support of Dr. Singh and Dr. Toriello's opinions as required pursuant to CPLR 3212. 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]), which evidentiary proof has not been provided in the moving papers.

Dr. Singh set forth that the sixty-five year old female was a restrained passenger when the vehicle was hit on the passenger side. She stated she sustained trauma to her neck, upper back, mid back, and lower back at the time of the accident. She was seen for emergency treatment at Huntington Hospital and released. She received follow up care and treatment, including chiropractic and physical therapy treatments three times a week for six months, then twice a week for six months. She also had an MRI of her back and NCV studies. She complained of lower back pain radiating to her right buttock, thigh, and hip. She can sit and stand for 15 to 20 minutes and can walk for thirty minutes. She experiences weakness in her right leg. In 1998 she had spontaneous lower back pain and underwent an MRI scan and received chiropractic treatment once or twice a month prior to the 2008 accident, and had no pain for one year prior to this accident. She is a free lance writer and reporter and is currently not working.

Dr. Singh performed range of motion testing on plaintiff's cervical spine, lumbar spine, and shoulder joints. However, he did not perform range of motion findings on plaintiff's thoracic spine, although he indicated he examined the thoracic spine and found no tenderness, thus precluding summary judgment as there are factual issues concerning whether or not there are restrictions in thoracic range of motion. He did note that the plaintiff had a scoliosis to the left in the mid-thoracic spine with drooping of the right shoulder, however, he did not comment as the whether or not these findings were causally related to the injuries sustained in the subject accident.

Upon performing range of motion values of the plaintiff's lumbar spine, Dr. Singh found that there was a deficit of twenty degrees in flexion when he compared this finding with the normal range of motion value for lumbar flexion. While Dr. Singh stated that his diagnosis was that of pre-existing ongoing osteoarthritis of the lumbar spine with pain off and on and exacerbation of pain since the June 4, 2008 accident, he does not state the basis for his opinion that the osteoarthritis was pre-existing. Dr. Singh also did not address the findings set forth in the reports of the plaintiff's MRI studies and nerve conduction studies. He does not offer an opinion as to whether the plaintiff's alleged herniated and bulging lumbar discs are causally related to the accident, nor does he address the duration of the findings (***Estella v Geico Insurance Company***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]), but stated that the injuries sustained on June 4, 2008 are causally related to the accident. Although, Dr. Singh indicated that the nerve conduction studies revealed abnormal findings, he stated in a contradictory manner that there is no evidence of radiculopathy or neuropathy, thus raising further factual issues.

Dr. Toriello and Dr. Singh have used differing normal range of motion values for cervical extension and flexion, and lumbar rotation, thus leaving it to this court to speculate as to which values are considered the normal range of motion values. Dr. Toriello determined straight leg raising testing was positive on the right, demonstrating a ten degree deficit from the normal value, but does not state whether or not this objective evidence is causally related to the plaintiff's alleged injuries. Dr. Toriello set forth the findings of plaintiff's lumbar MRI studies of March 7, 2007, which revealed bulging discs at L2-3, L3-4, L4-5, and L5S1 with moderate to severe spinal stenosis at L4-5 and degenerative changes. He stated that the MRI report of April 9, 2009 revealed moderate spinal stenosis at L4-5 secondary to bulging and degenerative changes, and degenerative changes at L5-S1 causing bilateral S1 nerve root compression and mild degenerative changes at L2-3 and L3-4. However, he does not address what the degenerative changes at L5-S1 are as demonstrated on the April 9, 2009 report, and he does not rule out the plaintiff's claim of nerve compression at S1, and the L2-3 and L3-4 thecal sac compression, are causally related to the accident, and does not mention the same. The plaintiff's MRI reports have not been provided to this court for review of the findings. Dr. Toriello set forth in a conclusory and unsupported statement that the plaintiff has pre-existing spinal stenosis related to degenerative changes not causally related to this accident.

In reviewing the report of the defendants' radiology expert, Dr. David Fisher, it is noted that Dr. Fisher simply stated that there are degenerative changes throughout the lumbar spine with mild disc bulges, however, he does not state at what level, how many disc bulges were demonstrated, or what the degenerative changes are. Nor has Dr. Fisher addressed whether or not there is any compression on the thecal sac or nerve compression at S1. He concluded that there is no radiographic evidence of traumatic or causally related injury to the lumbar spine, but does not state the basis for this opinion. Dr. Fisher, as the radiology expert, has not compared the MRI of April 9, 2009 to plaintiff's prior MRI of March 7, 2007, leaving this court to speculate as to his findings upon comparison of these studies.

Based upon the multiple factual issues and lack of supporting evidentiary proof, it is determined that the defendants failed to establish prima facie that the plaintiff did not sustain a serious injury as set forth in the first categories of injuries as defined by Insurance Law § 5102 (d).

Turning to the second category of injuries defined in Insurance Law § 5102 (d), it is determined that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus, rendering defendant's physician's affirmation 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]; *see* ***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 examining physician does not comment on the same. Neither physician related his findings to this category of serious injury for the period of time immediately following the subject accident (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Accordingly, there are factual issues concerning this second category of injury which preclude summary judgement.

These factual issues raised in defendant's moving papers preclude summary judgment, as the defendant failed to satisfy the burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) under either category (*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 has 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 defendants for summary judgment dismissing the complaint is denied.

Dated: 5/24/13

A.J.S.C.

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