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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 32

Index Number : 103245/2011
JACOBS, SHARONE MARIE
vs.
PERCIBALLI CONTAINER
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for MSJ on Serious Injury

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
MAY 28 2013
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5.14.13

HON. ARLENE P. BLUTH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

----------x

SHARONE MARIE JACOBS,

Plaintiff,

-against-

PERCIBALLI CONTAINER SERVICE INC. and JOHN A. GIASI,

Defendants.

Index No.: 103245/11

DECISION/ORDER
HON. ARLENE P. BLUTH,

This action for damages for personal injuries arising out of a motor vehicle accident which occurred on March 8, 2011 at the intersection of Narrows Road North and Fingerboard Road in Staten Island, New York. Defendants Perciballi Container Service Inc. and John A. Giasi (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Sharone Marie Jacobs' complaint on the ground that she has not met the serious injury threshold as defined by New York's No-Fault Law (Insurance Law § 5102 [d]). For the following reasons, the motion is denied.

BACKGROUND

At the time of the accident, plaintiff was a 34 year old physician; as an independent contractor, she worked for several entities. She had been assigned two shifts as a general surgeon and looked forward to building that up, as her goal was to do general surgery. Meanwhile, however, she performed disability exams for worker's compensation purposes (usually on Fridays) and worked with a company which provided wound care to patients in nursing homes.

On the day of the accident, she was on her way to visit patients at a nursing home in

Staten Island. She was driving straight in the left lane on Narrows Road North. As she attempted to travel through the intersection of Narrows Road North and Fingerboard Road, defendant's truck, which was also traveling on Narrows Road North, turned left from the center lane in front of plaintiff's vehicle (which was in the left lane), causing the two vehicles to collide.

Rather than proceeding to work, plaintiff turned around and headed back home. Minutes after leaving the accident scene, plaintiff allegedly began to experience pain in her neck, which radiated to her right shoulder. Later that day, plaintiff went to the emergency department of New York Presbyterian Hospital (the hospital). While at the hospital, plaintiff underwent a magnetic resonance imaging (MRI) of her cervical spine, which indicated a small broad-based disc herniation with annular fissure at C3-C4, as well as diffuse disc bulges at C4-C5 and C2-C3. Thereafter, plaintiff was given some muscle relaxants and released from the hospital.

DISCUSSION

In her bill of particulars (exh D to moving papers), plaintiff alleges that she missed several days of employment and sustained the following physical injuries as a result of the accident:

> injury to her neck and other parts of the body, straightening of normal cervical lordosis, bulging discs C2-3, C4-5, herniated discs at C3-4, C5-6 with stenosis and effacement of the spinal cord, neck pain with reduced range of motion and spasm, neck pain radiating down right arm, extreme pain and suffering, mental anguish and distress, plaintiff required hospital and medical care and will require such care and treatment in the future, unable to attend to her usual duties and vocation, affected plaintiff's ability to work as a surgeon, all of which damages are permanent in nature and continuing into the future.

In her supplemental bill of particulars, dated October 14, 2011, plaintiff stated that said

"injuries, their residuals and sequallae are permanent and progressive in nature and will tend to worsen over lifetime of the plaintiff, necessitating future surgery" (exh D to moving papers).

In addition, in the supplemental bill of particulars, plaintiff alleges that she sustained a serious injury, as defined by the Insurance Law § 5102 (d), in that she sustained:

> A permanent loss of use of a body organ, member, function or system,
> A permanent consequential limitation of use of a body organ or member,
> Significant limitation of use of a body function or system,
> A medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted plaintiff's usual and customary daily activities for at least 90 days during the 180 days immediately following the accident herein.

Requirements for Motions for Summary Judgment

"On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action" (*Wadford v Gruz*, 35 AD3d 258, 258 [1st Dept 2006]). To meet the prima facie burden of summary judgment of the serious injury threshold, a defendant must "submit[] expert medical reports finding normal ranges of motion in the claimed affected body parts and no objective evidence that any limitations resulted from the accident" (*Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]; *Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). The burden then shifts to the plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*id.*; *Yagi v Corbin*, 44 AD3d 440, 440 [1st Dept 2007]).

In order to establish a permanent loss of use of a body organ, member, function or system, "the 'permanent loss of use' must be total" (*Oberly v Bangs Ambulance*, 96 NY2d 295, 299

[2001]). In order to establish a permanent consequential limitation of use of a body organ or member, or a significant limitation of use to a body function or system, plaintiff must demonstrate that "the limitation is 'significant' or 'consequential' in the sense that it is not minor or trivial" (*Altman v Gassman*, 202 AD2d 265, 265 [1st Dept 1994]; *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010] [a finding of a minor limitation in the plaintiff's lumbar spine by defendants' expert was "insignificant" in regard to Insurance Law § 5102 (d)]). "In order for a non-permanent injury to be considered 'serious,' ... there must be a medical determination as to the extent of the injury and its adverse impact on the injured party's ability to perform his usual and customary daily activities [citation omitted]" (*McLoyrd v Pennypacker*, 178 AD2d 227, 227 [1st Dept 1991]).

"Specifically, under the permanent consequential limitation and significant limitation categories, plaintiffs [are] required to submit medical proof containing 'objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system'" (*Felton v Kelly*, 44 AD3d 1217, 1218-1219 [3d Dept 2007], quoting *John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]; *Silva v Vizcarrondo*, 31 AD3d 292, 292 [1st Dept 2006] [affirmation of plaintiff's treating physician included her findings of limited ranges of motion in the lumbar and cervical spine and right elbow, which she assigned specific percentages and compared to the normal range, thus meeting the minimal standard required to substantiate a claim of serious injury pursuant to Insurance Law § 5102 (d)]).

Defendants' showing

In support of their motion, defendants offer evidence that the injuries allegedly sustained by plaintiff are now fully resolved and not resulting in any limitation of motion or residual disability. Defendants argue that, at most, any causally related injury allegedly sustained by plaintiff as a result of the accident was mild, and thus insignificant within the meaning of the statute. Specifically, defendants submit their attorney's affirmation, the pleadings, plaintiff's bills of particulars, plaintiff's deposition and the reports of independent medical examinations conducted by Marianna Golden, M.D. (Dr. Golden) and Thomas Nipper, M.D (Dr. Nipper).

Following a neurologic examination of plaintiff on December 13, 2011, Dr. Golden wrote a report dated January 19, 2012. That report (defendants' exhibit E) recited what plaintiff told Dr. Golden: that plaintiff was experiencing "radiating pain in her neck radiating to her right hand and pain in her lower back radiating to the buttocks", that she had not been involved in any prior motor vehicle accidents, that she had not sustained any other work-related or other injuries and that she was out of work for two and a half days due to the injuries that she allegedly sustained as a result of this accident.

Using a goniometer, Dr. Golden measured ranges of motion (expressed in degrees and corresponding normal values) in plaintiff's thoracolumbar spine and cervical spine, as per the AMA "Guides To The Evaluation Of Permanent Impairment, Fifth Edition" (*id.*). After examining plaintiff and referring to plaintiff's verified bills of particulars, MRI and CT reports, hospital records, physical therapy evaluation notes, as well as the medical reports of plaintiff's physician, Dr. Joyce Goldenberg, Dr. Golden reported the following "[n]ormal neurologic examination" diagnosis, based on a reasonable degree of medical certainty:

> "There is no objective evidence of radiculopathy. Based on today's examination, there is no evidence of neurologic disability or permanency as it relates to the accident of record. [Plaintiff] is capable of working and can perform all her normal activities of daily living without restrictions or any neurologic limitations. Based on my examination performed today, and the history as provided by [plaintiff] and the records reviewed, there is no neurologic injury causally related to the accident of record"

(defendants' exhibit E).

Dr. Nipper performed an orthopedic evaluation of plaintiff on the same day, December 13, 2011. In his report, also dated January 19, 2012 (and annexed as exhibit F to defendants' moving papers), Dr. Nipper stated that he based his conclusions on his own evaluation of plaintiff's ranges of motion, utilizing a goniometer, as compared with those listed in the AMA Guide, as well as his review of plaintiff's prior medical records, CT and MRI reports, verified bills of particulars, physical therapy reports and Dr. Goldenberg's notes.

In his report, Dr. Nipper noted that plaintiff, employed as a physician at the time of the accident, reported to him that she missed two and a half days of work as a result of the accident, and that she was currently back at work full-time. Following his examination of plaintiff, wherein he found no spasms present in plaintiff's cervical or lumbar spine, and no impingement of plaintiff's right shoulder, Dr. Nipper concluded that plaintiff was faking her injuries, that plaintiff's range of motion tests were in "normal" ranges, and that any "[d]ecreased range of motion is due to suboptimal effort due to subjective complaints". Dr. Nipper further expanded on his conclusions that plaintiff was faking it:

> "[Plaintiff] has decreased ranges of motion on today's cervical spine and right shoulder examination, which is subjective and voluntary. There were no objective clinical findings, such as muscle spasm or positive orthopedic testing to substantiate the subjective loss of motion."
>
> Based on today's examination, there is no objective evidence of orthopedic

> disability or permanency as it relates to the accident of 3/8/11. She is capable of working and performing all of her normal activities of daily living without limitations. Prognosis is good.
>
> Based on the [i]nformation available, the history as related by the claimant and my physical examination, there is a causal relationship between the sprain/strain injuries and the accident reported

(*id.*). Notably, Dr. Nipper maintained that plaintiff's cervical spine and lumbar spine strains were "resolved" (*id.*).

As defendants have submitted expert medical reports "finding normal ranges of motion in the claimed affected body parts and no objective evidence that any limitations resulted from the accident," they have met their prima facie burden of demonstrating that plaintiff did not suffer a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system involving her cervical and lumbar spine or right shoulder (*Vega v MTA Bus Co.*, 96 AD3d at 506; *Spencer v Golden Eagle, Inc.*, 82 AD3d at 591). Thus the burden to show a triable issue of fact shifted to the plaintiff.

Plaintiff's showing

In response to defendants' prima facie showing of entitlement to judgment as a matter of law, as set forth above, plaintiff puts forth the following opposition. On the day of the accident, plaintiff underwent an MRI of her cervical spine at the hospital. The findings of the MRI showed a straightening of plaintiff's cervical lordosis, with a small broad based disc herniation with annular fissure at C3-C4, causing central canal stenosis and mild cord effacement. In addition, plaintiff's MRI revealed a small left paracentral disc herniation at C5-C6, with diffuse disc

bulges at C4-C5 and C2-C3.

Shortly after the accident, on March 18, 2011, at Central Park Physical Medicine and Rehabilitation, P.C, plaintiff was examined by Joyce Goldenberg, M.D. (Dr. Goldenberg). As reflected in Dr. Goldenberg's medical report, dated July 16, 2012, at the initial visit plaintiff complained of dull and sharp neck pain with weakness and increased arm pain by the end of the day. Dr. Goldenberg's report also noted that plaintiff had no previous injuries or prior history involving her neck, back and right shoulder, and that all of plaintiff's present complaints followed the subject accident.

During the March 18, 2011 evaluation of plaintiff, using either an inclinometer or a goniometer, Dr. Goldenberg conducted objective range of motion tests which showed restrictions of between 22% and 33% is various areas. Dr. Goldenberg diagnosed plaintiff as having cervical sprain/whiplash, cervical myositis, muscle spasms, upper thoracic sprain, cervical radiculopathy and internal derangement of the right shoulder. Dr. Goldenberg prescribed plaintiff a course of physical therapy, home exercise and further MRIs, if necessary. Thereafter, beginning in March of 2011, plaintiff commenced a course of physical therapy with Central Park Physical Medicine and Rehabilitation.

Within three weeks of the accident, plaintiff began experiencing lower back pain with radiation to the buttocks bilaterally. Accordingly, on April 25, 2011, plaintiff was referred for an additional MRI of her lumber spine which was performed by a radiologist, Thomas M. Kolb, M.D. (Dr. Kolb), at Lenox Hill Radiology & Medical Imaging Associates. A posterior disc herniation at L5-S1, impinging on the thecal sac, could be seen on plaintiff's April 25, 2011 MRI. In addition, on May 4, 2011, plaintiff underwent a cervical spine EMG and Nerve

Conduction Study by Dr. Goldenberg, wherein Dr. Goldenberg determined that the EMG was positive for L5-S1 lumbar paraspinal muscle.

On June 15, 2011, about three months after the accident, plaintiff underwent an orthopedic examination by Jeffrey Passick, M.D. (Dr. Passick), on behalf of her no-fault insurance provider, Allstate Insurance Company (Allstate). Dr. Passick noted in his report that, before the date of the accident, plaintiff worked full-time as a physician, and that she was currently working at the same job, but with more limited duties. Dr. Passick opined that plaintiff's injuries, which included cervical spine sprain and radiculopathy, as well as lumbar strain, were caused by the accident.

After conducting a physical examination of plaintiff's cervical and lumbar spine, Dr. Passick found restrictions in range of motion in various areas from 12.5% to 36%. He stated in his report that plaintiff's cervical flexion was normal; her cervical extension was only two-thirds of normal; her right rotation was only two-thirds of normal; cervical rotation to the left was a little more than two-thirds of normal; and right and left lateral flexion was almost 90% of normal. In addition, plaintiff's lumbar flexion was only 75% of normal, and her lumbar extension was a little more than 80% of normal.

Nevertheless, Dr. Passick concluded that further physical therapy and orthopedic treatment were not medically necessary and asserted that plaintiff was capable of performing all tasks and maintaining employment, without restrictions. As a result of Dr. Passick's report, plaintiff's no-fault benefits were cut off. Plaintiff then appealed the denial of her no-fault benefits.

In response to the appeal, Dr. Passick issued an addendum to his original report, dated

August 29, 2011 (exh G to opp) wherein he stated:

> I have reviewed the additional medical records provided and I empathize with Dr. Jacobs. I do not deny her pain and I have positive findings in my report. The question is whether the treatment she was receiving was necessary and restorative to her. The types of treatment noted in her medical records and what she described to me during my examination on 6/15/11 were no longer beneficial to her and are not likely to speed her recovery.
>
> I know it can be frustrating to deal with pain after an injury. The issue at hand was not whether an injury occurred, that is clearly documented in my report. The issue was whether the treatment she was receiving was beneficial. I would certainly recommend that further treatment be allowed if it was going to be helpful to her and would gladly reassess Dr. Jacobs once a new treatment plan is formulated. My overall opinion has not changed but I hope the above has clarified that opinion.

In other words, Dr. Passick acknowledged plaintiff's ongoing pain, restricted range of motion and causation and radiculopathy, but said that additional physical therapy would not help her. He does not address how a surgeon with those findings and limitations can stand and stoop over a patient for as long as it takes to complete the operation – or several operations in a day. His findings simply do not comport with his conclusion that she can go back to general surgery shifts. No one wants a surgeon whose radiculopathy causes hand numbness and weakness.

On March 5, 2012, plaintiff was examined by Stuart Kahn, M.D. (Dr. Kahn), a pain management specialist with the Spine Institute of New York, affiliated with Beth Israel Medical Center. Dr. Kahn conducted his own examination of plaintiff and he reviewed plaintiff's medical records to date, including the emergency room records, plaintiff's cervical CT scan and cervical MRI from the hospital, as well as the medical reports of Dr. Goldenberg and Dr. Passick.

Dr. Kahn concluded that, as a result of the accident, plaintiff suffered from posttraumatic neck and back injury, cervical herniated disc with radiculopathy, lumbar herniated disk with

radiculopathy, chronic disability and decreased function. Dr. Kahn also stated that said diagnoses are permanent, and that, if plaintiff "does not undergo a surgical decompression in the cervical spine that it is highly unlikely that [she] will ever be able to return to full time surgical work as she has such a high risk of experiencing hand numbness and weakness in the middle of a critical surgery where those skills are needed" (exhibit I to opp). The Court notes that Dr. Kahn's examination was performed before the defendants served this motion; it was not done in response to it.

After this motion was served in May 2012, plaintiff was re-evaluated by Dr. Goldenberg on July 16, 2012. At that time, Dr. Goldenberg again performed range of motion tests of plaintiff's cervical and lumbar spine using either an inclinometer or goniometer. After comparing plaintiff's range of motion test results with what is considered normal, Dr. Goldenberg diagnosed plaintiff as having cervical disc herniations at C3-4 and C5-6, cervical disc bulges at C2-3 and C4-5, cervical radiculopathy at C5-6, cervical myofascial pain syndrome/muscle spasms, lumbar radiculopathy at L5-S1 and lumbar myofacial pain syndrome/muscle spasms.

Dr. Goldenberg stated that plaintiff's injuries and limitations are "the direct result of the accident in question and are causally connected" (exh C to opp). In addition, as a result of these symptoms, plaintiff has "developed limitation of use of her cervical and lumbar spine, which prevents her from performing her activities of day living" (*id.*). Dr. Goldenberg also concluded that the "loss in mobility that she suffers is permanent" (*id.*).

In her affidavit, sworn to August 21, 2012, plaintiff stated that although she can still see wound care patients, she cannot turn bedridden patients any longer and requires nurses or

orderlies to help. She is also no longer able to perform the ten to fifteen medical disability exams on any given day, due to weakness in her right hand. As a result, plaintiff's work as a physician is now less interesting than it was before the accident, and she has had to give up her goal of working as a general surgeon. Plaintiff also asserts that her pain and related symptoms have limited her activities outside of work, such as socializing, exercise and home errands.

Conclusion

Plaintiff has demonstrated that there are issues of fact which require a jury to decide. Quite simply, the doctors disagree and it is up to the jury, not this Court, to evaluate the medical testimony and decide who and what to believe. They may believe defendants' doctors: Dr. Golden said plaintiff is fine, that there was no radiculopathy, neurologic disability or permanency from the accident, and that plaintiff can perform all her normal activities of daily living without restrictions or any neurologic limitations. Dr. Nipper said that plaintiff is faking it. And Dr. Passick said plaintiff has injuries, including radiculopathy, but physical therapy will no longer help.

On the other hand, the jury may believe plaintiff's doctors: Dr. Goldenberg, a treating physician, states that the accident caused a C4-C5 herniated disc with radiculopathy, an L5-S1 herniated disc with radiculopathy, chronic lumbar and cervical pain, chronic radiculopathy, chronic disability and decreased function, and that these injuries are permanent. Moreover, not only does Dr. Kahn make similar findings as Dr. Goldenberg, Dr. Kahn suggested injections to the spine and implantation of a spinal stimulator or spinal surgery. If she doesn't have surgery, Dr. Kahn opines, plaintiff can never go back to being a general surgeon because of hand

numbness and weakness – with the spine surgery, she *may* have a chance to return to general surgery. Dr. Kahn also opines that the injuries are permanent.

If a jury agrees with Dr. Nipper – that plaintiff is faking her symptoms and essentially threw away her future as a surgeon for the chance of a pay day from this lawsuit, and instead is content to tend to nursing home patients' bedsores, then plaintiff will lose at trial. If, however, the jury believes that because of this accident the plaintiff went from an industrious young doctor keeping busy while pursuing her dreams of becoming a surgeon, and in fact had been hired to work shifts toward that goal, to someone who is taking Vicoden because of constant pain and can no longer hope to be a surgeon because she'll never be able to stand for operations or effectively and reliably use her right hand, as Drs. Kahn and Goldenberg report, then plaintiff will win at trial. It is up to the jury, not this Court.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff has not met the serious injury threshold defined by Insurance Law § 5102 [d] is denied.

DATED: May 14, 2013
New York, New York

Hon. Arlene P. Bluth, J.S.C.