[* 1]

SHORT FORM ORDER

INDEX No. 10-7541
CAL. No. 12-00873MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 7-27-12
ADJ. DATE 3-12-13
Mot. Seq. # 002 - MG; CASEDISP

----------X

RACHEL HEEGE,

Plaintiff,

- against -

LORI D. FALISI,

Defendant.

----------X

BONGIORNO LAW FIRM, PLLC
Attorneys for Plaintiff
250 Mineola Blvd
Mineola, New York 11501

RUSSO, APOZNANSKI & TAMBASCO
Attorneys for Defendant
875 Merrick Avenue
Westbury, New York 11590

Upon the following papers numbered 1 to 26 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 10 - 29 ; Replying Affidavits and supporting papers 25 - 26 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Lori Falisi seeking summary judgment dismissing plaintiff's complaint is granted.

Plaintiff Rachel Heege commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of County Road 16 and Route 112 in the Town of Brookhaven on September 3, 2009. By her complaint, plaintiff alleges that the right front side of her vehicle was struck by the vehicle operated by defendant Lori Falisi while she was attempting to make a left turn onto Route 112. Plaintiff alleges that she was stopped in the middle of the intersection on the westbound side of County Road 16 waiting for traffic to clear in order to execute her left turn. Plaintiff further alleges that when she executed her left turn the light controlling traffic on County Road 16 was red. By her bill of particulars, plaintiff alleges that she sustained numerous personal injuries as a result of the subject accident, including disc herniations at levels L4 through S1; bilateral radiculopathy at level L5-S1; posterior ridge complex at level C5-C6; cervical and lumbar intervertebral disc displacement; radiculopathy at level C5-C6; left knee impingement; and right shoulder rotator cuff strain.

3-12-13

Defendant now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained due to the subject accident fail to meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the affirmed medical report of Dr. Jimmy Lim. At defendant's request, Dr. Lim conducted an independent orthopedic examination of plaintiff on March 5, 2012.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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 under 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.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], 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 may also 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]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, defendant, by submitting competent medical evidence and plaintiff's deposition transcript, has established a prima facie case that plaintiff did not sustain an injury within the meaning of the serious injury threshold requirement of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Estrella v Geico Ins. Co.***, __ AD3d __, 2013 NY

Slip Op 00173 [2d Dept 2013]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Belliard v Leader Limousine Corp.***, 94 AD3d 931, 942 NYS2d 591 [2d Dept 2012]). Defendant's examining orthopedist, Dr. Lim, states in his medical report that an examination of plaintiff reveals she has full range of motion in her spine, shoulders and knees; that the straight leg raising test is negative; and that her muscle strength and gait are normal. Dr. Lim further states that no muscle spasm or tenderness is observed upon palpation of plaintiff's paravertebal spinal muscles, and that there is no evidence of tenderness or swelling in her knees or shoulders. Dr. Lim opines that the muscle strains sustained by plaintiff as a result of the subject accident have resolved. Dr. Lim concludes that his examination of plaintiff did not reveal any evidence of an orthopedic disability causally related to the subject accident. Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence based on objective findings, sufficient to raise a triable issue of fact that she sustained a serious injury (*see* ***Gaddy v Eyler***, *supra*).

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation 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]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

Plaintiff opposes the motion on the ground that the evidence in opposition demonstrates that she sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits photographs of her vehicle, her uncertified hospital records, the affidavit of Dr. David Beneliyahu, and the medical reports of Dr. Roderick Borrie and Dr. Michael Rosenfeld. Plaintiff also submits the affirmed medical reports of Dr. Stuart Cherney, Dr. Scott Jones, Dr. Augustine Romano, Dr. Michael Sileo, and Dr. Joseph Cole.

In opposition, plaintiff has failed to raise a triable issue of fact as to whether she sustained an injury within the meaning of the serious injury threshold requirement of § 5102(d) of the Insurance Law (*see* ***Tinyanoff v Kuna***, 98 AD3d 501, 949 NYS2d 203 [2d Dept 2012]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d

Dept 2011]). Although plaintiff is not required to proffer proof of a quantitative assessment contemporaneous with the accident (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Ortiz v Salahuddin***, __ AD3d __, 2013 NY Slip Op 00544 [1st Dept 2013]), she is required to offer competent objective medical evidence based upon a recent examination showing significant or consequential limitations in the range of motion in her spine, shoulders, and knees (*see* ***Vega v MTA Bus Co.***, 96 AD3d 506, 946 NYS2d 162 [1st Dept 2012]; ***Castaldo v Migliore***, 291 AD2d 526, 737 NYS2d 862 [2d Dept 2002]). Plaintiff failed to proffer such evidence in opposition to the motion (*see* ***Jean v Labin-Natochenny***, 77 AD3d 623, 909 NYS2d 103 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]). The most current admissible medical evidence upon which plaintiff relies is the affirmed report of Dr. Joseph Cole, outlining limitations in her range of motion in her cervical and lumbar regions, which was prepared approximately two years before defendant's examining orthopedist's findings of full range of motion in the subject body parts, resolved symptoms, and lack of an orthopedic disability (*see* ***Zambrana v Timothy***, 95 AD3d 422, 943 NYS2d 92 [1st Dept 2012]).

Additionally, the medical reports of Drs. Stuart Cherney, Scott Jones, Augustine Romano, and Michael Sileo were insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury within the meaning of the Insurance Law (*see* ***Wallace v Adam Rental Transp., Inc.***, 68 AD3d 857, 891 NYS2d 432 [2d Dept 2009]; ***Tudiso v James***, 28 AD3d 536, 813 NYS2d 482 [2d Dept 2006]). The doctors' medical reports failed to address causation (*see* ***Valdez v Benjamin***, 101 AD3d 622, 957 NYS2d 325 [1st Dept 2012]; ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]), to state what objective tests they performed on plaintiff (*see* ***Ponciano v Schaefer***, 59 AD3d 605, 873 NYS2d 212 [2d Dept 2009]), or to account for plaintiff's gap in treatment (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Barnes v Cisneros***, 15 AD3d 514, 790 NYS2d 513 [2d Dept 2005]). Furthermore, the medical records attached to the doctors' medical reports were unaffirmed and uncertified, and, therefore, inadmissible (*see* ***Grasso v Angerami***, 79 NY2d 837, 580 NYS2d 178 [1991]; ***Little v Locoh***, 71 AD3d 837, 897 NYS2d 183 [2d Dept 2010]; ***Maffei v Santiago***, 63 AD3d 1011, 886 NYS2d 29 [2d Dept 2009]). Also, Dr. Borrie's report and Dr. Rosenfeld's report were inadmissible, because, pursuant to CPLR 2106, a psychologist cannot affirm the truth of his statements with the same force as an affidavit (*see* ***Pascucci v Wilke***, 60 AD3d 486, 873 NYS2d 910 [1st Dept 2009]; *see generally* ***Salvenburg Corp. v Opus Apparel***, 53 NY2d 799, 439 NYS2d [1981]). The Court notes that it did review and consider all of the reports, and even if they were admissible, plaintiff still would have failed to raise a triable issue of fact that she sustained a serious injury.

Moreover, although a plaintiff may rely upon his or her examining physicians' unsworn medical reports once the defendant has proffered such evidence to establish his or her prima facie case (*see* ***Dietrich v Puff Cab Corp.***, 63 AD3d 778, 881 NYS2d 463 [2d Dept 2009]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]), in this instance, defendant did not submit any of the uncertified medical reports that plaintiff relied upon to attempt to raise a triable issue of fact as to whether she sustained an injury within the serious injury threshold requirement of § 5102(d) of the Insurance Law (*see* ***Khan v Finchler***, 33 AD3d 966, 824 NYS2d 340 [2d Dept 2006]). As a result, the numerous unsworn medical reports submitted by plaintiff in opposition are not sufficient to defeat defendant's motion for summary judgment (*see* ***Shamsoodeen v Kibong***, 41 AD3d 577, 839 NYS2d 765 [2d Dept 2007]; ***Luckey v***

Bauch, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; ***Elfiky v Harris***, 301 AD2d 624, 754 NYS2d 59 [2d Dept 2003]).

Finally, plaintiff admitted during her deposition that as a result of the injuries she sustained in the accident she missed approximately one week from her employment as an administrative assistant 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* ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; ***Clarke v Delacruz***, 73 AD3d 965, 900 NYS2d 669 [2d Dept 2010]; ***Mooney v Edwards***, 12 AD3d 424, 784 NYS2d 599 [2d Dept 2004]). Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is granted.

Dated: July 5, 2013

J. Gerard Asher
A.J.S.C.

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