SHORT FORM ORDER

INDEX NO. 26766-2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-10-12
ADJ. DATE 1-8-13
Mot. Seq. # 003 - MD

PATTI LYONS and JEFFREY G. LYONS, Plaintiff(s),	**Steven R. Zimmer, Esq.** Attorney for Plaintiff 400 Town Line Road Hauppauge, New York 11788
- against -	**Picciano & Scahill, P.C.** Attorneys for Defendant 900 Merchants Concourse Westbury, New York 11590
FRANK V. OGNO, Defendant(s).	

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant, dated November 30, 2011, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated November 12, 2012, and supporting papers; (3) Reply Affirmation by the defendant, dated December 13, 2012, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the defendant's motion (003), which seeks an order granting summary judgment pursuant to CPLR §3212, is hereby denied; and it is further

ORDERED that counsel for the movant shall promptly serve a copy of this Order upon counsel for the plaintiff, and shall promptly thereafter file the affidavit of such service with the County Clerk.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Patti Lyons, as a result of a motor vehicle accident that occurred on July 28, 2006 in the southbound lane of County Road 83 at its intersection with Coram Mount Sinai Road. According to the plaintiff, she was stopped at a red light when the defendant's vehicle made contact with the rear of her vehicle. In her bill of particulars, plaintiff alleges that she sustained various lumbar and cervical spine injuries as a result of the subject accident.

Defendant moves for summary judgment on the grounds that plaintiff's alleged injuries do not come within the meaning of the "serious injury" threshold requirement of Insurance Law §5102(d). In support of the motion, defendant submits a copy of the pleadings, plaintiff's deposition transcript, the August 22, 2011 sworn medical report of neurologist, Dr. Mathew M. Chacko, the September 6, 2011 sworn medical report of orthopedist, Dr. Michael J. Katz, and two August 30, 2011 sworn medical reports of radiologist, Stephen W. Lastig. Defendant contends that the evidence submitted presents a prima facie showing of entitlement to summary judgment as a matter of law.

Among the injuries alleged in the plaintiff's bill of particulars is "posterior disc herniation at the C4-5 level, which is encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally." The bill of particulars further alleges her injuries, including the cervical herniations at that level, "are permanent in nature and the plaintiff suffers from ongoing pain, stiffness and discomfort as a result therefrom." In her affidavit in opposition, the plaintiff states that she continues to have neck and low back pain, the neck being worse, with the pain traveling down both arms. She also states that her daily activities cause pain or discomfort, which shortens the activity time and causes residual pain.

In relevant part, CPLR §3212(b) provides that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance to grant summary judgment in negligence actions (*Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact or where an issue of fact is even arguable since it deprives a party of his day in court (*Id*; see also, *Schwartz v Epstein*, 155 AD2d 524, 547 NYS2d 382 [2d Dept 1989]; *Henderson v City of New York*, 178 AD2d 129, 576 NYS2d 562 [1st Dept 1991]).

Issue finding rather than issue determination is the key to the procedure (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue, or where a material issue of fact is even "arguable," summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307, 338 NYS2d 882 [1982]); *Rotuba v Cepcos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Freeman v Easy Glider Roller Rink Inc.*, 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985]). Furthermore, the proof of the party opposing the motion must be accepted as true and considered in a light most favorable to the opposing party (*Dowsey v Megerian,* 121 AD2d 497, 503 NYS2d 591 [2d Dept 1986]; *Museums at Stony Brook v The Village of Patchogue Fire Department,* 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]; *Matter of Benincasa v Garrubbo,* 141 A.D.2d 636, 529 N.Y.S.2d 797 [2d Dept 1988]).

In part relevant to this matter, Insurance Law §5102(d) defines a "serious injury" as "a personal injury which results in . . . significant limitation of use of a body function or system . . ." 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 [2d Dept 1995]; see also *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 NYS2d 681, 485 NYS2d 526 [1984]).

In order to recover under the "limitation of use" category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration in order to prove the extent or degree of physical limitation he or she sustained (*see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; *Laruffa v Yui Ming Lau*, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; *Cerisier v Thibiu*, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; *Meyers v Bobower Yeshiva Bnei Zion*, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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 may also suffice (see *Toure v Avis Rent A Car Systems, Inc.*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Dufel v Green*, 84 NY2d 795, 622 NYS2d 900 [1995]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

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]). Once defendant has met this burden, 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*, 84 NY2d 795, 622 NYS2d 900 [1995]; *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (see *Burns v Stranger*, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; *Rich-Wing v Baboolal*, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; see generally, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

In his August 22, 2011 report, defendant's orthopedist, Dr. Chacko, notes that the plaintiff's cervical ranges of motion were, in effect, normal. More specifically, he noted that with regard to cervical extension, plaintiff's range of motion was 60 degrees, whereas 60 is normal. Dr. Chacko found that there is no objective evidence of any neurological injuries noted on clinical examination and no objective clinical evidence of any neurological disability. He further noted that plaintiff is working and is capable of performing normal activities of daily living. Dr. Chacko concluded, however, that "if the history is accurate, there is a causal relationship between the claimant's original symptoms and the accident of 7/28/06." Although Dr. Chako reviewed MRI reports, he did not read the cervical MRI films themselves.

In his September 6, 2011 report, defendant's neurologist, Dr. Katz, also noted that his examination of the plaintiff's cervical spine revealed cervical extension to 60 degrees, with 60 degrees being normal. Dr. Katz's diagnosis was that the plaintiff did experience cervical and lumbosacral strains, which were resolved. Based on his examination, the review of records and the history as provided by the plaintiff, Dr. Katz concluded that "it appears that the mechanism of injury is consistent with the injury sites described." As with Dr. Chacko, although Dr. Katz reviewed the MRI reports, he did not read the MRI films themselves.

Defendant's radiologist, Dr. Lastig, did read the 9/15/2006 MRI study of the plaintiff's lumbar spine, as well as the 9/12/2006 MRI study of the plaintiff's cervical spine. Among the findings in his August 30, 2011 report regarding the MRI study of the lumbar spine, Dr. Lastig notes that at the L3-L4 level, there is a small shallow midline disc protrusion which mildly impresses upon the ventral thecal sac. In his summary regarding the lumbar films, Dr. Lastig concludes that "in my opinion, the described disc pathology at both the L3-L4 and L4-S-1 levels is most likely degenerative in origin and, therefore, unrelated to the accident of 7/28/2006."

Among his findings with regard to review of the plaintiff's 9/12/2006 cervical MRI study, Dr. Lastig noted that "[a]t C4-C5, there is a small shallow right paracentral disc herniation which mildly impresses upon the ventral subarachnoid space. Posterior, left-sided spondylitic changes are seen at C5-C6 composed of osteophytic ridging and annular bulging which impresses upon the ventral subarachnoid space." With regard to the C5-6 level, Dr. Lastig concluded that "in my opinion, the described disc pathology at C5-C6 is degenerative in origin and, therefore, unrelated to the accident of 7/28/2006. The osteophytic ridging and uncinate osteophyte formation indicate the presence of a long standing degenerative hypertrophic bony process which, in my opinion, definitely pre-exist the accident of 7/28/2006 which occurred only six weeks prior to this imaging study."

With regard to the C4-C5 level reading, Dr. Lastig confirmed that "there is a small disc herniation at C4-C5 which impresses upon the ventral subarachnoid space, but does not compress the cervical cord." As a result, he recommended that "[c]linical correlation is advised." Significantly, unlike his findings regarding the plaintiff's lumbar spine and the C5-C6 levels, Dr. Lastig does not opine that the disc herniation at C4-C5 is not causally related to the 7/28/2006 motor vehicle accident. He also does not conclude that such herniation at the C4-C5 level is not related to the limited range of motion in the plaintiff's cervical spine.

In opposition to the defendant's motion, plaintiff submits reports from the plaintiff's treating providers at Health 1 Medical P.C. On July 28, 2006, the date of the accident, Dr. Raymond Ortiz of Health 1 Medical noted that the plaintiff's cervical spine active range of motion extension had a limitation of 40/50. The August 1, 2006 examination performed by Dr. Stephanie Bayner of Health 1 Medical revealed limitation of 30/60 for the plaintiff's cervical spine extension testing. By report of September 13, 2006, Dr. Ortiz again noted that plaintiff's cervical extension limitation was 40/50. Dr. Gary DiCanio of Health 1 Medical further noted that the plaintiff's August 23, 2007 cervical spine range of motion extension test showed a limitation of 50/60, and he opined that "Mrs. Lyons [sic] condition is directly related to the accident." The August 28, 2007 report executed by both Dr. DiCanio and Dr. Ortiz of Health 1 Medical P.C. concludes that "[b]ased upon the history given by the patient and above objective findings, diagnostic testing including decreased range of motion, it is my opinion that as a direct result of the traumatic injuries sustained by Ms. Lyons on July 28, 2006, there were extremes of joint movement with concomitant overstretching of the supporting structures of the cervical ... spine." Based upon these findings, Dr. DiCanio and Dr. Ortiz concluded in their August 28, 2007 report that the plaintiff sustained multiple cervical spine disc herniations which were causally related to the subject accident. In relevant part, these conclusions were based upon review of the plaintiff's 9/12/2006 cervical spine MRI films, which revealed posterior disc herniation at the C4-5 level encroaching upon the ventral aspect of the thecal sac and the lateral recesses bilaterally.

The plaintiff also submits a November 30, 2012 report from Dr. Ortiz regarding his updated examination of the plaintiff. In his report, Dr. Ortiz again notes a limited range of motion in the plaintiff's cervical spine extension of 40/60, and states that "Mrs. Lyons [sic] present condition is directly related to the accident." Dr. Ortiz concludes that Mrs. Lyons "has sustained a permanent partial weakening of these regions with consequential limitation of use." Dr. Ortiz based his conclusions "upon the history given by the patient and objective findings," as well as upon "diagnostic testing including decreased range of motion."

Although the defendant's experts report normal range of motion in the plaintiff's cervical region, neither Dr. Chacko nor Dr. Katz read the 09/12/2006 MRI studies of the plaintiff's cervical spine. While Dr. Lastig did read those films, he failed to state that the disc herniation at C4-C5 is not causally related to the 7/28/2006 motor vehicle accident, or that such herniation at that level is not related to the limited range of motion in the plaintiff's cervical spine. Therefore, the defendant has failed to make a prima facie showing of entitlement to judgment under Insurance Law §5102(d), which precludes summary judgment in defendant's favor (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Straussberg v Marghub*, 2013 NY Slip Op 5442, ___ AD3d ___, ___ NYS2d ___ [2d Dept 2013]).

Even if the defendant had made a prima facie showing of entitlement to summary judgment, the plaintiff's treating providers have consistently reported limitations in plaintiff's cervical extension range of motion from the date of the accident up to and including November 30, 2012 when the plaintiff had an updated examination. Those contemporaneous and recent examinations, which revealed range of motion limitations of plaintiff's cervical spine extension, coupled her treating providers' conclusions that the MRI-confirmed cervical herniations and range of motions limitations are causally related to the subject accident, present triable questions of fact (see *Kanard v Setter*, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; *Awadh v Moronta*, 86 AD3d 524, 926 NYS2d 172 [2d Dept 2011]).

Furthermore, the conflicted findings between defendants's experts and plaintiff's treating providers regarding plaintiff's cervical range of motion – particularly when coupled with Dr. Lastig's failure to opine as to whether or not the plaintiff's C4-5 disc herniation is causally related to the accident – raise questions of fact concerning whether or not the plaintiff's C4-C5 herniation and reports of pain and other symptoms are causally related to the accident (see *Pommells v. Perez*, 4 NY3d 566, 577-578, 797 NYS2d 380 [2005]; *Straussberg v Marghub*, 2013 NY Slip Op 5442, ___ AD3d ___, ___ NYS2d ___ [2d Dept 2013]; *Osario-Salcedo v. Mazarova*, 100 AD3d 976, 954 NYS2d 642 [2d Dept 2012]; *Awadh v Moronta*, 86 AD3d 524, 926 NYS2d 172 [2d Dept 2011]).

Lastly, despite plaintiff's arguments to the contrary, plaintiff has provided an adequate explanation for the gap in her treatment history by explaining that she continued to treat at Health 1 Medical for almost 2 years on a regular basis and, after the no-fault carrier stopped paying her doctors, she treated when she was financially able to do so (see *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Awadh v Moronta*, 86 AD3d 524, 926 NYS2d 172 [2d Dept 2011]); *Evans v Pitt*, 77 AD3d 611, 908 NYS2d 729 [2d Dept 2010]; *Delorbe v Perez*, 59 AD3d 491, 873 NYS2d 198 [2d Dept 2009]; *Black v Robinson*, 305 A.D.2d 438, 759 NYS2d 741 [2d Dept 2003]).

Based upon the foregoing, the defendant's motion for summary judgment is denied.

Dated: August 16, 2013

PETER H. MAYER, J.S.C.

[ ] FINAL DISPOSITION

[X] NON FINAL DISPOSITION