SHORT FORM ORDER

COPY

INDEX No. 11-17760
CAL No. 13-00124MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 5-9-13
ADJ. DATE 7-19-13
Mot. Seq. # 001 - MD

VIMBAINASH H. MUTSENGIWA,

Plaintiff,

- against -

OLGA M. ALVARADO and SUFFOLK TRANSPORTATION SERVICES, INC.,

Defendants.

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-21; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 22-28; Replying Affidavits and supporting papers 29-30; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Olga M. Alvarado and Suffolk Transportation Services, Inc., pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Vimbainash H. Mutsengiwa, has not sustained a serious injury as defined by Insurance Law § 5102 (d), is denied.

This is an action to recover damages for personal serious injuries allegedly sustained by the plaintiff, Vimbainash H. Mutsengiwa, on February 6, 2009, at or near the intersection of Lexington Avenue and Route 111, in the Town of Islip, Suffolk County, New York, when plaintiff's vehicle was struck by the school bus operated by Olga M. Alvarado and owned by Suffolk Transportation Services, Inc.

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***

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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]).

In support of this application, the defendant has submitted an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's bill of particulars; an uncertified copy of the MV 104 Police Accident Report; an unsigned and certified copy of the transcript of the examination before trial of plaintiff dated July 25, 2012; Good Samaritan Hospital emergency room record; the sworn letters of necessity dated February 19, 2009, March 5, 2009, April 2, 2009, April 30, 2009, July 23, 2009, and November 5, 2009 of Nizarali Visram, M.D.; sworn report of Nizarali Visram, M.D. concerning the EMG/NCV study in which he diagnosed left C6 radiculopathy; letter dated February 6, 2009 from Barry M. Katzman, M.D. to Dr. Visram concerning his orthopedic examination of the plaintiff; and the sworn reports of Paul J. Miller, M.D. dated April 23, 2009 and William Healy, M.D. dated November 5, 2012 concerning their independent orthopedic examinations of the plaintiff. The unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see* ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]). The unsigned but certified copy of the transcript of the examination before trial of plaintiff is considered (***Zalat v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]) as plaintiff has submitted a copy in her opposing papers.

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 competent or admissible, 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 the plaintiff's verified bill of particulars, the plaintiff alleges that as a result of the subject accident, she has suffered injuries consisting of: left should supraspinatus tendinopathy; cervical spine multiple disc bulges with disc herniation with myofascial pain; focal disc bulges at C4-5 and C5-6 creating impingement on the neural canal, focal herniation at C6-7 creating impingement on the neural canal; post traumatic tension headaches; left elbow lateral epicondylitis; cervical radiculopathy as per electrodiagnostic studies; left elbow pain; left shoulder pain; neck pain; left hand and arm pain; sleep disturbances; and anxiety.

Based upon a review of the defendants' evidentiary submissions, it is determined that the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d). The defendants have not provided copies of the medical records which their experts reviewed and on which they base their opinions, in part, 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]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which evidence has not been provided in this case. Although Dr. Miller indicated that he reviewed progress notes from Perry Physical Medicine, and various x-ray reports, none have been submitted. Nor have the plaintiff's MRI studies been reviewed and commented upon by him. Dr. Healy has reviewed various MRI reports of the plaintiff's left shoulder dated March 11, 2009, an MRI report of the cervical spine dated March 11, 2009, a psychologist report, and peer reviews by Dr. Sukhov and Dr. Westerband, which have not been provided to this court. The moving papers also set forth factual issues which preclude summary judgment as a matter of law. It is noted that neither Dr. Miller nor Dr. Healy, defendants' experts, have submitted copies of their respective curriculum vitae to each qualify as an experts in this matter.

Neither Dr. Miller nor Dr. Healy set forth the objective method employed to obtain the range of motion measurements of the plaintiff's various body parts as reported, such as the goniometer, inclinometer or arthroidal protractor (*see* ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup. Ct., Nassau County 2008]), leaving this court to speculate as to how each determined such ranges of motions when examining the plaintiff, and raising factual issues which preclude summary judgment.

It is noted that both Dr. Miller and Dr. Healy, in obtaining cervical range of motion studies, reported the normal range of motion values in a spectrum or range of motion, rather than one definitive number. When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). The court is left to speculate as to when such ranges of motion are applicable and under what circumstances. Such factual issues preclude summary judgment.

It is further noted that although the plaintiff has pleaded cervical radiculopathy as an injury relating to this accident, and Dr. Healy reports that the EMG nerve conduction study report of April 8, 2009 notes Dr. Visram's impression of an abnormal EMG consistent with left C6 radiculopathy, no report from an examining neurologist has been submitted to rule out this injury raising further factual issues precluding summary judgment.

Dr. Healy has opined that as a result of this accident, the plaintiff has sustained a cervical strain and traumatic impingement to her left shoulder, however, he has failed to rule out the herniated cervical discs were caused by the subject accident.

Additionally, the defendants' examining physician, Dr. Healy, did not examine the plaintiff during the statutory period of 180 days following the accident, and he does not comment upon the plaintiff's condition during this period, thus, rendering defendants' physician's affidavit 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 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]). Dr. Miller examined the plaintiff April 23, 2009 and stated that the plaintiff complained of pain in her left shoulder and left elbow which are radicular in origin. He further stated that she is unable to perform shopping and running errands as she is unable to lift heavy things. However, that statement is inconsistent with his subsequent opinion that the plaintiff is able to perform all activities of daily living without restrictions or limitations as consistent with age, raising factual issues which preclude summary judgment. Dr. Miller also opined that based upon the plaintiff's history and findings upon examination, that there is a probable causal relationship between the accident and her reported symptomatology.

The plaintiff testified that she attended physical therapy three times a weeks for a couple weeks, and continued twice a week for an unknown period of time. She received injections and needles (electro) for the pain in her neck, left shoulder and elbow. She saw a psychologist for the nightmares she experienced about the accident, and her fear of driving and school buses. She cannot perform hard work or work for a long period of time, or carry things, or spend the whole day doing housework since the accident due to pain in her neck. Rather, her husband must assist her.

These factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy the 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 parties have failed to establish their 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 [2nd 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 defendants for dismissal of the complaint on the basis that the plaintiff has failed to meet the serious injury threshold as defined by Insurance Law §5102 (d) is denied.

Dated: 8-22-13

Hon. Denise P. Molia
A.J.S.C.

___ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**