SHORT FORM ORDER

INDEX No. 11-34693

COPY

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

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-18-13
ADJ. DATE
Mot. Seq. # 002 - MD

---X

SUHYUN HUR,

Plaintiff,

- against -

LEASE PLAN USA INC. and ROBERT SCHNAIER,

Defendants.

---X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated May 20, 2013, and supporting papers (1-8); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated May 23, 2013, and supporting papers 9-19; (4) Reply Affirmation by the defendant, dated June 17, 2013, and supporting papers 20-21; (5) Other 22 by plaintiff-Mem. of Law (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

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

ORDERED that this motion by defendants, Lease Plan USA and Robert Schnaier, brought prior to the filing of the note of issue, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Suhyun Hur, has not sustained a serious injury as defined by Insurance Law §5102 (d), is denied.

In this action premised upon the alleged negligence of the defendants, Lease Plan USA and Robert Schnaier, the plaintiff, Suhyun Hur seeks damages for personal injuries alleged to have been sustained in a motor vehicle accident on July 20, 2010, at or near exit 31 eastbound Cross Island Parkway near Northern Boulevard, Queens New York. The plaintiff was a passenger in a host vehicle which was struck by the defendants' vehicle operated by Robert Schnaier and owned by Lease Plan USA, Inc. The defendants now seek summary judgment dismissing the plaintiff's complaint on the basis that he did not sustain a serious injury as defined by Insurance Law §5102 (d).

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

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation, copies of the summons and complaint, defendants' answer, and plaintiff's verified bill of particulars; and unsigned and uncertified copy of the transcript of the plaintiff's examination before trial which is not in admissible form (*see* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), is not accompanied by an affidavit or proof of service pursuant to CPLR 3116; a photograph; and the sworn report of Michael J. Katz, M.D. concerning his independent orthopedic examination of the plaintiff.

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*).

By way of her bill of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of C2-3 small central disc herniation indenting the thecal sac; C3-4 small central disc herniation indenting the thecal sac; C4-5 central and slightly left paracentral disc herniation indenting the thecal sac; C5-6 moderate left paracentral and foramina disc herniation compressing the thecal sac which indirectly compresses the cord with mild spinal stenosis and proximal left neural foraminal encroachment; C6-7 large extruded left paracentral and foramina disc herniation compressing the thecal sac and left ventral aspect of the cord and impinging upon the left C7 nerve root with left sided neck pain with radiation down the left upper extremity into the thumb with numbness; right foramina disc herniation at L4-5 contacting the right L4 nerve root, right paramedian posterior protruded disc herniation at the L5-S1 level coming in contact with the right S1 nerve roots in the lateral recess, minimal retrolisthesis L5-S1 with a small central disc herniation with electro-diagnostic evidence of peroneal neuropathy bilaterally and absent H reflex on the left with right low back pain with radiation down the right lower extremity to approximately the ankle level; left shoulder tendinopathy supraspinatus and infraspinatus with articular fraying of both tendons more noted at the infraspinatus; left wrist severe arthrosis basal joint of the thumb, insertional abductor pollicis longus tendinosis, low grade intra substance tear and overlying soft tissue edema; Torado 60 mg. IM trigger point injections on 8/18/10, 9/11/10, and 10/16/10; acute severe sprain/strain of the cervical spine with severe pain and stiffness in the neck and upper back regions, aggravated by all head or neck motions with radiation of pain from the neck down the cervical, thoracic, and lumbar regions of the spine resulting in limitation of motion of the head and neck and generalized weakness; acute severe sprain of the lumbar spine with radiculitis and nerve root irritation right and left lower extremity, accompanied by severe pain, tenderness and stiffness in the middle and lower back regions, resulting in the inability to bear and lift weight, with limitations of rotation, flexion, and extension; abnormal electrocardiogram and echocardiogram.

Upon careful review and consideration of the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Suhyun Hur did not sustain a serious injury as to either category of injury as defined by Insurance Law § 5102 (d). It is further determined that the defendants' moving papers raise triable issues of fact which preclude summary judgment.

The defendants have failed to support their motion with copies of the many medical records and test results for the MRI and CT studies of the plaintiff's cervical and lumbar spine, and MRIs of the left wrist and left shoulder; and the EMG/NCV report reviewed by the defendants' examining physician, Dr. Katz, and set forth in his report, leaving this court to speculate as to the contents and findings in those records and reports. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the 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]). It is further noted that Dr. Katz has not provided a copy of his curriculum vitae to qualify as an expert to render opinions in this matter. Thus, defendants' application is insufficient as a matter of law.

Although the plaintiff has alleged she suffered radiculopathy as demonstrated by the EMG/NCV testing, Dr. Katz does not report on the findings and no report from an examining neurologist has been submitted by the defendants to rule out such injury (***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]). Dr. Katz has diagnosed the plaintiff with cervical sprain with radiculopathy-resolved; status post left shoulder tendinopathy by history-resolved; left wrist basal joint arthritis preexisting and unrelated to the event of July 20, 2010; thoracolumbosacral strain with radiculitis-resolved; and left shoulder contusion. However, he does not set forth a basis for his determination that the plaintiff's cervical or lumbar radiculopathy has resolved, raising factual issues to further preclude summary judgment.

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2d Dept 2002]). Dr. Katz does not opine as to the cervical and lumbar MRI findings and whether or not the plaintiff sustained herniated discs as a result of this accident. Notably absent from Dr. Katz's report is any comment ruling out the claimed cervical and lumbar disc herniations, although he opined that the radiologic studies indicate degenerative changes. He does not indicate the basis for his opinion that the changes are degenerative. He does not indicate the duration, or causes of such changes, and whether or not such changes and conditions predate the subject accident (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 9000; ***Carmona v Youssef***, 27 Misc3d 1238(a) 910 NYS2d 761 [Sup. Ct. Queens County 2010]), precluding summary judgment.

It is noted that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's 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 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]; ***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 expert offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

Additionally, although the defendant has not submitted an admissible copy of the plaintiff's transcript of her examination before trial, the plaintiff references it in her opposing papers. The plaintiff testified that she worked as an assistant teacher at the Montessori School in Stony Brook, in September 2010, she changed classrooms following the accident as she could not lift up the gym equipment. In the classroom, she could not lift the two year old children. Immediately after the accident, she felt neck pain, stiffness in her neck, and a headache and was treated in the emergency room. Thereafter, she treated with Dr. Hussain for pain in her neck, lower back, right ankle, and numbness from her neck into her left arm and hand, which she still experiences. She also has pain that radiates from her back into both legs. She had three injections for the pain in her neck and thumb. She saw Dr. Sathi who recommended surgery for her neck. She had a second opinion with Dr. Epstein who also recommended that she have neck surgery. She also received acupuncture and massage therapy for four months with Dr. Wu. She had physical therapy for two months, two days a week. She used the TENS unit for several months, had neck traction, a neck brace and a back brace. She takes Lyrica for the pain daily. She feels better when she does not do anything, and experiences pain with activities. She developed cardiac problems after the accident and had cardiac ablation. Prior to the accident, she ran three times a week for two hours, but has not been able to run since. She also walked and made jewelry, but can no longer engage in those activities due to the pain in her neck. She is unable to vacuum, unload the dishwasher, garden, read, or go to the hair salon. The plaintiff's testimony raises factual issues with Dr. Katz opinion that the plaintiff is capable of her full time work and activities of daily living. Thus, the defendants failed to demonstrate entitlement to summary judgment on this category of injury as well.

It is therefore determined that the defendants have failed to demonstrate their entitlement to summary judgment on either category of injury defined in 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 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]). However, even if the court were to review the plaintiff's opposing papers, it is determined that the plaintiff has raised factual issues which would preclude summary judgment.

The affirmed reports of Dr. Fredrick A. Mendelsohn, by way of the EMG/NCV report demonstrates the the H-reflex studies indicate that the left tibial H-reflex has no response; that the right peroneal motor nerves showed decreased conduction velocity, and the right tibial motor nerve showed decreased conduction velocity. There was no response in the left superficial peroneal sensory and right superficial peroneal sensory nerves in the lower leg. His interpretation of the plaintiff's left shoulder MRI confirms diffuse tendinopathy and spraying of the supraspinatus and infraspinatus with AC joint arthropathy, with capsular scarring.

Dr. Elizabeth P. Maltin, M.D. set forth in her affirmed report that the plaintiff's MRI of the lumbar spine revealed right foraminal disc herniation at L4-5 contacting the right L4 nerve root; minimal retrolisthesis at L5-S1 with small central disc herniation. As to the cervical MRI, she diagnosed small disc herniations at C2-3, C3-4, C4-5, left paracentral and foraminal disc herniation at C5-6 with cord flattening

and mild spinal stenosis. There is a large extruded left paracentral and foraminal disc herniation at C6-7 with cord flattening, spinal stenosis and left C7 nerve root impingement.

Dr. Nancy E. Epstein, M.D. has affirmed in her report that upon her examination of the plaintiff and review of the MRI and electro diagnostic studies, she has recommended that Ms. Hur undergo anterior cervical corpectomy, partial at C5, total at C6, partial at C7, and complete and total major discectomy at C5-6, C6-7, with resection of disc/spondylostenosis/OPLL with left iliac crest autograft placement.

Dr. Alex Rosioreanu, M.D. affirms that his review of the plaintiff's lumbar MRI of November 1, 2011, reveals right foraminal protruded disc herniation at the L4-5 level coming in contact with the exiting right L4 nerve roots; right paramedian posterior protruded disc herniation at the L5-S1 level coming in contact with the right S1 nerve roots in the lateral recess. He added that the disc herniation is now larger than on the MRI of August 2010.

Dr. Cono W. Gallo, M.D. set forth in his affirmation that the MRI of November 2, 2011 of the plaintiff's left wrist demonstrated severe arthrosis basal joint of the thumb; insertional abductor pollicis longus tendinosis, low-grade intra substance tear and overlying soft tissue edema.

Dr. David Beneliyahu, D.C. set forth in his affidavit the range of motion findings and restrictions he found upon examining the plaintiff's cervical and lumbar spine, as compared to the normal ranges of motion, as recently as December 10, 2012. It is his opinion that based upon his record of treating the plaintiff and review of all her diagnostic tests, and the duration of her symptoms and restrictions in ranges of motion, that she has sustained a permanent consequential limitation of her musculoskeletal system as a result of the subject motor vehicle accident, and that she had a category 4 impairment of both the cervical and lumbar spines.

These reports submitted by the plaintiff in opposition to defendants' motion for dismissal raise factual issues which preclude summary judgment from being granted.

Accordingly, motion (002) is denied.

Dated: 8/28/13

PETER H. MAYER, J.S.C.