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SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 101210/11**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 006**

RAMIJA MORALES,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

DANIEL DILORENZO,
EXPEDITE TRUCKING & CONTAINER SERVICES, LLC,
DANELLA CONSTRUCTION OF NY, INC,

Defendants

The following items were considered in the review of the following motion for summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition	2
Reply Memorandum of Law	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Daniel DiLorenzo and Danella Construction of NY, Inc., move for summary judgement dismissing the plaintiff's complaint on the grounds that the plaintiff failed to demonstrate that she sustained a "serious injury" as defined by Insurance Law § 5102(d).

Facts

This is an action to recover personal injuries sustained as a result of a motor vehicle accident on October 8, 2009 at or near the intersection of Broadway and Reade Street in New York, New York. The plaintiff was taken from the scene to Beekman Downtown Hospital by ambulance. The plaintiff's bill of particulars alleges that she sustained the following injuries:

> Left L5-S1 radiculopath; Lumbar radiculitis; Lumbosacral Myofascitis with hypomobility; Lumbar disc disorder; Lumbosacral spine derangement; Lumbalgia; Left C5-C6 radiculopathy; Reversal of normal cervical lordosis; Cervical radiculitis; Cervicalgia;Cervico-Thoracic myofascitis with hypomobility; Thoracic radiculitis; Thoracicalgia; Post-Traumatic visual

> impairment of the left eye; Post-Concussion syndrome with associated sequellae; Contusion of the anterior chest wall; Left shoulder contusion; Sacroilitis; Adjustment disorder with mixed anxiety and depression;

In support of the motion for summary judgment the defendants submitted the affirmations of Igor Rubinshteyn, M.D., a board certified orthopaedic surgeon; Daniel Feuer, M.D. a Diplomate of the American Board of Psychiatry and Neurology; and Mark Fromer, M.D., a Diplomate of the American Board of Ophthalmology stating that the plaintiff had normal range of motion for all affected body parts, was capable of daily living without restrictions and that she did not suffer neurological disabilities or ocular injury from the subject accident.

In opposition, the plaintiff submits two affirmed reports of Conrad Williams, M.D. as well as medical records from Targee Medical Center and Downtown Hospital as well as other test results taken in 2009 and 2010. Dr. Williams' report of February 2010 detailed the physical health of plaintiff and concluded, based on several diagnostic tests, that plaintiff suffered serious injuries as a result of the subject accident. In addition, Dr. Williams' report of August 2013 indicated that the plaintiff suffers from chronic pains, specifically in her knee and lumbar / cervical spine while concluding that the plaintiff was "clearly unable to perform a significant portion, if not all" of her normal activity for at least 90 of the first 180 days following the accident. Importantly, Dr. Williams' report also indicates that plaintiff complained about *left* knee pain for the first time during this examination as well as admitting that she had not seen any additional doctors since leaving his care or had any trouble with working ten to fourteen hour days.

Discussion

To obtain summary judgment it is necessary that the movant establish his position by submitting admissible evidentiary proof sufficient to allow the court to direct judgment in their favor.[1]. "Moreover, the parties competing contentions must be viewed in a light most favorable to

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[1]CPLR 3121(b); *Friends of Animals, Inc., v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 [1979].

the party opposing the motion."[2] Summary judgment is an extraordinary remedy and only appropriate where a full examination of the facts indicates no triable issues of fact or arguable issues.[3] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[4] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[5]

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.[6] The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.[7] The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient.[8] Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the

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[2] *Marine Midland Bank, N.A., v. Dino*, et. al., 168 AD2d 610 [2d Dept. 1990].

[3] *American Home Assurance Co., v. Amerford International Corp*., 200 A.D.2d 472 (1st Dept 1994); *Rotuba Extruders v. Ceppos,,* 46 N.Y.2d 223 [1978]; *Herrin v. Airborne Freight Corp.,* 301 AD2d 500 [2d Dept. 2003].

[4] *Weiner v. Ga-Ro Die Cutting,* 104 A.D.2d 331 [2d Dept. 1984] *Aff'd* 65 N.Y.2d 732 [1985].

[5] *Glennon v. Mayo,* 148 A.D.2d 580 [2d Dept. 1989].

[6] *See*, *Kordana v. Pomellito*, 121 A.D.2d 783, appeal dismissed, 68 N.Y.2d 848.

[7] S*ee*, *Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]; *Grossman v. Wright* 268 AD2d 79 [2d Dept. 2000].

[8] *Id*.

plaintiff.

In accordance with Insurance Law §5102(d), plaintiff claims to have suffered 1) "permanent loss of use of a body organ, member function or system," 2) "permanent consequential limitation of use of a body organ or member," 3) "significant limitation of use of a body function or system," and 4) injuries which prevent her from performing "customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." In order to substantiate a claim under the "permanent loss" category, the alleged loss "must be total,"[9] while the "permanent consequential limitation" is "used in the sense of 'important' or 'significant.'"[10] The "significant limitation" category requires the plaintiff to provide objective evidence of the extent or degree of the limitation and its duration[11] and the ninety out of one hundred and eighty day category requires the plaintiff to demonstrate he has "been prevented from performing his usual activities to a great extent, rather than some slight curtailment."[12]

The moving defendant claims the plaintiff in the instant case has failed to substantiate a claim under any of the specified categories provided by the Insurance Law. Defendants supported their position with affirmed reports made in late 2012, early 2013 by Drs. Rubinshteyn, Feur, Froman and Mishkin. Dr. Rubinshteyn fully reviewed plaintiff's medical records including MRI and CT scan results, conducted range of motion tests, and concluded that any complained of injury as a result of the accident had resolved itself and that she could perform activities of daily life without restrictions. Dr. Feur and Dr. Mishkin concluded the plaintiff did not demonstrate any objective neurological or psychological disabilities while Dr. Froman determined plaintiff did not present any ocular abnormality. As a result, defendants have met their initial burden.

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[9] *Oberly v. Bangs Ambulance,* 96 N.Y.2d 295, 299 [2001].

[10] *Kordana v. Pomellito*, 121 A.D.2d 783, 784 [3rd Dept. 1986].

[11] *Beckett v. Conte*, 176 A.D.2d 774, 774 [2d Dept. 1991].

[12] *Thompson v. Abbasi*, 15 A.D.3d 95, 101 [3rd Dept. 2005].

The plaintiff has not substantiated claims under the permanent loss or ninety out of one hundred eighty day category. Dr. William's affirmed June 2010 report opined that the plaintiff had "partial permanent disability," but his August 2013 report only states there is "mild loss" of lumbar lordosis accompanied by chronic, yet manageable pains. These conclusions do not bear out the conclusion that the plaintiff experienced a total loss of use of any body part involved in the accident. Plaintiff admits that she was able to fully return to work within two months of the accident and that while there were some limitations on her daily activity, she did not need any follow up surgery or prescription medication to manage the pain. The only admissible evidence in which Dr. Williams' found plaintiff unable to perform her daily activities for the statutory minimum is contained in the 2013 report. Thus, plaintiff has failed to produce sufficient evidence demonstrating any more than a slight curtailment of normal activity within the statutory time frame.

Nonetheless plaintiff has created an issue of fact in the permanent consequential or significant limitation categories. As held in *Toure v. Avis Rent A Car Sys.*, whether limitation of use or function is significant enough to support a claim of "serious injury" relates to medical significance and involves comparative determination of the degree or qualitative nature of an injury.[13] In Dr. Williams' 2010 report, he buttressed his impressions of the plaintiff's subjective complaints with several objective diagnostic tests including: 1) range of motion tests for the cervical and lumbosacral spine 2) MRI's for the cervical and lumbar spine and 3) consultation reports from other doctors to fully flesh out his diagnosis. Significantly, the range of motion testing for the cervical spine revealed flexion, extension, right and left rotation and right and left lat flexes at seventy-one to seventy-eight percent of normal while lumbosacral testing showed ranges of sixty-seven to seventy-eight percent of normal. Dr. Williams' correlated these reduced ranges to the subject accident and ultimately conclusion that the plaintiff's range of motion in the affected areas was abnormal. This opinion is in conflict with Dr. Rubinshteyn's opinion stating that the plaintiff's range of motion was within normal limits. When viewed in conjunction with plaintiff's subjective complaints of pain, difficulty walking / driving and inability to lift heavy objects as granting all favorable inferences toward the

[13] *See Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002].

non-movant, the plaintiff has raised a sufficient issue of fact as to whether she sustained a "serious injury."

Finally, "mindful that issue finding and not issue resolution" is a court's proper function, defendant's contention that plaintiff's unexplained gap between appointments with Dr. Williams is unavailing.[14] The plaintiff is entitled to the favorable inference that she ceased treatment because it would have been futile in consideration of the fact that Dr. Williams recommended home care to manage her chronic pain after plaintiff had already attended physical therapy for a period of months.[15]

Accordingly, it is hereby:

ORDERED, that the defendants DiLorenzo and Danella Construction motion for summary judgment is denied; and it is further

ORDERED, that the parties shall return to DCM Part 3, 130 Stuyvesant Place, 3rd Floor, on **Monday, November 18, 2013 at 9:30 AM** for a Pre-Trial Conference.

ENTER,

DATED: October 4, 2013

Joseph J. Maltese
Justice of the Supreme Court

[14] *Cruz v. American Export Lines*, 67 N.Y.2d 1, 13 [1986].

[15] *See, e.g.*, *Baez v. Rahamatali*, 24 A.D.3d 256 [1st Dept. 2005].