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SHORT FORM ORDER

INDEX No. 12-16215
CAL. No. 13-01338MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 11-18-13
ADJ. DATE 4-9-14
Mot. Seq. # 002 - MD

KAREN NEILANDS,	:	CERUSSI & GUNN, P.C.
	:	Attorney for Plaintiff
Plaintiff,	:	1325 Franklin Avenue, Suite 225
	:	Garden City, New York 11530
- against -	:	
	:	BELLO & LARKIN
BINA NANAVATI and TEJAS NANAVATI,	:	Attorney for Defendants
	:	150 Motor Parkway, Suite 405
Defendants.	:	Hauppauge, New York 11788

Upon the following papers numbered 1 to 22 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 10-20; Replying Affidavits and supporting papers 21-22; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendants, Bina Nanavati and Tejas Nanavati, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Karen Neilands, did not sustain a serious injury as defined by Insurance Law § 5102 (d) and 5104 (a), is denied.

Plaintiff Karen Neilands commenced this negligence action to recover for the injuries she alleges she sustained on May 19, 2010, in an automobile accident on Route 110 at or near its intersection with Semon Street, Huntington, New York. The plaintiff's alleges that her vehicle was struck in the rear by the vehicle operated by defendant Bina Nanavati and owned by defendant Tejas Nanavati.

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]); (***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***,

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supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to 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 submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; the sworn report of Michael J. Katz, M.D. dated June 14, 2013 concerning his independent orthopedic examination of the plaintiff; the transcript of the plaintiff's examination before trial dated March 21, 2013, which is unsigned, but not objected to by plaintiff (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); copies of uncertified medical records which appear to be kept by Dr. Thomas Dowling; and the electronically signed MRI studies of plaintiff's lumbar spine dated June 24, 2011 and the electronically signed and unsworn report by Glen Gray M.D. of the MRI of plaintiff's lumbar spine dated February 17, 2012, which are not in admissible form.

CPLR 2106 governs the use of physician affirmations. While deemed admissible by the Appellate Division, First Department, electronic signatures are not recognized by the Second Department (*see* ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, 50 AD3d 778, 860 NYS2d 532 [2d Dept 2008]; ***Eill v Morck***, 37 Mis3d 1211 (A), 961 NYS2d 357 [Sup Ct Kings County 2012]). In ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, *supra*, the Second Department held medical reports to be inadmissible where they contained computerized, affixed, or stamped facsimiles of a physician's signature. The court stated the records failed to comport with CPLR 2106 as the signatures were not subscribed or affirmed, and the reports merely contained facsimiles of the physician's signature without any indication as to who placed them on the reports, or as to whether they were properly authorized. Subsequent to ***Vista Surgical Supplies, Inc. v Travelers Ins. Co.***, the Appellate Term, Second Department ruled inadmissible "affirmed" medical reports with stamped or electronic facsimile signatures where the record did not demonstrate that the signature was placed on the report by the doctor or at the doctor's direction (*see* ***Rogy Med., P.C. v Mercury Cas. Co.***, 23 Misc3d 132 [A], 885 NYS2d 713, 2009 NY Slip Op 50732[U] [App Term, 2d Dept 2009]); ***Sweeney v Springs***, 2012 NY Slip Op 30415 [U] [Sup Ct, Nassau County 2012], [affirmed medical report with stamped signature submitted on serious injury motion ruled inadmissible]).

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 the verified bill of particulars, the plaintiff alleges to have sustained the following injuries in the subject accident: extensive spinal stenosis, bulging and facet hypertrophy most marked at the L4-5 level; spondylolisthesis; L3-4 facet and ligamentous hypertrophy and bulging with mild stenosis; L5-S1 hypertrophy; and lumbar radiculopathy.

Upon careful review and consideration of the defendant's evidentiary submissions, it is determined that the moving party has not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Karen Neilands did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Although the plaintiff alleges that she sustained lumbar radiculopathy, a report from a neurologist who examined the plaintiff on behalf of the moving defendants has not been submitted to rule out the claimed neurological injury, precluding summary judgment (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]).

Dr. Katz has not set forth his education or training and work experience and has not submitted a copy of his curriculum vitae with the moving papers. Although Dr. Katz set forth the materials and medical records and reports which he reviewed, and upon which he bases his opinions in part, said copies of those records and reports have not been provided. 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 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]). Here, the aforementioned records and reports are not in evidence, leaving this court speculate as to the contents of those reports.

Dr. Katz set forth that the plaintiff is a 67 year old female who alleges she sustained injury in the subject accident of May 19, 2010. Dr. Katz opined that the plaintiff has underlying preexisting degenerative disc disease confirmed by an MRI report of the lumbar spine. However, his opinion is conclusory and unsupported. He indicated that she was involved in a prior motor vehicle accident in 2008 with "similar mechanism," however, at her examination before trial, the plaintiff denied prior injury to her back, indicating that she had sustained a knee/leg injury.

In reviewing the MRI report of June 24, 2011, it is stated that there is mild anterolisthesis of L4 on L5 which is new from the prior study. The report also indicated that there is signal abnormality within the pedicles bilaterally of L4 and L5 which are hyperintense on T2 and slightly hypointense on T1 with reactive change, new from the prior study. The report also indicates that the degree of facet degenerative change has progressed from the prior exam. Dr. Katz does not set forth that he reviewed any prior studies, including the MRI of March 25, 2006, to which the examining radiologist compared the subsequent MRI. Dr. Katz does not address the new findings and does not rule out that such injuries are related to the subject accident, precluding summary judgment.

It is noted that the movants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering their 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 the 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]), 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]). Thus, summary judgment is precluded to the moving parties with regard to this category of injury as well.

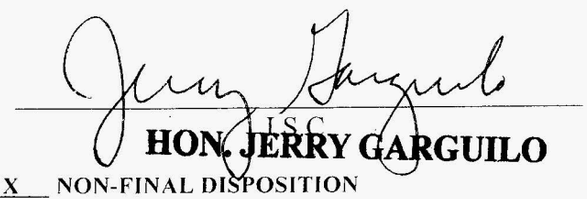
At the time of his examination of the plaintiff on June 4, 2013, Dr. Katz stated that the plaintiff has been undergoing physical therapy three times a week, and has limitations in standing, walking, sitting, bending, getting up and down, and going up and down steps. The plaintiff testified that immediately following the accident, she experienced pain in her neck, a headache, and had a lot of pain in her lower back. She described her care and treatment, as well as testing, and indicated that she was

continuing with physical therapy once or twice a week, but she was not getting better. Her physicians, Dr. Dowling and Dr. Schwartz, have recommended back surgery, but she stated that her plans are open on that. She also sought care and treatment from a neurologist, Dr. Sonstein. She experiences stabbing and aching pain in her back, sometimes on the right side, but mostly on the left and lower left side. She can no longer walk for long periods of time, lift anything heavy, ride her bicycle, and has difficulty going up and down stairs. She stated that she must sit and rest as she cannot do what she used to do, and if she tries, the pain comes back. It hurts her back to go shopping for groceries or to walk at the mall.

The factual issues raised in the defendants' moving papers preclude summary judgment. Thus, the defendants have 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 party has 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]).

Accordingly, motion (002) for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: JUN 26 2014



HON. JERRY GARGUILO J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION