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SHORT FORM ORDER

INDEX No. 13-10420
CAL. No. 14-01279MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN H. ROUSE
Acting Justice of the Supreme Court

MOTION DATE 12-12-14
ADJ. DATE 4-1-15
Mot. Seq. # 002 - MD

BLANCA VILLANUEVA,

Plaintiff,

- against -

IDALMIS NUNEZ and LUIS REYES,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 14 - 22 ; Replying Affidavits and supporting papers 23 - 24 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Idalmis Nunez and Luis Reyes seeking summary judgment dismissing the complaint is denied.

Plaintiff Blanca Villanueva commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred in the right lane of eastbound Long Island Expressway ("LIE"), approximately 1000 feet from Exit 56, in the Town of Islip on October 1, 2011. It is alleged that the accident occurred when the vehicle operated by defendant Idalmis Nunez and owned by defendant Luis Reyes crossed over into plaintiff's lane of travel, striking the front driver's side of her vehicle. As a result of the impact, plaintiff's vehicle allegedly was pushed into the guardrail to the right of her lane of travel, causing it to flip over. Prior to the accident, plaintiff's vehicle was traveling in the right lane of the eastbound LIE and defendants' vehicle was traveling in the middle lane of the eastbound LIE. By her bill of particulars, plaintiff alleges, among other things, that she sustained various personal injuries as a result of the subject collision, including disc herniations at level C5 through C7; disc bulges at level L1 through S1; cervical and lumbar radiculopathy; scarring of the left forearm and elbow; and cervical, thoracic and lumbar segmental joint dysfunction.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries do not meet the serious injury threshold requirement of Insurance Law § 5102(d). In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Craig Ordway and Dr. Jonathan Lerner. Dr. Ordway, at defendants' request, conducted an independent orthopedic examination of plaintiff on March 26, 2014. Dr. Lerner, also at defendants' request, performed an independent radiological review of the magnetic resonance imaging ("MRI") films of plaintiff's cervical and lumbar spine taken on November 29, 2011. Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" and the 90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits her own affidavit, photographs of the scarring to her left forearm and elbow, the affidavit of her chiropractor, Dr. Robert McEvoy, and the uncertified copies of her medical records regarding the injuries at issue.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "serious injury" as "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."

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]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment, using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79,

707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]). 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]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 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]).

Here, defendants have established through the submission of plaintiff's deposition transcript and competent medical evidence that plaintiff did not sustain a serious injury within the meaning of the serious injury threshold requirement of § 5102(d) of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Kim v Myung Sook Ahn***, 128 AD3d 1057, 8 NYS3d 9193 [2015]). Defendants' examining orthopedist, Dr. Orway, states in his medical report that an examination of plaintiff reveals that she has full range of motion in her spine, that there is no evidence of muscle spasm upon palpation of the paravertebral musculature of the spine, the trapezii or anterior strap muscles, that there is no evidence of weakness or atrophy of the muscles, and that there is no loss of sensation over the skin of the upper or lower extremities. Dr. Ordway states that the straight leg raising test is negative, that an examination of plaintiff's left elbow and forearm does not reveal any scarring or sequelai of her alleged injury, and that she has full range of motion in her left elbow. Dr. Ordway further states that the examination of plaintiff's spine and extremities was normal, that she does not have any evidence of an orthopedic disability or deformity, and that no evidence of a significant impairment exists which is causally related to the subject accident.

Additionally, Dr. Lerner, defendants' reviewing radiologist, states in his medical report that the MRI studies of plaintiff's cervical and lumbar spine show evidence of dessication of the C5/C6, C6/C7 and L5/S1 intervertebral disc space levels, which is consistent with degenerative disc disease and is suggestive of a chronic degenerative process, not a traumatic event. Moreover, Dr. Lerner further states that there is no evidence of central stenosis or neural foraminal narrowing in plaintiff's spine, and that there is no causal relationship between the findings on plaintiff's spinal MRI examinations and the subject collision.

Thus, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept

2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to the motion, plaintiff submitted competent medical evidence raising a triable issue of fact as to whether she sustained serious injuries to the cervical and lumbar regions of her spine under the limitations of use categories of the Insurance Law (*see* ***Garafano v Alvarado***, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Compass v GAE Transp.,*** inc., 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]). Plaintiff's treating chiropractor, Dr. Robert McEvoy, in his affidavit states, based upon his contemporaneous and recent examinations, that plaintiff has sustained significant range of motion limitations to the cervical and lumbar areas of her spine, that such limitations are causally related to the subject accident, and that the limitations are permanent (*see e.g.* ***Dixon v Fuller***, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]; ***Austin v Domiguez***, 79 AD3d 952, 913 NYS2d 757 [2d Dept 2010]; ***Casiano v Zedan***, 66 AD3d 730, 887 NYS2d 613 [2d Dept 2009]).

Thus, the affirmed medical report of plaintiff's expert conflicts with those of defendants' experts, who found that there were no significant limitations in plaintiff's ranges of motion in her spine. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see* ***Johnson v Garcia***, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Although disc bulges and herniations, standing alone are not evidence of a "serious injury" under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [1st Dept 2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Therefore, plaintiff has submitted sufficient evidence to raise a triable issue of fact as to whether her injuries are causally related to the subject accident (*see* ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2d Dept 2010]; ***Paula v Natala***, 61 AD3d 944, 879 NYS2d 153 [2d Dept 2009]; ***Azor v Torado***, 59 AD3d 367, 873 NYS2d 655 [2d Dept 2009]).

Finally, although plaintiff failed to refute defendants' prima facie showing that the scarring to her left elbow and forearm did not constitute a significant disfigurement within the meaning of the Insurance Law (*see* ***Lynch v Iqbal***, 56AD3d 621, 868 NYS2d 676 [2d Dept 2008]; ***Sirmans v Mannah***, 300 AD2d 465, 752 NYS2d 359 [2d Dept 2002]; ***Losieau v Maxwell***, 256 AD2d 450, 682 NYS2d 450 [2d Dept 1998]; ***Spevak v Spevak***, 213 AD2d 622, 623, 624 NYS2d 232 [2d Dept 1995]; ***Prieston v Massaro***, 107 AD2d 742, 484 NYS2d 104 [2d dept 1985]; *see also* Insurance Law § 5102[d]), once a plaintiff establishes proof an injury meets at least one category of the no-fault threshold, it is unnecessary to address whether plaintiff's proof in regards to other alleged injuries are sufficient to defeat defendant's prima facie showing (*see* ***Linton v Nawaz***, 14 NY3d 821, 900 NYS2d 593 [2010]; *see also* ***Angeles v American United Transp., Inc.***, 110 AD3d 639, 973 NYS2d 644 [1st Dept 2013]; ***McClelland v Estevez***, 77 AD3d 403, 908 NYS2d 192 [1st Dept 2010]).

Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is denied.

Dated: August 25, 2015

JOHN H. ROUSE A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION