SHORT FORM ORDER

INDEX No. 13-14282
CAL. No. 14-01366MV

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 12-3-14
ADJ. DATE 2-18-15
Mot. Seq. # 001 - MD

DIANNA JORDAN,

Plaintiff,

- against -

MELVIN BLACKMON,

Defendant.

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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 - 14; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 15 - 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 defendant Melvin Blackmon seeking summary judgment dismissing the complaint is denied.

Plaintiff Dianna Jordan commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Mill Road and Tellar Avenue in the Town of Brookhaven on January 18, 2012. By her complaint, plaintiff alleges that the vehicle owned and operated by defendant Melvin Blackmon crossed over the double yellow lines into her lane of travel and struck the rear driver side of her vehicle. Prior to the accident, plaintiff was traveling east on Mill Road and defendant was traveling west on Mill Road. By her bill of particulars, plaintiff alleges that she sustained various personal injuries, including disc herniations at levels C2 through C7; disc bulging at levels C7 through T5 and L2 through L5; myofascitis; and lumbar radiculopathy.

Defendant now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident fail to meet the serious injury threshold requirement of

§5102(d) of the Insurance Law. In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Gary Kelman and Dr. Jonathan Luchs. At defendant's request, Dr. Kelman conducted an independent orthopedic examination of plaintiff on July 14, 2014. Also at defendant's request, Dr. Luchs performed an independent radiological review of the magnetic resonance images ("MRI") films taken of plaintiff's cervical and lumbar spine on February 29, 2012. Defendant also submits copies of plaintiff's medical records regarding her treatment concerning the injuries at issue.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

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 a defendant has met this burden, the 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***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Initially, the Court notes that the transcript of plaintiff's deposition submitted in support of defendant's motion for summary judgment fails to comply with the requirements of CPLR 2101 and 22

NYCRR § 202.5(a), which require that a submission to the Court be legible, and that the document is bound on the side when the attached exhibits contain pages with writing on both sides of the pages.

Based upon the adduced evidence, defendant has established a prima facie case that plaintiff did not sustain an injury within the meaning 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*). Defendant's examining orthopedist, Dr. Kelman, used a goniometer to test the ranges of motion in plaintiff's spine and hips, and compared his respective findings to the normal range of motion values for each region (*see e.g.* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2d Dept 2009]; ***Staff v Yshua***, 59 AD2d 614, 874 NYS2d 180 [2d Dept 2009]; ***Desulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). The affirmed medical report of Dr. Kelman states that an examination of plaintiff revealed that she has full range of motion in her spine and hips, that there is no paraspinal tenderness or spasm upon palpation of the paraspinal muscles, that she does not have a limp or antalgic gait, and that the straight leg raising test is negative. Dr. Kelman opines that the strains/sprains sustained to plaintiff's spine and hips as a result of the subject accident have resolved, and that there is no evidence of sequelae from the accident.

In addition, the affirmed medical reports of defendant's reviewing radiologist, Dr. Luchs, states that a review of the MRI films of plaintiff's cervical and lumbar regions of her spine show that she suffers from chronic degenerative changes in her spine, which predate the subject accident, and that there is no evidence of posttraumatic findings on the MRI films of her lumbar or cervical spine.

Defendant, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). 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]).

Plaintiff in opposition to the motion argues 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, and that the evidence submitted in opposition raises triable issues of fact as to such. In opposition to the motion, plaintiff submits her own affidavit, the sworn affidavit of her treating chiropractor, Dr. Michael Campo, and unsworn records of plaintiff's treating records regarding the injuries at issue.

In opposition to the defendant's prima facie showing, plaintiff has raised a triable issue of fact as to whether she sustained an injury within the meaning of the serious injury threshold requirement of § 5102(d) of the Insurance Law (*see* ***Stanley v Caddie Serv. Co., Inc.***, 110 AD3d 711, 971 NYS2d 886 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]; ***Park v Shaikh***, 82 AD3d 1066, 918 NYS2d 887 [2d Dept 2011]), and as to whether such injuries were causally related to the subject accident (*see* ***Windisch v Fasano***, 105 AD3d 1039, 963 NYS2d 401 [2d Dept 2013]; ***Jilani v Palmer***, 83 AD3d 786 [2d Dept 2011]). Although the mere existence of a bulging or herniated disc, by itself, is not evidence of serious injury, but may constitute a serious injury when coupled with objective medical evidence as to the extent of the alleged physical limitations resulting from that injury and its duration (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Ponciano v Schaefer***, 59 AD3d 605, 873 NYS2d 212 [2d Dept 2009]). Plaintiff primarily relies upon the affidavit of her treating chiropractor, Dr. Michael Campo, who began treating her on January 25, 2012, and re-examined her on November 10, 2014. In his affidavit, Dr. Campo opines, based upon his contemporaneous and recent examinations, that plaintiff sustained damage to her discs, facet joints, ligaments and myofascial elements in the lumbar and cervical regions of her spine, that such damage resulted in significant range of motion limitations in her spine, and that such restrictions are permanent and causally related to the subject motor vehicle accident (*see* ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Tai Ho Kang v Young Sun Cho***, 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]; ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2d Dept 2010]). Additionally, Dr. Campo states that plaintiff stopped receiving treatment in August 2012, because her no-fault benefits were terminated and she did not have private medical insurance to help off-set the cost of continued treatment. Dr. Campo further explained that, although he recommends that plaintiff continue to receive palliative treatment, since she is still symptomatic, at the time she was dismissed from his treatment she had received the maximum benefit from the provided treatment (*see e.g.* ***Echevarria v G&G Classic, Inc.***, 91 AD3d 902, 937 NYS2d 608 [2d Dept 2012]; ***Jean-Baptiste v Tobias***, 88 AD3d 962, 931 NYS2d 645 [2d Dept 2011]; ***Abdelaziz v Fazel***, 78 AD3d 1086, 912 NYS2d 103 [2d Dept 2010]; ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]). Lastly, Dr. Campo states that plaintiff was asymptomatic prior to the subject collision, that the subsequent symptomology displayed by plaintiff is consistent with a trauma related injury, and that plaintiff does not have any pre-existing or degenerative conditions which are contributing to such symptomology.

Inasmuch as the affirmed medical reports of plaintiff's expert conflicts with that of defendant's expert, who concluded that the injuries plaintiff sustained to her spine as a result of the subject accident were resolved, triable issues of fact have been raised, precluding the granting of judgment as a matter of law. "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]). Moreover, "where [a] plaintiff establishes that at least some of [her] injuries meet the 'no-fault' threshold, it is unnecessary to address whether [her] proof with respect to other injuries [she] allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment" (***Linton v Nawaz***, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see* ***Rubin v SMS Taxi Corp.***, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is denied.

Dated: August 28, 2015

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION