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SHORT FORM ORDER

INDEX No. 15-10629
CAL. No. 16-02021MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 2-24-17
ADJ. DATE 3-9-17
Mot. Seq. # 002 - MG

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DOREEN L. WOJTAS and DAVID E. PARKER,

Plaintiffs,

- against -

MICHELLE F. FRANKLIN,

Defendant.

---X

Attorney for Plaintiffs:
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Upon the following papers numbered 1 to 34 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27 - 32 ; Replying Affidavits and supporting papers 33 - 34 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Michelle Franklin for summary judgment in her favor is **granted.**

This is an action to recover damages for injuries allegedly sustained by plaintiffs Doreen Wojtas and David Parker as a result of a motor vehicle accident, which occurred on January 30, 2015 on Middle Country Road, at or near its intersection with Fairview Street, in Smithtown, New York. The accident allegedly occurred when the vehicle operated by defendant Michelle Franklin struck the rear of the vehicle owned by plaintiff Parker and operated by plaintiff Wojtas. By their verified complaint, as amplified by their verified bills of particulars, plaintiffs allege that, as a result of the accident, Wojtas suffered serious injuries and symptoms, namely aggravation of previously asymptomatic degenerative multilevel disc desiccation in her cervical spine, and herniated and displaced discs of her cervical spine.

Defendant seeks an order granting summary judgment dismissing the claim of plaintiff Wojtas on the ground that Insurance Law § 5104 precludes her from pursuing a personal injury claim because she

did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant submits, in support of the motion, copies of the pleadings, the bills of particulars, and the medical reports of orthopedic surgeon Dr. Marc Chernoff and neurologist Dr. Richard Lechtenberg. In opposition, plaintiffs argue that triable issues of fact remain as to whether plaintiff Wotjas had a preexisting injury, and that her bulging and herniated discs and persistent pain constitute serious injuries. Plaintiffs submit, in opposition, plaintiff Wojtas' affidavit, and the medical reports of Dr. Paul Alongi and Dr. Marc Katzman.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Insurance Law § 5102 (d) defines "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 by the No-Fault Insurance Law bears the initial burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon 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 (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective

medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or 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*; ***McEachin v City of New York***, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Keith v Duval***; 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]; ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]). Likewise, sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Further, a plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a "great extent rather than some slight curtailment" (*see* ***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Defendant's submissions establish a prima facie case that the alleged injuries to plaintiff Wojtas' cervical spine do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Plaintiff Wojtas' alleged 90/180-day injury was sufficiently refuted, prima facie, by the submission of plaintiffs' amended bill of particulars, which alleges that she was not confined to bed or home following the accident (*see* ***Strenk v Rodas***, *supra*; ***Rosa v Mejia***, 95 AD3d 402, 943 NYS2d 470 [1st Dept 2012]; ***Hospedales v "John Doe,"*** 79 AD3d 536, 913 NYS2d 195 [1st Dept 2010]; ***Williams v Baldor Specialty Foods, Inc.***, 70 AD3d 522, 895 NYS2d 394 [1st Dept 2010]). Defendant also presented competent medical evidence that none of plaintiff Wojtas' alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*). The affirmed medical report of Dr. Chernoff states, in relevant part, that during her examination, plaintiff exhibited normal joint function in her cervical spine. Based on a review of a magnetic resonance imaging ("MRI") examination report dated April 2, 2015, Dr. Chernoff opines plaintiff Wojtas suffers from "degenerative disk disease with mild disk height loss C5-6 consistent with pre-existing condition." Although plaintiff Wojtas denied receiving any treatment for whiplash sustained in a prior motor vehicle accident in 2007, Dr. Chernoff opines that the whiplash, as well as finding of "mild multilevel disk disease" on an MRI examination report, demonstrates a preexisting condition of Wojtas' cervical spine. Dr. Chernoff

diagnoses plaintiff Wojtas as having suffered a sprain to her cervical spine, and a contusion or hematoma to her left elbow (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Rabolt v Park***, *supra*; ***Pagano v Kingsbury***, *supra*).

The affirmed medical report of Dr. Lechtenberg states, in relevant part, that during her examination, plaintiff exhibited normal range of function in her cervical spine. Dr. Lechtenberg finds no objective, clinical, neurologic deficits correlating to the finding of mild multi-level disc disease as described in the April 2, 2015 MRI examination report. Dr. Lechtenberg also opines plaintiff Wojtas has "no consistent, objective, clinical, neurologic deficits," and diagnoses her as having suffered a "status post cervical spine sprain," and notes that such injury has resolved (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Rabolt v Park***, *supra*; ***Pagano v Kingsbury***, *supra*).

Defendant having met her initial burden on the motion, the burden shifted to plaintiffs to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*; ***Pagano v Kingsbury***, *supra*). Plaintiffs submit the reports of Dr. Alongi and Dr. Katzman, which are insufficient to raise a triable issue of fact. As Dr. Alongi did not begin rendering treatment to plaintiff until June 18, 2015, about four and a half months after the accident, his report is insufficient to demonstrate the duration of the claimed range of motion limitations in plaintiff Wojtas' cervical spine (*see* ***Pryce v Nelson***, *supra*; ***Rovelo v Volcy***, *supra*; ***McLoud v Reyes***, *supra*; ***Stevens v Sampson***, *supra*). Thus, the conclusions of the Dr. Alongi that the injuries and limitations noted during Wojtas' examinations were the result of the subject accident were speculative (*see* ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]). Further, there is no indication that Dr. Alongi reviewed medical records related to the prior motor vehicle accident, as he took plaintiff Wojtas' word that she recovered from any injuries sustained therein. Due to his failure to adequately address the prior accident, Dr. Alongi's conclusions that Wojtas' cervical spine injuries were caused by the subject accident were speculative (*see* ***Wallace v Adam Rental Transp., Inc.***, 68 AD3d 857, 891 NYS2d 432 [2d Dept 2009]; ***Chanda v Varughese***, 67 AD3d 947, 890 NYS2d 88 [2d Dept 2009]; ***Joseph v A & H Livery***, 58 AD3d 688, 871 NYS2d 663 [2d Dept 2009]; ***Penaloza v Chavez***, *supra*). The medical report of Dr. Katzman also is insufficient to raise a triable issue of fact, as the certification of Dr. Mendelsohn is insufficient to affirm the contents of the medical report (*see* ***McLoud v Reyes***, *supra*; ***Buntin v Rene***, 71 AD3d 938, 896 NYS2d 894 [2d Dept 2010]). However, were it considered, Dr. Katzman concludes that plaintiff Wojtas suffers from straightening of the normal cervical lordosis, "mild to moderate broad disc bulging" at C5-6 and a "tiny" herniation at C7-T1. The mere existence of a herniated disc is not evidence of a serious injury (*see* ***Pommells v Perez***, *supra*; ***Hayes v Vasilios***, *supra*; ***Chanda v Varughese***, *supra*; ***Penaloza v Chavez***, *supra*). In addition, Dr. Katzman's report does not refute Dr. Chernoff's finding that plaintiff Wojtas suffers from a preexisting condition of her cervical spine due to a prior motor vehicle accident, as Dr. Katzman finds mild multilevel disc disease of Wojtas' cervical spine (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, 127 AD3d 811, 6 NYS3d 607 [2d Dept 2015]; ***Wallace v Adam Rental Transp., Inc.***, *supra*; ***Chanda v Varughese***, *supra*; ***Penaloza v Chavez***, *supra*).

As plaintiffs' submissions fail to offer competent quantitative medical evidence of plaintiff Wojtas' alleged loss of range of motion based on contemporaneous and recent examinations, they fail to rebut defendant's prima facie showing that she did not suffer a "serious injury" within the meaning of

the statute (*see* Insurance Law § 5102 [d]; ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*; ***McLoud v Reyes***, *supra*). Although plaintiff Wojtas stated in her affidavit that she quit her job due to neck pain, plaintiffs have not submitted any admissible medical evidence demonstrating that Wojtas was informed by any doctor that she was required to stop working as a result of the alleged injuries she sustained in the subject accident (*see e.g.* ***McLoud v Reyes***, *supra*). As a result, plaintiffs have failed to substantiate their claim that Wojtas sustained nonpermanent injuries that left her unable to perform her normal daily living activities for at least 90 out of the first 180 days immediately following the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2d Dept 2009]; ***Rabolt v Park***, *supra*; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2d Dept 2007]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2d Dept 2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]). Further, plaintiff Wojtas' subjective complaint of continued pain is insufficient to establish a triable issue of fact (*see* ***Licari v Elliott***, *supra*; ***Christian v Waite***, 61 AD3d 581, 877 NYS2d 319 [1st Dept 2009]; ***Dantini v Cuffie***, 59 AD3d 490, 873 NYS2d 189 [2d Dept 2009]; ***Coloquhoun v 5 Towns Ambulette***, 280 AD2d 512, 720 NYS2d 385 [2d Dept 2001]).

Accordingly, defendant's motion for summary judgment dismissing the claim of plaintiff Wojtas is **granted**.

Dated: May 22, 2017
Riverhead, New York

WILLIAM G. FORD J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION