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SHORT FORM ORDER

INDEX No. 14-19286
CAL. No. 16-01909MV

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 12-13-16
ADJ. DATE 3-9-17
Mot. Seq. # 001 - MG; CASEDISP

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STEPHANIE M. SALADINO,

Plaintiff,

- against -

SEGUNDO K. QUINTEROS,

Defendant.

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Attorney for Plaintiff:
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Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 9 - 35; Replying Affidavits and supporting papers 36 - 37; Other sur reply affirmation; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" as defined in Insurance Law § 5102 (d) is **GRANTED**.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when her vehicle collided with a vehicle owned and operated by defendant. The accident allegedly occurred on January 2, 2012, at approximately 3:00 p.m., at the intersection of Stuart Road and Broadway in Shirley, New York. By the bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained various injuries and conditions including a herniated disc at level L4-L5.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of moving defendant's examining physician (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On August 29, 2016, approximately four years and eight months after the subject accident, moving defendant's examining orthopedist, Dr. Gary Kelman, examined plaintiff and performed certain orthopedic and neurological tests, including the foraminal compression test and the straight leg raising test. Dr. Kelman found that all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff's cervical, thoracic and lumbar regions. Dr. Kelman also performed range of motion testing on plaintiff's cervical, thoracic and lumbar regions, using a goniometer to measure her joint movement. Dr. Kelman found that plaintiff exhibited normal joint function in her cervical, thoracic and lumbar regions. Dr. Kelman opined that plaintiff had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at her deposition, plaintiff testified that following the accident, she was confined to bed for approximately 10 days, and that although she missed a few weeks, she did not lose any pay. She testified that a week after the accident, she saw a chiropractor and received chiropractic treatment for approximately two years or more. She testified that she stopped chiropractic treatment because it was too hard for her to go to the chiropractor's office from home or work. She did not go to another medical provider since then. She also testified that while having difficulty gardening, cooking, cleaning and sitting for a long time, there is no activity that she is unable to perform because of the accident. Plaintiff's deposition testimony established that her injuries did not prevent her from performing "substantially all" of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendant met his initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement 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]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). 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 of the plaintiff 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***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***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*; ***Cebron v Tuncoglu***, *supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Plaintiff opposes the motion, arguing moving defendant's expert report is insufficient to meet his burden on the motion. Plaintiff also argues that the medical reports prepared by her treating chiropractor and physician raise a triable issue as to whether she suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the sworn affidavit, dated January 18, 2017, of Dr. Todd Goldman, her treating chiropractor; two sworn MRI reports performed on plaintiff's cervical and lumbar regions of Dr. Michele Rubin, a radiologist; and plaintiff's own affidavit.

The MRI report, dated March 28, 2012, of Dr. Rubin indicates that there is mild nasopharyngeal soft tissue prominence in her cervical region. The MRI report, dated April 9, 2012, of Dr. Rubin indicates that plaintiff had a herniated disc in her lumbar region. The mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see* ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). However, Dr. Rubin failed to proffer an opinion as to the cause of the disc pathology noted in her reports (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]).

The sworn affidavit of Dr. Goldman is insufficient to defeat summary judgment. Here, Dr. Goldman's affidavit set forth plaintiff's initial complaints and the findings, including the limitations in her cervical and lumbar spine joint function obtained during her initial examination on January 23, 2012. Dr. Goldman stated that he treated plaintiff for approximately two years, and that plaintiff's symptomology was "still significant" at the conclusion of the two year period. Dr. Goldman stated that on December 7, 2016, he performed range of motion testing on plaintiff's cervical and lumbar regions, using an inclinometer to measure her joint movement, and found that plaintiff exhibited significant limitation of range of motion in her cervical and lumbar regions. Dr. Goldman's affidavit failed to adequately explain a gap in treatment from January 2014 through December 2016 and, thus, is insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury (*see* ***Pommells v Perez***, *supra*; ***Valdez v Benjamin***, 101 AD3d 622, 957 NYS2d 325 [1st Dept 2012]; ***Osgood v Martes***, 39 AD3d 516, 831 NYS2d 724 [2d Dept 2007]; ***Li v Woo Sung Yun***, 27 AD3d 624, 812 NYS2d 604 [2d Dept 2006]).

Plaintiff stated in her own affidavit that since the accident, she is not able to sit at work for a long time and to bend for cooking, cleaning and laundry, and that she is limited in gardening and running. However, plaintiff also failed to adequately explain a gap in treatment from January 2014 through December 2016.

Finally, plaintiff failed to offer competent evidence that she sustained nonpermanent injuries that left her unable to perform her normal daily activities for at least 90 of the 180 days immediately following the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*).

Accordingly, defendant's motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted, and the complaint is dismissed.

Dated: May 8, 2017
Riverhead, New York

WILLIAM G. FORD, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION