SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. GEORGE R. PECK
JUSTICE

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ANGELICA M. PENARANDA,

Plaintiff,

-against-

KAHLIL C. DUPUY, MAX DUPUY, JEROME O. SMALL, THERESA I. SCARPELLO and GELCO FLEET TRUST,

Defendants.

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TRIAL/IAS PART 20

INDEX # 604143-2015

Motion Seq. 003, 004, 005, 006, 007

Motion Date 5-10-17

Upon the foregoing papers, the Defendants' motion seeking an order granting summary judgment pursuant to CPLR §3212 and dismissing the complaint of the Plaintiff on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is determined as hereinafter provided.

The Plaintiff's personal injury action arises out of a four (4) vehicle accident that occurred on August 19, 2013 on the Meadowbrook Parkway, in the County of Nassau, New York. The Plaintiffs' vehicle was struck twice in the rear, in a four (4) car collision. Plaintiff was struck twice, first by defendant Dupuy and then by defendant, Jerome O. Small.

Plaintiff claims that because of the subject accident, she has suffered personal injuries. She contends that these personal injuries qualify as "serious injuries," pursuant to Article 51 of the New York State Insurance Law, which is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of body organ or member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9)a medically determined injury of a non-permanent nature that prevents the injured person from performing

substantially all of the material acts which constitute their usual and customary daily activity for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury. *See McKinney's Consolidated Laws of New York*, Insurance Law §5102(d) .

Plaintiff alleges that as a result of the accident she suffered the following injuries:

LEFT SHOULDER:
-Tear of the supraspinatus tendon;
-Impingement of the supraspinatus muscle and tendon;
-Sprain and strain;
-Decreased range of motion;

LUMBAR SPINE:
-Left papacentral disc herniation at L5-S1 effecacing the ventral dura and compromising the left foramina with narrowing secondary to this process;
-L5 radiculopathy;
- Lumbar joings segmental dysfunction;
-Lumbar radiculopathy;
-Myofaciitis;
-Decreased range of motion.

CERVICAL SPINE:
- Broad based disc herniation at C5-C6 effacing and flattening the ventral dura;
-Disc bulge at C4-C5 effacing the ventral dura;
-Left C-6 radiculopathy;
-Cervical straightening;
-Cervicalgai;
-Cervical radiculopathy;
-Cervical joints segmental dysfunction;
-Thoracic Joints Segmental dysfunction;
-Thoracic sprain and strain;
-Limited range of motion;

MISCELLANEOUS;
-Intermittent headaches;
-Muscle spasm and tenderness at the thoracic paraspinal muscles, starting at T9-L5 spinous processes;
-Limited range of motion of the thoracic spine secondary to pain;
-Limitation of motion, involving the skin, bone, cartilage, ligaments, tendons, joints, blood vessels, nervous systems, lymphatic system and other tissues of the affected and surrounding areas.

Plaintiff testified she could not bathe her son, cook meals, or clean her home and was 100% disabled from the date of the accident until her examination in March 2014.

Based on the above conclusions of the examining doctors, Plaintiff asserts that she therefore sustained a serious injury" as defined by Insurance Law § 5102 (d).

The Defendant argues, that the Plaintiff's injuries do not meet any definition of "serious injury" as defined in any part of Insurance Law § 5102 (d) and therefore move for summary judgment pursuant to CPLR § 3212 and dismissal of the Plaintiff's complaint in its entirety.

In moving for summary judgment, the Defendant must make a prima facie showing that the Plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the Plaintiff to come forward with evidence to overcome the Defendant's submissions by demonstrating a triable issue of fact that a serious injury" was sustained (*see Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, 268 A.D. 2d 79, 84 [2nd Dept. 2000]).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the Plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102 (d) (*Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury" (*Licari v. Elliot*, 57 N.Y.2d 230 [1982]).

Within the scope of the Defendant's burden, a Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to the Plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Qu v. Doshna*, 12 A.D.3d 578 [2nd Dept. 2004]; *Browdame v. Candura*, 25 A.D.3d 747 [2nd Dept. 2006]; *Mondi v. Keahan*, 32 A.D.3d 506 [2nd Dept. 2006]).

On November 18, 2016, Dr. Raymond Shebairo conducted an independent orthopedic examination. Dr. Shebairo compared the plaintiff's observed range of motion to what is considered to be normal and found a full range of motion in the plaintiff's Cervical Spine, Thoracic Spine, Right Shoulder, and Left Shoulder; and better than normal range of motion in plaintiff's Lumbar Spine. Dr. Shebairo found that the plaintiff tested negative for atrophy in all bilateral upper and lower extremities examined, and scored a five (5) out of possible five (5) in neurological muscle strength testing in all upper and lower extremities. Dr. Shebairo also found deep tendon reflexes were normal; sensation to light touch was normal; there was no atrophy; no heat; no swelling; no effusion; no erythema; and no crepitus. Dr. Shebairo diagnosed mere resolved sprains. Dr. Shebairo's impression was there is no permanency.

Applying the aforesaid criteria to the report of Dr. Shebairo, this Court finds that the

moving Defendant has established a prima facie case that the plaintiff, Ms. Penaranda failed to sustain a serious injury within those categories of a permanent loss of use of a body organ, member, function or system, a significant limitation of use of a body organ or member (*Gaddy v. Euler*, 79 N.Y.2d 955 [1992], *supra*).

With respect to the categories of a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member, this Court notes that Dr. Shebairo opined that Ms. Penaranda's range of motion was within normal limits. Dr. Shebairo also concluded that there was no orthopedic or neurological disabilities present in Ms. Penaranda with regard to the subject accident. Thus, the burden now shifts to the Plaintiff to demonstrate a triable issue of fact with respect to the existence of a "serious injury" (*Licari v. Elliot*, 57 N.Y.2d 230 [1982], *supra*).

In order for the Plaintiff to satisfy the statutory serious injury threshold, the legislature requires objective proof of a Plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002), stated that a Plaintiff's proof of injury must be supported by objective medical evidence…paired with the doctor's observations during the physical examination of the Plaintiff.

Plaintiff commenced treatment after the collision with Care 4U Physical Therapy; Baldwin Chiropractic; and Baldwin Wellness Acupuncture. The plaintiff present to Dr. Quan, at Care 4U with initial complaints of frontal headaches and dizziness, sharp cervical pain that radiated down her left arm, left shoulder pain, sharp lower back pain radiating down her right leg, and left hip and left upper chest pain. Dr. Quan evaluated her at that time, and conducted range of motion studies. He found that she suffered as much as a 50% reduction is range of motion of her cervical spine and over 50% reduction in her Thoracid-Lumbar spine. At the first visit, Dr. Quan prescribed physical therapy three (3) times per week, chiropractic treatment, acupuncture, and a scheduled follow up visit.

Dr. Quan evaluated the plaintiff on five (5) additional occasions from the date of the collision to January 28, 2014, five months after the collision, and at each evaluation he found her to be 100% disabled. At the March 2014 office visit and evaluation, he found her 50% disabled. Plaintiff underwent sixty-six (66) separate physical therapy sessions from the date of the collision in August 2013 until April 8, 2014. Plaintiff underwent chiropractic treatment including sixty (60) separate session from the date of the collision to May 20, 2014, and seventy (70) sessions with acupuncture pain management through May 20, 2014.

Also, patient underwent MRK, read by board certified radiologist, Dr. Paul Bonheim. In his reports, Dr. Bonheim clearly indicates serious and significant findings in both the lumbar spine and the cervical spine and the left shoulder. The MRI film of the cervical spine showed a disc bulge at C-4-5 and a broad based herniated disc at C-5-6. The MRI of the lumbar spine indicated a left central disc herniation at L/5-S/1 that compromised the foramina indicated by narrowing in the spine. The MRI of the left shoulder clearly showed an impingement of the

supraspinataus muscle and tendon and a partial injury or tear of the tendon.

Plaintiff's doctor, Dr. Quan conducted an evaluation on February 14, 2107. His cervical spine evaluation indicates that Ms. Penaranda continues to suffer a significant loss of motion in her flexion (20%); Extension(33%); right lateral bending (22%); and left lateral bending (44%). Similarly he found lumbar range of motion reduced by the following amounts: Flexion (16%); Extension (40%); Right lateral bending (40%); and left lateral bending (60%). She also still exhibited tenderness in the left shoulder and her abduction was limited to 155% with normal being 180%, a loss of 13%.

Dr. Quan further reported in his narrative pertaining to the EMG/NCV studies performed on Ms. Penaranda which indicated a left sided radiculopathy at C-6-consistent with the MRI findings of a herniated disc and an L/5 radiculopathy-consistent with the MRI findings of a herniated disc t L-5-S/1.

Finally, Dr. Quan opines that even though plaintiff had a positive response to treatment she remains limited with a permanent disability and has reached maximum improvement.

When examining medical evidence offered by a Plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a Plaintiff's subjective claims as to pain or limitations of motion are sustained by verified objective medical findings (*Grossman v. Wright*, 268 A.D.2d 79 [2nd Dept 2000]).

Further, in addition to providing medical proof contemporaneous with the subject accident, the Plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury (*Kauderer v. Penta*, 261 A.D.2d 365 [2d Dept 1999]; *Constantinou v. Surinder*, 8 A.D.3d 323 [2nd Dept. 2004]; *Brown v. Tairi Hacking Corp.*, 23 A.D.3d 323 [2nd Dept. 2005]

Applying the foregoing principles to the medical evidence proffered by Ms. Penaranda the Court finds that the Plaintiff has raised a triable issue of fact. Dr. Quan quantified his findings of restricted motion with regards to the Plaintiff's range of cervical and lumbar motion and further opined that this condition is permanent and due to the subject accident. Additionally, Dr. Quan also set forth the opinion that Ms. Penaranda suffered a permanent and significant limitation of motion to her neck and back which was a result of the subject accident.

To meet the threshold regarding the significant limitation of use of a body function or system or permanent consequential limitation category, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Euler*, 79 N.Y.2d 955 [1992], *supra*; Licari v. Elliot, 57 N.Y.2d 230 [1982], *supra*; *Scheer v. Koubeck*, 70 N.Y.2d 678 [1987]).

When a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of the plaintiff's loss of range of motion is acceptable (*see Toure v. Avis Rent-a- Car Systems, Inc.*, 98 N.Y.2d 345 [2002], *supra*). In addition, an expert's qualitative assessment of a Plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and (2) the evaluation compares the Plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see id.*).

Ms. Penaranda asserts that she has suffered permanent partial limitation of motion with resultant pain that is expected to be a permanent consequence of the accident.

To prevail under the "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" category, a Plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102 [d]) "which would have caused the alleged limitations on the Plaintiff's daily activities" (*Monk v. Dupius*, 287 A.D.2d 187, 191 [3rd Dept. 2001]). A curtailment of the Plaintiff's usual activities must be "to a great extent rather than some slight curtailment" (*Licari v. Elliot*, *supra* at 236).

The Plaintiff contends that she still suffers from the effects of the accident.

With regards to this category, a Plaintiff must present objective medical evidence of a medically determined injury or impairment of a non-permanent nature which prevented the Plaintiff from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (*Toure v. Avis Rent-a- Car Systems*, 98 N.Y.2d 345 [2002], *supra*; *Licari v. Elliot*, 57 N.Y.2d 230 [1982], *supra*). In this case, Ms. Penaranda submitted medical reports and an affirmation of Dr. Cohen, which confirm his allegations.

In the instant matter, although the Defendant did succeed in making a prima facie showing that the Plaintiff, Ms. Penaranda did not sustain a serious injury pursuant to the Insurance Law, the Plaintiff successfully countered this showing with sufficient medical evidence demonstrating the existence of material issues of fact that she has in fact sustained a "serious injury" pursuant to the aforementioned insurance law.

Accordingly, based on the foregoing, the motion by the Defendants for summary judgment dismissing the claims against them must be **DENIED**.

As to the discovery motions:

Plaintiff must provide a response to defendant, Jerome Small's post EBT demands for authorizations dated August 6, 2016 and August 1, 2016 within thirty (30) days of the date of this order or

Plaintiff's cross motion for an order striking defendant's answer is **DENIED**.

Depositions of co-defendants, Kahil C. Dupuy and Max Dupuy and Jerome O. Small to be conducted within thirty (30) days of the date of this order.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: July 13, 2017
Mineola, NY

ENTER:

HON. GEORGE R. PECK, JSC

ENTERED

JUL 18 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE