SHORT FORM ORDER

INDEX No. 15-9257
CAL. No. 16-02146MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-21-17
ADJ. DATE 6-23-17
Mot. Seq. # 002 - MD

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ANA C. ORDONEZ,

Plaintiff,

- against -

CARLOS A. LABOR and GOOD TIME TRANSPORTATION SERVICES, INC.,

Defendants.

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PETER R. GARCIA, P.C.
Attorney for Plaintiff
38 Cedar Street
Stony Brook, New York 11790

BAKER, McEVOY, MORRISSEY & MOSKOVITS, P.C.
Attorney for Defendants
One MetroTech Center
Brooklyn, New York 11201

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated February 6, 2017, and supporting papers (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated June 17, 2017, and supporting papers; (4) Reply Affirmation by the defendant, dated June 22, 2017, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendants Carlos Labor and Good Time Transportation Services Inc., for summary judgment dismissing the complaint is denied.

Plaintiff Ana Ordonez commenced this action to recover damages for injuries she allegedly sustained as a result a motor vehicle accident that occurred at the intersection of Suffolk Avenue and Brentwood Parkway in the Town of Islip on January 30, 2015. It is alleged that the accident occurred when the vehicle operated by defendant Carlos Labor and owned by defendant Good Time Transportation struck the front passenger side of plaintiff's vehicle while it was stopped in traffic on

Suffolk Avenue. 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 bulges at levels C4 through C7, level T11-12, and levels L1 through L5; disc herniations at level L5-S1; cervical and lumbar radiculopathy; paraspinal myofascitis; levator scapular muscle tendinitis; left shoulder internal derangement; and right and left knee internal derangement.

Defendants now move for summary judgment dismissing the complaint 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 Section 5102(d) of the Insurance Law. In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. David Fisher, Dr. Edward Weiland, Dr. Salvatore Corso, and Dr. Ronlad Paynter. At defendants' request, Dr. Fisher performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's right knee, cervical spine and lumbar spine taken on February 9, 2015 and March 6, 2015, respectively. Also at defendants' request, Dr. Weiland conducted an independent neurological examination of plaintiff on March 10, 2016. In addition, Dr. Corso conducted an independent orthopedic examination of plaintiff on March 9, 2016. Dr. Paynter, also at defendant's request, performed an independent review of plaintiff's emergency department medical records on December 12, 2016. Plaintiff opposes the motion on the basis that defendants failed to meet their prima facie burden that she did not sustain a serious injury as a result of the subject accident, 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. In opposition to the motion, plaintiff submits certified copies of her medical records regarding the injuries at issue and the sworn medical report of Dr. Christopher Durant.

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, *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 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*).

Based upon the adduced evidence, defendants established, prima facie, their entitlement to judgment as a matter of law on the ground that the injuries allegedly sustained by plaintiff as a result of the subject collision failed to meet the serious injury threshold requirement of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Al-Khilwei v Truman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). Defendants' examining neurologist, Dr. Weiland, states in his medical report that an examination of plaintiff reveals she has full range of motion in her spine and knees, that there was no evidence of spasm or crepitus about the musculature of the spine, that there was no evidence of pain upon palpation of the paraspinal muscles, and that there was no atrophic or atypical motor activity in the muscle groups of the arms or legs. Dr. Weiland states that the straight leg raising test is negative, and that there are no hypertrophic neuropathic changes observed in the distal aspects of the upper and lower extremities. Dr. Weiland opines that the injuries plaintiff sustained to her spine as a result of the subject accident have resolved, and that the neurological examination was normal. Dr. Weiland further states that plaintiff is capable of performing her normal activities of daily living and gainful employment without restrictions, and that there are no findings of neurologic disability or permanency as a result of the subject accident.

Likewise, defendants' examining orthopedist, Dr. Corso, states in his medical report that an examination of plaintiff reveals she has full range of motion in her spine, left shoulder, and knees, bilaterally. Dr. Corso states that there was no evidence of paravertebral tenderness, muscle spasm, or trigger points upon palpation of the paraspinal muscles, that muscle strength is good with no noted atrophy, that she walks with a normal gait, and that the straight leg raising test is normal, bilaterally. Dr. Corso states that there no was evidence of instability during stress testing of the left shoulder and knees, bilaterally, that there was full strength in "all planes" of left shoulder motion, and that there was no evidence of soft tissue swelling in the right or left knee. Dr. Corso opines that the injuries to plaintiff's spine, left shoulder, and left knee have resolved, and that plaintiff's status is post right knee arthroscopy, which is healed. Dr. Corso further states that plaintiff is capable of engaging in her normal activities of

daily living and that she does have any evidence of an orthopedic disability or permanent injury as a result of the subject accident.

In addition, defendants' examining radiologist, Dr. Fisher, states in his medical report that a review of plaintiff's MRI films for her cervical spine, lumbar spine and right knee do not show any evidence of a recent traumatic injury causally related to the subject accident, but the MRI studies do show evidence of mild degenerative changes of the cervical spine and lumbar spine, and a mild disc bulge in her lumbar spine that is compatible with the observed degenerative changes. Dr. Fisher further states that the MRI study of plaintiff's right knee is a normal study, with no evidence of a meniscal or ligament tear.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that she sustained injuries within the limitations of use categories (*see* ***Colon v Tavares***, 60 AD3d 419, 873 NYS2d 637 [1st Dept 2009]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]) and the 90/180 category under Insurance Law § 5102(d) (*see* ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 897 NYS2d 648 [4th Dept 2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]).

Defendants, 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 defendants' 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]).

In opposition to defendants' prima facie showing, plaintiff has raised a triable issue of fact as to whether she sustained a serious injury to her spine and knees within the meaning of Insurance Law § 5102(d) (*see* ***Levin v Khan***, 73 AD3d 991, 904 NYS2d 73 [2d Dept 2010]; ***Nisanov v Kiriyenko***, 66 AD3d 655, 885 NYS2d 633 [2d Dept 2009]; ***Shtesl v Kokoros***, 56 AD3d 544, 867 NYS2d 492 [2d Dept 2008]). 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]). Plaintiff primarily relies upon the affirmed medical report of her treating orthopedist, Dr. Christopher Durant, in opposition to the motion. Based upon his contemporaneous and recent examinations of plaintiff, which revealed significant range of motion limitations in plaintiff's spine, and knees, and his review of the MRI studies of plaintiff's cervical and lumbar regions of her spine, and her right knee, as well as his performance of a right knee arthrosporic surgery on plaintiff on April 30, 2015, Dr. Durant concluded that the injuries sustained by plaintiff to those areas of her body were significant, permanent, and causally related to the subject accident (*see* ***Johnson v Kara***, 72 AD3d 901, 898 NYS2d 525 [2d Dept 2010]; ***Dizdari v Chhon***, 72 AD3d 875, 898 NYS2d 506 [2d Dept 2010]; ***Su Gil Yun v Barber***, 63 AD3d 1140, 883 NYS2d 242 [2d Dept 2009]; ***Modeste v Mercier***, 67 AD3d 871, 888 NYS2d 427 [2d Dept 2009]). Thus, plaintiff has submitted competent medical evidence raising a triable issue of fact as to whether she sustained serious injuries to her spine and knees under the limitations of use categories of the Insurance Law as a result of the subject accident (*see* ***Young Chool Yoi v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Additionally, plaintiff's medical evidence conflicts with that of defendants' experts, who found that the injuries sustained by plaintiff were resolved. "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 [s]he allegedly sustained would have been sufficient to withstand [defendants'] 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, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: January 24, 2018

PETER H. MAYER, J.S.C.