SHORT FORM ORDER

INDEX No. 16-958
CAL. No. 17-01112MV

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 8-25-17
ADJ. DATE 10-16-17
Mot. Seq. # 001 - MG; CASEDISP

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JESSICA WESLEY,

Plaintiff,

- against -

CROWN MASONRY CONSTRUCTION, INC., and FERNANDO GOMES,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated July 19, 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 September 29, 2017, and supporting papers; (4) Reply Affirmation by the defendants, dated October 4, 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 Crown Masonry Construction Corp. and Fernando Gomes seeking summary judgment dismissing the complaint is granted.

Plaintiff Jessica Wesley 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 Route 112 and Bicycle Path in the Town of Brookhaven on March 29, 2015. By her complaint, plaintiff alleges that the accident occurred when the vehicle operated by defendant Fernando Gomes and owned by defendant

Crown Masonry Construction Corp. struck the rear of the vehicle that plaintiff was riding in as a front seat passenger while it was stopped at a red traffic light on northbound Route 112. By her bill of particulars, plaintiff alleges, among other things, that she sustained various personal injuries as a result of the subject accident, including supraspinatus tendinosis with intrasubstance tear of the right shoulder, bursitis of the right shoulder, and partial tear of the rotator cuff of the right shoulder.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries do not 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, uncertified copies of plaintiff's medical records regarding the injuries at issue, and the sworn medical reports of Dr. Gary Kelman. At defendants' request, Dr. Kelman conducted an independent orthopedic examination of plaintiff on May 24, 2017. Plaintiff opposes the motion on the grounds that defendants failed to make a prima facie case that she did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition shows 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 her own affidavit and the affirmed medical report of Dr. James Paci.

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*).

Defendants, by submitting competent medical evidence and plaintiff's deposition transcript, have established their prima facie entitlement to judgment as a matter of law on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendants' examining orthopedist, Dr. Kelman, states in his medical report that an examination of plaintiff reveals she has full range of motion in her spine and shoulders, that there was no paraspinal tenderness or spasm upon palpitation of the paraspinal muscles, that there was no evidence of atrophy of the intrinsic muscles, and that the straight leg raising test was negative. Dr. Kelman states that there was no evidence of tenderness, crepitus, effusion, or atrophy upon examination of plaintiff's right and left shoulders, and that the impingement sign was negative. Dr. Kelman states that plaintiff was able to arise on heels and toes, and that there was no sign of limp or antalgic gait observed. Dr. Kelman opines that the strains/sprains plaintiff sustained to her spine and right shoulder as a result of the subject accident have resolved. Dr. Kelman concludes that plaintiff does not have any objective findings of an orthopedic disability, and that plaintiff is currently working and may continue to do so without restrictions or limitations.

Additionally, plaintiff's own medical records from St. Charles Hospital's emergency room and Port Jeff Medical demonstrate that plaintiff did not sustain a serious injury (*see* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Estaba v Quow***, 74 AD3d 734, 902 NYS2d 155 [2d Dept 2010]). Significantly, the records state that the radiological studies performed on plaintiff's spine, brain and right shoulder were normal studies, not showing any evidence of soft tissue swelling or any fractures, and that plaintiff was discharged to home in her own care. While these records may not have been certified, a defendant is allowed to rely upon the uncertified and unsworn medical reports of an injured plaintiff to establish the lack of a serious injury by a plaintiff (*see* ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Itkin v Devlin***, 286 AD2d 477, 729 NYS2d 537 [2d Dept 2001]).

Furthermore, plaintiff's deposition testimony establishes that she did not sustain an injury within the 90/180 category of the Insurance Law (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d dept 2015]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Rico v Figueroa***, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Plaintiff testified at an examination before trial that she works as a physical therapist, that she only missed one day from work following the accident, and that she continued to work the same eight-hour shifts and perform the same duties at work as she did prior to the accident, but that she slightly modified the way in which she performed her duties. Plaintiff further testified that she stopped attending physical therapy, because it was difficult for her to get appointments

that fit in with her work schedule, and that shortly after she stopped seeing the physical therapist she underwent a physical examination by her insurance company's independent medical examiner, after which her No-Fault benefits were terminated. Lastly, plaintiff testified that currently she is not receiving any medical treatment for any of the injuries she sustained in the subject accident.

Therefore, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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, plaintiff has failed to raise a triable issue of fact as to whether she sustained a serious injury within the meaning of Section 5102 (d) of the Insurance Law as a result of the subject collision (*see* ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950; 944 NYS2d 236 [2d Dept 2012]; ***Mack v Valfort***, 61 AD3d 831, 876 NYS2d 887 [2d Dept 2009]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). Plaintiff has submitted the medical report of Dr. James Paci, which concludes that plaintiff has sustained a partial thickness right shoulder intrasubstance supraspinatus rotator cuff tear that is causally related to the subject accident. However, Dr. Paci in deriving his conclusions, impermissibly relied upon the unsworn medical records and reports of other physicians (*see* ***Villeda v Cassas***, 56 AD3d 762, 871 NYS2d 167 [2d Dept 2008]; ***Vishnevsky v Glassberg***, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]; ***Magarin v Kropf***, 24 AD3d 733, 870 NYS2d 398 [2d Dept 2005]). Of greater significance, Dr. Paci's report failed to establish that plaintiff

sustained significant range of motion limitations in her right shoulder based upon either a contemporaneous or recent examination (*see* ***Sukalic v Ozone***, 136 AD3d 1018, 26 NYS3d 188 [2d Dept 2016]; ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Estrella v GEICO Ins. Co.***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]). Indeed, Dr. Paci's report shows that plaintiff had full range of motion in her right shoulder during Dr. Paci's initial examination of her on July 14, 2015, as well as at the time of his final examination of her on October 6, 2015. Moreover, Dr. Paci's report fails to address plaintiff's other allegations that she sustained injuries to her cervical and lumbar regions as a result of the subject accident. As a result, Dr. Paci's report is insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury as a result of the subject accident (*see* ***Ali v Mirshah***, 41 AD3d 748, 840 NYS2d 83 [2d Dept 2007]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Elgendy v Nieradko***, 307 AD2d 251, 762 NYS2d 275 [2d Dept 2003]). Consequently, the medical evidence submitted by plaintiff is insufficient to overcome defendants' prima facie showing. Further, plaintiff's self-serving affidavit failed to raise a triable issue of fact that she sustained a serious injury caused by the subject accident, since there was no objective medical evidence to establish that she sustained a serious injury (*see* ***Gordon-Silvera v Long Is. R.R.***, 41 AD3d 431, 837 NYS2d 324 [2d Dept 2007]; ***Elder v Stokes***, 35 AD3d 799, 828 NYS2d 138 [2d Dept 2006]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]).

Finally, plaintiff failed to submit competent medical evidence demonstrating that the injuries she sustained prevented her from performing substantially all of their usual or customary activities for not less than 90 days of the first 180 days following the subject accident (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***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]). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: April 3, 2018

PETER H. MAYER, J.S.C.