SHORT FORM ORDER

INDEX NO. 9254/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

MARCIANA BOURDIER and KATIE BOURDIER,

Plaintiffs,

-against-

NICHOLAS J. DAMBROSIA and ALTERNATIVE MAINTENANCE CORP.,

Defendants.

ORIG. RETURN DATE: NOVEMBER 17, 2016
FINAL SUBMISSION DATE: DECEMBER 15, 2016
MTN. SEQ. #: 002
MOTION: MG

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Upon the following papers numbered 1 to 7 read on this motion FOR SUMMARY JUDGMENT.
Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation and supporting papers 6, 7; it is,

ORDERED that this motion (seq. #002) by defendants NICHOLAS J. DAMBROSIA and ALTERNATIVE MAINTENANCE CORP. for an Order, pursuant to CPLR 3212, granting defendants summary judgment due to plaintiff KATIE BOURDIER's failure to meet the threshold limits set by Insurance Law §§ 5102 and 5104, is hereby **GRANTED** to the extent provided hereinafter. The Court has received opposition to this application from counsel for plaintiffs MARCIANA BOURDIER and KATIE BOURDIER.

This action was commenced to recover damages for personal injuries allegedly sustained by plaintiffs MARCIANA BOURDIER and KATIE BOURDIER as a result of a motor vehicle accident that occurred on September 15, 2013, at the intersection of Wicks Road and Fran Street, in Suffolk County, New York.

This action was commenced with the filing of a summons and complaint on May 26, 2015. Issue was joined by defendants by the service of a verified answer dated September 11, 2015.

Defendants have filed the instant motion for summary judgment, arguing that plaintiff KATIE BOURDIER ("Katie") has failed to meet the serious injury threshold of Insurance Law § 5102 (d). Katie alleges to have sustained the following injuries as a result of the subject accident, among others, as set forth in her verified bill of particulars: aggravation and exacerbation of previously quiescent cervical, thoracic and lumbar spine injuries that occurred as a result of a prior motor vehicle accident on February 8, 2008; syringohydromyelia of the lower cervical cord; loss of the normal cervical lordosis; loss of range of motion; cervical nerve root injury; cervical myofascitis; cervical spasm; cervical spine sprain/strain; right trapezius pain and muscle tenderness; and aggravation and exacerbation of a previously quiescent right shoulder injury that occurred as a result of a prior motor vehicle accident on February 8, 2008. Defendants allege that a close review of the medical records proves that Katie did not suffer a "serious injury" as a result of the accident on September 15, 2013.

On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NY2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman*, 49 NY2d 557; *Blake v Guardino*, 35 AD2d 1022 [1970]).

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a *prima facie* case that he or she sustained "serious injury" and may maintain a common law tort action (*see Licari v Elliott*, 57 NY2d 230 [1982]; *Tipping-Cestari v Kilhenny*, 174 AD2d 663 [1991]). 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 moving for 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 a *prima facie* case that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270 [1992]). A defendant also may establish entitlement to summary judgment using a plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878 [2010]; *Fragale v Geiger*, 288 AD2d 431 [2001]; *Torres v Micheletti*, 208 AD2d 519 [1994]; *Craft v Brantuk*, 195 AD2d 438 [1993]). Once a defendant meets this burden, plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy*, 79 NY2d 955; *Pagano*, 182 AD2d 268; *see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Here, defendants' submissions are sufficient to establish a *prima facie* case that Katie did not sustain serious physical injury within the "limitation of use" categories of Insurance Law § 5102 (d) as a result of the subject accident, based upon, among other things, the reports from neurologist, Dr. Mathew Chacko, and orthopedist, Dr. Marc Chernoff (*see Toure*, 98 NY2d 345; *Santucci v Sousa*, 131 AD3d 1036 [2015]; *Master v Boiakhtchion*, 122 AD3d 589 [2014];

Kreimerman v Stunis, 74 AD3d 753 [2010]; *Staff v Yshua*, 59 AD3d 614 [2009]; *Rodriguez v Huerfano*, 46 AD3d 794 [2007]). Defendants also met their burden regarding Katie's 90/180 claim through Katie's own deposition testimony wherein she stated she missed only one week from school and was confined to bed for only three days following the accident (*see Leeber v Ward*, 55 AD3d 563 [2008]).

The burden then shifted to Katie to raise a triable issue of fact (*see Gaddy*, 79 NY2d 955). 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 [2d Dept 2008]; *Mejia v DeRose*, 35 AD3d 407 [2006]; *Laruffa v Yui Ming Lau*, 32 AD3d 996 [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 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*, 18 NY3d 208 [2011]; *Toure*, 98 NY2d 345; *Rovelo v Volcy*, 83 AD3d 1034 [2011]). She also must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see Magid v Lincoln Servs. Corp.*, 60 AD3d 1008 [2009]; *Hackett v AAA Expedited Freight Sys.*, 54 AD3d 721 [2008]; *Ferraro*, 49 AD3d 498). A minor, mild, or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari*, 57 NY2d 230; *Cebron v Tuncoglu*, 109 AD3d 631 [2013]). 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 [2005]; *see Vasquez v John Doe #1*, 73 AD3d 1033 [2010]; *Rivera v Bushwick Ridgewood Props., Inc.*, 63 AD3d 712 [2009]).

In opposition, plaintiffs have merely submitted an affirmation of their counsel. Plaintiffs' counsel argues that questions of fact exist with respect to Katie's "90/180" claim, and her claim for economic loss in excess of basic economic loss. Counsel cites Katie's Verified Bill of Particulars which indicates that Katie was partially disabled from the date of the accident to the present and continuing into the future. Moreover, counsel alleges that defendants' motion does not even address Katie's claim for economic loss in excess of basic economic loss, and therefore the motion must be denied.

The Court finds that based upon Katie's own deposition testimony, she has not sustained a "serious injury" under the 90/180-day category of Insurance Law § 5102 (d). Further, although a claim for economic loss does not require a plaintiff to have sustained a serious injury (*see Wilson v Colosimo*, 101 AD3d 1765 [2012]), defendants' motion did not address Katie's claim for economic loss in excess of basic economic loss in the first instance, and Katie has pleaded such a claim in the complaint (*see* CPLR 3016 [g]; *Acerra v Gutmann*, 294 AD2d 384 [2002]; *Rulison v Zanella*, 119 AD2d 957 [1986]; *cf. Watford v Boolukos*, 5 AD3d 475 [2004]). Therefore, that claim survives the instant motion. However, the Court notes that the burden is on Katie at trial to prove that she sustained economic loss in excess of basic economic loss (*see Jones v Marshall*, 147 AD3d 1279 [2017]).

Accordingly, defendants' motion for summary judgment is **GRANTED** to the extent that the portion of the complaint asserting that Katie has sustained a serious injury is hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: October 15, 2019

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**