SHORT FORM ORDER

INDEX No. 610678/2018
CAL. No. 201902322MV

ORIGINAL

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2/27/20 (001)
MOTION DATE 7/9/20 (002)
MOTION DATE 8/6/20 (003)
ADJ. DATE 8/6/20
Mot. Seq. # 001 MG; CASEDISP
002 MD
003 MD

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MARY JAKES-SILVERS,

Plaintiff,

- against -

TREVOR CAHILL, DOUGLAS S. CAHILL and PATRICIA A. FLYNN,

Defendants.

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Upon the following papers read on these e-filed motion and cross motions for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by Cahill defendants, dated December 11, 2019; Notice of Cross Motion and supporting papers by plaintiff, dated May 6, 2020 and by defendant Flynn, dated August 3, 2020; Answering Affidavits and supporting papers by Cahill defendants, dated June 29, 2020 and by plaintiff, dated August 4, 2020; Replying Affidavits and supporting papers by Cahill defendants, dated May 18, 2020 and by defendant, dated July 6, 2020; Other ___; it is

ORDERED that the following motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Douglas Cahill and Trevor Cahill for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by plaintiff for an order granting summary judgment in her favor on the issue of liability is denied, as moot; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by defendant Patricia Flynn for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied, as moot.

This is an action to recover damages for injuries sustained by the plaintiff as a result of a chain-reaction, rear-end motor vehicle collision which occurred on Sycamore Avenue in the Town of Islip, New York, on June 19, 2017. There were allegedly three vehicles involved in the accident. The lead vehicle was owned and operated by the plaintiff; behind the plaintiff's vehicle was the vehicle owned by defendant Douglas Cahill and operated by defendant Trevor Cahill; behind the Cahill vehicle was the vehicle owned and operated by defendant Patricia Flynn. By the bill of particulars, plaintiff alleges that, as a result of the accident, she sustained various serious injuries and conditions, including herniated and bulging discs in the cervical and thoracic regions.

Defendants Douglas Cahill and Trevor Cahill move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

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* ***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865 [2002]; ***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 N YS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]).

Here, the Cahill defendants 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 defendants' examining physicians (*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]). On September 24, 2019, approximately two years and three months after the subject accident, the Cahill defendants' examining orthopedist, Dr. Stuart Hershon, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, the impingement sign, the Neer sign, the O'brien test, the Speed test, the Yergson test, the Hawkins test, the McMurray test, and the Lachman test. Dr. Hershon found that all the test results were negative or normal. Dr. Hershon also performed range of motion testing on plaintiff's spine, left shoulder, right wrist, and left knee, using a goniometer to measure her joint movement. Dr. Hershon found that plaintiff exhibited normal joint function. Dr. Hershon 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 missed only two days from work and that she returned to work with no restrictions. She testified that although she had difficulty in driving for a month after the accident, 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, the Cahill defendants met their initial burden of establishing that the 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 the 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 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, 936 NYS2d 655 [2011]; ***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***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

The plaintiff opposes the motion, arguing the Cahill defendants' expert report is insufficient to meet their 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 report of her treating chiropractor, Dr. Edward Beller, and the unsworn magnetic resonance imaging (MRI) examination report of Dr. Stephen Hershowitz. The unsworn medical report of Dr. Hershowitz submitted by plaintiff is insufficient to raise a triable issue of fact, as it is not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]).

Dr. Beller's report states that on August 24, 2017, approximately two months after the subject accident, plaintiff was first seen in his office for evaluation of the injuries sustained in the accident. However, during the initial consultation, no range of motion test was performed. Dr. Beller's report set

forth plaintiff's complaints and the findings, including significant limitations in her cervical and lumbar joint function measured during range of motion testing performed at his last consultation on February 27, 2020, more than two years and eight months after the subject accident. However, Dr. Beller failed to provide any medical evidence concerning plaintiff's condition contemporaneous to the accident (*see* ***Sukalic v Ozone***, 136 AD3d 1018, 269 NYS3d 188 [2d Dept 2016]; ***Griffiths v Munoz***, 98 AD3d 997, 998, 950 NYS2d 787 [2d Dept 2012]). A contemporaneous doctor's report is important to proof of causation (*see* ***Perl v Meher***, *supra*), and the absence of a contemporaneous medical report invites speculation as to causation (*see* ***Griffiths v Munoz***, *supra*). Dr. Beller's report, therefore, is insufficient to raise a triable issue of fact.

Further, even assuming that plaintiff was entitled to rely on the unaffirmed MRI report prepared by Dr. Hershowitz, such report is insufficient to warrant denial of the Cahill defendants' motion for summary judgment. Said MRI report revealed herniated and bulging discs in plaintiff's cervical and thoracic regions. However, 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]; ***Byrd v J.R.R. Limo***, 61 AD3d 801, 878 NYS2d 95 [2d Dept 2009]).

Moreover, plaintiff failed to offer competent evidence that she sustained nonpermanent injuries that left her unable to perform substantially all of 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*).

Thus, the Cahill defendants' motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted, and the complaint is dismissed. Accordingly, plaintiff's motion for summary judgment on the issue of liability and defendant Flynn's motion for summary judgment on the issue of liability are denied, as moot.

Dated: SEP 15 2020

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION