ORIGINAL

SHORT FORM ORDER

INDEX No. 610963/2018
CAL. No. 202001089MV

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 4/8/21
ADJ. DATE 5/6/21
Mot. Seq. # 001 MD

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KAREN URVALEK,

Plaintiff,

- against -

GREGORY C. MACCIA and MARLA GALE MACCIA,

Defendants.

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SOBO & SOBO, LLP
Attorney for Plaintiff
One Dolson Avenue
Middleton, New York 10940

MARTYN MARTYN SMITH & MURRAY
Attorney for Defendants
102 Motor Parkway, Suite 230
Hauppauge, New York 11788

Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated March 11, 2021 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff, dated April 29, 2021 ; Replying Affidavits and supporting papers by defendant, dated May 5, 2021 ; Other ; it is

ORDERED that the motion by defendants Gregory Maccia and Marla Maccia seeking summary judgment dismissing the complaint is denied.

Plaintiff Karen Urvalek commenced this action to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred in front of the parking lot to the premises known as Bridgehampton Commons located at 2044 Montauk Highway, Southampton, New York, on August 11, 2016. It is alleged that the accident occurred when the vehicle operated by defendant Marla Maccia and owned by defendant Gregory Maccia struck the rear of plaintiff's vehicle while it was stopped in traffic at a red light. By her bill of particulars, plaintiff alleges that she sustained various injuries as a result of the subject collision, including an aggravation of a preexisting left shoulder condition; tears of the distal supraspinatus and infraspinatus tendons of the left shoulder; a complex tear of the glenoid labrum of the left shoulder; disc bulges at level C-3-C4; and listhesis of the cervical spine at levels C5 through C7.

Defendants now move for summary judgment on the basis that the injuries plaintiff alleges to have to sustained as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, and the sworn medical reports of Dr. Raymond Shebairo and Dr. Marc Katzman. At defendants' request, plaintiff underwent an independent orthopedic examination conducted by Dr. Shebairo on November 8, 2019. Also at defendants' request, Dr. Katzman performed an independent radiological review of the magnetic resonance imaging (MRI) scans of plaintiff's cervical spine and left shoulder taken on February 16, 2017, as well as MRI scans of plaintiff's left shoulder taken on June 19, 2015. Plaintiff opposes the motion on the grounds that defendants failed to make a prima facie showing that she did not sustain a serious injury as a result of the subject collision, and that the evidence submitted in opposition demonstrates that she sustained injuries within the "limitations of use" categories of the Insurance Law. In opposition to the motion, plaintiff submits the sworn medical report of Dr. Michael Genereux.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

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***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants have failed to establish their prima facie entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Hodge v St. Eloi***, 168 AD3d 690, 89 NYS3d 691 [2d Dept 2019; ***Stead v Serrano***, 156 AD3d 67 NYS3d 244 [2d Dept 2017]; ***Jensen v Nicmanda Trucking, Inc.***, 47 AD3d 769, 851 NYS2d 594 [2d Dept 2008]). Despite Dr. Shebairo concluding in his report that the strains plaintiff sustained to her spine and left shoulder as a result of the subject accident have resolved, Dr. Shebario notes significant range of motion limitations in plaintiff's spine and left shoulder during active range of motion testing when he examined plaintiff approximately three years after the subject accident (*see* ***Katanov v County of Nassau***, 91 AD3d 723; 936 NYS2d 285 [2d Dept 2012]; ***Grisales v City of New York***, 85 AD3d 964, 925 NYS2d 633 [2d Dept 2011]; ***Rhodes v Stoddard,*** 79 AD3d 997, 912 NYS2d 908 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581, 893 NYS2d 157 [2d Dept 2010]; ***Held v Heideman***, 63 AD3d 1105, 883 NYS2d 246 [2d Dept 2009]; ***Torres v Garcia***, 59 AD3d 705, 874 NYS2d 527 [2d Dept 2009]). Although Dr. Shebairo indicates that plaintiff's decreased range of motion is subjective in nature, he failed to substantiate with any objective medical evidence the basis for his conclusion that such limitations were self-imposed (*see* ***Raguso v Ubriaco***, 97 AD3d 560, 947 NYS2s 343 [2d Dept 2012]; ***Roc v Domond***, 88 AD3d 862, 931 NYS2d 522 [2d Dept 2011]; ***Cheour v Pete & Sals Harborview Transp., Inc.***, 76 AD3d 989, 907 NYS2d 517 [2d Dept 2010]).

While defendants' examining radiologist, Dr. Katzman, concludes in his medical reports that plaintiff suffers from preexisting chronic degeneration and degenerative-type injuries in her left shoulder and cervical spine, and that there is no evidence of a "recent post-trauma" injury to either plaintiff's left shoulder or cervical spine, neither he nor Dr. Shebairo addressed plaintiff's allegations that the subject accident aggravated her preexisting left shoulder condition (*see* ***Little v Ajah***, 97 AD3d 801, 949 NYS2d 109 [2d Dept 2012]; ***Edouazin v Champlain***, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]; ***Pero v Transervice Logistics, Inc.***, 83 AD3d 681, 920 NYS2d 364 [2d Dept 2011]).

In light of defendants' failure to meet their initial burden of establishing a prima facie case, it is unnecessary to consider whether plaintiff's papers in opposition were sufficient to raise a triable issue of fact (*see* ***Cervantes v McDermott***, 159 AD3d 669, 71 NYS3d 612 [2d Dept 2018]; ***Chiara v Dernago***, 70 AD3d 746, 894 NYS2d 129 [2d Dept 2010]; ***Stern v Oceanside School Dist.***, 55 AD3d 596, 865

NYS2d 325 [2d Dept 2008]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: JUN 15 2021

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

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