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SHORT FORM ORDER

INDEX No. 07-9281
CAL No. 10-00195MV

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 7-27-10
ADJ. DATE 12-7-10
Mot. Seq. # 002 - MD

YAMILETH DIAZ, Plaintiff, - against - LENNDY A. MARTINEZ and HERMINIO MARTINEZ, Defendants.	MORICI & MORICI, LLP Attorney for Plaintiff 1399 Franklin Avenue, Suite 202 Garden City, New York 11530 ROBERT P. TUSA, ESQ. Attorney for Defendants 898 Veterans Memorial Highway, Suite 320 Hauppauge, New York 11788

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated May 21, 2010, and supporting papers (including Memorandum of Law dated __); (2) Affirmation in Opposition by the plaintiff, dated December 6, 2010, and supporting papers; and now

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

ORDERED that this motion by defendants Lenndy Martinez and Herminio Martinez seeking summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Yamileth Diaz as a result of a motor vehicle accident that occurred at the intersection of Marshall Avenue and Clark Street in Brentwood, New York on January 20, 2006. The accident allegedly occurred when the vehicle operated by defendant Lenndy Martinez and owned by defendant Herminio Martinez struck the driver's door of the vehicle operated by plaintiff when it failed to yield the stop sign controlling its direction of traffic. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including a disc bulge at level C3/C4; straightening of the cervical lordosis; disc herniations at levels L2 through S1; bilateral L5-S1 radiculopathy; cervical myofascitis; cervical and lumbar intervertebral disc syndrome with RHS radiculitis; sciatica; brachial neuralgia; and cervical and

lumbar strains. Plaintiff alleges that following the accident she was confined to her bed and home for several weeks. Plaintiff further alleges that she missed a month from her employment as a cutting machine operator at Source One Packaging, LLC following the accident.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries do not come within the meaning of the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendants submit a copy of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Isaac Cohen and Dr. Sheldon Feit. At defendants' request, Dr. Cohen conducted an independent orthopedic examination of plaintiff on October 29, 2009. At defendants' request, Dr. Feit performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's lumbosacral spine on January 28, 2007. Plaintiff opposes the motion on the ground that defendants have failed to establish that the injuries she sustained as a result of the accident do not meet the serious injury threshold requirement of Insurance Law § 5102(d). In the alternative, plaintiff asserts that the injuries she sustained as a result of the accident come within the "limitations of use" and the "90/180 days" categories of serious injury. In opposition, plaintiff submits her own affidavit, the sworn medical report of Dr. Mark Shapiro, and the affidavit of her treating chiropractor, Dr. Anthony Saladino.

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 also* ***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 [1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 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."

In order to recover under the "limitation of use" category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration in order to prove the extent or degree of physical limitation he or she sustained (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2005]). 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 may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***,

supra; ***Dufel v Green***, *supra*). 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]).

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 [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 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden, 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 [2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [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 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Dr. Cohen in his medical report states, in pertinent part, that an examination of plaintiff's cervical spine reveals "flexion and extension is to 50 degrees (both normal 45 to 65), lateral bending to the right and the left is in the 50-degree range (normal 46+-6.5), and rotational motion is to 80 degrees to the right and left (normal 78 +-15)." The report states that an examination of plaintiff's lumbosacral spine reveals that she exhibits "flexion to 60 degrees (normal up to 66 +-15), extension to 30 degrees (normal up to 33+-5.5), and right and left lateral bending to 20 degrees (normal up to 29 +-6.6), left and right rotational motion is to 20 degrees (normal up to 30)." It states that there is maintenance of the normal cervical and lordotic curvature and that upon palpation the muscles are supple and non-tender. The report states that plaintiff's straight leg raising test is negative to "90 degrees in the sitting position bilaterally (normal is 90)." Dr. Cohen opines that the cervical and lumbosacral sprains that plaintiff sustained as a result of the accident have resolved and plaintiff is able to perform all of her normal activities without restriction.

Additionally, Dr. Feit in his medical report clearly states, that plaintiff suffers from pre-existing degenerative changes, and that the disc bulges observed on the MRI examination of her lumbar spine performed in February 2006 are not posttraumatic, but are degenerative and secondary to "annular degeneration and/or ligamentous laxity." Dr. Feit opines that plaintiff's lumbosacral MRI examination did not reveal any posttraumatic changes and that the bulging discs identified at levels L3 through S1 are not causally related to the subject incident.

Based upon the adduced evidence, defendants have failed to establish their prima facie burden that plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2009]; ***Rizzo v Torchiano***, 57 AD3d 872, 868 NYS2d 926 [2008]). Significantly, Dr. Cohen's medical report is deficient in that the normal range of motion measurements that he set forth for plaintiff consists of variable ranges of motion and, therefore, leaves the court to speculate as to the normal values and under what circumstances those variable ranges occur (*see* ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2005]). Furthermore, Dr. Feit's report merely provided his opinion concerning the review of the MRI of plaintiff's lumbar spine. However, plaintiff alleged more than lumbar injuries in her bill of particulars, and Dr. Feit's report does not address any of those other claims, such as injuries to her cervical spine, left leg, and arm (*see* ***Mungo v Juran***, __AD3d __, 2011 NY Slip Op 1447 [2nd Dept 2011]; ***Bright v Moussa***, 72 AD3d 859, 898 NYS2d 865 [2010]; ***Menezes v Khan***, 67 AD3d 654, 889 NYS2d 54 [2009]). Inasmuch as defendants have failed to establish their entitlement to judgment as a matter of law, the sufficiency of plaintiff's papers in opposition to the instant motion need not be considered (*see* ***Takaroff v A.M. USA, Inc.***, 63 AD3d 1142, 882 NYS2d 265 [2009]; ***Alvarez v Dematas***, 65 AD3d 598, 884 NYS2d 178 [2009]). Accordingly, defendants' motion for summary judgment is denied.

Dated: 3/22/11

Peter H. Mayer
PETER H. MAYER, J.S.C.