[* 1]

SHORT FORM ORDER

INDEX No. 10-30380
CAL. No. 11-02078MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 2-24-12
ADJ. DATE 7-12-12
Mot. Seq. # 002 - MD

MONICA ALFONSO and PETER ORENGA,	:	SARISOHN, SARISOHN, CARNER & DEVITA
	:	Attorney for Plaintiffs
	:	350 Veterans Memorial Highway
Plaintiffs,	:	Commack, New York 11725
	:	
	:	RICHARD T. LAU & ASSOCIATES
- against -	:	Attorney for Defendant
	:	P.O. Box 9040
	:	Jericho, New York 11753-9040
	:	
KAREN KENNEY,	:	HANNUM FERETIC PRENDERGAST, et al.
	:	Attorney for Plaintiff on Counterclaim
Defendant.	:	55 Broadway, Suite 202
		New York, New York 10006

Upon the following papers numbered 1 to 37 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 23 - 34 ; Replying Affidavits and supporting papers 35 - 37 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Karen Kenney seeking summary judgment dismissing the complaint is denied.

Plaintiffs Monica Alfonso and Peter Orenga commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Middle Country Road and Paula Boulevard in the Town of Brookhaven on December 30, 2009. By their complaint, plaintiffs allege that the accident occurred as plaintiff Orenga was making a left turn onto Middle Country Road from a drive-through exit. Plaintiff Orenga's vehicle, in which plaintiff Alfonso was a front seat passenger, was struck in the left front side by the vehicle operated by defendant Karen Kenney as she ran a red light controlling her direction of travel. By her bill of particulars, plaintiff Alfonso alleges, among other things, that she sustained various personal injuries as a result of the subject accident, including chondromalacia patella of the left knee, and cervical and lumbar sprains. She alleges that as a result of the injuries she sustained in the accident she was incapacitated from her employment for approximately three

weeks immediately after the accident. Plaintiff Alfonso further alleges that she underwent surgery on July 13, 2010 to repair the injury to her left knee, and that she was incapacitated from her employment for approximately 10 weeks following the surgery. By his bill of particulars, plaintiff Orenga also alleges that he sustained various personal injuries as a result of the subject accident, including bilateral knee derangement, thoracolumbosacral and cervical spine sprain, and a disc herniation at level T12-L1. Plaintiff Orenga alleges that as a result of the injuries he sustained in the collision that he remains partially disabled to date.

Defendant now moves for summary judgment on the basis that the injuries allegedly sustained by plaintiffs as a result of the subject accident fail to meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits copies of the pleadings, plaintiffs' deposition transcripts, uncertified copies of plaintiffs' medical records, and the sworn medical reports of Dr. Michael Katz and Dr. Alan Greenfield. At defendant's request, Dr. Katz performed an independent orthopedic examination of plaintiff Alfonso on September 20, 2011, and Dr. Greenfield performed an independent radiological review of the magnetic resonance images ("MRI") film of plaintiff Alfonso's left knee conducted on February 24, 2010. Also, at defendant's request, Dr. Katz performed an independent orthopedic examination of plaintiff Orenga on September 20, 2011, and Dr. Greenfield performed an independent radiological review of an MRI examination of plaintiff Orenga's lumbar spine performed on October 12, 2010.

Plaintiff Alfonso opposes the motion on the ground that defendant failed to establish her prima facie burden that she did not sustain an injury within the meaning of the serious injury threshold requirement of § 5102(d) of the Insurance Law and that she sustained injuries within the "limitations of use" categories of the Insurance Law. In opposition to the motion, plaintiff Alfonso submits her own affidavit, the sworn medical report of Dr. Douglas Petraco, certified copies of her medical records, and the unsworn medical report of Dr. Eric Stauss. A stipulation of discontinuance, dated June 12, 2012, has been submitted discontinuing plaintiff Orenga's claim. Therefore, the branch of defendant's summary judgment motion seeking dismissal of plaintiff Orenga's claim on the basis that he did not sustain a serious injury within the meaning of the Insurance Law is denied, as moot.

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*).

Moreover, 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***, 57 NY2d 230, 455 NYS2d 570 [1982]). 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]).

Furthermore, to qualify as a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts that constituted his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment objective medical evidence must be presented of

plaintiff's curtailment, and it must be demonstrated that plaintiff's activities were significantly curtailed (*see* ***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Nesci v Romanelli***, 74 AD3d 765, 902 NY2d 172 [2d Dept 2010]; ***Amato v Fast Repair, Inc.***, 42 AD3d 477, 840 NYS2d 394 [2d Dept 2007]). Additionally, a plaintiff must demonstrate through the use of competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see* ***Varveris v Franco***, 71 AD3d 1128, 898 NYS2d 213 [2d Dept 2010]; ***Jules v Calderon***, 62 AD3d 958, 880 NYS2d 131 [2d Dept 2009]; ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Here, defendant failed to establish her prima facie entitlement to judgment as a matter of law that plaintiff Alfonso did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject accident (***Toure v Avis Rent A Car Sys.***, *supra*; ***Licari v Elliott***, *supra*; ***Galofaro v Wylie***, 79 AD3d 652, 910 NYS2d 524 [2d Dept 2010]; ***Guzman v Joseph***, 50 AD3d 741, 855 NYS2d 638 [2008]; ***Daddio v Shapiro***, 44 AD3d 699, 844 NYS2d 76 [2d Dept 2007]; ***Lopez v Geraldino***, 35 AD3d 398, 825 NYS2d 143 [2006]). Where, as here, a plaintiff is claiming that he or she has sustained an injury within the 90/180 days category, it is incumbent upon the examining medical expert to relate his findings to this category of serious injury for the period of time immediately following the subject accident (*see* ***Aujour v Singh***, 90 AD3d 686, 934 NYS2d 686 [2d Dept 2011]; ***Takaroff v A.M. USA, Inc.***, 63 AD3d 1142, 882 NYS2d 264 [2d Dept 2009]). Defendant's examining orthopedist, Dr. Katz, although he concludes in his affirmed medical report that plaintiff Alfonso has full range of motion in her spine, left hip and left knee, that the strains she sustained to her spine have resolved, and that her left knee arthroscopy was successful, fails to relate any of his findings to the category of serious injury for the period immediately following the accident (*see* ***Bangar v Man Sing Wong***, 89 AD3d 1048, 933 NYS2d 586 [2d Dept 2011]; ***Mungo v Juran***, 81 AD3d 908, 917 NYS2d 892 [2d Dept 2011]; ***Marshall v Inst. for Community Living, Inc.***, 50 AD3d 975, 856 NYS2d 660 [2d Dept 2008]). In addition, Dr. Katz conducted his examination of plaintiff Alfonso approximately 20 months after the subject accident. Similarly, the affirmed report of Dr. Greenfield fails to address this category of serious injury, despite concluding that plaintiff Alfonso suffers from degenerative changes in her left knee and that the changes seen in her left knee are not casually related to trauma or the subject accident (*see* ***Bright v Moussa***, 72 AD3d 859, 898 NYS2d 865 [2d Dept 2010]; ***Menezes v Khan***, 67 AD3d 654, 889 NYS2d 54 [2d Dept 2009]; ***Ali v Rivera***, 52 AD3d 445, 859 NYS2d 713 [2d Dept 2008]). Dr. Katz and Dr. Greenfield inexplicably failed to offer an opinion as to whether plaintiff Alfonso suffered an injury that limited her usual daily activities for 90 of the 180 days immediately after the accident (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Nakanishi v Sadaqat***, 35 AD3d 416, 826 NYS2d 373 [2d Dept 2006]; ***Faun Thai v Butt***, 34 AD3d 447, 824 NYS2d 131 [2d Dept 2006]).

Further, while a defendant is permitted to use a plaintiff's deposition testimony to establish that he or she did not sustain a nonpermanent injury that prevented him or her from performing substantially all of his or her material daily activities for at least 90 of the 180 days immediately following the accident (*see e.g.* ***Neuburger v Sidoruk***, 60 AD3d 650, 875 NYS2d 144 [2d Dept 2009]; ***Shaw v Jalloh***, 57 AD3d 647, 869 NYS2d 189 [2d Dept 2008]; ***Sanchez v Williamsburg Volunteer of Hatzolah***, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]), defendant's reliance on plaintiff Alfonso's testimony in the instant matter is insufficient to meet her burden on the motion (*see* ***Neuburger v Sidoruk***, *supra*; ***Tinsley v Bah***, 50 AD3d 1019, 857 NYS2d 180 [2d Dept 2008]; ***Torres v Performance Auto. Group, Inc.***, 36 AD3d 894, 894, 829

NYS2d 181 [2d Dept 2007]; *cf.* ***Geliga v Karibian***, 56 AD3d 518, 867 NYS2d 519 [2d Dept 2008]). Plaintiff Alfonso testified at her deposition that she missed approximately three weeks from work immediately following the accident, that when she returned to work she required assistance performing her duties as a cashier/baker at the Cheesecake Factory, and that she had to stop working because her left knee would become swollen from standing. She testified that although she received physical therapy twice a week and cortisone shots, her left knee continued to swell, and that as a result her orthopedist recommended that she have surgery on the left knee to relieve the pressure. Following her doctor's recommendation, she testified that she had surgery on her left knee on July 13, 2010 and that she missed an additional three months from her employment. Plaintiff Alfonso testified that following her surgery, she returned to work as a part-time employee, because she required a modified duty, consisting of additional 15 minute breaks in between her usual 15 to 20 minute break, assistance carrying heavy items, and she only was able to work 20 hours per week. She further testified that she did not return to full-time status until two months after her return to work.

Having determined that defendant failed to meet her initial burden, it is unnecessary for the court to consider whether plaintiff Alfonso's opposition papers were sufficient to raise a triable issue of fact (*see* ***Katechis v Batista***, 91 AD3d 912, 937 NYS2d 610 [2d Dept 2012]; ***Cohn v Khan***, 89 AD3d 1052, 933 NYS2d 403 [2011]; ***Kouros v Mendez***, 41 AD3d 786, 838 NYS2d 669 [2d Dept 2007]). According, the branch of defendant's summary judgment motion seeking dismissal of plaintiff Alfonso's cause of action on the basis that she failed to sustain an injury within the meaning of the serious injury threshold requirement of the Insurance Law is denied.

Dated: October 19, 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION