STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CAROLYN A. MEYER,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 2021-09
RJI NO. 01-09-98218

BERNICE KORTZ,

Defendant.

Supreme Court Albany County All Purpose Term, November 19, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
The DeLorenzo Law Firm, LLP
Cory Ross Dalmata, Esq.
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TERESI, J.:

On April 18, 2008, Plaintiff was driving her automobile on Albany Avenue in Schenectady, New York, when Defendant's vehicle collided with her (hereinafter "the accident"). Plaintiff claims that Defendant negligently struck her vehicle, which caused her to sustain a serious injury.

Plaintiff commenced this action, seeking to recover for her claimed injuries. Issue was joined by Defendant, discovery is complete and a trial date certain is set. Defendant now moves for summary judgment, claiming that Plaintiff suffered no causally related "serious injury" as

required by New York's No Fault Law. (Insurance Law §5102[d]). Plaintiff opposes the motion. Because Defendant demonstrated her entitlement to judgment as a matter of law, and Plaintiff raised no genuine issue of fact, Defendant's motion is granted.

It is well established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries." (Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345, 350 [2002]). However, "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

On this motion for summary judgment, Defendant bears the initial "burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident." (Howard v. Espinosa, 70 AD3d 1091 [3d Dept. 2010], Tracy v. Tracy, 69 AD3d 1218 [3d Dept. 2010], Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]). Such burden is met under all categories of the No-Fault law by Defendant "offering evidence that plaintiff did not sustain any serious injury as a result of the... accident." (Howard v. Espinosa, supra at 1093).

If Defendant establishes her right to judgment as a matter of law, the burden then shifts to the Plaintiff to "set forth competent medical evidence based upon objective medical findings and tests to support [her] claim of serious injury and to connect the condition to the accident." (Tracy v. Tracy, supra at 1219, quotiong Blanchard v. Wilcox, 283 AD2d 821[3d Dept. 2001).

The "serious injury" at issue in this action is defined by Plaintiff's Bill of Particulars. (Lee v. Laird, 66 AD3d 1302, 1303 [3d Dept. 2009], Seymour v. Roe, 301 AD2d 991 [3d Dept. 2003], MacDonald v Meierhoffer, 13 AD3d 689 [3d Dept. 2004]). In her bill of particulars Plaintiff alleges suffering injuries to her cervical spine, lumbar spine and left shoulder; allegedly

constituting a 90/180 day injury, a "significant limitation" injury, a "permanent consequential limitation" injury and "permenant loss of use" injury under Insurance Law §5102(d).

In support of her motion, Defendant properly offered a portion of Plaintiff's medical records (Parks v. Miclette, 41 AD3d 1107 [3d Dept. 2007]; Tuna v. Babendererde, 32 AD3d 574, 575 [3d Dept. 2006]; Seymour v. Roe, 301 AD2d 991 [3d Dept. 2003]), the pleadings and a duly affirmed independent medical examination (hereinafter "IME"). Defendant's attorney's affirmation, however, is of no "probative value." (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Similarly, Defendant's motion is not properly supported by Plaintiff's deposition testimony, because it was neither signed nor admissible pursuant to CPLR §3116(a)'s 60 day exchange provision. (Marmer v. IF USA Exp., Inc., 73 AD3d 868 [2 Dept. 2010]; McDonald v. Mauss, 38 AD3d 727 [2d Dept. 2007]; Pina v. Flik Intern. Corp., 25 AD3d 772 [2 Dept. 2006]; Scotto v. Marra, 23 AD3d 543 [2 Dept. 2005]; Martinez v. 123-16 Liberty Ave. Realty Corp., 47 AD3d 901 [2 Dept. 2008]).

The IME, conducted by Doctor Barry Katzman (hereinafter "Katzman"), established that Plaintiff's injuries had resolved as of the date of his exam. Katzman physically examined Plaintiff. He tested her Cervical and Thoracolumbar spine's flexion, extension, rotation and lateral bend, resulting in "normal"[1] findings. He too examined Plaintiff's left shoulder, finding near normal flexion, while noting that her left shoulder's flexion, rotation and strength were all equal to her right shoulder. Katzman's additional spine and left shoulder tests were similarly "normal." Such proof demonstrates that any injury Plaintiff had suffered from the accident,

[1] He explained "normal" for each of his tests.

resolved its objective manifestations.

Plaintiff's hospital records similarly demonstrate the lack of a serious injury. Plaintiff was taken from the accident scene, by ambulance, to St. Claire's Hospital. She was ambulatory when released after only two hours, being given ibuprofen for her pain. Upon discharge she was prescribed lortab and directed to followup with Dr. Eaton within seven days.

Nor do Plaintiff's additional medical records demonstrate an objective manifestation of a serious injury. Although Plaintiff's chiropractor's notes indicate "objective" findings, such results are not supported by any testing. As such, no issue of fact is raised by their submission. Similarly, the additional handwritten doctor's notes, presumably prepared by Plaintiff's primary care physician, do not show an objective manifestation of a serious injury. Rather, within three months of the accident, such handwritten notes indicate Plaintiff's "good ROM" and only "tenderness" in her back. Moreover, from the "prescription" slips submitted, it appears that Plaintiff was out of work well less than ninety days following the accident.

The above competent medical evidence duly demonstrated that Plaintiff suffered no serious injury as a result of the accident, and established Defendant's entitlement to judgment as a matter of law.

In opposition, Plaintiff failed to sufficiently set forth "competent medical evidence based upon objective medical findings and tests to support [her] claim of serious injury." (Tracy v. Tracy, supra at 1219). She submits only her Plaintiff's attorney's affirmation, which is of no probative value (2 North Street Corp. v. Getty Saugerties Corp., supra), and her chiropractor's affidavit, which is properly admissible and considered on this motion. She did not submit her own affidavit.

Considering the sole probative evidence Plaintiff submitted, Plaintiff's chiropractor's affidavit did not establish Plaintiff's serious injury with objective medical findings and tests. While such affidavit recounts "tenderness of the lower back... discomfort... diminished range of motion... [and] subluxation," the chiropractor "failed to identify the objective tests" he used to obtain such findings (Dean v. Ahn Ja Jin, __AD3d__ [3d Dept. 2010]), the results of his specific testing or explain the objectivity of his testing. Moreover, his unexplained office notes fail to cure such defects. As the chiropractor did not demonstrate the "objective" nature of his test, his conclusions are "both speculative and conclusory and, thus, patently insufficient to raise an issue of fact sufficient to withstand summary judgment." (Anderson v. Capital Dist. Transp. Authority, 74 AD3d 1616 [3d Dept. 2010]).

Accordingly, Defendant's motion for summary judgment is granted and Plaintiff's complaint is dismissed.

This Decision and Order is being returned to the attorneys for the Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: December 13, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated September 14, 2010, Affirmation of Brian Richardson, dated September 14, 2010, and attached Exhibits A - G.
2. Affirmation of Cory Ross Dalmata, dated November 8, 2010; Affidavit of John Hackett, dated November 8, 2010, with attached Exhibits A-B.