Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Kemba Benjamin,

Plaintiff,

-against-

Karen Buckley and Scott Buckley,

Defendants.

Motion Sequence No.: 001; MG
CDISPO

Motion Date: 6/23/10
Submitted: 10/13/10

Index No.: 29066/2008

Attorney for Plaintiff:

Cerussi & Gunn, P.C.
1325 Franklin Avenue, Suite 225
Garden City, New York 11530

Attorney for Defendants:

Richard Lau & Associates
300 Jericho Quadrangle, P.O. Box 9040
Jericho, New York 11753

Clerk of the Court

Upon the following papers numbered 1 to 21 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 8; Answering Affidavits and supporting papers, 9 - 19; Replying Affidavits and supporting papers, 20 - 21.

The instant action seeks to recover damages for personal injuries arising from a motor vehicle accident which occurred on May 1, 2007 at the intersection of Route 110 and Airport Plaza in the Town of Babylon, New York. The accident allegedly occurred when a vehicle owned by defendant Karen Buckley and operated by defendant Scott Buckley collided with a vehicle in which the plaintiff was a passenger. The plaintiff alleges that she sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, the bill of particulars alleges that the plaintiff sustained posterior subligamentous disc bulges from level C2/3 through

level C6/7; straightening of the normal cervical lordosis; posterior disc bulges at level L2/3 through L5/S1; cervical radiculitis; lumbosacral disc displacement and radiculopathy; right shoulder impingement syndrome; denervation of the right gastrocnemius muscle; and chronic headaches. It alleges that following the accident the plaintiff was confined to bed for two weeks and to home for four weeks. It alleges that the plaintiff is partially disabled to date. Lastly, the bill of particulars alleges that the injuries sustained by the plaintiff are serious within the meaning of the insurance law in that the plaintiff suffered a fracture; a significant disfigurement; a permanent loss of use of a body organ, member, function or system; a significant limitation of use of a body function or system; a permanent consequential limitation of use of a body organ or member; and a non-permanent medically determined injury or impairment which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence.

The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a "serious injury" as defined by Insurance Law Section §5102 (d).

A defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of making a *prima facie* showing that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]). A defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (see, Moore v. Edison, 25 AD3d 672 [2nd Dept., 2006]). Once this showing has been made the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]; see also, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In support of their motion for summary judgment the defendants submit, *inter alia*, the affirmed report of Jay Nathan, M.D. and the plaintiff's deposition testimony. Dr. Nathan avers that he performed an independent orthopedic examination on the plaintiff on August 3, 2009. Upon examination of the plaintiff's shoulders, he found no tenderness or swelling. He measured the range of motion of the plaintiff's shoulders, compared his findings to normal values and found it to be normal in all respects. He performed the impingement sign test and drop arm test and obtained negative results bilaterally. He examined the plaintiff's hips, knees and ankles and found no tenderness or effusion. He measured the range of motion, compared it to normal values and found the plaintiff's range of motion to be normal. He performed Fabrere-Patrick's maneuvers, the anterior

drawer sign test, Lachman's test, McMurray's test, valgus instability test, quad atrophy test, posterior draw sign test, pivot shift test, tight lateral retinaculum test, varus instability test and the patella facet tenderness test and obtained negative results bilaterally. Upon examination of the plaintiff's cervical spine, Dr. Nathan found no vertebral tenderness or paravertebral spasm. He performed range of motion testing, compared his findings to normal values and found the plaintiff's cervical range of motion to be normal in all respects. He performed the foraminal compression test and obtained negative results. Lastly, upon examination of the plaintiff's thoracolumbar spine Dr. Nathan found no vertebral tenderness or paravertebral spasm. He measured the range of motion, compared his findings to normal values and found the plaintiff's thoracolumbar range of motion to be normal in all respects. He performed straight leg raising test and obtained negative results in the seated and supine positions. He performed Lasegue's test and obtained negative results. Dr. Nathan concluded that the plaintiff had sustained a cervical sprain and lumbar sprain, but that she was not disabled and was able to return to pre-loss activity levels and occupational duties without restriction.

The plaintiff testified that, following the accident, she first felt pain while she was in the hospital waiting room. At the hospital she complained of neck pain, back pain and a headache. She was released the same day. She next sought medical attention from her primary care physician the day following the accident and was told to contact a chiropractor. She began treating with a chiropractor within a few days. She treated with the chiropractor three times a week for approximately three or four months. She stopped treating with the chiropractor in October of 2007 because the payments she was receiving for such treatment were cut off. She also treated with a neurologist and an eye doctor for injuries she purportedly sustained in the accident. The plaintiff has not been to a doctor from October of 2007 to present. The plaintiff testified that as a result of her injuries she can no longer run around with her kids like she had previously. She also has a hard time braiding her daughter's hair because she cannot hold her neck down for a long period of time. She testified that her neck gets stiff in the morning, her lower back hurts when she sits for a long period of time and she still gets headaches. The plaintiff testified that she was not employed at the time of the accident, but began working as a receptionist approximately one week later. She has missed a couple of hours, sporadically, in order to attend doctor appointments.

The evidence submitted by the defendants established their *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Saetia v. VIP Renovations Corp., 68 AD3d 1092 [2nd Dept., 2009]; Dietrich v. Puff Cab Corp., 63 AD3d 778 [2nd Dept., 2009]; DiFilippo v. Jones, 22 AD3d 788 [2nd Dept., 2005]; Casella v. N.Y. City Transit Auth., 14 AD3d 585 [2nd Dept., 2005]). In opposition to the defendants' *prima facie* showing, it was required that the plaintiff demonstrate, by the submission of objective proof of the nature and degree of the injury, that she did sustain a "serious" injury as a result of the instant

accident, or that there are questions of fact as to whether she sustained such an injury as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002] at 350). The plaintiff failed to meet this burden.

In opposition to the motion the plaintiff submitted, *inter alia*, the police accident report, uncertified and unaffirmed emergency room records, uncertified and unaffirmed chiropractic treatment records, uncertified and unaffirmed treatment records of primary care physician Anthony Cipolla, M.D., an unaffirmed MRI report of the plaintiff's lumbar spine dated July 23, 2007, an unaffirmed electromyography report, unaffirmed treatment reports by Jasjit Singh, D.O. dated July 17, 2007, July 24, 2007, and August 27, 2007, an affirmed narrative report by Jasjit Singh, D.O., and her own affidavit. Initially, to the extent that the evidence submitted is uncertified and unaffirmed it is of no probative value (see, Grasso v. Angerami, 79 NY2d 813 [1991]; Vasquez v. John Doe # 1, 73 AD3d 1033 [2nd Dept., 2010]; Lozusko v. Miller, 72 AD3d 908 [2nd Dept., 2010]; McMullin v. Walker, 68 AD3d 943 [2nd Dept., 2009]; Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]). In any event, the evidence submitted was insufficient to raise a triable issue of fact. It is well settled that a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (see, Caraballo v. Kim, 63 AD3d 976 [2nd Dept., 2009]; Sealy v. Riteway-1, Inc., 54 AD3d 1018 [2nd Dept., 2008]; Kilakos v. Mascera, 53 AD3d 527 [2nd Dept., 2008]). The evidence submitted fails to set forth any objective medical findings that reveal the existence of limitations that were contemporaneous with the subject accident (see, Vilomar v. Castillo, 73 AD3d 758 [2nd Dept., 2010]; Villante v. Miterko, 73 AD3d 757 [2nd Dept., 2010]; Milosevic v. Mouladi, 72 AD3d 1036 [2nd Dept., 2010]; Kuperberg v. Montalbano, 72 AD3d 903 [2nd Dept., 2010]). In this regard, the affirmed narrative report of Dr. Singh is insufficient. Dr. Singh first examined the plaintiff on July 17, 2007, more than two months after the subject accident (see, Resek v. Morreale, 74 AD3d 1043 [2nd Dept., 2010]). Although he avers that the plaintiff suffered "restricted" range of motion in her cervical spine and lumbar spine at this time, he fails to provide the objective testing he relied on in forming his conclusion (see, Mancini v. Lali NY, Inc., 909 NYS2d 141 [2nd Dept., 2010]; Jean v. Labin-Natochenny, 909 NYS2d 103 [2nd Dept., 2010]). In a similar vein, the evidence submitted is insufficient as it fails to set forth any objective medical findings revealing the existence of limitations that are based on a recent examination of the plaintiff (see, Clarke v. Delacruz, 73 AD3d 965 [2nd Dept., 2010]; Ciancio v. Nolan, 65 AD3d 1273 [2nd Dept., 2009]; Diaz v. Lopresti, 57 AD3d 832 [2nd Dept., 2008]; Sharma v. Diaz, 48 AD3d 442 [2nd Dept., 2008]). While Dr. Singh avers that he examined the plaintiff on August 31, 2010 and that, in his opinion, she sustained a "30% reduction in use of her cervical spine" and a "20% reduction in use of her lumbar spine," he provides no objective testing or findings in support of this conclusion (see, Jean v. Labin-Natochenny, 909 NYS2d 103 [2nd Dept., 2010]; Resek v. Morreale, 74 AD3d 1043 [2nd Dept., 2010]; Kauderer v. Penta, 261 AD2d 365 [2nd Dept., 1999]). Further rendering Dr. Singh's report insufficient is his failure to adequately explain the gap in the plaintiff's treatment (see, Pommells v. Perez, 4 NY3d 566

[2005]; Collado v. Abouzeid, 68 AD3d 912 [2nd Dept., 2009]; Rivera v. Bushwick Ridgewood Props., 63 AD3d 712 [2nd Dept., 2009]; Garcia v. Lopez, 59 AD3d 593 [2nd Dept., 2009]). Moreover, to the extent that Dr. Singh relies on the unsworn MRI report of another physician in forming his conclusions, his report is insufficient to raise a triable issue of fact (see, Vilomar v. Castillo, 73 AD3d 758 [2nd Dept., 2010]; Villante v. Miterko, 73 AD3d 757 [2nd Dept., 2010]; Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]; Magid v. Lincoln Servs. Corp.,60 AD3d 1008 [2nd Dept., 2009]; Ferber v. Madorran, 60 AD3d 725, 875 NYS2d 518 [2nd Dept., 2009]). The plaintiff's self-serving affidavit is, likewise, insufficient to raise a triable issue of fact (see, Toure v. Avis Rent a Car Sys., 98 NY2d 345 [2002]; Maffei v. Santiago, 63 AD3d 1011 [2nd Dept., 2009]; Joseph v. A & H Livery, 58 AD3d 688 [2nd Dept., 2009]; Kauderer v. Penta, 261 AD2d 365 [2nd Dept., 1999]).

Lastly, the plaintiff also failed to submit competent medical evidence that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see, Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]; Sainte-Aime v. Suwai Ho, 274 AD2d 569 [2nd Dept., 2000]).

Based on the foregoing, it is

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted.

Dated: December 22, 2010

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION