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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 8

KAITLYN BROWN,

Plaintiff,

-against-

EDGAR J. TEEPE and NEW HYDE PARK FIRE DISTRICT,

Defendant.

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INDEX NO. 6424/06

XXX

MOTION DATE: 12/6/10

SEQUENCE NO. 001

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Upon the foregoing papers, it is ordered that the motion by Defendants, EDGAR TEEPE and NEW HYDE PARK FIRE DISTRICT, for summary judgment, pursuant to CPLR §3212, on the grounds that the plaintiff did not sustain a serious injury within the meaning of New York State Insurance Law §5102 (d) and §5104 is granted.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Kaitlyn Brown, as a result of a motor vehicle accident which occurred on January 19, 2005, on Lakeville Road, at its intersection with Bryant Avenue, in New Hyde Park, New York.

Movants contend that plaintiff's injuries fail to meet the "serious injury" requirements of Insurance Law §5102 (d) and §5104 . In support of their motion, Movants submit plaintiff's

executed 50-h hearing transcript, plaintiff's executed deposition transcript, an examination report of orthopedic surgeon, Dr. John C. Killian, and plaintiff's MRI reports, among other evidence. Movants argue that plaintiff testified that she only missed three days from school as a result of the accident and that she was playing varsity lacrosse by March 2005, two months after the accident. Additionally, defendants argue that plaintiff attended less than six months of physical therapy, totaling thirty-one sessions, with treatment ceasing after said time. Plaintiff has not had any physical therapy since August 15, 2005. While attending physical therapy during the summer months of 2005, plaintiff was employed as a lifeguard, where her duties included diving into a pool to rescue distressed swimmers.

On May 10, 2010, plaintiff underwent an examination by an orthopedic surgeon, Dr. John C. Killian, hired by the defendants. Dr. Killian found normal ranges of motion in plaintiff's cervical spine, lumbar spine, shoulders, and knees. He quantified the findings of his specific range of motion tests and compared his findings with those found in a "normal" individual. He also quantified the normal ranges of motion to which he compared plaintiff's results. Dr. Killian concluded that the plaintiff had no orthopedic impairment or disability and that she could continue with her usual activities of daily living without limitations. As part of his examination, Dr. Killian also conducted a neurological examination of the plaintiff and concluded that the neurological exam was normal.

Movants further contend that although plaintiff has an MRI showing disc bulges at L4-5 and L5-S1, the MRI report does not show any injury that has kept the plaintiff from performing her normal activities or that has caused any significant or permanent limitation. Movant points out that plaintiff returned to playing varsity lacrosse within two months of the accident and returned to lifeguarding by the summer of that same year. Movants further argue that the

existence of a herniated or bulging disc is insufficient to defeat a summary judgment motion absent evidence that they led to a period of disability following the accident. (*See, Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005); *Ortiz v. Ianina Taxi Services, Inc.*, 73 A.D.2d 721 (2d Dept. 2010)).

Accordingly, Movants contend that plaintiff has not sustained a serious injury in accordance with New York State Insurance Law §5102(d) and §5104.

In opposition, plaintiff argues that defendant has not established a prima facie showing of entitlement to summary judgment. Plaintiff argues that her Bill of Particulars alleges head trauma with post-concussion headache syndrome as a result of the accident. Plaintiff argues that since Dr. Killian failed to sufficiently set forth whether any of the objective tests performed were specifically performed to rule out this claim, defendant cannot make a prima facie showing of entitlement to summary judgment. Dr. Killian, however, performed a neurological examination of plaintiff which was negative and also remarked that he reviewed hospital notes which indicated that a CT scan of plaintiff's head was negative. Further, plaintiff made no complaints of headaches or head pain to Dr. Killian during his examination and also did not testify to having headaches or head pain when asked at her deposition on August 11, 2009 about her current complaints of pain (p. 67). Allegations that are unsupported by acceptable medical evidence are insufficient to defeat a motion for summary judgment based upon the threshold issue of whether the plaintiff has suffered serious physical injury. *(See, Georgia v. Ramautar*, 180 A.D.2d 713 (2d Dept. 1992)).

Plaintiff also argues that Dr. Killian notes that plaintiff's straight leg raising test was negative bilaterally in the sitting position and in the supine position, but fails to quantify the results of that test. Plaintiff argues that said failure is fatal to defendant's motion. All of the

other objective tests performed by Dr. Killian, however, have quantified findings which show no range of motion limitations.

Finally, plaintiff contests the validity of Dr. Killian's range of motion tests, as Dr. Killian measured plaintiff's range of motion through visual inspection. Plaintiff does not cite any authority, however, which states that the use of visual observation by doctors to measure the results of a patient's range of motion testing is an unaccepted medical practice. Plaintiff also fails to cite any case law that holds that normal findings of range of motion tests taken by visual measurement are insufficient make a prima facie showing of entitlement to summary judgment on the grounds that the plaintiff's injuries do not meet the "serious injury" requirements of Insurance Law §5102(d).

Contrary to plaintiff's arguments, Movants have made a prima facie showing of entitlement to summary judgment on the grounds that the plaintiff's injuries do not meet the "serious injury" requirements of Insurance Law §5102(d). (*Tourre v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 (Ct. of App. 2002); *Gaddy v. Eyler*, 79 N.Y.2d 955 (Ct. of App. 2002)). Dr. Killian quantified the results of plaintiff's range of motion tests, compared those tests to the normal ranges, and found that plaintiff did not have any limitations in her cervical spine, lumbar spine, shoulders, and knees. Dr. Killian also conducted a neurological examination of plaintiff and found that she did not have any neurological limitations.

Further, plaintiff was clearly not limited in her "usual and customary" daily activities for at least 90 days during the 180 days immediately following accident, as she missed only three days of school and returned to playing varsity lacrosse within or around 60 days after the accident. *(See, Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008); *Charley v. Goss*, 863 N.Y.S.2d 205 (1st Dept. 2008); *Rodriguez v. Virga*, 24 A.D.3d 650, 808

N.Y.S2d 373 (2d Dept. 2005); *Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008)).

Additionally, plaintiff did not have any medical treatment for her injuries after August 15, 2005, evidencing a five and a half year gap in treatment, and plaintiff did not offer any evidence from a treating physician that any further treatment would only be palliative in nature. *(See, Pommells v. Perez, et. al.*, 4 N.Y.3d 566 (Ct. of App. 2005); *Franchini v. Palmieri*, 1 N.Y.3d 536 (Ct. of App. 2003)).

Lastly, the existence of a bulging disc alone, without evidence that it led to a period of disability, is insufficient to defeat summary judgment. (*See, Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005); *Ortiz v. Ianina Taxi Services, Inc.*, 73 A.D.2d 721 (2d Dept. 2010); *St. Pierre v. Ferrier*, 28 A.D.3d 641 (2d Dept. 2006)).

Accordingly, defendants have made a prima facie showing that plaintiff's injuries do not meet the serious injury threshold. The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

In opposition, plaintiff fails to offer any evidence to make an affirmative showing that she suffered a serious injury pursuant to Insurance Law §5102(d). Plaintiff offers no medical evidence or doctors' affirmations to support her allegations, and as such, has failed to

demonstrate a triable issue of fact as to whether she sustained a serious injury as a result of the January 19, 2005 accident. (*Kwak v. Villamar*, 71 A.D.3d 762 (2d Dept. 2010)).

Accordingly, defendants' motion for summary judgment is granted.

Dated: January 31, 2011

Anthony L. Parga, J.S.C.

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