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SHORT FORM ORDER

INDEX No. 08-41602
CAL. No. 10-01281MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 10-27-10
ADJ. DATE 12-29-10
Mot. Seq. # 002 - MD

GERALDINE SARCI,

Plaintiff,

- against -

PAUL TWARDY AND TOWN OF BABYLON

Defendant.

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West Islip, New York 11795

PAUL MARGIOTTA, ESQ. TOWN ATTORNEY,
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Upon the following papers numbered 1 to 8 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-10 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 11-16 ; Replying Affidavits and supporting papers 17-18 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendants Paul Twardy and the Town of Babylon pursuant to CPLR §3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint because the plaintiff Geraldine Sarci has failed to meet the serious injury threshold limits is denied.

This is a personal injury action allegedly sustained by Geraldine Sarci (hereinafter plaintiff), when she was involved in a motor vehicle accident on June 9, 2008, on Route 27A and Fleets Drive, Town of Babylon, County of Suffolk, New York. Paul Twardy was the operator of a Town of Babylon vehicle (hereinafter defendants) when it came into contact with the vehicle operated by the plaintiff.

The plaintiff claims in her bill of particulars that as a result of the within accident she sustained injury and pain in the left shoulder and trapezius; headaches; tightness in the left shoulder to the neck area; limited motion and burning sensation in the left shoulder blade; mid back and neck pain; posterior disc herniations at T6-7 and T8-9; aggravation of reversal of cervical lordosis with multilevel disc bulges and uncovertebral joint hypertrophy; causing spinal and left formaminal stenosis at multiple levels as well as mild cord compression.

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The defendants now seeks summary judgment dismissing the complaint because the plaintiff's claimed serious injuries fail to meet the threshold imposed by Insurance Law §5102(d).

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979], ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

Here, the initial burden is on the defendants to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***,182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendants have met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***,166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

In order to recover under the "permanent loss of use" category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott, supra***).

The Court determines in the first instance whether a prima facie showing of serious injury has been established (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2nd Dept 1991]). The defendants have the initial burden "to present evidence, in competent form, showing that the plaintiff has no cause of action" ***Rodriguez v Goldstein***, *supra*. Once the defendants have met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's bill of particulars; an uncertified copy of the police accident MV 104 report; an unsigned copy of the transcript of the plaintiff's examination before trial, dated October 5, 2009; and the sworn report of Arthur M. Bernhang, M.D. (hereinafter Bernhang), dated April 14, 2010, concerning his independent orthopedic examination of the plaintiff. Initially, the Court notes that the unsworn police accident MV-104 report constitutes hearsay and is inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2nd Dept 1999]). The unsigned deposition transcript of the plaintiff is not in admissible form and is not considered on this motion nor is the unsigned transcript accompanied by an affidavit pursuant to CPLR §3116 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus,*** 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]).

Based upon a review of the admissible evidence, the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint in this case.

Bernhang states in his report the records and reports he reviewed, including an MRI of the thoracic spine performed September 16, 2008 which indicated: "Impression: Minimal posterior disc herniations at T6-7 and T8-9 causing minimal spinal stenosis without foraminal stenosis; MRI of the cervical spine performed on September 5, 2008 which states in part: "Impression: Reversal of the cervical lordosis with multilevel disc bulges and uncovertebral joint hypertrophy, causing spinal and left foraminal stenosis at multiple levels, as well as mild cord compression at several levels as described." While disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2nd Dept 2002]), Bernhang does not comment on these findings and does not rule out whether these injuries were causally related to the accident herein.

Although Bernhang used a goniometer and tape measure to determine the plaintiff's range of motion cervical spine and shoulders, he compares his findings with the average ranges of joint motion rather than the normal ranges of motion (*see,* ***Frey v Fedorciuc***,36 AD3d 587, 828 NYS2d 454 [2nd Dept 2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 602 [2nd Dept 2006]; ***Disla v Murillo***,17 Misc3d 1114A, 851 NYS2d 63 [Supreme Court, Queens County 2007]). This creates factual issues in that he has not set forth the age group, sex, or other variable factors in determining an average range of motion, thus leaving it to this Court to speculate on what is meant by "average" (*see*, ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]). Bernhang's report is deficient inasmuch as the standard of comparison used, average range of motion, does not comport with the required comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see*, ***Frey v Fedorciuc***, 36 AD3d 587, 828 NYS2d 454 [2nd Dept 2007]; ***Powell v Alade***, *supra*; *see also*, ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2nd Dept 2007]), leaving it to this Court to speculate under what circumstances the average range of motion is determined. Bernhang's examination revealed range of motion deficits in cervical flexion of 20 degrees, lateral flexion of 10 to 15 degrees, cervical rotation of 15 to 30 degrees, and deficits in shoulder range of motion for abduction of both shoulders of 35 degrees, forward shoulder flexion of 32 degrees, and "D8" of both shoulders which range of motion denomination is not explained. Bernhang does not state an opinion concerning whether these deficits are causally related to the accident herein nor does he state whether or not his diagnosis of chronic myofascitis of the left rhomboid major is permanent or if it is causally related to the plaintiff's accident.

Additionally, although Bernhang notes there is spinal cord compression at several levels of the cervical spine, no report by an examining neurologist has been submitted to comment on this claimed injury (see, ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2nd Dept 2006]) and Bernhang also fails to address all the plaintiff's claimed injuries (*see*, ***Bentivegna v Stein***, 42 AD3d 555, 841 NYS2d 316 [2nd Dept 2007]; ***Staubitz v Yaser***, 41 AD3d 698, 839 NYS2d 113 [2nd Dept 2007]; ***Wade v Allied Bldg. Products Corp***, 41 AD3d 466, 837 NYS2d 302 [2nd Dept 2007]; ***Tchjevskaia v Chase***, 15 AD3d 389, 790 NYS2d 175 [2nd Dept 2005]). Based upon the foregoing, the defendants have failed to demonstrate entitlement to summary judgment dismissing the complaint on the issue of whether the plaintiff sustained a serious injury within the meaning of Insurance Law §5102(d).

Bernhang did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering his affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]; *see*, ***Uddin v Cooper***, 32 AD3d 270,820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]).

These factual issues raised in the defendants' moving papers preclude summary judgment. The defendants failed to satisfy their burden of establishing prima facie that the plaintiff did not sustain a serious injury (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2nd Dept 2006]). Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2nd

Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2nd Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2nd Dept 2005]) as the burden has not shifted.

Accordingly, motion (001) by defendants for dismissal of the complaint on the serious injury threshold is denied.

Dated: FEB 16 2011

Peter Solomon
J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION