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SHORT FORM ORDER

COPY

INDEX No. 07-13160
CAL. No. 10-01899MV

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10-13-10
ADJ. DATE 12-13-10
Mot. Seq. # 005 - MotD

LISVET I. JOHNSON, Plaintiff, - against - CHANDRAKANT SHAH, HERTZ RENT-A-CAR, MARJON, INC. AND JD AUTOMOTIVE, Defendants.	STEVEN D. DOLLINGER & ASSOCIATES Attorney for Plaintiff 5 Threepence Drive Melville, New York 11747 DeSENA & SWEENEY, LLP Attorney for Defendants 1383 Veterans Memorial Highway, Suite 32 Hauppauge, New York 11788

Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14 - 19 ; Replying Affidavits and supporting papers 20 - 21 ; Other 22 - 23 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the defendants' motion for summary judgment dismissing the complaint is granted to the extent that it seeks dismissal of the cause of action to recover damages for personal injuries, and is otherwise denied.

This action seeks to recover damages for personal injuries and property damage arising from a motor vehicle accident which occurred on November 3, 2004 in the Town of Smithtown, New York. The accident purportedly occurred when a vehicle operated by defendant Chandrakant Shah and owned by defendants Hertz Rent-A-Car, Marjon, Inc. and JD Automotive Inc. collided with the plaintiff's vehicle. The plaintiff alleges that she sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, by way of the bill of particulars, she alleges that she sustained serious and permanent injuries including, *inter alia*, straightening of the curvature of the lumbar spine with some loss of the normal lordosis; posterior disc herniation at L5-S1 level; lumbosacral neuritis; radiculitis throughout the entire spine; shoulder contusion; lumbar sprain/strain; insult to the muscular skeletal system of both the cervical and lumbar spine; post-concussion syndrome; headaches and aggravation of any prior injuries. As a result of the injuries sustained in the accident, the plaintiff was not confined to her bed. She was confined to her home, and incapacitated from

employment, for two weeks. The plaintiff alleges that the injuries she sustained are serious within the meaning of the Insurance Law in that she sustained a dismemberment; a significant disfigurement; a fracture; a permanent loss of use of a body organ, member, function, system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury of a non-permanent nature whereby she could not substantially perform her usual activities for 90 days within the 180 day period following the accident.

By order dated March 4, 2008, the action was dismissed against defendants Hertz Rent-A-Car, Marjon, Inc. and JD Automotive Inc. Defendant Shah, the remaining defendant in the action, now moves for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

"By enacting the No-Fault Law, the Legislature modified the common-law rights of persons injured in automobile accidents to the extent that plaintiffs in automobile accident cases no longer have an unfettered right to sue for injuries sustained" (***Licari v Elliott***, 57 NY2d 230, 237, 455 NYS2d 570 [1982]). Specifically, the Legislature provided that "there shall be no right of recovery for non-economic loss [i.e., pain and suffering] except in the case of a serious injury, or for basic economic loss" (***Licari v Elliot***, *supra* at 234, quoting Insurance Law, § 673, subd 1). A "serious injury" is defined 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 constitutes 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" (Insurance Law § 5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, *supra*; ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008] *affd* 12 NY3d 750, 876 NYS2d 700 [2009]).

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 (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant may satisfy this burden by submitting, among other things, 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, 811 NYS2d 724 [2d 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, 582 NYS2d 990 [1992]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d dept 2000]; ***Pagano v Kingsbury***, *supra*; *see also*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of the motion for summary judgment, defendant Shah submits the affirmed medical examination reports of Craig B. Ordway, M.D., the affirmed neurological examination report of Edward M. Weiland, M.D. and the plaintiff's deposition testimony. As is relevant to this motion, Dr. Ordway avers that he examined the plaintiff on December 9, 2009 and that the orthopedic and neurologic examinations or her lumbar spine were normal. He finds no evidence of any post-traumatic neurologic deficit, deformity or impairment secondary to the accident in question. Dr. Ordway notes that the plaintiff was involved in two subsequent automotive accidents on November 29, 2004 and February 23, 2007. In an affirmed report dated June 16, 2010, Dr. Ordway indicates that he was in possession of the plaintiff's treatment records for the period of time following the two subsequent accidents and that a number of these records indicate that she was receiving treatment for lower back injuries that were causally related to the subsequent accident occurring on November 29, 2004.

Dr. Weiland affirms that he performed a neurologic examination on the plaintiff on June 17, 2010. He examined the plaintiff's lumbar spine, thoracic spine, cervical spine and shoulders. He performed range of motion testing, compared his findings to normal values, and found the plaintiff's range of motion to be within normal limits in all respects. Dr. Weiland performed straight leg raising testing and found it to be unlimited. He performed Fabere-Patrick sign and Adson's maneuver and obtained negative results. Dr. Weiland concluded that the plaintiff had sustained a cervical sprain/strain and a lumbosacral sprain/strain that had resolved. He found her neurologic examination to be normal. He concluded that there was no finding of neurologic residual permanency and there was no reason why she would be unable to perform her activities of daily living, and continue gainful employment activities, without restrictions. Based on his examination, he found the plaintiff had no primary neurologic disability as related to the injuries reportedly sustained during the subject accident.

During her deposition, the plaintiff testified that she was taken to the emergency room following the accident and complained of pain in her back and neck. She was released and told to follow up with her physician and a chiropractor. The same day she commenced treatment with Dr. Vicente of Brentwood Village Rehabilitation. She received treatment from Dr. Vicente's practice every day for six months and then three times a week until approximately June of 2006. She has not received any medical treatment for her injuries since. According to the plaintiff, she terminated her treatment because she started to feel better. The plaintiff testified that she missed two weeks from work following the accident and that upon her return to work she was promoted to a new position. She testified that as a result of the injuries she sustained in the subject accident she still suffers from pain in her lower back from once a week to once every other week. She can no longer sit or stand for long periods of time and cannot lift heavy items.

The plaintiff admitted that she was involved in subsequent motor vehicle accident on November 29, 2004, approximately three weeks after the subject accident, and that she sought medical treatment

from Dr. Vicente for the injuries she sustained from such accident. According to the plaintiff, she only injured her neck in the second accident and not her lower back. She felt only a little bit of pain in her lower back at that time. She further testified that the pain she was feeling in her neck and back did not get worse after the November 29, 2004 accident but stayed the same. According to the plaintiff, she treated with Dr. Vicente's practice simultaneously for the injuries she sustained in both of the November accidents. The plaintiff also admitted being involved in a motor vehicle accident on February 23, 2007. She did not go to a doctor for any injuries resulting from this accident. The plaintiff testified that at the time of the February 23, 2007 accident she was not having pain in her neck and back, but that the pain in her back returned following this accident. The plaintiff admitted that she commenced lawsuits following both of the subsequent accidents. The plaintiff also admits that she has not sought medical treatment since June of 2006.

The evidence submitted established the defendant's *prima facie* entitlement to summary judgment dismissing the plaintiff's cause of action for personal injuries 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, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, *supra*; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Euvino v Rauchbauer***, 71 AD3d 820, 897 NYS2d 196 [2d Dept 2010]; ***Casella v New York City Transit Auth.***, 14 AD3d 585, 787 NYS2d 883 [2d Dept 2005]; ***Pagano v Kingsbury***, *supra*). In opposition to the defendant's *prima facie* showing, it was incumbent upon the plaintiff to 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.***, *supra* at 350). The plaintiff failed to meet this burden.

In opposition to the motion, the plaintiff submits her emergency room records, the affirmation of her treating physician Socorro C. Vicente, M.D., the affirmed MRI report of John Himelfarb, M.D., and her own deposition testimony. The plaintiff's emergency room records are of no probative value in opposing the motion because they were not certified (*see* ***Rush v Kwan Chiu***, _ AD3d _, 914 NYS2d 234 [2d Dept 2010]; ***Husbands v Levine***, _ AD3d _, 913 NYS2d 773 [2d Dept 2010]). Dr. Himelfarb's report is also insufficient to raise a triable issue of fact. Dr. Himelfarb concludes that an MRI taken of the plaintiff's lumbar spine on January 12, 2005 depicts, *inter alia*, a posterior disc herniation at L5-S1. However, the mere existence of 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* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Simanovskiy v Barbaro***, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; ***Caraballo v Kim***, 63 AD3d 976, 882 NYS2d 211 [2d Dept 2009]; ***Sealy v Riteway-1, Inc.***, 54 AD3d 1018, 865 NYS2d 129 [2d Dept 2008]; ***Kilakos v Mascera***, 53 AD3d 527, 862 NYS2d 529 [2d Dept 2008]; ***Waring v Guirguis***, 39 AD3d 741, 834 NYS2d 290 [2d Dept 2007]). The plaintiff fails to provide the requisite objective evidence. Dr. Vicente's report was insufficient for this purpose. Dr. Vicente failed to provide competent objective medical evidence revealing the existence of a significant limitation in the plaintiff's cervical or lumbar spine that was contemporaneous with the subject accident (*see* ***Rush v Kwan Chiu***,

supra; ***Husbands v Levine***, *supra*; ***Torchon v Oyezole***, 78 AD3d 929, 910 NYS2d 662 [2d Dept 2010]; ***Posa v Guerrero***, 77 AD3d 898, 911 NYS2d 82 [2d Dept 2010]; ***Mancini v Lali NY, Inc.***, 77 AD3d 797, 909 NYS2d 141 [2d Dept 2010]; ***Vickers v Francis***, 63 AD3d 1150, 883 NYS2d 77 [2d Dept 2009]). In addition, Dr. Vicente failed to address the fact that the plaintiff was involved in two subsequent motor vehicle accidents, one only three weeks after the subject accident (*see* ***Vickers v Francis***, *supra*; ***Maffei v Santiago***, 63 AD3d 1011, 886 NYS2d 29 [2d Dept 2009]; ***Jules v Calderon***, 62 AD3d 958, 880 NYS2d 131 [2d Dept 2009]; ***Berkowitz v Taylor***, 47 AD3d 740, 851 NYS2d 597 [2d Dept 2008]). Moreover, neither the plaintiff nor Dr. Vicente adequately explain the gap in her treatment spanning approximately four and one half years (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Maffei v Santiago***, *supra*; ***Rivera v Bushwick Ridgewood Props.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]; ***Pompey v Carney***, 59 AD3d 416, 872 NYS2d 541 [2d Dept 2009]; ***Waring v Guirguis***, *supra*; ***Garcia v Lopez***, 59 AD3d 593, 872 NYS2d 719 [2d Dept 2009]).

Lastly, the plaintiff's submissions also failed to set forth competent medical evidence that the injuries she allegedly sustained as a result of 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 following the accident (*see* ***Husbands v Levine***, *supra*; ***Garcia v Lopez***, *supra*; ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Based on the foregoing, the defendant's motion for summary judgment is granted to the extent that it seeks dismissal of the plaintiff's first cause of action seeking to recover damages for personal injuries. The cause of action dismissed herein is severed and the plaintiff's remaining cause of action for property damage shall continue.

Dated: 3/21/14

THOMAS F. WHELAN, J.S.C.