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SHORT FORM ORDER

COPY

INDEX No. 09-20861
CAL No. 12-00075MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

***PRESENT:***

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 5-3-12
ADJ. DATE 7-20-12
Mot. Seq. # 001 - MD

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GLORIA WALKER,

Plaintiff,

- against -

FRANCES J. HINES,

Defendant.

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-9; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10-25; Replying Affidavits and supporting papers 26-27; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that motion (001) by the defendant, Frances J. Hines, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Gloria Walker, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this action, the plaintiff, Gloria Walker, seeks damages for personal injuries allegedly sustained on June 8, 2007 on Oak Street in Babylon, New York, when the plaintiff pedestrian was struck by the defendant's vehicle when it backed into her.

The defendant, Frances J. Hines, seeks summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined 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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). 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]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are

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real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

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]).

On this motion for summary judgment on the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the moving party to present evidence in competent form, showing that the plaintiff did not sustain a serious injury as a result of the accident (*see* ***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met the burden, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does exist (*see* ***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 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a 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*).

In support of motion (001), the defendant has submitted exhibits consisting of, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; the sworn report of Noah Finkel, M.D. dated November 18, 2011 concerning his orthopedic examination of the plaintiff, and his unsworn letter dated January 31, 2012; the unsigned but certified transcript of the examination before trial of Gloria Walker, to which the plaintiff has not objected, is considered (***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]).

By way of the bill of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of annular bulge at T10-T11; right shoulder rotator cuff tear with impingement syndrome and longitudinal split biceps tendon with tearing requiring right shoulder arthroscopy, arthroscopic subacromial

decompression, debridement and partial tearing of the biceps tendon, rotator cuff tear and insertion of pain catheter; right shoulder full thickness or near full thickness rotator cuff tear of supraspinatus tendon involving the articular surface; right shoulder myofascitis; curved acrominon process with prominent hypertrophic changes of the acromioclavicular joing causing a moderate degree of subacromial impingement upon the musculotendinosis of the supraspinatus; large amount of fluid in the subacromial subdeltoid bursa, right shoulder; straightening of the normal lumbar lordosis; straightening of the cervical lordosis; central disc herniation at L5-S1 indenting the ventral thecal sac; pain in the right knee, upper thigh and foot; pain in the right rib and chest; tenderness of the mid axillary line at the fifth, sixth, and sevenths ribs; right lower back pain; right hip pain; left foot pain; tenderness and fixation in the cervical, thoracic and lumbar vertebral motion segments; hypertonicity of the paraspinal musculature; restricted range of motion of the right knee; positive shoulder depression test; weakness secondary to pain on the right shoulder external rotator; decreased sensation on the right L5 dermatome to light touch and pinprick; multiple sprains, strains, swelling, bruises, contusions, pains, limitations of ranges of motion, nerve fiber, sympathetic nerves, muscle and tendon damage; emotional stress, acute mental anxiety; inability to perform everyday functions; and loss of normal pursuits and pleasures of life; and ambulatory surgery on October 5, 2007.

Based upon review and consideration of defendant's evidentiary submissions, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury.

The defendant has submitted the report of Noah Finkel, M.D. concerning his orthopedic examination of the plaintiff, however, his curriculum vitae has not been provided to qualify him as an expert. Dr. Finkel has set forth the materials and records which he reviewed, however, none of the medical records, including the various x-ray and MRI reports of the plaintiff's cervical, thoracic, and lumbar spine and right shoulder, and operative report for surgery conducted on the plaintiff have been submitted as required pursuant to ***Friends of Animals v Associated Fur Mfrs***., *supra*. Expert testimony is limited to facts in evidence. (*see also* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), and these records and reports are not in evidence. Thus, this court is left to speculate as to the full contents and findings in those records and reports.

Upon examination of the plaintiff's cervical spine, Dr. Finkel failed to either conduct or record range of motion findings, thus raising factual issues concerning whether any deficits in the ranges of motion were realized. Upon examination of the plaintiff's right shoulder, he noted a deficit of 150/180 in abduction and flexion, but does not comment on the cause. He also noted "no significant subacromial crepitation" in the right shoulder, but does not indicate what "significant" crepitation means, again raising a factual issue. He further found a deficit in abduction and flexion of 160/180 upon examination of the left shoulder, but does not comment on the cause. Although Dr. Finkel examined the plaintiff's lumbar spine, he failed to report the rotation of the lumbar spine. He reported a deficit in lumbar extension 30/35 and forward flexion of 50/60, and reported that the patient noted generalized lower back discomfort at the extreme of each position without radicular pain. Although Dr. Finkel examined the plaintiff's hips and knees, he has not reported any range of motion findings and simply states that the examination is unremarkable and asymptomatic.

Relative to the range of motions determinations which Dr. Finkel reported, he set forth that he visually identified the ranges of motion. His report does not set forth that an objective method was employed to determine such range of motion findings, such as the goniometer, inclinometer or arthroidal protractor (*see* ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff.

While Dr. Finkel's impression was that of cervical strain, resolved, and sprain/strain of the right shoulder, resolved, he continued that comprehensive medical record review and clinical examination revealed some residual limitation of range of motion relative to both shoulders, right somewhat more than left. He further continued that the plaintiff has undergone a rotator cuff repair and arthroscopic decompression of the right shoulder. He stated that his record review and the pre-operative MRI "appear" to indicate pre-existing degenerative changes relative to both the glenoid surface and humeral head along with cystic changes at the greater and lesser tuberosity. He further noted a longitudinal split of the biceps tendon and crescent tear of the supraspinatus tendon and stated that these two findings, along with the chondral changes relative to the humeral head and glenoid surface are degenerative in nature and "probably" pre-existing, unrelated to the injury described previously. He stated that the crescentic tear is unlikely to be causally related to the plaintiff's twisting injury. However, Dr. Finkel does not set forth the bases for these conclusory opinions. He does not rule out with any degree of reasonable medical certainty that the injuries are causally related to the accident, and instead opines that the causation is "unlikely" related and "probably" pre-existing, thus raising factual issues which preclude summary judgment due to the speculative nature of his opinion. Additionally, the plaintiff testified that she sustained injury to her shoulders, among other injuries, when she was struck by the defendant's car, and that prior to this accident, she never had an injury to her right shoulder.

The plaintiff opposes the motion and submits the affirmation of Anthony Cappellino, M.D. Dr. Cappellino treated the plaintiff for her shoulder injury, as well as for other injuries, after the subject accident. Dr. Cappellino set forth the findings demonstrated in the MRI of her right shoulder on August 26, 2007, and opined that they were consistent with an acute injury having occurred within two to three months prior to the MRI testing. He recommended right shoulder arthroscopic rotator cuff repair and subacomrial decompression, which was performed on October 25, 2007. Dr. Cappellino stated that it is his opinion within a reasonable degree of medical certainty that the injury sustained by the plaintiff to her right shoulder was a result of the accident of June 8, 2007, and that the injury was exacerbated by the accident she had on July 4, 2007.

Relative to the surgery conducted on the plaintiff's right shoulder, although Dr. Finkel opines that the operative report does not show evidence of an acute rotator cuff tear, the defendant has not submitted a copy of this report in support of this motion. Moreover, Dr. Finkel has not set forth the basis for such opinion, or commented as to why the surgery was performed, and when the symptoms began. Thus, these factual issues preclude summary judgment.

Dr. Finkel set forth in his letter of January 31, 2012, that he reviewed the MRIs of the plaintiff's cervical spine dated July 10, 2007; thoracic spine dated July 17, 2007; lumbar spine dated July 24, 2007; and right shoulder dated August 26, 2007, and stated that his review is compatible with the initial conclusion relative to the previously noted IME of November 18, 2011. However, this letter is not sworn, and is not in admissible form.

Dr. Finkel did not comment on the bulging and herniated discs and did not rule out that these conditions were causally related to the accident, thus raising further factual issues which preclude summary judgment.

Defendant's examining physician offered no opinion as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident, he did not examine the plaintiff during that statutory period (*see* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d 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]), and offered no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Thus, there are factual issues concerning whether the plaintiff sustained a serious injury under this category of injury.

Based upon the foregoing, it is determined that the defendant has failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain serious injury as defined by Insurance Law § 5102 (d) in either category of injury.

Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the plaintiff's opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Dated: 9/25/12

Hon. Denise F. Molia
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION