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SHORT FORM ORDER

INDEX No. 09-47213
CAL. No. 12-00868MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-6-12
ADJ. DATE 11-27-12
Mot. Seq. # 001 - MD

MILAGROS PAREDES, Plaintiff, -against- R.E. MITTERANDO, JR. Defendants.	ALBERT ZAFONTE, JR. ESQ. Attorney for Plaintiff 215 Uniondale Avenue Uniondale, New York 11553 ZAKLUKIEWICZ, PUZO & MORRISSEY, LLP Attorney for Defendant 2701 Sunrise Highway, Suite 2 PO Box 389 Islip Terrace, New York 11752

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause (001)by the defendant R.E. Mitterando, Jr. dated August 13, 2012 and supporting papers numbered 1-11 (including Memorandum of Law none); (2)Affirmation in Opposition by the and supporting papers by the plaintiff Milagros Paredes dated October 20, 2012 numbered 12-18; (3) Reply Affirmation by the defendant dated November 20, 2012 and supporting papers numbered 19-20; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (001) by the defendant R.E. Mitterando for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

In this negligence action, the plaintiff, Milagros Paredes, alleges that she sustained serious personal injury as a result of an accident which occurred on January 2, 2009 at 7:50 a.m., on Pershing Street, at or near the intersection of Classon Avenue, Brookhaven, New York, when the front of the vehicle, which was owned by William Paredes and operated by the plaintiff, and the front end of the vehicle operated by the defendant, R.E. Mitterando, Jr., came into contact.

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 (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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 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" (CPLR 3212[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 real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this motion, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; two unsigned but certified transcripts of the examinations before trial of the plaintiff which are considered as they are not objected to by the plaintiff (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); plaintiff's affidavit; the sworn reports of Robert Michaels, M.D. dated February 13, 2012 concerning his independent orthopedic evaluation of the plaintiff, and David A. Fisher, M.D. dated October 13, 2011 concerning his independent review of the MRI films of plaintiff's lumbar spine taken April 22, 2009.

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 medically 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 a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant 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 defendant has 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 [2d 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 [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*).

Upon review and consideration of the defendant's evidentiary submissions, it is determined that the defendant has not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Milagros Paredes did not sustain a serious injury as defined by Insurance Law § 5102 (d).

By way of her verified bill of particulars, the plaintiff alleges that as a result of this accident that she sustained injuries consisting of post traumatic L5-S1 central and slightly left sided disc herniation effacing the epidural fat as confirmed by MRI; post-traumatic aggravation, activation, and exacerbation of dormant and quiescent L4-5 central disc herniation which effaces the ventral aspect of the thecal sac as confirmed by MRI; post-traumatic multilevel disc herniation with foraminal narrowing; lumbar disc derangement; bilateral foraminal stenosis; lumbar radiculitis; permanent partial loss of use, function, strength of cervical spine; cervical sprain; mental anxiety, anguish, embarrassment and psychological disturbances; scarring; severe pain; and numbness, swelling and ecchymosis, with damage to the soft tissues, nerves, tendons, muscles, ligaments and blood vessels in the affected areas with loss of use, function, and motion.

The reports of Dr. Michaels and Dr. Fisher are not supported with copies of their respective curriculum vitae to qualify them to render expert medical opinions in this action. Although Dr. Michaels has set forth the records and materials which he reviewed in rendering his opinion in part, none of those medical records, inclusive of the MRI report of the plaintiff's lumbar spine of April 22, 2009, have been provided with the moving papers, leaving this court to speculate as to the contents thereof in contravention of the requirements of CPLR 3212 (*see* ***Friends of Animals v Associated Fur Mfrs.***, supra. Expert testimony is limited to facts in evidence (*see* ***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]. It is further noted that Dr. Fisher has not submitted a copy of the MRI report of April 22, 2009 although he stated he reviewed the films relative thereto, leaving it to this court to speculate as to the contents of the initial report.

Although the plaintiff has claimed lumbar radiculitis in her bill of particulars, no report from a neurologist who examined the plaintiff on behalf of the moving defendant has been submitted to rule out the claimed neurological injury (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]).

Dr. Michaels set forth range of motion values for the plaintiff's cervical and thoracolumbar spine and compared his findings to the normal ranges of motion, setting forth no deficits. However, he opines that the injuries which the plaintiff alleges to have sustained in the subject accident are causally related to the accident, and he does not rule out that the plaintiff did not sustain the alleged herniated disc. Dr. Michaels further opined that the plaintiff exhibits no disability and that she may continue to work and perform the activities of daily living without restrictions. However, Dr. Michaels set forth in his report that the plaintiff complains of pain in her lower back with shooting pains radiating to her right leg, accompanied by numbness, and that she has difficulty walking, bending, pushing, pulling, climbing, lifting and sleeping, and that she is unable to hold or lift the coin vault at the bank were she works as the vault is too heavy. These conflicting findings raise factual issues which further preclude summary judgment.

It is further determined that even if Dr. Fisher's report were in admissible form and he was qualified to render expert opinion in this matter, that his report raised factual issues which preclude summary judgment. Dr. Fisher stated that his review of the films revealed no disc herniations, although he stated that there are degenerative changes, mild bulges and small posterior annular tears at the L4-5 and L5-S1 levels. This report conflicts with Dr. Michaels' statement that the MRI report of April 22, 2009, of the plaintiff's lumbar spine, reveals evidence of L4-5 central disc herniation which effaces the ventral aspect of the thecal sac, and L5-S1 central and slightly left-sided disc herniation which effaces the epidural fat. Nor has Dr. Fisher stated that he compared this MRI to the previous MRI of the plaintiff's lumbar spine to ascertain whether or not there were any interval changes. Further, he did not indicate what is meant by "annular tears", leaving this court to speculate as to the same, and their distinction from herniations or bulging discs. These factual issues in the moving papers likewise preclude summary judgment from being granted.

It is noted that the defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physicians' affidavits 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 [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 the experts offer 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]). Although Dr. Michaels set forth that the plaintiff was involved in a motor vehicle accident in 2003 and sustained injury to her back, the plaintiff has averred that she received no treatment from any health care providers relative to the accident of December 26, 2003. The plaintiff testified on August 18, 2005 that she remembered that she was involved in a motor vehicle accident on July 28, 2002, but she was not injured in that accident. On December 28, 2002, she was backing out of her driveway and backed into another

vehicle, but sustained no injuries. On February 28, 2003, she was involved in another car accident when she struck another vehicle in the rear. There was another accident she was involved in on November 10, 2002, but she sustained no injury. Thus, there are factual issues precluding summary judgment as no medical records have been provided concerning the injuries sustained in the previous accident, and the expert's opinions concerning whether or not the plaintiff sustained additional injury in this accident.

In her deposition transcript of August 18, 2005, the plaintiff also testified that after the accident of July 8, 2003, she went to Brookhaven Memorial Hospital to be examined and complained of pain in her lower back, right hip, neck and stated that she had a tingling feeling in her right thigh. Within a week of the accident, she saw a neurologist, Dr. Matthews, and he advised her, after he conducted an EMG, that she had nerve damage in her lower back. She also visited a massage therapist, Kelly O'Donnell, about three times a week for eight months. She also saw Dr. Alexovitz, a chiropractor, for lower back and right leg pain, and treated with him two times a week for a few months. She made no complaints about her neck. He prescribed a neck brace which she wore for a week. Thereafter, she no longer had back pain. She also had an MRI which she stated showed that she had herniations at L3- L4 of the lumbar spine. When the insurance stopped paying for the visits, she then treated with Michael Crohn, a chiropractor whose office was next door to the bank where she was employed. She treated with Dr. Crohn twice a week for a few months. She testified that she had also seen Dr. Crohn for the accident in December 2003 in which she suffered injury to her neck and mid-back. She further testified that after the accident of July 8, 2005, she experienced pain in her lower back on the right side underneath the back bone, and has sharp, shooting pain that comes through her thigh and makes her calf feel like she has pins and needles, and that her calf and leg buckles. Her mid- back was fine. She stated that she was confined to her home for seven months after that accident.

At her testimony given on December 7, 2011, the plaintiff testified that since the subject accident of January 2, 2009, she cannot exercise like she use to. She was previously a member of a gym, attending four times a week, however, she stopped attending due to the injuries she sustained in this accident. At the time of this subject accident, she experienced pain in her neck, lower back, and left knee, and was taken to Brookhaven Memorial Hospital. She thereafter sought treatment with Dr. Singh and was referred by him to Dr. Saccio for chiropractic care, and was also referred for an MRI of her back, and to physical therapy. She treated with Dr. Saccio twice a week for nearly a year, then once a week as she could not afford the payments. Dr. Saccio advised her that she had an additional herniation in her lower back. The pain radiating down her right leg was more severe after this accident, and sometimes the pain radiates to her left side. She continued that she had no complaints related to this accident for anxiety, anguish, embarrassment, or psychological issues. At work at the bank, she cannot pick up coin boxes. She can no longer bowl or play field hockey. She cannot sit at the movies for long, cannot exercise four times a week doing kickboxing and Zumba classes. She stated that she will never get to go skydiving. She has difficulty vacuuming, and dusting. She now has difficulty maintaining her weight. Thus, these factual issues preclude summary judgment as to this category of serious injury.

Based upon the foregoing, the defendants have not demonstrated that the plaintiff did not suffer a serious injury as defined by either section of Insurance Law § 5102 (d).

The factual issues raised in defendants' moving papers preclude summary judgment. The defendants have failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). 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 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]).

Accordingly, motion (001) by the defendant for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 1/29/13

PETER H. MAYER, J.S.C.