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SHORT FORM ORDER

INDEX No. 10-29136
CAL No. 12-01493MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 11-13-12
ADJ. DATE 1-15-13
Mot. Seq. # 001 - MD
002 - MD

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YVONNE T. ZUARO,

Plaintiff,

- against -

ARLENE MOTKIN and KATHERINE V. PAULETTI,

Defendants.

MEYERSON & LEVINE, L.L.P.
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Franklin Square, New York 11010

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Upon the following papers numbered 1 to 33 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 13(002) 14-15; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16-31; Replying Affidavits and supporting papers 32 - 33; 34 - 35; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant, Arlene Motkin, 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; and it is further

ORDERED that motion (002) by the defendant, Katherine V. Pauletti, 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, Yvonne Zuaro, alleges that she was involved in a four-car, chain collision motor vehicle accident on April 7, 2010, on the Long Island Expressway, east of Exit 53 in Suffolk County, New York, when the plaintiff's vehicle, while stopped, was struck in the rear by the vehicle

operated by defendant Arlene Motkin, and subsequently struck on the passenger side by the vehicle operated by defendant Katherine V. Pauletti. After the plaintiff's stopped vehicle was struck, it was caused to strike the rear of the stopped vehicle operated by non-party Dominique Vazquez, which was directly in front of the plaintiff's vehicle. The plaintiff alleges that she sustained serious personal injury as a result of the impacts to her vehicle.

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]).

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*).

In support of this motion, the moving defendant in motion (001) has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' respective answers with cross claims asserted by defendant Pauletti against defendant Motkin for indemnification and contribution, and plaintiff's verified bill of particulars; the transcript of the examination before trial of the plaintiff dated October 12, 2011; plaintiff's emergency room record from Southside Hospital; uncertified and unsigned record of Island Musculoskeletal Care, M.D., P.C. setting forth, inter alia, purported findings report of x-rays of plaintiff's cervical, lumbosacral spine, both knees, and left hip and pelvis, dated April 13, 2010; and the sworn reports of Isaac Cohen, M.D. dated February 2, 2012 concerning his independent orthopedic evaluation of the plaintiff, and Mark Zuckerman, M.D. dated February 6, 2012, concerning his independent neurological examination of the plaintiff, and Audrey Eisenstadt, M.D. concerning her independent radiologic review of the MRI of the plaintiff's cervical spine dated August 11, 2011. In support of motion (002), the defendant has submitted two attorney's affirmations and appears to incorporate by reference the exhibits and arguments proffered by the defendant in motion (001).

By way of her verified bill of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of acute compression fracture deformity of the L1 vertebral body; disc herniations at C2-3 and C4-5; right foraminal ridge at C6-7 with compression of the right C7 nerve root; spondylitic ridge at C5-6 with compression of the left side of the spinal cord and compression of the left C6 nerve root; cervical sprain with cervicogenic headache; disc bulge at L3-4 and L4-5; lumbar spondylosis; and bilateral knee and hip pain. The plaintiff further alleges that she was confined to bed for two weeks following the accident and to home for six months following the accident, with loss of earnings in excess of $13,000.

Upon review and consideration of the defendants' evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Yvonne Zuaro did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury.

The reports of Dr. Cohen and Dr. Zuckerman are not supported with copies of their respective curriculum vitae to qualify them as experts in this matter. The moving defendants have failed to submit into evidence for this court's review, *inter alia*, copies of the plaintiff's medical records and reports, including the MRI reports of plaintiff's cervical spine, lumbar spine, the neurological consult of Dr. Frederick A. Mendelsohn, ultrasound reports, and the independent chiropractic IME report of Janice C. Salayka, D.C.,

report of Salvatore Corso, M.D. concerning his independent orthopedic IME of the plaintiff, and the report of Roy Shannon, M.D. concerning his independent neurological IME of the plaintiff; leaving this court to speculate as to the contents of those materials, and 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]). Although the defendant's experts have examined the plaintiff within their respective areas of expertise, they have not correlated their findings with any medical tests and studies conducted on the plaintiff based upon evidentiary proof submitted to this court.

Dr. Cohen set forth that he assessed the range of motion measurements of the plaintiff's cervical and lumbar spine, hips and knees, at the joints by visual observation and goniometric and/or bubble inclinometer measurements, as indicated by his report, however, this court is left to speculate which range of motion findings were determined visually or with the use of goniometric or bubble inclinometer, raising factual issues. It is noted that many of the normal range of motion values set forth by Dr. Cohen and Dr. Zuckerman relative to the plaintiff's cervical and lumbar spine range of motion findings are inconsistent, leaving this court to speculate as to which normal range of motion value is applicable, and whether or not the plaintiff suffers deficits in the ranges of motion, depending upon which values are applicable. Such factual issues preclude summary judgment. Additionally, Dr. Zuckerman has set forth the normal range of motion values, to which he compared his range of motion findings, to a spectrum of normal values. When the normal range of motion is set forth within a range or spectrum, it leaves it to this court to speculate as to under which conditions such variations would be applicable (*see* ***Hypolite v International Logistics Mgt., Inc.,*** 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]).

It is noted that Dr. Zuckerman indicated that the plaintiff's lumbar MRI shows an endplate compression deformity which was not diagnosed on the x-ray taken at Southside hospital, raising a factual issue. Dr. Zuckerman does not rule out that the plaintiff sustained a fracture at that site as alleged by the plaintiff. Although Dr. Cohen acknowledges this fracture deformity at L1, he sets forth that the hospital record does not reveal the same, again raising the same factual issue. It is additionally noted that Dr. Cohen was comparing an x-ray to an MRI and does not indicate the extent that certain injuries can be demonstrated by those studies, and does not preclude the finding of the fracture by MRI study. Dr. Cohen, as the examining orthopedist performing the IME, does not rule out that this alleged fracture was caused by the accident. A fracture is included as a category of serious injury pursuant to Insurance Law § 5102 (d), thus precluding the granting of summary judgment.

Although Dr. Eisenstadt has opined that the plaintiff did not sustain cervical disc herniations at the various aforementioned levels, this opinion contradicts the MRI findings set forth by Dr. Cohen, including herniated discs at C2-3 through C4-5, thus raising further factual issues which preclude summary judgment. 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 [2d Dept 2002]). It is additionally noted that

Dr. Eisenstadt did not indicate that she reviewed the plaintiff's lumbar MRI films. None of the examining physicians have ruled out that the plaintiff's alleged lumbar injuries were causally related to the accident

Although the plaintiff claims to have undergone chiropractic treatment, treatment with acupuncture, and suffers headaches as a result of this accident, no report from a chiropractor has been submitted by the defendants (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]), and Dr. Zuckerman does not comment as to the necessity of the acupuncture treatments as related to the injuries claimed by the plaintiff, thus raising further factual issues.

It is noted that the defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physician's 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 [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]).

The factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy the burden of establishing, prima facie, that the 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 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, motions (001) and (002) by the defendants 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) are denied.

The foregoing constitutes the Order of this Court.

Dated: February 13, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION