SHORT FORM ORDER

COPY

INDEX No. 10-26317
CAL No. 12-01014MV

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 10-15-12
ADJ. DATE 11-16-12
Mot. Seq. # 001 - ~~MG~~ MD

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REINA SANCHEZ-VIGIL,

Plaintiff,

- against -

GERMAN RAIMUNDO NAJERA GARCIA,

Defendant.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-17 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 18-22; Replying Affidavits and supporting papers 23-24; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant, German Najera Garcia s/h/a German Raimundo Najera Garcia, for summary judgment dismissing the complaint on the basis that the plaintiff, Reina Sanchez-Vigil, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this action, the plaintiff, Reina Sanchez-Vigil, seeks damages for personal injuries sustained in a motor vehicle accident on April 3, 2009, on Suffolk Avenue, at or near its intersection with Grant Avenue, in Brentwood, New York, when the plaintiff's vehicle was struck in the rear by the vehicle operated by defendant German Najera Garcia.

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]). 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

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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 motion (001), the defendant has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, answer, and plaintiff's verified bill of particulars; uncertified

medical record from Southside Hospital emergency department; the sworn report of Dr. Michael J. Katz dated January 3, 2012 concerning his independent orthopedic examination of the plaintiff; copies of letters to defendant's counsel concerning what appears to be a review dated December 22, 2011 by Steven M. Peyser, M.D., of the MRI dated May 15, 2009 of the plaintiff's left knee, right shoulder MRI dated May 10, 2009, left shoulder MRI dated May 8, 2009, cervical spine MRI dated May 20, 2009, and lumbar spine MRI dated May 26, 2009; an unauthenticated letter of Dr. Martin dated May 30, 2009; a partial copy of plaintiff's No Fault wage verification; and a copy of the transcript of the examination before trial of the plaintiff dated October 31, 2011, accompanied by proof of service.

By way of the bill of particulars, the plaintiff alleges that as a result of this accident, the following injuries were sustained: discoid lateral miniscal tear of the posterior horn of the left knee; medial patellar subluxation of the left knee; joint effusion of the left knee; medial patellar plica of the left knee; supraspinatus impingement of the acromioclavicular arch of the left shoulder; supraspinatus impingement of the acromioclavicular arch of the right shoulder; cervical radiculopathy; and internal derangement of the right shoulder, left shoulder and left knee.

Upon review of the evidentiary submissions, it is determined that the defendant has not established prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as to either category of injury as defined by Insurance Law § 5102 (d) as the moving papers raise triable issues of fact which preclude summary judgment.

The defendant has failed to support this motion with copies of the medical records and initial test results for the MRI studies which both Dr. Katz and Dr. Peyser refer to, as well as the NCV and EMG reports of plaintiff's upper extremities, leaving it to this Court to speculate as to the contents of the records and reports reviewed. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the 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]).

Upon examination of the plaintiff, Dr. Katz indicated that the 28 year old plaintiff was out of work as a factory worker for two months due to the accident, and denied prior or subsequent accidents. Dr. Katz evaluated the plaintiff's range of motion with regard to her lumbar and cervical spine, right and left shoulders, and left knee. He has not set forth range of motion findings for lumbar rotation, raising factual issues as to whether such inspection was made. Dr. Katz' diagnosis of the plaintiff's injuries was that of cervical radiculopathy by history, resolved; left knee contusion, resolved; bilateral shoulder contusion, resolved. He added that the treatment for these injuries appears to be related to the accident. Although Dr. Katz diagnosed the plaintiff with cervical radiculopathy, no report from a neurologist who examined the plaintiff on behalf of the moving defendants has been submitted to rule out these claimed neurological/radicular injuries, which Dr. Katz refers to in his report concerning his independent orthopedic examination of the plaintiff (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issue precluding summary judgment.

Although Dr. Peyser had submitted his letters to plaintiff's counsel concerning his interpretation of the MRI reports of the plaintiff's left knee, right shoulder, left shoulder, cervical spine, and lumbar spine, he has failed to provide copies of the reports generated by the plaintiff's treating physicians who conducted said tests, thus leaving this court to speculate as to the contents of those original reports, and whether or not the findings are consistent with Dr. Peyers' opinions. It is further noted that his opinions are conclusory and unsupported by evidentiary proof or explanation for the opinions, nor has he correlated his interpretations with clinical presentation by the plaintiff.

It is further noted that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's 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 his 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 expert offers 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 plaintiff testified that as a result of the accident, she felt pain in her right shoulder, her left knee was very swollen, and her back and neck hurt as well. She was admitted overnight to Southside Hospital and administered pain medication and intravenous therapy. She treated with Dr. Martin, everyday for six months for massage therapy, hot and cold packs, and treatment with "tweezers." Thereafter, she treated twice a week for two months. She delivered a baby on October 12, 2011, and had to stop working October 1, 2011 due to the pain in her back. It is noted that Dr. Katz set forth that the plaintiff was out of work for two months following the accident. The plaintiff testified that she was out of work for two and one-half months following the accident. At the time of the accident she was working five days a week, eight hours a day inspecting and packaging cell phones. When she returned to work, she had to work the night shift as that shift did not require so many hours sitting and standing, and she could go to the doctor during the day. At work, she was not putting out the same production and could not carry the boxes that arrived. She used to go to the gym and can only exercise lightly now. She can no longer sit for the eight hours to do her job. Her husband has to do the laundry. She can no longer wear heels due to her knee injury. Her husband has to help with cleaning the bathroom, mopping, and cooking. Her husband's sister helps her to care for the baby. She denied prior or subsequent injuries to those parts of her body which she claims had been injured in the subject accident. Based upon the foregoing, there are factual issues raised in the moving papers with regard to this category of injury as well.

Based upon the foregoing, the defendant has failed to demonstrate entitlement to summary judgment on either category of injury defined in 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: 2/14/13

Hon. Denise F. Molia

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION