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SHORT FORM ORDER

INDEX No. 11-14432
CAL. No. 12-01614MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-11-12
ADJ. DATE 1-17-13
Mot. Seq. # 002 - MD

MARGARET LOPEZ, Plaintiff, - against - MATTHEW S. KNIPFING and SCOTT R. KNIPFING, Defendants.	CANNON & ACOSTA Attorney for Plaintiff 1923 New York Avenue Huntington Station, New York 11746 MARTIN FALLON & MULLÈ Attorney for Defendants 100 East Carver Street Huntington, New York 11743

Upon the following papers numbered 1 to 21 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-11; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12-21; Replying Affidavits and supporting papers ___; Other __; it is,

ORDERED that this motion (seq. #002) by the defendants Matthew S. Knipfing and Scott R. Knipfing 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, Margaret Lopez, alleges that she was involved in a three-car motor vehicle accident on June 2, 2010, on Depot Road at or near its intersection with Vondran Street, in Huntington, New York, when the plaintiff's vehicle, and the vehicle operated by defendant Matthew S. Knipfing and owned by defendant Scott R. Knipfing, came into contact following a contact between the defendants' vehicle and another car. The plaintiff alleges that as a result of this accident, she sustained serious personal injury. The passenger in the Lopez vehicle died after being admitted to a hospital for medical care and treatment after the accident.

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 defendants have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; the unsigned but certified, incomplete transcript of the examination before trial of the plaintiff; and the sworn reports of Robert Israel, M.D. dated February 7, 2012, concerning his independent orthopedic evaluation of the plaintiff, and Richard Lechtenberg, M.D. dated April 16, 2012, concerning his independent neurological examination of the plaintiff.

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*).

By way of her verified bill of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of C4-5 disc herniation with mass effect on the ventral thecal sac and foraminal encroachment; L4-5 disc herniation with thecal sac impingement and foraminal encroachment; adjustment disorder with mixed emotional features; scapholunate ligament tear in the radiocapral joint and radial styloid of the left wrist; tear of the medial meniscus of the left knee; ligamentous strain of the left thumb ulnar collateral ligament at the metacarpal phalangeal joint requiring multiple injections with Celestone Lidocaine; cervical radiculopathy; lumbar radiculopathy; C5-6 disc bulge with foraminal encroachment; L5-S1 disc bulge; tendinosis of the supraspinatus of the left shoulder; joint effusion of the left shoulder; effusion of the first carpometacarpal joint of the left wrist; tear of the distal quadriceps tendon of the left knee; chondromalacia patella of the left knee; joint effusion of the left knee; exaggerated lumbar lordosis; and loss of normal cervical lordosis. The plaintiff also claims an aggravation and/or exacerbation of any and all pre-existing and/or prior injuries and/or conditions. All the injuries are claimed to be of a permanent nature.

Upon review and careful 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 Margaret Lopez did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury.

The reports of Dr. Israel and Dr. Lechtenberg are not supported with a copy of the plaintiff's medical records and reports, including the MRIs of her left shoulder, left knee, left arm, neck and lumbar spine, 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]; ***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. 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 or introduced the same into evidence.

It is noted that although the plaintiff has alleged various herniated and bulging cervical and lumbar discs, and among other things, joint effusion of the left shoulder; effusion of the first carpometacarpal joint of the left wrist; tear of the distal quadriceps tendon of the left knee; chondromalacia patella of the left knee; joint effusion of the left knee, Dr. Israel does not rule out that these injuries were causally related to the accident. He merely set forth that the plaintiff suffered resolved sprains of the cervical spine, thoracic spine, lumbar spine, left shoulder, left wrist and left hand, left knee, left ankle and left leg. He goes on to state that the claimant has no disability, but if the history of the accident is correct, that there was a cause and effect relationship between the above diagnoses and the reported accident. The Court is left to speculate as to whether the other injuries claimed by the plaintiff are causally related to the accident, thus further precluding summary judgment.

Dr. Lechtenberg set forth that he assessed the range of motion at the joints by visual observation and goniometric measurements, as indicated by his report, however, this Court is left to speculate which range of motion findings were determined visually or by goniometric measurements. It is noted that many of the normal range of motion values set forth by Dr. Lechtenberg and Dr. Israel 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. While Dr. Lechtenberg has diagnosed the plaintiff with post cervical and lumbar spine sprains, and has set forth that she currently has no objective, clinical, neurologic deficits, that her prognosis is excellent, and that she can return to her pre-loss activity, he has not addressed the status of her claim of cervical and lumbar radiculopathy, or correlated his examination with any medical testing or examinations provided by her treating physicians.

Although the plaintiff sought psychiatric care from Dr. Benjamin Hirsh, the defendants have not submitted the report of an examining psychiatrist to rule out psychological injury as a result of this accident (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***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]).

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 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 defendants have submitted only a partial transcript of the plaintiff's examination before trial. Based upon the incomplete testimony, it appears that two other vehicles came into contact, and thereafter, the Knipfing vehicle struck the plaintiff's vehicle causing the plaintiff's vehicle to strike a telephone pole. Based upon the incomplete testimony, Ann Crispin, a passenger in plaintiff's vehicle, died as a result of injuries sustained in this accident. Due to the incomplete transcript, this Court is left to speculate as to the entirety of the plaintiff's testimony, and why pages were omitted, raising factual issues which preclude summary judgment.

At her deposition, the plaintiff testified that she lost consciousness after her car impacted the telephone pole. As a result of the accident, she felt pain in her back, left shoulder, left neck left knee, left wrist, left thumb, and "spinal." She was advised by Dr. Sebastian after the accident that she needed spinal surgery, but could not have it as she was taking Plavix due to her prior surgery and medical condition wherein, in December, 2009, she had heart surgery. The epidural injections into her spine for the pain, as recommended by her doctor, were also contraindicated for this same reason. She treated with Dr. Burma, a chiropractor, up to five days a week for over three months due to the pain in her back, because she couldn't have the epidural injections. She had to stop treatment with Dr. Burma due to the pain. Dr. Berkowitz

treated her injury to her knee and shoulder. She had to wear a splint on her thumb for a year following the accident and was advised that she needed surgery to both her knee and shoulder, however, she could not have that surgery because her cardiologist would not permit it due to her taking Plavix and the contraindications associated therewith. Because she could not have surgery, she began treating for six months with Dr. Benjamin Hirsh, a psychiatrist, to help her heal. She had been out of work for six months after her heart surgery, and planned to return to work in June, 2010. Although she had been called by the agency she had been working to take care of hospice patients in June 2010, she was unable to return to work until nine months after the accident, and returned four hours a day working with end-stage patients.

The factual issues raised in defendants' moving papers preclude summary judgment. The defendants have 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 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, this motion 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) is denied.

Dated: February 27, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**