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SHORT FORM ORDER

COPY

INDEX No. 10-22820
CAL No. 12-00786MV

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 9-7-12
ADJ. DATE 11-30-12
Mot. Seq. # 001 - MG; CASEDISP

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JESSICA JEAN BAPTISTE,

Plaintiff,

- against -

WILLY MATHIEU and RICO MATHIEU,

Defendants.

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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 1 - 13 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14 - 19 ; Replying Affidavits and supporting papers 20 - 21 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the defendants Willy Mathieu and Rico Mathieu seeking summary judgment dismissing plaintiff's complaint is granted.

Plaintiff Jessica Jean Baptiste commenced this action to recover damages for injuries she allegedly sustained in a motor vehicle accident that occurred at the intersection of Straight Path Road and Hilltop Drive in the Town of Babylon on March 28, 2009. It is alleged that the accident occurred when the vehicle operated by defendant Willy Mathieu and owned by defendant Rico Mathieu struck the rear of the preceding vehicle, which was stopped at a red light on Straight Path Road. When the accident occurred plaintiff was a front seat passenger in the Mathieu vehicle. By her bill of particulars, plaintiff alleges that she sustained various personal injuries, including a disc herniation at level L4-L5, a disc bulge at level C4-C5, cervical and lumbar radiculopathy, and straightening of normal cervical lordosis. Plaintiff further alleges that as a result of the injuries she sustained in the subject collision she was confined to her home and bed for approximately two days.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries fail to meet the "serious injury" threshold requirement of § 5102(d) of the Insurance Law. In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's hospital records, and the affirmed medical reports of Dr. Michael Katz and Dr. Alan Greenfield. At defendants' request, Dr. Katz conducted an independent orthopedic examination of plaintiff on January 17,

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2012. Also, at defendants' request, Dr. Greenfield performed independent radiological reviews of the magnetic resonance images ("MRI") films of plaintiff's cervical spine and left shoulder performed on May 19, 2009.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Here, defendants, through the submission of plaintiff's deposition transcript and their medical evidence, established their prima face burden that plaintiff did not sustain an injury within the meaning of § 5102(d) of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendants' examining orthopedist, Dr. Katz, used a goniometer to test plaintiff's ranges of motion in her spine, shoulders and right wrist, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009];

***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Katz states in his medical report that an examination of plaintiff reveals she has full range of motion in her spine, shoulders and right wrist. Dr. Katz states that there is no muscle spasm or tenderness upon palpation of plaintiff's paraspinal muscles, and that there is no swelling, erythema or induration in her shoulders or right wrist. Dr. Katz states that the straight leg raising test is negative, that plaintiff's gait is normal, that she has full sensation and motor strength, and that no gross deformities are observed in her spine, shoulders or right wrist. Dr. Katz opines that the spinal radiculopathy and left shoulder contusion that plaintiff sustained as a result of the accident have resolved. Dr. Katz concludes that plaintiff's examination did not reveal any signs or symptoms of "permanence relative to [her] musculosketal system" or the subject accident, and that she is not disabled and is capable of performing her daily living activities without restrictions.

In addition, defendants' examining radiologist, Dr. Greenfield, states in his report that the finding of straightening of the cervical lordosis is a "non-specific finding" and is not attributable to the subject accident. Dr. Greenfield states that there is mild degenerative changes in plaintiff's cervical spine and left shoulder, which is a pre-existing condition, and that the fluid observed in the synovial sheath of her left biceps tendon in her left shoulder is consistent with synovitis, which is a "non-specific finding," and is not causally related to the accident. Dr. Greenfield states that his review of the MRIs of plaintiff's cervical spine and left shoulder did not reveal any findings that can be attributed to the subject collision.

Furthermore, plaintiff's deposition testimony demonstrates that "substantially all" of her daily activities were not curtailed (*see e.g.* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Kolodziej v Savarese***. 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]). Plaintiff, who was a junior in high school at the time of the accident, testified that she missed approximately one week from school, that she did not participate in gym class, and that she was unable to stand for long periods of time while working at Adventureland. However, plaintiff testified that she had "partial gym," because she attended a medical assisting course in the morning, that she was able to run and play softball during gym class, and that she was never informed by a medical doctor to not participate in gym class. Therefore, plaintiff's claims only indicate a slight curtailment of her daily activities, which is not sufficient to establish a serious injury within the 90/180 category (*see* ***Licari v Elliott***, *supra*; ***Siew Hwee Lim v Dan Dan Tr., Inc.***, 84 AD3d 1213, 923 NYS2d 677 [2d Dept 2011]).

Defendants, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent,

percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden and that her evidence in opposition demonstrates that she sustained an injury within the "limitations of use" categories and the "90/180" category as a result of the subject accident. In opposition to the motion, plaintiff submits the medical reports of Dr. Mark Shapiro and Dr. Sima Anand.

In opposition, plaintiff has failed to raise a triable issue of fact as to whether she sustained a serious injury within the limitations of use categories or the 90/180 category of the Insurance Law (***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]). Dr. Shapiro states, among other things, in his medical report that plaintiff has a disc herniation in her lumbar spine, a disc bulge in her cervical spine, and fluid within the biceps tendon sheath. However, Dr. Shapiro did not opine as to causation regarding his radiological findings, nor did he address the findings of degenerative change by defendants' expert and, as such, his report is insufficient to rebut defendants' prima facie case (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [1st Dept 2009]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]). Further, a herniated or bulging disc, by itself, is insufficient to constitute a serious injury; rather, to constitute an injury, a herniated or bulging disc must be accompanied by objective evidence of the extent of the alleged physical limitations resulting from the herniated or bulging disc (*see* ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]).

While Dr. Anand's medical report states that plaintiff's losses in range of motion in her spine and shoulders are causally related to the subject accident, he also failed to refute defendants' evidence that plaintiff suffers from a pre-existing degenerative condition in her spine (*see* ***Knoll v Seafood Express***, 5 NY3d 817, 803 NYS2d 25 [2005]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; *cf.* ***Perl v Meher***, *supra*; ***Synder v Rivera***, 98 AD3d 1104, 951 NYS2d 233 [2d Dept 2012]). In addition, Dr. Anand did not provide any qualitative assessment of plaintiff condition since he failed to compare plaintiff's limitations in her spine "to the normal function, purpose, and use of" that affected region (***Fiorillo v Arriaza***, 52 AD3d 465, 466, 859 NYS2d 699 [2d Dept 2008], *quoting* ***Toure v Avis Rent A Car***, *supra* at 350). Indeed, Dr. Anand did not provide any range of motion testing of plaintiff's left shoulder (*see* ***Simanovskiy v Barbaro***, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; ***Duke v Saurelis***, 41 AD3d 770, 840 NYS2d 88 [2d Dept 2007]). Moreover, Dr. Anand's affirmation, while stating that plaintiff had restrictions in her range of motion in her cervical and lumbar regions, and in her shoulders, contemporaneous with the accident and during her recent examination on October 3, 2012, he failed to account for her cessation of medical treatment (*see* ***Pommells v Perez***, *supra*; ***Islam v Apjeet Singh Makkar***, 95 AD3d 1277, 944 NYS2d 897 [2d Dept 2012]; ***Ning Wang v Harget Cab Corp.***, 47 AD3d 777, 850 NYS2d 537

[2d Dept 2008]; *cf.* ***David v Caceres***, 96 AD2d 990, 947 NYS2d 159 [2d Dept 2012]). No evidence has been submitted by plaintiff that she underwent medical treatment during said time period and there has been no explanation provided as to why none was appropriate (*see* ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]; ***Strok v Chez***, 57 AD3d 887, 869 NYS2d 345 [2d Dept 2008]; ***Wei-San Hsu v Briscoe Protective Sys.,*** 43 AD3d 916, 842 NYS2d 455 [2d Dept 2007]). Evidence of complaints of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Young v Russell***, 19 AD3d 688, 798 NYS2d 101 [2d Dept 2005]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Thus, plaintiff's medical evidence fails to demonstrate that she sustained an injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Larrabee v Bradshaw***, 96 AD3d 1257, 947 NYS2d 659 [3d Dept 2012]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: 2/26/13

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

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