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SHORT FORM ORDER

COPY

INDEX No. 11-32379
CAL No. 12-01377MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 12-14-12
ADJ. DATE 2-1-13
Mot. Seq. # 001 - MD

---X

MYRIANTHI AKAPNITIS,

Plaintiff,

- against -

HELMER BECK,

Defendant.

---X

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Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 13-16; Replying Affidavits and supporting papers 17-18; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendant, Helmer Beck, pursuant to 3212 dismissing the plaintiff's complaint on the basis that the plaintiff, Myrianthi Akapnitis, has not sustained a serious injury as defined by Insurance Law § 5102 is denied.

In this action, the plaintiff, Myrianthi Akapnitis, seeks damages for serious injuries alleged to have been sustained on December 2, 2008, at approximately 5:30 p.m., on Broadway at or near the intersection with Delamere Street, in Huntington, New York, when the vehicle operated by Myrianthi Akapnitis, and the vehicle owned and operated by defendant Helmer Beck 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

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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]).

Motion (001) by defendant Beck is supported by, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; uncertified, unidentified copy of plaintiff's emergency room record dated December 2, 2008; a copy of the transcript of the examination of plaintiff dated March 27, 2012; and the sworn reports of Michael J. Katz, M.D. dated May 1, 2012 concerning his independent orthopedic examination of the plaintiff, and Sondra J. Pfeffer, M.D. dated May 21, 2012 concerning her radiological review of the CD-Rom for the MRI studies of the plaintiff's cervical spine of February 6, 2009, and lumbar spine dated December 6, 2010.

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 the verified bill of particulars, the plaintiff alleges that as a result of this subject accident, the following injuries have been sustained: focal disc herniation at C5-6 indenting the thecal sac; post- traumatic cervical and lumbar sprain/strain; severe sprain/strain of the cervical spine with loss of range of motion; severe sprain/strain of the lumbar spine with loss of range of motion; and post-traumatic headaches.

Based upon a review of the evidentiary submissions, it is determined that the moving defendant has not demonstrated prima facie entitlement to summary judgment dismissing the complaint on either category of injury defined by Insurance Law § 5102 (d). The moving papers raise factual issues which preclude summary judgment.

The defendant has not submitted copies of all the medical records and reports, as required pursuant to CPLR 3212, inclusive of the CT scans of plaintiff's brain and abdomen, MRI reports of the plaintiff's cervical and lumbar spine, x-rays, and narrative report of Nunzio Saulle, M.D., which Dr. Katz reviewed in forming his opinion. 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]).

Although the plaintiff has pleaded that she sustained post-traumatic headaches as a result of the subject accident, no report concerning an independent neurological examination of the plaintiff by a neurologist has been submitted by the defendants (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issues and leaving this court to speculate as to whether these headaches are related to the accident. Dr. Katz set forth in his report that the plaintiff's injuries of cervical and lumbar spine with radiculitis have resolved, but no neurology report concerning radiculitis has been submitted. Additionally, Dr. Katz does not comment on the plaintiff's claims of focal disc herniation at C5-6 indenting the thecal sac, leaving this court to speculate as to his opinion relating to proximate cause, duration, and prognosis.

Dr. Pfeffer set forth in her report concerning her radiological review of the MRI CD-ROMs of the plaintiff's cervical spine that there is multi-level disc desiccation indicative of pre-existing degenerative disc disease from C2-3 to C5-6, inclusive of posterior disc bulge at C2-3, minimal circumferential disc bulging at C3-4, minor circumferential disc bulging with anterior endplate spurring at C4-5, minor anterior disc bulging with anterior endplate spurring and posterior disc herniation slightly eccentric to the left of midline, and equivocal posterior disc bulging at C6-7. Dr. Pfeffer failed to submit the MRI reports concerning the interpretation of the MRI studies by the plaintiff's treating physician, and fails to correlate clinical presentation of the plaintiff's complaints and symptoms with such findings. Nor does she provide measurements as to what she defines as "minimal bulging." Her report is conclusory and she does not set

forth the duration of what she considers degenerative disc disease, or its origin, causing the court to speculate as to duration and causation of these injuries, precluding summary judgment. Although Dr. Pfeffer stated that the cervical disc disease, as set forth, is of "indeterminate age/etiology" based solely on MRI criteria, she continued that it is clearly unrelated to the subject accident. If the age and etiology are indeterminate, her opinion relating to causation raises factual issues precluding summary judgment. It is also noted that the original MRI report generated with the MRI of plaintiff's cervical spine on February 6, 2009, submitted by the plaintiff, reveals solely small focal central disc herniation at the C5-6 level only, without reference to any other degenerative changes in the cervical spine as diagnosed by Dr. Pfeffer, raising factual issues concerning the inconsistency of the treating radiologist's interpretation of the MRI, and Dr. Pfeffer's interpretation.

Concerning the MRI review of the study of the plaintiff's lumbar spine, Dr. Pfeffer set forth that there is subtle disc desiccation at L3-4 which she opined is early degenerative disc disease, with subtle disc desiccation at L3-4, L4-5, and L5-S1, with minor posterior disc bulging at L5-S1. She continued that the findings are of indeterminate age/etiology based on MRI criteria and that it would be difficult, if not impossible, to reliably attribute such findings to the accident. However, she does not clinically correlate her opinion and findings to the plaintiff's history and onset, and does not rule out the possibility that such findings are not related to the subject accident. Nor does she provide a copy of the original MRI report for this court to compare with her opinions. Such conclusory and unsupported opinions raise factual issues which preclude summary judgment.

The defendant's experts have offered no opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of ninety days in the 180 days following the accident, and they did not examine the plaintiff during that statutory period (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]; ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]; ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]). The thirty-five year old married plaintiff, mother of three children, ages eight and four year old twins, testified that immediately following the accident she suffered pain in her neck, her head and left shoulder. She also developed pain in her back and right shoulder. Upon completion of the MRI studies, she was advised that she had a tear in her cervical disc, for which she was sent for physical therapy two to three times a week for six months. She also received epidural injections into her lower back. She had nerve testing for her upper and lower extremities, revealing carpal tunnel syndrome on the right. She continues to experience pain in her neck, right wrist, legs, and back, on a daily basis, along with numbness in her legs. She finds walking painful. She testified that prior to the accident, she could do laundry, clean house, grocery shop, and play with her children, and that it is now difficult to do the same as she cannot bend or kneel, or run. She has difficulty carrying a laundry basket or vacuuming. She was not involved in any prior or subsequent accidents wherein she injured those parts of her body which she claims were injured in the subject accident.

Inasmuch as the moving parties have failed to establish their 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) as to either category of injury, 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]) as the burden has not shifted.

Accordingly, motion (001) by the defendant for summary judgment dismissing the complaint is denied.

Dated: 3-6-13

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION