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SHORT FORM ORDER

INDEX No. 08-7502
CAL No. 10-02286MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 3-30-11
ADJ. DATE 7-27-11
Mot. Seq. # 002 - MD

----------X

DOREEN GLUCK,

Plaintiff,

- against -

LARA PETTIT BREINGAN,

Defendant.

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 12 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13-31; Replying Affidavits and supporting papers 22-23 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendant, Lara Pettit Breingan, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Doreen Gluck, has failed to sustain a serious injury as defined by Insurance Law §5102(d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Doreen Gluck, on August 4, 2006, on New York Avenue at its intersection with Main Street, Huntington, New York, when the defendant's vehicle struck plaintiff's vehicle in the rear.

The plaintiff claims in her bill of particulars that as a result of the within accident she sustained cervical radiculopathy; lumbosacral radiculopathy; anti-phospholipid antibody syndrome; acute C6-7 bilateral radiculopathy; left sided disc herniation at T8-9 resulting in left-sided cord flattening; L2-3 right parasagittal focal disc bulging indenting the thecal sac; eccentric disc bulging toward the right; L5-S1 disc bulging and endplate ridging and central posterior superimposed disc herniation; central disc herniation causing severe stenosis at the C4-5 level; large annular tearing and herniation at C5-6 causing moderate stenosis and worsening right foraminal narrowing at C6-7; multilevel herniation at C4-5; straightening of cervical lordosis; prominent central, right-sided herniation at C4-5; central herniation at C4-5 with cord compression and mild central canal stenosis; supraspinatus tendinopathy in combination with acromioclavicular arthrosis, bursitis and bicipital tensosynovitis consistent with impingement; scarring of the anterior capsule with derangement of anterior labrum above equator; bilateral cerebellar lacunes; head trauma with closed head injury; microvascular change; ischemia to the right cerebellar hemisphere and to a lesser extent to the left; microvascular ischemic changes toward the vertex bilaterally; burning sensation and numbness in both arms; and difficulty sleeping.

CR

The defendant now seeks summary judgment dismissing the complaint on the basis that plaintiff's claimed injuries fail to meet the threshold imposed by Insurance Law §5102(d).

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 [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 [1992]). Once 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 [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 [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 [1990]).

In order to recover under the "permanent loss of use" category, 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 defendant has submitted, inter alia, an attorney's affirmation; a copy of the pleadings and the plaintiff's verified bill of particulars; a copy of the transcript of the examination before trial of Doreen Tamara Gluck dated June 30, 2009; a copy of the MV 104 Police Accident Report; and copies of the reports for the independent neurological examination performed by Howard B. Reiser, M.D., dated September 10, 2010, and the independent orthopedic examination by David J. Weissberg, M.D. dated October 19, 2010; and the medical records of Paul Alongi, M.D. Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see* ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

Doreen Gluck testified to the effect that she had been working, but went out on disability in June 2006, prior to the accident, as she had a problem with her neck due to herniated discs. She woke up one morning not being able to move very well. She received short-term disability through her job, and thereafter returned to work. After the accident of August 4, 2006, she was unable to return to work and began receiving long-term Social Security/Disability payments due to herniated discs in her neck and back and due to medical problems. She further testified that the decision from Social Security was based in part on the accident of August 4, 2006.

She continued that the accident of August 4, 2006 exacerbated the herniated discs in her neck and back. Since the accident, she has had increasing symptoms, and experienced additional pain, in her neck and back, neuropathy in her legs, tingling, pain and numbness in her arms, hands, wrists and forearms, and further experiences more migraines. In addition, she had less range of motion in her neck and back, and she had shoulder pain. She also testified that the vertigo and migraines which she experienced prior to the accident became worse. Since the accident, she suffers headaches all the time, but all the headaches do not become migraines. She suffers about four migraines a month. Her migraines tend to be worse when her neck and back are bothering her. The pain she experiences in her back involves the lower, middle and upper back. It was not chronic prior to the accident but became so after the accident. Now she experiences pain all the time. Although, it was recommended by the doctor at Long Island Spine Care that she undergo surgery, she has not done so due to medical conditions including a clotting disorder, migraines, TIA's, and vertigo. Prior to the accident, she had never been advised to have surgery for her neck or back. After the accident, she had pain in her left knee and experienced a torn meniscus. She did not know if it was caused by the accident.

She continued that the cause of her clotting problem has not been determined. She does not relate the clotting disorder, antiphospholipid syndrome, the matter involving her brain, microvascular changes or bilateral cerebral lacunas, to the accident. Prior to the accident, she had been misdiagnosed as having lupus, but actually had sarcoidosis, an autoimmune disease which is usually treated by a rheumatologist. When she is placed on prednisone, it helps to a minimal degree with the pain associated with muscle aches, but it does not alleviate the problems she experiences with her neck and back. Ms. Gluck testified that she has constant pain now as a result of this accident, and she can no longer work. At times her sister has to wipe her feet and put on her socks for her because she cannot bend. At times she cannot pull her pants down fast enough to go to the bathroom and soils herself. She does not have the control. Sometimes she is unable to get out of bed. Either she can only sleep for about two hours without waking up from pain, or she cannot fall asleep at all due to the pain

Howard D. Reiser has set forth in his affirmed report that he performed a neurological examination of the plaintiff relating to the injuries claimed in the accident of August 4, 2006 when her vehicle was struck in the rear by the defendant's vehicle. Dr. Reiser states that plaintiff continues to experience symptoms including

severe pain in the posterior neck and upper back as well as limitation of motion in these regions; and she states she has numbness in both hands, and cannot stay in one position for too long as it preciptates neck and back symptoms. Dr. Reiser continues that plaintiff was diagnosed with sarcoidosis, a clotting disorder (anitcardiolipin, antibodoy/antiphospholipid antibody), transient blindness in her right eye from the clotting disorder, migraines, vertigo, and hearing loss. He continues that she had been out of work prior to the accident because of neck symptoms which worsened after the accident. She has not returned to work.

Dr. Reiser has set forth the many physician reports and MRI reports which he reviewed, including the findings on those MRI reports both prior to and following the accident; post-accident EMG and Nerve Conduction studies, none of which have been provided to this court as required pursuant to CPLR 3212 and ***Friends of Animals v Associated Fur Mfrs***. *supra*. Upon his review of the same, his impression is that Ms. Gluck presents with ongoing subjective symptoms, including severe pain in the posterior neck and upper back regions associated with limited motion, and that she reports numbness of both hands, and lately has facial pain and nasal congestion. Dr. Reiser states that his neurological examination reveals no objective deficits, but continues that the reflexes in her lower extremities are hypoactive to absent. He opines that this is not an indication of trauma and may be related to her complex medical history. However, he does not set forth the basis for his conclusion that the hypoactive to absent reflexes in the lower extremities are not an indication of trauma.

Although Dr. Reiser acknowledges that Ms. Gluck presents with posterior neck and upper back limitation of motion and pain, Dr. Reiser has not set forth that he conducted any range of motion testing on the plaintiff's neck and back demonstrating that there is no objective finding of limitation of motion in these regions, thus leaving it to this court to speculate concerning the same.

Dr. Reiser states that he finds no objective neurological disorder caused or exacerbated by the accident, although he acknowledges that the EMG and Nerve Conduction Study report of October 16, 2006 includes an impression of bilateral acute C6-7 radiculopathy. Dr. Reiser does not rule out the causation of radiculopathy from the within accident, and sets forth that there were "some test results which were reported to have shown possible neurological involvement" such as acute bilateral C6-C7 radiculopathy. However, he states, he found no "objective deficit" to suggest ongoing cervical radiculopathy. Dr. Reiser does not set forth what those objective deficits would be and whether or not he conducted such testing. Importantly, he does not comment on why the EMG/Nerve Conduction Study does not serve as an objective test for making a determination regarding radiculopathy, leaving it to this court to speculate as whether or not the report is correct, and upon what Dr. Reiser's opinion is based. Dr. Reiser states that cranial nerve examination reveals no abnormality and that all cranial nerves are normal, however, he has not set forth the objective method employed to perform such testing.

Although Dr. Reiser sets forth that the MRI report of the plaintiff's thoracic spine dated September 13, 2006 indicates a left sided disc herniation at T8-T9, with minimal left-sided cord flattening, as well as multilevel degenerative changes, he does not opine that this finding was not proximately caused by the accident, and instead, does not comment on this MRI finding. It is noted that when Dr. Weissberg commented on the MRI report, he also noted that there were degenerative changes at T5-6 and T6-7, on which Dr. Reiser does not comment. Although Dr. Reiser set forth that the MRI report of the plaintiff's lumbar spine dated February 2, 2004 includes an impression of central herniation at L3-4 as well as central and right paracentral herniation at L4-5, Dr. Reiser fails to address the findings of the post-accident MRI of November 14, 2006 which reveals right parasagittal herniation at L3-4, as well as multilevel degenerative changes, and an additional central posterior herniation at L5-S1. He does not comment on the difference in the reported MRI findings post-accident, leaving it to this court to speculate as to causation. Dr. Reiser states that "[i]t is also of note that MRI

scans of the brain, cervical spine and lumbar spines have been performed subsequent to the incident of August 4, 2006. No new findings of neurological significance have been identified. MRI of the thoracic spine was said to reveal herniation and cord flattening, as well as multilivel degenerative changes. However, there is no ongoing symptom or objective deficit to correlate with the report of the thoracic spine MRI." Thus, the court is left to speculate concerning the findings of the EMG/Nerve Conduction Study and Dr. Reiser's opinion that there were no objective findings. He does not indicate how those objective findings would be determined and if he indeed performed such objective testing, such as range of motion testing.

David J. Weissberg, M.D. states that he performed an orthopedic examination on the plaintiff. He sets forth her past medical history and the records, reports, and diagnostic studies which he reviewed. Dr. Weissberg states that he performed range of motion testing aided by the use of a goniometer, and strength testing in the upper extremities aided by the use of a dynamometer. Dr. Weissberg examined the plaintiff's cervical and lumbar range of motion and compared the findings to the normal range of motion. However, he excluded lateral right and left cervical and lumbar extension measurements, leaving it to this court to speculate as to the respective ranges of motion. Dr. Weissberg examined the plaintiff's shoulder range of motion for forward flexion, but has not reported on the plaintiff's abduction and adduction. These omissions leave it to the court to speculate as to those measurements, thus precluding summary judgment.

Dr. Weissberg states that if the history of the accident is correct, that the plaintiff's diagnosis is status post-accident cervical and shoulder sprains as well as possible lumbar sprain following the motor vehicle accident, which sprains have completely resolved. He continues that all the symptoms the claimant is currently suffering from are related to pre-existing spinal pathology, and a complex medical history, which includes multiple rheumatological disorders, including sarcoidosis and fibromyalgia, which are responsible for her ongoing symptomotology. However, Dr. Weissberg does not comment on the post-accident MRI finding of a herniated disc at T8-9 with minimal left-sided cord flattening, and mild degenerative changes at T5-6 and T6-7, and the post-accident MRI of November 14, 2006 which reveals right parasagittal herniation at L3-4, as well as multilevel degenerative changes, and an additional central posterior herniation at L5-S1 not demonstrated prior to the accident. Dr. Weissberg does not state that he reviewed any of the pre-accident testing reports and findings, or that he compared the post-accident reports and findings to them, thus leaving it to the court to speculate as to how he arrived at his opinions and conclusions. Dr. Weisberg does not rule out that these additional findings of herniated discs, diagnosed after the accident, were not caused by the within accident.

Additionally, the defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether either 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, and the physicians do not offer an opinion that the plaintiff was able to substantially perform pursuant to the statute during this statutory period (***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]).

Based upon the foregoing, it is determined that the defendant failed to establish her prima facie entitlement to summary judgment dismissing the complaint on the issue of whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) as Dr. Weissberg's and Dr. Reiser's reports raise factual issues which preclude summary judgment.

To prevail on the motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see* ***Toure v Avis Renta A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197; ***Gaddy v Eyler,*** 79 NY2d 955, 582 NYS2d 990 [1992]. Here, the defendant failed to satisfy that burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 33 AD3d 737, 822 NYS2d 766 [2d Dept 2006]; *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).

Inasmuch as the defendant failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the ground that the plaintiff did not sustain a "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,*** 833 NYS2d 406, NY Slip Op 03885 [2d Dept 2007]***; Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted to the plaintiff.

Accordingly, motion (002) by the defendant for dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined in Insurance Law §5102(d) is denied.

Dated: SEP 1 2 2011

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION