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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE** IAS PART 14

_____X

BARBARA G. BRENNAN,

Plaintiff,

-against-

Index No.: 013349/05
Motion Sequence...01
Motion Date...11/15/11
**XXX**

ALBERT J. ALAGNA and AJA HOME IMPROVEMENT, INC.,

Defendants.

_____X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the Defendant, Albert J. Alagna's ("Alagna") motion seeking an order granting him summary judgment, pursuant to CPLR § 3212 and dismissing the complaint of the Plaintiff, Barbara G. Brennan ("Brennan"), on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), is determined as hereinafter provided.

This action arises out of a motor vehicle accident that occurred on September 15, 2002 at approximately 5:15 p.m. at the intersection of Carman Avenue and Choir Lane

in the Town of Hempstead, New York.

At the outset, the Court must first determine the timeliness of the Defendant's motion. This case was initially certified ready for trial on March 22, 2010. The Certification Order stated that motions for summary judgment must be filed within sixty (60) days of the filing of the Note of Issue. (*See* Certification Order, dated March 22, 2010, attached to the Plaintiff's Affirmation in Opposition as Exhibit "A") The Note of Issue was subsequently filed on June 11, 2010. (*See* Note of Issue, dated June 11, 2010, attached to the Plaintiff's Affirmation in Opposition as Exhibit "B") Although the Defendant was required to file his motion for summary judgment by August 10, 2010, the Endorsement Cover Page from the Nassau County Clerk's Office reveals that the motion was not filed until September 10, 2010. Based on the untimeliness of the Defendant's motion, the Plaintiff's counsel urges this Court to deny the motion.

On January 31, 2011, the Calendar Control Part Justice vacated the Note of Issue filed on June 11, 2010 and restored the matter to the Trial Re-certification Part pursuant to Part 22 NYCRR 202.21(e). The Defendant's counsel argues that the issue of untimeliness is moot as vacatur of the Note of Issue starts anew the time in which the Defendant may file a motion for summary judgment.

On the same date that this motion was fully submitted, the case was re-certified as ready for trial. The Re-Certification Order, signed by all counsel and the Hon. R. Bruce Cozzens, Jr., states that motions for summary judgment must be filed within 60 days of the

filing of the Note of Issue. A new Note of Issue was filed by the Plaintiff on February 7, 2012. In light of the fact that the Defendant now has until April 9, 2012 to file a motion for summary judgment, the Court finds that the Plaintiff's argument regarding the timeliness of the Defendant's motion has now been rendered moot. Denial of the Defendant's motion based on untimeliness at this juncture would not be in the interest of judicial economy as the Defendant essentially has another opportunity to file the same motion. As such, the Court will consider the merits of the Defendant's motion.

The Plaintiff, Barbara G. Brennan, claims that she sustained, *inter alia*, the following serious injuries as a result of the motor vehicle accident on September 15, 2002: Grade III going on Grade IV spondylolisthesis at L4/L5 and L5/S1 with diffuse unroofing of the disc at the L5/S1 level; spondylolysis at L4/L5 and L5/S1; narrowing of the neural foramina bilaterally at L4 / L5 and L5 / S1 with impingement upon the exiting L5 nerve roots resulting in chronic L5 radiculopathy of the left lower extremity; chronic lower motor neuron dysfunction in the L5 innervated muscles; truncal instability and the possibility of paralysis and consequent future need for lumbar surgery in the event of further deterioration of the L4/L5 and L5/S1 interspace; lumbar derangement; chronic bilateral lumbar pain; lumbar pain aggravated by movement or prolonged periods of sitting, standing or walking; restriction in flexion and extension of the lumbar spine; intense spasm and tenderness of the lumbar spinal muscles; cervical radiculitis, thoracic subluxation and thoracic nerve root compression. (*See* Bill of Particulars, ¶ 5, attached to the Defendant's Notice of Motion as Exhibit "B")

At her oral examination before trial, the Plaintiff testified that she had a pre-existing injury to her lower back from another car accident in 1988 (*See* EBT Transcript at pp. 55-6, attached to the Defendant's Notice of Motion as Exhibit "C") After being treated for the injuries from that accident, the Plaintiff continued treating with a chiropractor for occasional discomfort to her back, "as needed," rather than having a set schedule of appointments (*Id.* at p. 40) Following the subject accident, it was suggested by multiple doctors that the Plaintiff undergo surgery and/or physical therapy, but she declined and chose to continue seeing the chiropractor instead. (*Id.* at pp. 45, 47) The Plaintiff also declined pain medication immediately following the accident, preferring over the counter medication (*Id.* at p. 46). The Plaintiff's visits with the chiropractor are currently on an "as needed" basis, like before the accident, where she would call and schedule an appointment if she was experiencing more pain. (*Id.* at pp. 48-9) A period of more frequent visits occurred following the subject accident, though it is unclear how long this period lasted until the appointments returned to an "as needed" basis.

The Plaintiff stated that, as a result of the subject accident, she was confined to her home and bed for about a week. (*Id.* at p. 59). At the time of the accident, the Plaintiff was working as a sales representative, mostly on the road. (*Id.* at p. 50) The accident caused the Plaintiff to miss around a week and a half of work, and upon returning, she worked in the office rather than on the road for a couple of weeks, for the same salary but potentially costing her some commission pay. (*Id.* at 50) The Plaintiff was eventually able to return to

her work on the road, but sometimes needed someone to join her to help carrying things into and out of the car. (*See* EBT Transcript at pp. 55-6, attached to the Defendant's Notice of Motion as Exhibit "C") The Plaintiff has since begun working at a new job, at which she stated she had no limitations. (*Id.* at p. 53)

Following the accident, Plaintiff testified to having trouble bending over, walking long distances, participating in her children's activities, dancing, hiking and brushing her teeth. (*Id.* at 61-62) Plaintiff claimed that she had some occasional discomfort in her back prior to the subject accident, and that the accident exacerbated that pain into a chronic condition. (*Id.* at p. 62)

The Plaintiff, who was 38-years-old at the time of the subject accident, claims that her injuries fall within the following three categories of the serious injury statute: to wit, permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and 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. (*See* Bill of Particulars, ¶ 21)

The Plaintiff's claims that her injuries satisfy the 90/180 category of Insurance Law § 5102 (d) are unsupported and contradicted by her own testimony wherein she states that she only missed a week and a half of work and was confined to her home or bed for one

week. Additionally, the Plaintiff does not provide any evidence that she was "medically" impaired from doing any daily activities as a result of this accident for 90 days within the first 180 days following the subject accident. Other than being unable to participate in hobbies including dancing and hiking, there is nothing she can no longer do, as a result of the subject accident. Thus, this Court determines that the Plaintiff has effectively abandoned her 90/180 claim for purposes of the Defendant's initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc. 3d 743 (Sup. Ct. Nassau 2007).

Accordingly, this Court will restrict its analysis to the remaining two categories as it pertains to the Plaintiff; to wit, "permanent consequential limitation of use of a body organ or member;" and "significant limitation of use of a body function or system."

Under the no-fault statute, to meet the threshold for significant limitation of use of a body function or system or permanent consequential limitation of use of a body organ or member, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. (*Gaddy v. Eyler*, 79 N.Y.2d 955 (1992); *Scheer v. Koubeck*, 70 N.Y.2d 678 (1987); *Licari v. Elliot*, 57 N.Y.2d 230 (1982). A minor, mild or slight limitation is deemed "insignificant" within the meaning of the statute. (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 A.D.2d 79, 83 (2d Dept. 2000).

When, as in the instant case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use

of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of the plaintiff's loss of range of motion is acceptable. (*Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345, 353 (2002). Additionally, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id*).

Recently, the Court of Appeals held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v. Meher*, 2011 N.Y. Slip Op. 08452 [2011]).

With these guidelines, the Court now turns to the merits of the Defendant's motion.

In support of his motion, the Defendant relies on the Plaintiff's deposition testimony; the unsworn Plaintiff's x-ray report from Nassau County Medical Center documenting her visit following the September 15, 2002 accident; the affirmation of Dr. Robert Israel, an orthopedist who performed an independent neurological examination of the Plaintiff on April 23, 2010; and the affirmation of Dr. Steven Ender, a neurologist who performed an independent medical examination of the Plaintiff on February 25, 2010.

Based upon the foregoing evidence, the Court finds that the Defendant has

established his prima facie entitlement to judgment as a matter of law.

Specifically, Dr. Steven Ender examined the Plaintiff, performed quantified range of motion testing on her cervical spine and lumbar spine with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal. Based on his clinical findings and review of the medical records, Dr. Ender concluded that the Plaintiff can continue working and performing current activities of daily living. *Staff v. Yshua*, 59 A.D.3d 614 (2d Dept. 2009); *Cantave v. Gelle*, 60 A.D.3d 988 (2d Dept. 2009).

Having made a prima facie showing that the injured Plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the Plaintiff to come forward with evidence to overcome the Defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained. (*Pommels v. Perez*, 4 N.Y.3d 566 (2005); *see also Grossman v. Wright*, supra).

In opposition, the Plaintiff relies on the unsworn ambulance report from the day of the accident, September 15, 2002, and the unsworn emergency room records as produced in the days following the accident; the unsworn medical records of Dr. Alexandre de Moura, a physician, from Plaintiff's visits on April 7, 2004 and April 15, 2004; the unsworn medical records of Dr. Thomas Mauri, an orthopedist, from visits in October of 2006 and April of 2008; the unsworn medical records of Dr. Vincent Leone, a radiologist, detailing the Plaintiff's four visits throughout 2004; and the sworn statement of Dr. Alexandre de Moura

from an October 13, 2011 examination of the Plaintiff.

The Plaintiff's proof is wholly insufficient to present a triable issue of fact herein.

First, the ambulance report and emergency room records prove the occurrence of the accident, but do not provide any indication that a serious injury was suffered, and are not relevant for the purpose of determining whether a permanent or significant limitation resulted.

While it would appear that the medical records of Dr. de Moura, Dr. Mauri and Dr. Leone preclude an award of summary judgment in the Defendant's favor, these unsworn, unaffirmed medical records do not constitute competent medical evidence in opposition to the Defendant's prima facie showing of entitlement to judgment as a matter of law. *Pagano v. Kingsbury*, 182 A.D.2d 268 (2d Dept. 1992) (where opponent is to succeed in defeating a summary judgment motion, he or she must make a showing by producing evidentiary proof in admissible form unless he or she demonstrates an acceptable excuse for the failure to meet the strict requirement of tender in admissible form). Further, even with competent evidence, the unexplained 18 month gap in the Plaintiff's medical attention following the accident is fatal to her claim of serious injury. More specifically, the Plaintiff appeared to receive no treatment following the accident, aside from seeing a chiropractor who she had been seeing before the subject accident. The Court of Appeals held in *Pommells v. Perez*, *supra*:

> While a cessation of treatment is not dispositive * * * a plaintiff who terminates therapeutic measures following the accident,

> while claiming "serious injury," must offer some reasonable explanation for having done so.

The Plaintiff provided no explanation as to why she failed to pursue any treatment for her injuries in the year and a half following the accident, nor did her doctors *Id.*; *See also Franchini v. Palmieri*, 1 N.Y.3d 536 (2003). Therefore, the unsworn medical records of Dr. de Moura, Dr. Mauri and Dr. Leone should be deemed as stale and insufficient to present an issue of fact. (*Id*; *Caracci v. Miller*, 34 A.D.3d 515 (2d Dept. 2006).

Finally, in the sworn statement of Dr. de Moura, dated over nine years after the subject accident, Dr. de Moura admits the Plaintiff was seen by him for the first time in April of 2004, over 18 months after the subject accident. With regard to the cause of the Plaintiff's injury, Dr. de Moura states, "according to the patient, the current problem is a result of a motor vehicle accident." After describing the Plaintiff's history of motor vehicle accidents, Dr. de Moura states, "at the time of the second accident in 9/15/02, however, she was doing well." Later, however, Dr. de Moura claims:

> "it is my opinion that the 9/15/02 accident has caused a significant worsening of the spondylolisthesis and accounts for the great majority of the patient's symptoms and complaints in that the 9/15/02 accident caused the spondylolisthesis to become significantly worse and potentially unstable."

The 18 month gap between the accident and the Plaintiff's first doctor visits renders the medical expert's later opinion on causation speculative and places into question the seriousness of the injuries themselves. While the Court of Appeals recently pronounced in *Perl*, supra, that a quantitative assessment of a plaintiff's injuries does not have to be made

during an initial examination, it did not dispense with the requirement that a plaintiff must submit objective medical findings contemporaneous with the subject accident in order to raise an issue of fact with respect to causation. Additionally, Dr. de Moura's opinion, in conjunction with the medical evidence as a whole, fails to describe how the Plaintiff's injuries amount to a "serious injury" as defined by Insurance Law § 5102 (d). (*Pommels v. Perez*, supra).

Accordingly, it is hereby

**ORDERED**, that the Defendant's motion seeking summary judgment dismissing the Plaintiff's complaint pursuant to CPLR § 3212, is **GRANTED**.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
February 9, 2012

**Hon. Randy Sue Marber, J.S.C.**
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