SHORT FORM ORDER

INDEX No. 09-31524

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



***PRESENT:***

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 9-22-11
ADJ. DATE 2-8-12
Mot. Seq. # 001 - MD

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KRYSTLE A. DELVALLE,

Plaintiff,

- against -

APRIL L. REESE and LILLIE REESE,

Defendants.

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Upon the following papers numbered 1 to 32 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 13-24; Replying Affidavits and supporting papers 25-28; Other 29-32; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that motion (001) by the defendants, April L. Reese and Lillie Reese, pursuant to CPLR 3212 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, Krystle A. Delvalle, seeks damages for personal injuries allegedly sustained in an automobile accident on September 1, 2006, on Southern State Parkway and Route 111, Suffolk County, New York, when her vehicle was struck in the rear passenger side by a vehicle operated by the defendant, April L. Reese, causing the plaintiff's vehicle to flip over.

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 ***(Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***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

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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]).

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 medical 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 [1 st 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 accident, she sustained injuries consisting of head contusion; post traumatic headaches; cervical disc displacement

without myelopathy; cervical brachial syndrome; cervical radiculopathy with spasm; cervical spine sprain and strain; lumbar herniated disc without myelopathy; lumbar nerve root injury; lumbar radiculopathy with spasm; contusion of the lumbosacral spine with nerve root impression; lumbosacral sprain and strain; thoracic spine strain and sprain; tendinitis and contusion of the right shoulder; and tendinitis and contusion of the buttocks.

In support of this application, the defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings; plaintiff's verified bill of particulars; the unsigned and uncertified transcript of the examination before trial of Krystle Delvalle dated January 11, 2011 which is not in admissible form (*see* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), is not accompanied by an affidavit or proof of service pursuant to CPLR 3116, and is not considered on this motion; an uncertified copy of plaintiff's Southside Hospital emergency department record; the consultation report of David W. Rabinovici, M.D dated January 12, 2007 concerning his consulting neurological examination of the plaintiff; and the report of Mark J. Zuckerman, M.D. dated March 1, 2011 concerning his independent neurological examination of the plaintiff.

Upon review and 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 Krystle Delvalle did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Dr. Zuckerman has not submitted a copy of his curriculum vitae to qualify as an expert, other than stating he is licensed to practice medicine in New York.

The defendants have failed to support this motion with the medical records, the independent radiological review of a lumbar MRI's; cervical MRI report of October 6, 2006, inclinometer test results of the lumbar spine dated January 12, 2007, range of motion testing dated October 6, 2006 and October 13, 2006, nerve conduction/EMG test of the lumbar spine dated December 6, 2006, physiatric report of Dr. David Khanan of December 6, 2006, medical reports of Dr. Vicente and Dr. Perez, relative to the plaintiff's claimed injuries, and which records and reports Dr. Zuckerman reviewed and set forth in his report. Expert testimony is limited to facts in evidence. (*see also* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***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]). The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that expert testimony is limited to facts in evidence. (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***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]).

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith,*** 294 AD2d 540; 742 NYS2d 876). Dr. Zuckerman has noted that the plaintiff's testing revealed a bulging cervical disc at the C4-5 level, and a herniated lumbar disc at L5-S1. In determining range of motion values of the plaintiff's lumbar spine and cervical spine with a goniometer, Dr. Zuckerman compared his findings to the normal range of motion values set forth in a range or spectrum, leaving it to this Court to speculate as to how the variations in the ranges of motion are relative to his findings, and as to the actual value for the range of motion (*see* ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown, and the Court is left to speculate (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; *see also* ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]).

Dr. Zuckerman does not comment upon the results of the nerve conduction/EMG testing and does not rule out that she did not sustain a radicular injury, although he stated there was no evidence of the same at the time of his examination. Additionally, no evidentiary proof or opinion has been submitted by the defendants concerning the plaintiff's claim with regard to the cervical and lumbar disc bulges and/or herniations, thus, these conditions have not been ruled out as not having been caused by the subject accident. Additionally, Dr. Rabinovici notes in his consultation report that the plaintiff had a bulging cervical disc and a herniated lumbar disc, as evidenced by the MRI reports of the cervical and lumbosacral spine following the accident.

It is noted that the defendants' examining physician 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 experts offer 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]). Additionally, the plaintiff testified to the extent that she was unable to work at her usual job at AHRC as she was unable to lift patients due to the pain following the accident, thus raising factual issue. It is additionally noted that the neurology report by Dr. Rabinovici recommended that she not do any heavy lifting.

The factual issues raised in defendants' moving papers preclude summary judgment. The defendants have failed to satisfy the 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***, 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, motion (001) 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: APR 17 2012

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION