SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

SUSAN RUBINO,

Plaintiff,

SUBMISSION DATE: 8/10/07
INDEX No.: 4787/05

-against-

GEORGE SCHERRER ,

MOTION SEQUENCE # 1,2

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	XX
Answering Papers.....	XX
Reply.....	
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, the motion by defendant George Scherrer for an order pursuant to CPLR 3212 granting him summary judgment on the ground that plaintiff did not sustain a serious injury within the ambit of Insurance Law § 5102(d) is denied. Cross- motion by plaintiff for an order pursuant to CPLR 3212 granting her summary judgment on the issue of liability is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on August 24, 2003. The accident occurred on Library Road at or near its intersection with Stevens Lane, Westhampton Beach, New York. At the time of the accident, plaintiff was treated and released at Central Suffolk Hospital,

Riverhead, New York. The discharge diagnosis was blunt injury/MVA.

In her bill and supplemental bill of particulars, plaintiff alleges that she sustained the following injuries:

> tear of left anterior cruciate ligament;
>
> extensive bone marrow edema in posterior aspect of medial and lateral tibial plate with contusion/microfracture;
>
> large left suprapatella joint effusion;
>
> disc bulges C4-C5, C5-C6 and C6-C7;
>
> sprain of middle glenohumeral ligament, right shoulder;
>
> secondary rotator cuff tendinitis left shoulder;
>
> head and facial trauma;
>
> and scarring and disfigurement to the right cheek, left shoulder, right wrist area and legs.

Defendant moves for summary judgment on the grounds that plaintiff has not sustained a serious injury within the purview of Insurance Law § 5102.

In automobile accident cases where the plaintiff seeks to recover for pain and suffering, or other non-economic loss, plaintiff must allege and ultimately prove the existence of a serious injury (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]). § 5102 of the Insurance Law defines 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 nonpermanent 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 no less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

In order to establish a permanent consequential limitation of a significant limitation of use, the only categories of serious injury applicable here, the medical evidence submitted by plaintiff must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected organ, member, function or system (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]. Subject complaints of pain alone are insufficient to establish a *prima facie* case of serious injury (*Munoz v Hollingsworth*, 18 AD3d 278, 279 [1st Dept. 2005]). The movant has the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law (*Hughes v Cai*, 31 AD3d 385 [2nd Dept. 2006]. The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (*Perez v Exel Logistics, Inc.*, 278 AD2d 213, 214 [2nd Dept. 2000]). If the movant meets that burden, the burden shifts to the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she sustained a serious injury or that there are questions of fact as to whether the purported

injury, in fact, is serious (*Flores v Leslie*, 27 AD3d 220, 221 [1st Dept. 2006]).

In support of his motion, defendant has submitted the affirmed medical reports of Dr. Jerrold M. Gorski; Dr. Murthy Vishnubhakat; and Dr. Sondra J. Pfeffer.

On January 10, 2007, Dr. Gorski conducted an independent examination of plaintiff. In his report, Dr. Gorski revealed that the plaintiff had full range of motion in both knees of 0 to 140 degrees. She had a positive Lachman's test on the left, but the examination revealed no gross medial or lateral instability. Straight leg raising test was negative standing, seated and lying and the plaintiff had full

recorded ranges of motion with respect to her lower extremities, and her head and neck (cervical spine). Dr. Gorski noted that an MRI report of the left knee revealed a torn ACL and on objective examination there is a positive indication of a tear of the ACL. Dr. Gorski further opined that "her objective examination to date is quite good in spite of her subjective complaints which all told appear to be relatively mild."

On January 12, 2007, Dr. Vishnubhakat performed an independent neurological examination of plaintiff. In the report, Dr. Vishnubhakat concluded as follows:

> Ms. Rubino does not offer any neurological symptoms and has a completely normal neurological and musculoskeletal evaluation. Thus, as a result of the accident of 8/24/03 she did not sustain any injuries to the brain, spinal cord, nerve roots or the peripheral

> nerves. She does not have any symptoms of postconcussion syndrome, radiculopathies or neurovascular abnormalities. There are no neurologic disabilities or adverse prognostic indicators.

On December 15, 2006, Dr. Sondra Pfeffer performed an independent review of the MRI film studies of the plaintiff's left knee taken at Central Queens Imaging on September 13, 2003. Dr. Pfeffer noted that from her review of the MRI, it revealed poor visualization of the proximal anterior cruciate ligament (ACL) extending into the femoral sight, raising the possibility of a ligament (ACL) extending into its femoral sight raising the possibility of a ligament rupture tear. Dr. Pfeffer, however, also concluded that the cause of the ACL condition shown on the film study could not be determined based solely on the one MRI, noting that a trauma-related causal relationship to the plaintiff's ACL condition was extremely unlikely given the absence of any documentation in the E.R. records of Central Suffolk Hospital of left knee injury, complaints or pain. Dr. Pfeffer noted that acute ACL ligament tears are immediately symptomatic post inception and preclude normal ambulation and/or weight-bearing on the injured knee. Dr. Pfeffer also found that the MRI revealed intra-articular joint effusion in addition to mild, superficial soft tissue contusion anterior and medial to the left knee and that such mild, superficial soft tissue contusion and joint effusion, while it may be causally related to the subject accident, would be expected to resolve *et sequella*. Finally, Dr. Pfeffer also noted that notwithstanding her findings

stated above, the plaintiff's left knee was reportedly completely asymptomatic, as indicated by Dr. Steven Fealy's 2/25/04 follow-up report.

Overall, defendant urges that plaintiff's medical records do not indicate any objective medical support that the plaintiff sustained any significant limitation, total loss of use, or permanent or partial consequential limitation, or any type of permanent or partial resulting residual disability from the subject vehicle-pedestrian incident. Defendant further asserts that the claimed categories of "serious injury" under Insurance Law § 5102 are completely negated by the fact that the plaintiff returned full-time to her duties as a medical office manager only nine (9) days following the subject accident and has continued to work full-time in that position since September, 2003. Defendant further states that this fact negates any claim under the 90/180 category of serious injury with respect to an impairment of a permanent nature.

Defendant has failed to satisfy the initial burden of establishing *prima facie* entitlement to judgment as a matter of law. Two of the defendant's doctors acknowledge the evidence of a tear of an anterior cruciate ligament. Although the magnetic resonance images of plaintiff's knee and shoulder are not, in themselves, evidence of a serious injury (*Gordon-Silvera v Long Island R.R.*, 41 AD3d 431, 432 [2nd Dept. 2007]), the affirmation of plaintiff's treating orthopedist, Dr. Bregman, documents objective

evidence of the extent of plaintiff's injuries and specifically quantifies the loss of motion in the left knee and right shoulder. Hence, the court need not consider whether the opposition papers are sufficient to raise a factual issue (*Kouros v Mendez*, 41 AD3d 786, 788 [2nd Dept. 2007]; *Nembhard v Delatorre*, 16 AD3d 390, 391 [2nd Dept. 2005]; *McDowall v Abreau*, 11 AD3d 590 [2nd Dept. 2004]).

Even if the court were to find that defendant has satisfied his burden, albeit barely, summary dismissal of the complaint must be denied as plaintiff has raised issues of fact concerning whether she sustained a serious injury.

In support of and in opposition to the motion, plaintiff relies upon the present affirmation of her employer, Dr. Alvin Bregman, with whom the plaintiff also received treatment following the subject accident. Dr. Bregman's treating records reveal *inter alia* that plaintiff sustained a torn anterior cruciate ligament left knee, rotator cuff tendinitis right shoulder with sprain middle glenohumeral ligament, and secondary rotator cuff tendinitis left shoulder. Dr. Bregman concluded as follows:

> "In view of the patient's history and physical examination and of the time elapsed since the significant traumatic episode of August 24, 2003, the plaintiff's prognosis must be considered poor. It is expected that the left knee injury will result in varying degrees of pain, stiffness, swelling and instability which will limit Ms. Rubino's activities of daily living and may result in the necessity for surgical intervention. In addition, it is likely that the right shoulder condition will persist and result in limitation of motion with weakness and pain on a permanent basis. Surgical intervention for the right shoulder

> may also be indicated at some point in the future. It should be noted that the patient has no prior history of left knee or shoulder problems before the traumatic accident of August 24, 2003 and she has a permanent partial disability with respect to the left knee and right shoulder, which is causally related to the auto accident of August 24, 2003."

Dr. Bregman explains that plaintiff underwent treatment under his direction on a continuous basis for approximately three years and was discharged from therapy when no further benefit could be derived from further treatment.

As far as the gap in treatment is concerned, plaintiff has offered a satisfactory reason, to wit: the tear of the ACL is a permanent injury which is inherently unstable and is only correctable through surgery; and further treatment would have been palliative, as no therapy could have repaired the torn ACL.

A plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of an injury. Plaintiff's cessation of treatment has been sufficiently explained to raise an issue of fact and survive summary judgment (*Brown v Dunlap sub nom Pommells v Perez*, 4 NY3d 566 [2005]).

In addition to the foregoing, plaintiff submits an affirmation of radiologist Jonathon Schwartz, M.D. In his report, Dr. Schwartz states, in pertinent part, that the MRI revealed:

> "Tear of the anterior cruciate ligament at its proximal femoral attachment. Extensive bone marrow edema in the posterior aspect of both

> the medial and lateral tibial plateaus consistent with contusion/microfracture. The possibility of underlying more extensive fracture cannot be entirely excluded. There is also suggestion of posterolateral corner injury of the tibial plateau on the axial views. For further evaluation, a CT scan is suggested for more detailed osseous information. Grade II sprain of the medial collateral ligament. Large suprapatellar joint effusion."

Under the circumstances, plaintiff has presented an issue of fact sufficient to defeat the motion for summary judgment. Plaintiff, however, has not presented competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the accident (*Albano v Onolfo*, 36 AD3d 728 [2nd Dept. 2007]; *Picott v Lewis*, 26 AD3d 319 [2nd Dept. 2006]; *Doran v Sequino*, 17 AD3d 626 [2nd Dept. 2005]; *Sainte-Aime v Ho*, 274 AD2d 569 [2nd Dept. 2000]).

The branch of the cross motion which seeks summary judgment on the issue of liability is denied. The deposition testimony of the parties hereto and the facts surrounding the vehicle-pedestrian accident raise issues of plaintiff's own comparative negligence which should be resolved by a jury (*see John v Leyba*, 38 AD3d 496 [2nd Dept. 2007]). While defendant acknowledged that he may have looked away from the road or his direction of travel just prior to the accident, issues of fact exist as to whether plaintiff was jogging in the street, or whether there was an available walking/bicycle path. Specifically, plaintiff did not recall whether she was running on the jogging/bicycle path or in the

street when the contact occurred (plaintiff's Examination Before Trial, pages 27 and 28).

In view of the foregoing, the motion is denied.

This decision constitutes the order of the court.

Dated: OCT 3 0 2007

HON. KENNETH A. DAVIS J.S.C.