

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
DANICA MARKOVIC

Plaintiff,

-against-

DIANE E. SOUTHARD and JOHN SOUTHARD
Defendant.
-----x

TRIAL PART: 21
NASSAU COUNTY

INDEX NO: ^{010292/06} ~~01029/06~~

MOTION SEQ. NO: 01

SUBMIT DATE: 6/23/08

The following papers having been read on this motion:

Notice of Motion.....1
Opposition 2

Motion by the attorney for the defendants for an order dismissing plaintiff's complaint pursuant to CPLR §3212 and Insurance Law §5102 is denied.

This is an action for personal injuries allegedly sustained as a result of a motor vehicle accident on June 27, 2003.

The plaintiff was examined by Isaac Cohen, M.D. on June 31, 2007, for an orthopedic evaluation at the request of the attorneys for the defendants. Dr. Cohen's examination found that the paravertebral muscles are supple and non-tender on palpation. Range of motion is satisfactory and normal. Flexion and extension of 45 degrees (normal up to 45), lateral bending in the 45degree range to the right and left (normal up to 45), and rotational motion to the left and right in the 80 degree range (normal up to 80). Compression test and Spurling's test are negative. Upper extremities: Examination is satisfactory normal with normal reflexes in both biceps, triceps and brachioradialis. Range of motion is full bilaterally. Range of motion of both shoulders, elbows and wrists is also within normal range. Neurovascular examination of both upper extremities is unremarkable as documented with normal reflexes. No sensorial deficit is present. Diagnosis: cervical strain, resolved, soft contusion, resolved. The claimant has a completely normal functional capacity of the cervical spine area. Claimant does not have any evidence of sequelae or permanency related to this

accident and has a satisfactory normal functional capacity of both upper extremities. Defendant has established a *prima facie* case through the submission of an expert's report to satisfy defendant's initial burden of demonstrating that plaintiff did not sustain a serious injury.

In opposition to the motion plaintiff contends she was seen by a physical therapist directly after the accident and he found that the plaintiff sustained a 20 percent loss of flexion, 30 percent loss of extension, 56 percent loss of left side bend and 56 percent loss of left side bend of the cervical spine after the subject accident (Exhibit E to plaintiff's affirmation in opposition). On July 11, 2003 the plaintiff underwent an MRI test of her cervical spine. The MRI of her cervical spine shows disc bulges at C4-5, C5-6 and C6-7 of the cervical spine (see the affirmed report of Dr. Lustrin annexed as Exhibit B and the affirmed report and addendum report of Dr. Hausknecht annexed as Exhibits C and D to the affirmation in opposition).

On November 1, 1998, Mrs. Markovic had an MRI of her cervical spine. The MRI of her cervical spine showed disc herniation at C5-6 and a disc bulge at C4-5 of the cervical spine (Exhibit F). Plaintiff alleges she was treated for the neck pain that she experienced in 1998, and made a full recovery. Plaintiff also claims that as a result of the subject accident she aggravated her prior cervical spine condition.

On May 29, 2008, Mrs. Markovic underwent a neurological examination by Dr. Aric Hausknecht—Diplomate, American Board of Psychiatry & Neurology, and Diplomate, American Academy of Pain Management. Dr. Hausknecht personally reviewed the MRI films of Mrs. Markovic's cervical spine as well as Dr. Lustrin's reports. In Dr. Hausknecht's opinion, the films reveal disc bulges at C4-5 and C6-7 and a disc herniation at C5-6. Dr. Hausknecht measured Mrs. Markovic's ranges of motion of the cervical spine and compared them with normal ranges of motion. He found that Mrs. Markovic's left lateral flexion is 0-35 degrees (normal is 0-50 degrees), right lateral flexion is 0-30 degrees (normal is 0-50 degrees), left rotation is 0-60 degrees (normal is 0-80 degrees) and right rotation is 0-70 degrees (normal is 0-80) of the cervical spine. He opined that Mrs. Markovic sustained a 30 percent loss of left lateral flexion, 40 percent loss of right lateral flexion, 25 percent loss of left rotation and 13 percent loss of right rotation of the cervical spine. Significantly, these findings are objective in that they were measured passively and actively using an arthoidal protractor and goniometer, Dr. Hausknecht stated the normal ranges of motion and the results were analyzed in comparison to that AMA guideline and the NYS Division of Disability

Determination. In addition, Dr. Hausknecht performed on Mrs. Markovic a Spurling maneuver, which was positive on the left and a NCV/EMG study of the upper extremities which revealed left C5-6 radiculopathy. He also found that Mrs. Markovic has a 5- weakness of the left shoulder abductor and a 5- weakness of grip strength in the left hand. After reviewing Mrs. Markovic's medical history and medical records, and conducting his own physical examination and various tests on her, Dr. Hausknecht found with a reasonable degree of medical certainty, the motor vehicle accident of 6/27/03 is the substantial cause of her condition. Further, Dr. Hausknecht states that Mrs. Markovic has been symptomatic for almost 5 years. She has received an adequate course of rehabilitation and has reached maximal medical improvement. Prognosis is poor for any further recovery. Dr. Hausknecht states that with a reasonable degree of medical certainty that Mrs. Markovic's condition is permanent in nature and she has sustained significant limitation of use of her cervical spine. She has a permanent partial disability. Dr. Hausknecht also opines that Mrs. Markovic is in need of further medical treatment and evaluation beyond conservative pain management. She is an appropriate candidate for cervical steroid injections and a C5-6 ACDF surgery.

Within the context of injuries to vertebral discs, "a bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law § 5102(d)." *Espinal v Galicia*, 290 AD2d 528, quoting *Monette v Keller*, 281 AD2d 523, 523-24, and an MRI or other diagnostic film is sufficient objective evidence to establish the existence of the bulge or herniation. *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; see also *Galati v Brice*, 290 AD2d 530; *Lesser v Smart Cab Corp.*, 283 AD2d 273.

The plaintiff's expert medical report was sufficient to raise triable issues of fact as to whether the subject accident was the cause of plaintiff's alleged injuries. *Toure v Avis Rent A Car Systems, Inc.*, *supra*. The medical reports submitted by respective counsel give rise to questions of credibility precluding the granting of summary judgment. See *S. J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338.

Notwithstanding anything to the contrary, the plaintiff did not present competent medical evidence to support her claim that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days following the subject accident. *Jackson v Colvert*, 24 AD3d 420. Plaintiff's deposition testimony establishes that she did not suffer an injury that prevented her

from performing substantially all of her customary daily activities for at least 90 days of the 180 days immediately after the accident.

The Court notes that the attorneys for the movant have not interposed a reply affidavit challenging the claims made by the plaintiffs' counsel in their opposition papers.

The motion for summary judgment is denied.

This constitutes the decision and order of this Court.

DATED: July 22, 2008

ENTER



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J. S.C.

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ENTERED

JUL 30 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE