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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
JEAN CONDRILL and DONNA CONDRILL,

Plaintiff,

-against-

KATHLEEN E. ISHAM,

Defendants.

-----X

TRIAL PART: 16

NASSAU COUNTY

INDEX NO: 1472-09

MOTION SEQ. NO: 2

SUBMIT DATE: 11/4/10

The following papers having been read on this motion:

- Notice of Motion..... 1
- Opposition..... 2
- Reply..... 3

This motion by the defendant Kathleen E. Isham for an order pursuant to CPLR §3212 dismissing the complaint against her on the ground that the plaintiff Donna Condrill did not sustain a “serious injury” as defined by Insurance Law § 5102(d) and required by Insurance Law § 5104(a) is denied.

In this action, the plaintiff Donna Condrill seeks to recover damages for personal injuries she allegedly sustained as a result of a motor vehicle accident on January 9, 2009. The defendant seeks dismissal of her claim on the ground that she did not sustain a serious injury as defined by Insurance Law § 5102(d) and required by Insurance Law § 5104 (a) in order to recover.

“On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff’d. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp.,

supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

Insurance Law § 5102(a) 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 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 persons’s usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment.”

“A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities casually related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). . .” Kearse v New York City Transit Authority, 16 AD3d 45, 49-50 (2nd Dept. 2005); see also, Johnson v County of Suffolk, 55 AD3d 875 (2nd Dept. 2008); Siegel v Sumaliyey, 46 AD3d 666 (2nd Dept. 2007).

The plaintiff Donna Condrill alleges that she injured her neck, mid back and lower back and shoulders bilaterally. More specifically, in her Verified Bill of Particulars, plaintiff Donna Condrill alleges that as a result of the motor vehicle accident, she has sustained five herniated discs, a cervical sprain/strain, radiculitis and subluxation of her cervical spine, cervical myofascitis, cervicgia, restricted motion of her cervical spine, a thoracic sprain/strain, subluxation of her thoracic spine, thoracic myofascitis, restricted motion of her thoracic spine, a lumbar sprain/strain, radiculitis and subluxation of her lumbar spine, lumbar myofacitis, fibromyaglia, scapulo-humeral fibromyositis, restricted motion of her lumbar spine, left shoulder impingement, bilateral internal shoulder derangement and restriction of motion in her left shoulder.

In support of her motion, defendant Isham has submitted the affirmations of orthopedic

surgeon Dr. Frank D. Olweto and Board Certified Neurologist Dr. Naunihal Sachdev Singh, both of whom have examined the plaintiff Donna Condrill.

In his affirmation, Dr. Olweto notes that the plaintiff injured her neck in 1996 when a roof collapsed on it. He represents that despite Donna Condrill's subjective complaints of discomfort, his examination of her using a goniometer revealed no objective findings to justify her complaints. No positive orthopedic testing was noted. His examination revealed that she has full range of motion in her cervical and thoracolumbosacral spines as well as her right and left shoulders. He accordingly diagnosed the plaintiff Donna Condrill as having suffered cervical and thoracolumbosacral strains which have objectively resolved and healed. No disabilities were discovered and no further treatment was necessary.

In her affirmation, Dr. Singh noted that Donna Condrill continued to complain of pain in her lower back, neck and shoulder blades. She also noted that Donna Condrill had sustained a back injury in 1992 when she slipped on a wet floor and a neck injury in 1996 when a roof collapsed on her. She notes that Ms. Condrill missed only a few days from work as a result of the motor vehicle accident. Dr. Singh's examination of Donna Condrill using a goniometer also revealed that she had full range of motion in her cervical and lumbar spines as well as her shoulders. Dr. Singh also diagnosed Donna Condrill as having suffered cervical and lumbar spine strains as a result of the motor vehicle accident which had fully resolved. No disabilities were found nor was further treatment needed.

In view of the fact that Donna Condrill missed only a few days of work, she did not sustain a serious injury which prevented her from performing substantially all of the material acts which constitute her customary daily activities during at least 90 of the 180 days immediately following the accident. Richards v Tyson, 64 AD3d 760 (2nd Dept. 2009), citing Sanchez v Williams Volunteer of Hatzolah, Inc., 48 AD3d 664, 665 (2nd Dept. 2008).

The defendant has established her entitlement to summary judgment dismissing the complaint thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact.

In opposition, the plaintiff has attempted to establish that she sustained a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of her customary daily activities for at least 90 of the 180 days immediately following the accident and that she sustained a permanent consequential limitation of use of a body organ, member, function or system and/or a significant limitation of use of a body function or

system.

In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. See, Dufel v Green, 84 NY2d 795, 798 (1995); Lopez v Senatore, 65 NY2d 1017, 1020 (1985); cf., Gaddy v Eyler, 79 NY2d 955 (1992). An expert's qualitative assessment of a plaintiff's condition will suffice, provided that the evaluation has an objective basis that can be measured against the normal function, purpose and use of the affected body part. Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345, 350 (2002).

In opposition, the plaintiff Donna Condrill has submitted the medical affidavit of her long-term treating chiropractor, Dr. Michael S. Russo, D.C. He attests that the plaintiff first came under his care for injuries suffered in the subject accident five days after it, on January 14, 2009. At that time, she complained of severe pain in her neck, upper back and shoulders. His examination revealed abnormal findings of a positive compression test right/left, a positive left shoulder Depressor test, a positive Soto-Hall Test, a positive Kemp's Test Bilaterally and a positive Straight Leg Raise which was 65 degrees to the right leg, and 60 degrees to the left leg with the normal 90 degrees. His range of motion tests revealed limitations in her cervical and lumbar spines. He referred Ms. Condrill to an orthopedist to evaluate her shoulders. She underwent physical therapy with Dr. Russo. Because her range of motion limitations continued on February 28, 2009, Donna Condrill underwent manipulation under anesthesia to her cervical and thoracic spines and closed reduction manipulation of her shoulders on March 3rd, 4th and 5th. Physiotherapy continued. Dr. Russo notes that an MRI report of March 13, 2009 (which the defendant's experts referred to and accordingly can be relied on by him [see, Williams v Clark, 54 AD3d 942 (2nd Dept. 2008), citing Zarate v McDonald, 31 AD3d 632 (2nd Dept. 2006); Silkowski v Alvarez, 19 AD3d 476 (2nd Dept. 2005); Ayzen v Melendez, 299 AD2d 381 (2nd Dept. 2002)]) revealed: (1) straightening of the usual lordosis; (2) widening of the spinal cord with a large syrinx as well as low lying cerebellar tonsils; (3) shallow posterior herniation at C2-3 favoring the left; (4) small left posterolateral herniation at C3-4 with mild narrowing of the left neural foramen; (5), disc degeneration at C4-5, C5-6, C6-7, anterior spondylitic change and disc herniations with encroachment upon the cord, and narrowing in the left neural foramen at C5-6 and C6-7. Dr. Russo notes that Ms. Condrill continued treatment with him through June 26, 2009, for a total of approximately 37 visits. He explains that her treatment ended despite the continuance of her symptoms because she had reached the maximum

chiropractic medical level of improvement: There was nothing more that could be done for her.

As for Ms. Condrill's prior accidents, Dr. Russo notes that prior to the subject motor vehicle accident, the plaintiff had been asymptomatic for a number of years. In addition, he compares the plaintiff's MRI from March 15, 2009 to the one from March 11, 1996 which again he may rely on (see, Williams v Clark, *supra*; citing Zarate v McDonald, *supra*; Silkowski v Alvarez, *supra*; Ayzen v Melendez, *supra*) and concludes that her cervical injuries became worse as a result of the 2009 motor vehicle accident. He notes that additional disc herniations are reflected on the 2009 MRI, thus he opines "the patient had some prior cervical disc pathology from the prior 1996 accident that was aggravated, but the patient's injuries have progressed from the subject accident of January 9, 2009."

Dr. Russo attests that he examined Ms. Condrill on September 14, 2010 and found via a hand-held goniometer that she continued to exhibit significant limitations in the range of motion of her cervical and lumbar spines. Thus, he opines that as a result of the 2009 motor vehicle accident, the plaintiff sustained posterior herniation at C2-3 favoring the left as per [the] MRI report; posterolateral herniation at C3-4 with mild narrowing of the left neural forearm, as per MRI report; posterior disc herniations at C5-6 and C6-7 with encroachment upon the cord, as per MRI report; post traumatic cervicalgia and fibromyalgia/myositis of the cervical and thoracic regions; scapulo-humeral fibromyositis; post traumatic cervical sprain/strain; post traumatic thoracic sprain/strain; post traumatic thoracic pain and post traumatic right and left shoulder pain.

Donna Condrill attests that she now avoids strenuous activities and that she experiences pain in her neck, upper back, shoulders and hands when she stands too long and when sitting, standing or bending for extended periods of time. She further attests that her upper body pain is exacerbated when she reaches or lifts overhead. She also complains of difficulty sleeping because of her aggravated pain. She also states that she could not perform household chores for six months following the accident; she did not lift heavy bags of groceries, or vacuum or mop. She still limits her laundry tasks and avoids taking out the garbage. She attests that she can no longer dance or bowl or play with her young nephews.

The plaintiff has established the existence of a material issue of fact as to whether she sustained a serious injury as a result of the 2009 accident. She has established objective evidence of physical injuries to her cervical and lumbar spines which have been distinguished from her prior injuries and that she has experienced limitations in the range of motion of those areas as well.

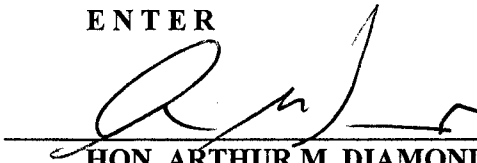
However, she has not established the existence of a material issue of fact as to whether she

sustained an injury which prevented her from performing substantially all of her material acts which constituted her usual and customary daily activities for 90 out of the 180 days following the accident. The activities which she complains have been limited simply do not reach the level required by the statute.

This constitutes the decision and order of this Court.

DATED: December 3, 2010

ENTER


HON. ARTHUR M. DIAMOND
J. S.C.

ENTERED

DEC 07 2010

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