SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

TIMIKO M. PERRY,

Plaintiff,

Index No. 019023/08
Sequence #s 003,004
Part 37

- against -

06/21/10

JENNIFER M. ATAMIAN and JOHN K. ROGERS,

Defendants,

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Upon the foregoing papers, defendants' motion and cross-motion pursuant to CPLR Sec. 3212 granting summary judgement in their favor and dismissing the summons and complaint of plaintiff upon the grounds that, as a matter of law, plaintiff has not suffered a serious injury as defined by Insurance Law Sec. 5102 (d) are granted.

This case involves a motor vehicle accident that occurred on June 28, 2007, resulting in plaintiff's claim of serious injury as defined under Insurance Law Sec. 5102 (d).

Movants have sustained their initial burden of submitting evidentiary proof in admissible form to warrant the objective findings that plaintiff has not suffered a serious injury, including the affirmed report of Doctors Leon Sultan, John Kelemen and Stanley Sprecher, who concluded that there were no positive objective physical findings that plaintiff sustained any substantial or permanent injuries or disability as a result of the subject accident (see *Kearse v. NYCTA*, 16 AD3d 45; *Grossman v. Wright*, 268 AD2d 79; *Guzman v. Paul Michael Management*, 266 AD2d 508).

In addition, an affirmed medical report of plaintiff's radiologist dated February 23, 2009 is included which indicates there is evidence of longstanding degenerative discopathy in plaintiff's lumber MRI and no finding of causality to the subject accident. Also, medical evidence of plaintiff's two prior motor vehicle accident injuries and two right knee surgeries is attached (see *Carrasco v. Mendez*, 4 NY3d 566).

The Court also finds that defendants demonstrated a *prima facie* entitlement to judgment under the 90/180 days threshold category by the inclusion of plaintiff's deposition testimony (*Robinson v. Polasky*, 32 AD3d 1214; *Lopez v. Caprio-Ceballo*, 20 AD3d 336).

Plaintiff must now come forward with some admissible evidence demonstrating a serious injury within the meaning of the No-Fault Law (*Gaddy v. Eyler*, 79 NY2d 995). This she has failed to do.

Plaintiff's opposition consists of a recent examination performed by Dr. Craig Levitz on October 21, 2009. His letter report dated November 16, 2009 is not affirmed and therefore inadmissible (*Grasso v. Angerami*, 79 NY2d 813). ✳

Even if the report were admissible, Dr. Levitz' notes from plaintiff's initial examination on December 12, 2007, a mere 6 months after the accident, indicate plaintiff suffers from significant osteoarthritis in the right knee patella and trochlear groove. On January 7, 2008 at a follow-up evaluation, Dr. Levitz finds plaintiff's right knee to have a full range of motion (ROM). Dr. Levitz mentions lower back and neck pain for the first time in the final examination held October 21, 2009. He is evidently aware that plaintiff was injured in the neck, back and right knee in two prior automobile accidents and that plaintiff had two right knee surgeries as a result. Still, all of the tests on plaintiff's right knee are negative, except for crepitus, a grating sound, often associated with osteoarthritis. He discussed physical therapy with plaintiff again, as well as other conservative treatment.

Dr. Levitz' recent opinion regarding any spinal injury, even if it were admissible, is speculative without recent objective evidence of plaintiff's current spinal ROM (see *Weissman v. Nally*, 277 AD2 222). Further, by his own analysis, there is no quantified limitation regarding plaintiff's knee and her ability to walk or bend (see *McHaffie v. Antieri*, 190 AD2d 780).

Bootstrapping the recent examination to an examination performed on October 21, 2009 on behalf of the defense does not help plaintiff's opposition in establishing her current spinal condition. Dr. Vartkes Khachaduria found normal ROM with respect to plaintiff's spine, with the exception of standing forward flexion of 60°, 90° being normal, which was determined not by objective testing, but by subjective movements under the plaintiff's control.

As for plaintiff's right knee ROM, his finding that movement is 110° out of a normal 125° is not significant as a matter of law, especially when her baseline uninjured left knee is 120° out of 125° (see *Style v. Joseph*, 32 AD3d 212, 214).

✳ Plaintiff's claim that because defendants' included Dr. Levitz' report dated January 7, 2008, its use in opposition does not have to be affirmed to be admissible is accurate (*Flores v. Stankiewicz*, 35 AD3d 804; *Zarate v. McDonald*, 31 AD3d 632). However, that does not mean that all of Dr. Levitz' records or reports are admissible, unless they are incorporated by reference (see *Ilkhaniza deh v. Axelrod*, 258 AD2d 441), which is not the case here.

The finding by Dr. Khachaduria that plaintiff was injured as a result of the subject accident but the injury was superimposed on pre-existing pathologies with degenerative disease and with no evidence of disability or impairment certainly does not suggest the injury was either medically significant or permanent. Complaints of pain and limitation of motion alone are insufficient to demonstrate serious injury (*Park v. Champagne,* 34 AD3d 274; *Young v. Russell,* 19 AD3d 688).

In addition, plaintiff did not submit competent medical proof in admissible form contemporaneous with the accident to be used as a means of comparison (*Li v. Yun*, 27 AD3d 624). Dr. Levitz' first examination of plaintiff almost 6 months after the collision certainly does not provide it nor does his follow-up examination almost 4 weeks later where he finds full range of motion in plaintiff's right knee.

Although Dr. Peter Swerz' contemporaneous examination of plaintiff provides competent object evidence of plaintiff's reduced spinal ROM, his opinion that it was "apparently" causally related to the subject accident without first reviewing any medical records, including spinal MRIs, from her prior two accidents, was at best premature. Therefore, it is insufficient proof of a casual relationship (*Fusco v. Barnwell House of Tires*, 16 AD3d 620; see also *Pommells v. Perez*, 4 NY3d 566).

Plaintiff has also failed to demonstrate an acceptable excuse from a physician for the 1 year 9 ½ months gap in treatment. Dr. Harvey Orlin and later Dr. Shapiro constantly referred to plaintiff's need for physical therapy, as did Dr. Levitz. Plaintiff declined to pursue physical therapy on January 7, 2008 against his advice.

Finally, plaintiff's proof was insufficient as it contained no competent medical evidence which would support the claim she was unable to perform substantially all of her daily activities during the initial 90/180 day period (*Knijnikov v. Mushtag*, 35 AD3d 545; *Boyle v. Gundogan*, 19 AD3d 351).

The complaint is dismissed.

July 30, 2010

Hon. John M. Galasso, J.S.C.

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