

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU

Present: HON. ZELDA JONAS  
Justice

LYNN C. ZVENGROWSKI,

Plaintiff,

- against -

JENNIFER EVE MARR and BARBARA J. MARR,

Defendants.

TRIAL/IAS PART 26

Index # 25566/99

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Motion by defendants for summary judgment pursuant to CPLR 3212 and Insurance Law Section 5104(a) dismissing the plaintiff's complaint on the ground plaintiff did not suffer a "serious injury" as defined in Insurance Law §5102(d) is granted.

Cross-motion by plaintiff for summary judgment pursuant to CPLR 3212 on the issue of liability in favor of plaintiff and against defendants is denied as moot in view of the determination herein on the main motion.

In order to obtain summary judgment, it is necessary that the movant establish his cause of action or defense sufficiently to warrant the Court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in

admissible form (*Gaddy v. Eyler*, 79 N.Y.2d 953; *Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1064; *Borschardt v. New York Life Insurance Company*, 102 A.D.2d 465, aff'd 63 N.Y.2d 1000, rearg. den. 64 N.Y.2d 776). Upon the movant meeting this burden of setting forth evidentiary facts sufficient to entitle that party to judgment as a matter of law, the burden shifts to the opposing party to come forward with proof, again in evidentiary form, to show the existence of genuine triable issues of fact (*Lopez v. Senatore*, 65 N.Y.2d 1016, 1017; *Piccolo v. De Carlo*, 90 A.D.2d 609; *Soc. of N.Y. Hosp. v. Tyszkiewicz*, 74 Misc.2d 178).

In support of this motion, defendants have submitted the affirmation of their attorney together with the following exhibits annexed thereto:

- Exhibit A - Summons and Complaint verified by plaintiff's attorney
- Exhibit B - Defendants' Verified Answer and Demand for Verified Bill of Particulars
- Exhibit C - Plaintiff's Bill of Particulars verified by plaintiff's attorney
- Exhibit D - Dr. Leon Sultan's Affirmation dated 8/22/01 of his medical report
- Exhibit E - Dr. Paul Lerner's Affirmation dated 8/22/01 of his medical report

The defendants made a *prima facie* showing that the plaintiff has not sustained a "serious injury" as defined by Insurance Law §5102(d) as a result of the subject accident of December 5, 1996. The affirmation dated August 22, 2001 of Dr. Sultan, an orthopedist, shows that after taking the history of the 30-year old plaintiff and noting her prior accidents and treatment records therefor and her present complaints and making a physical examination and performing objective tests on her, concluded as follows:

“Today’s orthopedic examination involving this woman’s cervical spine and lumbar spine is unremarkable except for the well healed surgical scar from a prior condition. She is otherwise orthopedically stable and neurologically intact, and does not demonstrate any objective clinical signs of ongoing disability or functional impairment in regard to the occurrence of 12/5/96. Pre-accident lumbar MRI testing of 1/10/95 and pre-accident lumbar myelogram and post myelogram CT scanning documents preexisting disc changes at the L4-5 level, unrelated to the occurrence of 12/5/96.”

The affirmation, dated August 22, 2001 of Dr. Lerner, a neurologist, shows that after taking plaintiff’s past medical history and present complaints and reviewing her medical and hospital records and making a physical examination of plaintiff and conducting objective testing, Dr. Lerner concluded as follows:

“At the present time the patient’s neurological examination is objectively within normal limits. Specifically objective neuropathic abnormalities such as fasciculations, reflex changes or muscular spasm or muscular atrophy are all absent. There are only subjective findings of sensory disturbance, tenderness and discomfort. From a neurologic point of view and in regards to the motor vehicle accident of December 5, 1996 there is no residual disability or impairment and the overall diagnosis is one of resolved cervical and lumbar strain. It is noted that the medical record reports the presence of an L4-5 HNP prior to the December 5, 1996 motor vehicle accident and that no structural changes or new disc herniations are reported following the December 5, 1996 motor vehicle accident. The fact that the patient had a laminectomy in the past would suggest there is some mild residual disability from the 1992 surgery that would prohibit her from very heavy lifting. Independent radiology review of all the imaging studies and independent orthopedic consultation may be of some value.”

The evidence submitted by the plaintiff in opposition was insufficient to defeat the defendants' motion for summary judgment or to raise genuine triable issues of fact. In opposition thereto, the plaintiff submitted the following on her cross-motion:

- Plaintiff's attorney's Affirmation dated December 19, 2001 (pages 7 through 16) and plaintiff's own affidavit sworn to on December 18, 2001 together with the following exhibits:

- Exhibit A DMV accident report
- Exhibit B EBT report of Jennifer Eve Marr (certain pages applicable to underlying accident)
- Exhibit C EBT report of Lynn C. Zvengrowski (certain pages applicable to underlying accident)
- Exhibit D Affirmation dated 12/19/01 of Dr. Jeffrey Perry, D.O. - an orthopedist affiliated with Alliance Physical Medicine and Rehabilitation, P.C.
- Exhibit E Dr. Maquels' hospital and emergency report; Radiological Consultation Report (CF Scan of Lumbosacral spine) by Marvin J. Nash, M.D.; and Radiological Consultation report of cervical spine by Reza Hedayati, M.D. [unsworn documents]
- Exhibit F North Shore Comprehensive Medical, P.C. report dated 12/9/96 of Mandakini Patel, M.D., with physician's diagnosis and notes, no-fault verification of treatment signed by Dr. Patel on 3/24/97 and description of treatment. [unsworn documents]
- Exhibit G Doshi Diagnostic Imaging Services report dated 2/20/97, signed by Leena Doshi, M.D. - concerning MRI of the lumbar spine and affidavit dated 12/21/01 of Leena Doshi, M.D. confirming that the radiologist who supervised the testing on 2/20/97 of the magnetic resonance image of the lumbar spine of plaintiff and that he has read the MRI report of the lumbar spine.
- Exhibit H Statement of Dr. Patel's changes made to Metro Pt. for diagnosis of cervical and lumbar degenerative arthritis and Metro Pt. medical history for plaintiff and relevant notes.

Dr. Perry, being an osteopath, has the authority to submit an affirmation in lieu of an affidavit. (See, CPLR 2106.) Dr. Perry's affirmation of November 27, 2001 is based upon a review of plaintiff's past medical history (par. 2), hospital records following the

subject accident including x-rays of plaintiff's lumbar and cervical spine, CAT Scan (par. 3), the records of North Shore Comprehensive Medical P.C. signed by Dr. Patel, plaintiff's initial treating physician, including the results of his tests (par. 4), and the results of Dr. Patel's diagnosis (par. 5); the MRI of her lumbar spine at Doshi Diagnostic Imaging Services (par. 6); Metro P.T.'s records of plaintiff's physical therapy (par. 7); plaintiff's continuous complaints to physical therapists of having neck and lower back pain (par. 8); Dr. Perry's physical examination of plaintiff on November 23, 2001 (Par. 9); the results of his physical examination of plaintiff (Par. 10); testing that Dr. Perry performed (Par. 11); plaintiff's complaints to Dr. Perry and his opinion (Par. 12); and Dr. Perry's opinion and conclusion that plaintiff suffered a permanent disability with significant limitation of use of her lumbar spine which significantly interferes with her ability to perform and engage in daily activities and that the exacerbation and aggravation of the pre-existing condition to her lumbar spine amount to a permanent disability which is solely causally related to the motor vehicle accident of December 5, 1996. There is, however, no affirmation or affidavit of Dr. Patel nor is there any sworn document contained in the hospital records or other records of North Shore Comprehensive Medical or of Metro P.T. on which Dr. Perry relied except that this Court accepts the late submission of Dr. Leena Doshi's affirmation dated December 21, 2001 confirming the MRI report of plaintiff on February 20, 1997. Neither the MRI report itself or Dr. Doshi's affirmation connect the injuries stated therein to the 1996 accident. Although Dr. Perry's report shows a recent examination, it

comes almost five years after the date of the accident and the medical treatment of Dr. Patel; and there is no explanation either by plaintiff's attorney or by Dr. Perry in their initial opposition papers for such a long gap, except that plaintiff's attorney tries to partially explain this long gap in his later Sur Reply Affirmation by stating that they could not locate the whereabouts of Dr. Patel, the physician who initially examined and treated the plaintiff, and finally when they did locate his residence in Flushing, New York, he did not respond to their calls; and that based upon these circumstances it was not until November 23, 2000 that plaintiff was able to find and visit a physician (Dr. Perry) that would provide a narrative report as to plaintiff's current medical condition. Such Sur Reply explanation is improper. (*See, TIG Insurance Company v. Pellegrini*, 258 A.D.2d 658; *Dannasch v. Bifulco*, 184 A.D.2d 415, 417.) As stated in *Clearwater Realty Company v. Hernandez*, (256 A.D.2d 100) at p. 102:

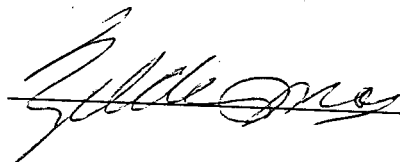
“Arguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion. This Court has required and will require consistent application of the rule (*Azzopardi v American Blower Corp.*, 192 AD2d 453, 454; *Dannasch v Bifulco*, 184 AD2d 415, 415-417)’ (*Lumbermen’s Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626).”

Since this Court will not accept the Sur Reply affirmation because plaintiff first raised the basis for the unexplained gap in its reply papers, the unexplained gap renders Dr. Perry's medical affirmation lacking in probative value. (*See, Massey v. Jung*, 280 A.D.2d 586; *Pierre v. Nanton*, 279 A.D.2d 621; *Goldin v Lee*, 275 A.D.2d 341, 342.) Furthermore, while Dr. Perry found that plaintiff's "musculoskeletal system has been

permanently and irreversibly damaged to the point where Lynn C. Zvengrowski in my opinion, will never be totally free of pain and she will never regain full, complete, normal and unrestricted range of motion of the affected area of her spine," Dr. Perry has not set forth what objective tests he performed in arriving at this conclusion. (See, *Grossman v. Wright*, 268 A.D.2d 79; *Smith v. Askew*, 264 A.D.2d 834.) Moreover, without proof of injuries, the self-serving affidavit of the plaintiff is insufficient to raise triable issues of fact.

Accordingly, the defendants' motion is granted; and the plaintiff's cross-motion is denied.

Dated: 1/25/02

  
J.S.C.

**ENTERED**

JAN 29 2002

NASSAU COUNTY  
COUNTY CLERK'S OFFICE