SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

TRIAL/IAS PART 17

MARGARET HOFFMAN,

Plaintiff,

- against -

RAMONA D. NARAIN,

Defendant.

Index No. 18951/03

Sequence No. 2
Motion Date: February 9, 2006

RAMONA D. NARAIN,

Third-Party Plaintiff,

- against -

ROBERT M. HOFFMAN,

Third-Party Defendant.

The following papers read on this motion:

Notice of Motion 1
Affirmation in Opposition 2
Reply Affirmation 3

This motion by defendant Narain for an order pursuant to CPLR 3212 granting her summary judgment dismissing the complaint against her is granted.

Plaintiff in this action seeks to recover damages for personal injuries sustained in a motor vehicle accident on January 19, 2001. Defendant seeks dismissal of the complaint on the ground that plaintiff did not sustain a "serious injury" as required by Insurance Law § 5104(a) and defined by Insurance Law § 5102(d).

The medical evidence submitted by defendant in support of her application sets forth a *prima facie* showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). Affirmed medical reports by examining physicians establish that plaintiff had no disabilities, deficits, or other limitations. *See, Springer v. Arthurs*, 22 A.D.3d 829 (2d Dept. 2005); *citing, Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345 (2002). More specifically, Dr. Michael Katz, a Fellow of the American Academy of Orthopedic Surgeons and a Diplomate of the American Board of Forensic Medicine, affirms that he examined plaintiff on May 5, 2005 and found that she had normal range of motion in her cervical and lumbar spine. He concluded that plaintiff had cervical and lumbosacral strains which had resolved and that she showed no signs or symptoms of permanence on a causally-related basis. He concluded that she was not disabled on a causally-related basis and that she was capable of her activities of daily living. Dr. John Kelemen, a Board Certified Neurologist, also affirms that he examined plaintiff on May 5, 2005 and diagnosed her status as "post cervical strain." He found that there was no evidence of an associated neurological abnormality or disability from a neurological perspective. Dr. Stephen W. Lastig, a Board Certified Radiologist, attests that he reviewed the MRI films of plaintiff's cervical spine taken on

March 24, 2001 and found only evidence of degenerative disc disease. As for plaintiff's claim that she was unable to perform substantially all of her customary daily activities for at least 90 out of the 180 days immediately following the accident, defendant notes that plaintiff admitted at her examination before trial that she was already unemployed and on social security disability at the time of the accident due to a prior work accident. The burden shifts to plaintiff to establish the existence of a triable issue of fact (*Franchini v. Palmieri*, 1 N.Y.3d 536 [2003]; *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72 [2003]).

Contrary to defendant's argument, the plaintiff may rely on the unsworn reports listed and relied upon by defendant's experts. Defendant "open[ed] the door for the plaintiff to rely upon [the] same unsworn or unaffirmed reports and records in opposition to the motion" (*Kearse v. New York City Transit Authority*, 16 A.D.3d 45, fn. 1 [2d Dept. 2005; *citing, Pech v. Yael Taxi Corp.*, 303 A.D.2d 733 [2d Dept. 2003]).

Dr. Anthony Latona, plaintiff's treating chiropractor from January 25, 2001 to May 22, 2001, attests that he examined plaintiff on January 25, 2001, a week after the accident, and he found that plaintiff had significant limitations in the range of motion of her cervical and lumbar spines. He states: "the Foraminal Compression Test, the Kemps Test and the Lasagues Test were positive bilaterally. The Distraction Test was positive, the Valsava's Test was positive in the neck and back, and the Soto Hall Test was positive in the neck. Cervical-Thoracic moderate muscle spasms were noted. My initial diagnosis was post-traumatic cephalgia and cervical lumbar sprain-strain with

radiculitis." Dr. Latona notes that a review of plaintiff's MRI reports and films as well as the results of her Nerve Conduction Velocity Studies demonstrated central disc herniations at C5-C6 and C6-C7 with impingement on the anterior epidural space as well as right C6-C7 and left C7-C8 radiculopathy. Dr. Latona further attests that his recent examination of plaintiff performed on December 29, 2005 revealed continued significant limitations in the range of motion of her cervical and lumbar spines. Finally, Dr. Latona concludes:

> "Due to the patient's constant episodes of pain, muscle spasms and the restricted range of motion at this point in time, in addition to the MRI results and Nerve Conduction Velocity Studies I have reviewed, it is clear that the patient has suffered permanent neck and back injuries. From my examinations of Ms. Hoffman, the diagnostic results I have reviewed, the orthopedic tests I have performed, as well as the patient's lack of symptoms prior to the accident date, it is clear that the accident was a direct cause of the patient's injuries."

As for the four-year gap between her treatment by Dr. Latona and her recent exam, plaintiff attests that, although she did not want to, she was forced to cease treatment because her insurance would no longer pay for it.

The plaintiff has failed to establish the existence of an issue of fact. Dr. Latona has failed to identify any of "the objective medical tests utilized at his most recent examination of the plaintiff which led him to conclude that the plaintiff continued to experience limitations" in her cervical and lumbar spines (*Springer v. Arthurs, supra*, at p. 830; *citing, Ersop v. Variano*, 307 A.D.2d 951 [2d Dept. 2003]; and *Carroll v. Jennings*, 264 A.D.2d 494 [2d Dept. 1999]; *see also, Toure v. Avis Rent A Car Systems,*

Inc., supra, at p. 357-358; *McConnell v. Ouerdraogo*, 24 A.D.3d 423 [2d Dept. 2005]; *Murray v. Hartford*, 23 A.D.3d 629 [2d Dept. 2005]).

In addition, the plaintiff has failed to adequately explain the cessation of her treatment. Without more, that her insurance ran out simply does not suffice (*Gomez v. Ford Motor Credit Company*, 10 Misc.3d 900 [Supreme Court, Bronx County (Renwick, J.)]; *citing, McNamara v. Wood*, 19 A.D.3d 921 [3d Dept. 2005]; and *Shapurkin v. SSI Services, FLQ, Inc.*, 2005 WL 2002452 [E.D.N.Y. 2005]; *compare*, *Ahmed v. Khan*, 5 Misc.3d 129[A] [2004]; *Black v. Robinson*, 305 A.D.2d 438 [2d Dept. 2003]).

Dated: 4/4/06

J.S.C.