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SHORT FORM ORDER mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

CANDICE M. BETHEL,

Plaintiff(s),

-against-

ANTHONY MESSINA,

Defendant(s).

MOTION DATE: 2/2/09
INDEX No.:7198/07
MOTION SEQUENCE NO:1

CAL. NO.:2008H3240
X X X

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-5
Answering Affidavits.....	6-11
Replying Affidavits.....	12,13
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendant for an order pursuant to CLR 3212 granting summary judgment dismissing the complaint on the ground that the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102[d], is granted.

This is an action to recover money damages for serious personal injuries emanating from an occurrence on September 18, 2005, at 4:00 am, when the plaintiff, then aged 23, returned from a night out with her cousin and sister, and was struck by the defendant's vehicle as she walked across Little East Neck Road in West Babylon, New York towards a nearby 7-11. The police report recounts that the plaintiff was struck as she attempted to catch up with her companions, who had crossed ahead of her.

After the accident, the plaintiff was taken to the emergency room at Good Samaritan Hospital where X-rays and a CAT scan of the head and cervical spine were performed, after which she was given a prescription for Vicodan and released later that day.

Within a week of her release, the plaintiff went to her family

doctor complaining of headaches and right knee pain. She then sought treatment with a neurologist and an orthopedist, who examined the plaintiff and sent her for a right knee MRI, back X-rays and prescribed physical therapy. The right knee MRI was conducted in November 2005 and produced a finding of, *inter alia*, "Grade II linear intrameniscal degeneration" with "[n]o evidence of full thickness tear."

The plaintiff treated with this orthopedist until January of 2006, until her "no fault was cut off" and also received "trigger point" injections from the neurologist, with whom she treated until April of 2006.

In June of 2006, the plaintiff began treatment with a new orthopedist, Dr. David Benatar, who examined the plaintiff and allegedly discerned at that time significant range of motion limitations in the cervical and lumbar spines, as well as the right knee.

Dr. Benatar prescribed acupuncture therapy, and chiropractic care, although these treatments were discontinued in November of 2006, allegedly due to their ineffectiveness, and because the plaintiff's health benefits had expired. Although she was allegedly still in pain, the plaintiff discontinued treatment with Dr. Benatar in November of 2006, also allegedly due to a termination in benefits.

In February of 2008, some 15 months after discontinuing treatment, and after the commencement of her serious injury action, the plaintiff returned to Dr. Benatar, who upon examination, found that her lower back and knee paid had improved, but that her cervical spine pain allegedly had not.

An MRI performed in March of 2008 revealed a central disc herniation at the C7 level and a "small central" disc bulges/herniations at the C4-5, C5-6 levels. The plaintiff returned to Dr. Benatar for follow-up visits in June, September and December of 2008. The latter visit being subsequent to the making of defendant's motion for summary judgment.

During his latest, post-motion (December, 2008) examination, Dr. Benatar again conducted range of motion tests and allegedly discerned limitations in the plaintiff's cervical and lumbar spines and up to a 5% limitation "in all phases of the plaintiff's right knee.

According to Dr. Benatar, these findings supported a diagnosis of accident related cervical herniations at the C5-C6 and C6-C7 levels, with radiculopathy; lumbar myofascitits and right knee patellofemoral syndrome, which are purportedly chronic in nature, thereby allegedly constituting a permanent partial disability causally related to the subject accident.

This action was commenced in April of 2007, and first and a bill ofparticulars and supplemental bill of particulars have been served alleging a variety of injuries including, *inter alia*, cervical disc herniation (C5-C6; C6-C7); cervical enthesiopathy sprain/strain; torn meniscus of the right knee and restriction of the right knee.

The complaint also alleges the existence of a medically determined injury of a nonpermanent nature which prevented her from performing her usual and customary activities for 90 of the 180 days immediately following the accident.

Discovery having been conducted, the defendant now moves for summary judgment dismissing the complaint. The motion is granted.

The defendants have established their *prima facie* entitlement to judgment by submitting, *inter alia*, the affirmed medical affirmations of their examining neurologist, radiologist and orthopedist - who conducted various tests and reviewed stated records - and thereafter concluded that the plaintiff suffers from no objective or verifiable medical sequella attributable to the underlying accident (*see, Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]; *Gaddy v. Eyler*, 79 NY2d 955, 957 [1992]; *Jin Mei Liu v. Lamberta*, 58 AD3d 687; *Carrillo v. DiPaola*, 56 AD3d 712; *Johnson v. County of Suffolk*, 55 AD3d 875, 876 *see also, Kaminski v. Kawamoto*, 49 AD3d 501, 502).

More particularly, the defendant's examining orthopedist and neurologist have recorded, *inter alia*, numeric range of motion findings with respect to, *inter alia*, the plaintiff's lumbar/cerivcal spine and knee and then compared those results to normal findings, thereby establishing that the plaintiff had full range of motion in all relevant tested locations (*see, Kaminski v. Kawamoto, supra*, 49 AD3d at 502).

In opposition to the motion, the plaintiff has failed to raise a triable issue of fact with respect to her claims that the soft tissue injuries she sustained are "serious" within the meaning of Insurance Law § 5102 (*e.g., Jin Mei Liu v. Lamberta*, 58 AD3d 687).

Preliminarily, the court notes that although the plaintiff's supplemental bill of particulars, which the defendant denied having received, refers to a torn meniscus, the medical reports submitted do not make reference to the existence of a torn right knee meniscus. Nor has the plaintiff submitted the affirmations of her chiropractor, her examining neurologist or the orthopedist whom she initially treated with prior to her first visit with Dr. Benatar in June of 2006.

The unsworn and uncertified medical records generated by these providers, including the unsworn reports of Dr. Benatar, which the plaintiff has annexed to her papers - are not in admissible form and therefore are lacking in probative import (*see generally, Grasso v. Angerami*, 79 NY2d 813, 814-815 [1991]; *Migliaccio v. Miruku*, 56 AD3d 393, 394; *Michel v. Blake*, 52 AD3d 486, 487; *Marrache v. Akron Taxi Corp.*, 50 AD3d 973, 974 *see also, Washington v. Mendoza*, 57 AD3d 972).

Further, the affirmed magnetic resonance imaging reports submitted by the examining radiologists, none of whom expressed an opinion with respect to causation (*Luizzi-Schwenk v. Singh*, 58 AD3d 811; *Sapienza v. Ruggiero, supra*, at 645) do not alone establish the existence of a serious injury. Indeed, "[t]he mere existence of herniated or bulging discs, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Luna v. Mann*, 58 AD3d 699, 700; *Joseph v. A and H Livery*, 58 AD3d 688, 689; *Choi Ping Wong v. Innocent*, 54 AD3d 384, 385).

Moreover, it is settled that "'[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally 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), despite the existence of an MRI which shows herniated or bulging discs'" (*Johnson v. County of Suffolk, supra*, 55 AD3d 875, 876, *quoting from, Kearse v. New York City Tr. Auth., supra*, at 49-50).

Additionally, the plaintiff has not proffered competent medical evidence generated contemporaneously with the underlying accident establishing that she sustained the serious injuries now alleged to exist. It is undisputed that Dr. Benatar first examined the plaintiff some eight months post-accident (*Shevardenidze v.*

Vaiana,___AD3d___, 2009 WL 563156 [2nd Dept. 2009]; *Garcia v. Lopez*, ___AD3d___,872 NYS2d 719, 720; *Luizzi-Schwenk v. Singh*, 58 AD3d 811, 812; *Camacho v. Dwelle*, 54 AD3d 706).

The court also agrees that the plaintiff failed to adequately explain the 15 month gap which occurred between her November, 2006 orthopedic visit with Dr. Benatar and her subsequent, February, 2008 office visit (*Pommells v. Perez*, 4 NY3d 566, 577 [2005]).

It is settled that "even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury - such as a gap in treatment, an intervening medical problem or a preexisting condition - summary dismissal of the complaint may be appropriate" (*Pommells v. Perez, supra*, at 577).

The plaintiff's subjective assertions to the effect that she believed the treatments she was undergoing were not helping, is not an admissible medical opinion from a "physician that a continuation of medical therapy would have only been 'palliative in nature'" (*Pommells v. Perez, supra*, 4 NY3d at 577 *see, Gonzalez v. A.V. Managing, Inc.*, 37 AD3d 175; *Besso v. DeMaggio*, 56 AD3d 596, 597; *DeSouza v. Hamilton*, 55 AD3d 352).

Dr. Benatar's affidavit does not contain an affirmatively rendered medial opinion to the effect that further treatments would be medically unproductive; rather, he merely repeats the plaintiff's claims to this effect.

Additionally, Dr. Benatar's assertion that the plaintiff told him that her benefits had been denied, is similarly inadequate to explain the gap which ensued under the circumstances presented (*Pommells v. Perez, supra*, at 574 *cf., Gonzalez v. A.V. Managing, Inc., supra*, 37 AD3d 175). Apart from her own unsubstantiated assertions, the plaintiff has not submitted any probative, documentary materials corroborating her assertion that no fault benefits ran out, such as "a letter from the insurance carrier as to when and why the carrier discontinued coverage" (*Lee v. Troia*, ___Misc3d___, 2006 WL 5403064 [Supreme Court, Queens County 2006], *affd*, 41 AD3d 469; *see, Paul v. Allstar Rentals*, 22 AD3d 476, 477-478; *Smith v. New York City Transit Authority*, ___Misc3d___, 2009 WL 641609 [Supreme Court, Queens County 2009]; *Coleman v. New Ridgewood Car Service*, 19 Misc.3d 1136(A), 1136(A), 2008 WL 2152726 [Supreme Court, Kings County 2008]; *Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900, 903-904 [Supreme Court, Bronx County 2005]).

Lastly, the plaintiff has failed to raise a triable issue of fact with respect to the claim that she sustained a medically-determined injury of a nonpermanent nature which prevented her from performing her usual and customary activities for 90 of the 180 days immediately following the accident (*see e.g., Perez v. Santiago*, 59 AD3d 692; *Luizzi-Schwenk v. Sing, supra; Joseph v. A and H Livery, supra; Laurent v. McIntosh*, 49 AD3d 820, 821-822; *Roman v. Fast Lane Car Serv., Inc.*, 46 AD3d 535, 536; *Sibrizzi v. Davis, supra*, 7 AD3d 691).

The plaintiff concededly missed only some two weeks from work (*see, Camacho v. Dwelle*, 54 AD3d 706, 707; *Kouros v. Mendez*, 41 AD3d 786, 788; *Ocasio v. Henry*, 276 AD2d 611, 612; *Bucci v. Kempinski*, 273 AD2d 333), and the record does not otherwise establish that the she suffered from a medically determined injury that prevented her from performing her usual activities for the statutory period (*Camacho v. Dwelle, supra; Perdomo v. Scott, supra, Jones v. Gooding*, 50 AD3d 968). As previously noted, Dr. Benatar did not examine the plaintiff until some nine months after the accident and offers no probative evidence with respect to the plaintiff's 90/180 claim.

The plaintiff's subjective claims and assertion with respect to the 90/180 day claim, as set forth in her affidavit, are lacking in probative value(*Dantini v. Cuffie*, 59 AD3d 490; *Uribe-Zapata v. Capallan*, 54 AD3d 936, 937; *Rashid v. Estevez*, 47 AD3d 786, 788).

The court has considered the plaintiff's remaining contentions and concludes that they are insufficient to defeat the defendant's motion for summary judgment.

Therefore, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: APR 06 2009

J.S.C.

bethel