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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

ROSEMARY CRUZ

Plaintiff,

-against-

LOUIS ROSCOE, SAJINDER S. BHATIA and BALDEV S. BHATIA,

Defendants.

Motion Sequence # 002, # 003
Submitted January 19, 2007

INDEX NO: 11526/05

The following papers were read on these motions:

BHATIA Notice of Motion.....1
ROSCOE Notice of Cross-Motion.....2
Affirmation in Opposition.....3
BHATIA Reply Affirmation.....4
ROSCOE Rely Affirmation.....5

Requested Relief

Counsel for defendants, SAJINDER S. BHATIA and BALDEV S. BHATIA (hereinafter referred to as "BHATIA"), move for an order, pursuant to CPLR 3212 and Article 51 of the Insurance Law, dismissing the complaint of plaintiff, ROSEMARY CRUZ, on the ground that the injuries alleged by the plaintiff do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the Insurance Law of the State of New York and, as such, plaintiff has no cause of action under Section 5104(a) of the Insurance Law.

In a companion motion, co-defendant, LOUIS ROSCOE, cross-moves for the same relief and adopts the arguments of BHATIA. Plaintiff opposes the motion and cross-motion which are determined as follows:

Background

The action arises out of a motor vehicle accident that occurred on December 16, 2004, at approximately 11:45 P.M., on the southbound Van Wyck Expressway entrance ramp near Hillside Avenue, Queens County, New York. In her affidavit, plaintiff claims that she was the seat-belted driver of her own car that was forcefully struck in the rear while she was slowed down, waiting for an opportunity to enter the Expressway. She states that, shortly thereafter, there was a second impact to her car and, with each impact, her car jerked forward, causing her head to hit the steering wheel and then fall backward into the seat. From the bill of particulars, it appears that plaintiff's vehicle was first struck from behind by defendant ROSCOE's vehicle, which was then struck from behind by defendant, BHATIA's vehicle.

Plaintiff claims that the day after the accident, as a result of pain in her neck, back, head and leg, she sought treatment from Dr. Barry Goodman, a board certified chiropractor, who administered chiropractic treatment to her three (3) times per week, and referred her to Dr. Lattuga, an orthopedist, who recommended MRI's and EMG/NCV tests. Plaintiff claims that those tests revealed that she had disc herniations and bulges in her cervical spine and disc bulges in her lumbar spine. Plaintiff asserts that she continues to have back and neck pain, which is at times severe, and that her ability to bend, lift, stretch and kneel has been compromised and, although she continues to do home exercises, there has been no improvement to her neck or back. She states that she can no longer

row (she was a member of the Dragon boat crew team prior to the accident), lift weights, ride a bike or roller skate, and has difficulty cleaning her home, sleeping at night, climbing steps and driving for any length of time. Plaintiff states that, prior to the accident, she never had any significant injury to her lower back and was never treated for same.

On or about July 13, 2005, plaintiff commenced the instant action for personal injuries against defendants by filing and later serving the Summons and Complaint. In August 2005, defendant BHATIA interposed an answer denying the material allegations of the complaint together with nine (9) affirmative defenses, and defendant ROSCOE interposed an answer denying the material allegations of the complaint together with three (3) affirmative defenses. The co-defendants cross-claimed against each other. Following joinder of issue, plaintiff served a bill of particulars in which she alleged that she sustained the following injuries which she alleged are permanent and caused by the underlying accident:

- Severe cervical sprain/strain ;
- Cervical vertebral subluxation complex;
- Positive compression testing;
- Positive Kemp testing;
- Myofascial spasm with trigger points and hypertonicity;
- All of these injuries with accompanying pain, exquisite tenderness, headaches, and loss of range in all directions;
- Severe sprain/strain of the lumbosacral spine;
- Myofascial spasms with trigger points and hypertonicity;
- Lumbosacral vertebral subluxation complex;
- All of the above injuries with accompanying pain, exquisite tenderness, limitation of range of motion and positive straight leg raising;
- Sprain/strain of the thoracic spine;
- Thoracic vertebral subluxation complex;
- All of the above injuries with accompanying pain, exquisite tenderness, pain upon attempted movement, heaviness in the back, shoulders, arms and legs;

See, Verified Bill of Particulars, Exhibit C, paragraph .

It is the plaintiff's position that the above listed injuries are "serious injuries" as defined by the New York Insurance Law and that some of her injuries are permanent and that she will continue to suffer pain and inconvenience as a result of injuries caused by the December 16, 2004 accident.

Upon the instant application, defendants now move for summary judgment dismissing the complaint on the ground that the injuries claimed by the plaintiff fail to meet the "serious injury" threshold requirement of the No Fault Law. In support of the motion, defendants have submitted (1) the affirmed medical report of Sarasavani Jayarman, M.D., a board certified neurologist, dated July 6, 2006, (2) the affirmed medical report of Wayne Kerness, M.D., an orthopaedic surgeon, dated June 20, 2006, and (3) the affirmed medical reports of Natalio Damien, M.D., a radiologist who reviewed the radiographs of plaintiff's cervical and lumbar spine, dated July 26, 2006.

In her report, Dr. Jayarman concludes, after reviewing plaintiff's medical records and a physical examination of her on July 6, 2006, during which she administered objective tests, that plaintiff's neurological evaluation is normal, that there are no focal deficits, that there is no need for treatment and that plaintiff is capable of all activities of daily living and work at this time, with no neurological disability.

Similarly, in his report Dr. Kerness opines, after reviewing plaintiff's medical records and a physical examination of her, on June 20, 2006, during which he administered objective tests, that plaintiff showed a normal range of motion in her cervical and lumbar spine, normal muscle strength, reflexes and gait. Dr. Kerness diagnosed plaintiff with a resolved cervical, thoracic and lumbar sprain/stain, with no disability or restriction of activities of every day living. Although noting tenderness in the paraspinals, bi-lateral

hypethasia in the small fingers and continuing headaches, Dr. Kerness concludes that plaintiff has no orthopedic residuals or permanency.

Finally, Dr. Damien, who reviewed the MRI films of plaintiff's cervical and lumbar spine, concludes that plaintiff's cervical spine shows hypertrophic degenerative changes with osteophyte formation and disc space narrowing at the C4/5, C5/6 and C6/7 levels of the cervical spine, and facet joint arthropathy and disc space narrowing at the L4/5 and L5/S1 levels of the lumbar spine, opines that said findings reflect a long-standing chronic process which are not related to any single traumatic event.

In opposition to the motion, counsel for plaintiff states that the neurologist and orthopedist who examined her years after the date of the loss, never addressed the possibility that she had a medically determined injury or impairment immediately following the accident that affected her activities during the 180 days immediately following the accident. Moreover, plaintiff provides her own affidavit which details all of the activities of daily living which have been impaired or limited by her injuries and the affidavit of her treating chiropractor, Dr. Goodman, who found significant limitations in plaintiff's range of motion. Additionally, the affirmation of Dr, Lubitz, M.D., is provided, the radiologist who administered the MRI's to plaintiff, who found a straightening of the cervical and lumbar lordosis suggesting muscle spasm, degenerative changes at C4/5 through C6/7, C3/4 bulge and C4/5 central and right lateral disc herniation, with flattening of the ventral sac, and C6/7 central disc herniation with effacement of the ventral sac, together with L4/5 and L5-S1 disc bulges with effacement of the ventral sac. Dr. Goodman concludes that based upon plaintiff's chronic symptomology, two (2) years post accident, she has chronic lumbar and cervical syndrome, with multiple herniated discs and bulges narrowing the neural

foramina and impressing the exiting root, and that plaintiff has a permanent partial disability. Dr. Goodman states that said injuries were caused by the subject motor vehicle accident, or were significantly exacerbated by the traumatic insult, and that she will require further care and treatment, including pain management, with a guarded prognosis, as further chiropractic treatment will be palliative and not curative. He further states that plaintiff has sustained a medically determined injury which disabled her from the majority of her usual and customary daily activities for more that 90 out of 180 days immediately following the accident as a result of said motor vehicle accident.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light

most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 (C.A.1993); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 (2nd Dept. 2001).

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [C.A. 1982]). On the present motion, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (*Lowe v Bennett,* 122 AD2d 728, 511 NYS2d 603 [1st Dept. 1986], *affirmed,* 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendants' motion is sufficient to raise the issue of whether a "serious injury" has been administered, the burden shifts and it is then incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. (*Licari, supra; Lopez v Senatore*, 65 NY2d 1017, 494 NYS2d 101 [1985]).

Discussion

After a careful reading of counsels' submissions, the Court finds that defendants' physicians reports that plaintiff did not sustain a serious injury are insufficient to establish, as a matter of law, that plaintiff did not sustain a "serious injury". The doctors, who examined the plaintiff on but one occasion, opine in conclusory fashion that plaintiff has no disability at this time that is causally related to the accident, however said finding are inconsistent with the objective tests that were administered which reveal continuing

symptomology and positive findings in plaintiff's cervical range of motion, tenderness in the cervical spine, loss of sensation in the fingers, etc. Where the conclusion of the defendants' examining physician, that the plaintiff had no disability or impairment, is directly contradicted by his report of the plaintiff's examination, which recorded positive symptomology, no *prima facie* entitlement to summary judgment was shown. *Cf., Parsons Coach, Ltd,* 12 AD3d 484, 784 NYS2d 647 (2nd Dept. 2004) and *Holtz v Y. Derek Taxi,* 12 AD3d 486, 784 NYS2d 614 (2nd Dept. 2004). Additionally, the differences of opinion among the medical experts as to the nature, cause and extent of plaintiff's injuries raise issues of credibility that must be resolved by a jury. *Kaplan v Gak*, 259 AD2d 736, 685 NYS2d 634 (2nd Dept. 1999).

The Court concludes that defendants never adequately addressed the 90/180 day claim as none of defendants' experts, who examined plaintiff almost two (2) years after the accident, addressed the possibility that she had a medically determined injury or impairment immediately following the accident. *Holtman v Bishop*, 35 AD3d 815, 828 NYS2d 135 (2nd Dept. 2006). Moreover, in addition to defendants' failure to demonstrate a *prima facie* right to the requested relief, the reports and affirmations of plaintiff's experts, together with plaintiff's affidavit, were sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) (see, *Abedin v Tynika Motors, Inc.*, 279 AD2d 595, 719 NYS2d 698 [2nd Dept. 2001]; *Stark v Amadio*, 239 AD2d 569, 658 NYS2d 991 [2nd Dept. 1997]; *Washington v Mercy Home for Children,* 232 AD2d 549, 648 NYS2d 956 [2nd Dept. 1996]). Dr. Goodman's affidavit that plaintiff has reached maximum medical improvement because further chiropractic

treatment would only be palliative, not curative, has adequately explained any gap in treatment. *See, Brown v Dunlap*, 4 NY3d 506, 797 NYS2d 380 (C.A. 2005); *Williams v New York City Transit Authority*, 12 AD3d 365, 786 NYS2d 183 (2nd Dept. 2004).

Conclusion

Based on the foregoing, it is therefore,

ORDERED, that defendants' motion and cross-motion for an order dismissing plaintiff's complaint on the ground that plaintiff has not sustained a "serious injury" are denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 30, 2007

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