S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

ALMA MEJIA and RAFAEL CORREA,

Plaintiffs,

-against-

KRISTIN RIZZI and ANTHONY RIZZI,

Defendants.

Motion Sequence #1
Submitted October 22, 2009
XXX

INDEX NO: 14072/08

The following papers were read on these motions:

Notice of Motion.....1
Opposition.....2
Reply Affirmation.....3

Requested Relief

Counsel for defendants, KRISTIN RIZZI and ANTHONY RIZZI, moves for an order, pursuant to CPLR §3212, dismissing the action of the plaintiff, ALMA MEJIA (hereinafter referred to as "plaintiff"), on the ground that she has not sustained a "serious injury" as defined in New York Insurance Law §5102(d). Plaintiff's husband RAFAEL CORREA, has interposed a derivative action. Counsel for plaintiffs opposes the motion, which is determined as follows:

Background

Plaintiffs commenced this action for injuries allegedly sustained in a two (2) vehicle collision that occurred on April 19, 2008 on South Long Beach Road at or near its intersection with Merrick Road, Freeport, New York. It is alleged that, at the time of the accident, plaintiff owned and operated a 1996 Nissan that came into contact with a 2003 Chevrolet, owned by defendant, ANTHONY RIZZI and operated by defendant, KRISTIN RIZZI, with the consent of the owner.

The action was commenced with the filing of a summons and complaint on July 30, 2008. The complaint alleges that plaintiffs were injured as the result of the negligence and carelessness of defendant in the operation and control of her vehicle. After issue was joined, plaintiffs served their bill of particulars which alleged that plaintiff sustained the following injuries: A) Subligamentous posterior disc herniations at L2-3, L4-5 and at L5-S1 impinging on the anterior aspect of the spinal canal; B) Posterior disc bulges at C5/6 and C6/7 impinging on the thecal sac and posterior disc bulge at the C3/4 level impinging on the anterior aspect of the spinal canal; C) Right L5 and S1 radiculopathy and left L3 radiculopathy; D) Cervical and lumbar radiculopathy; E) 1.5 inch laceration to the forehead and scalp requiring the same to be repaired with approximately 7 staples resulting in significant disfigurement and scarring. It is alleged that plaintiff suffered a "serious injury" within the meaning of the Insurance Law, that she suffered significant disfigurement and scarring, and was incapacitated and confined to her bed from the date of the accident, April 19, 2008, until May 1, 2008. She claimed that she could not attend to her employment at the Red Hot Spa in Roslyn, New York, and lost approximately $600.00 in wages.

At her deposition, the plaintiff testified that, following the accident, she went to South Nassau Hospital where she received seven (7) stitches to the forehead and was released. About one week later, plaintiff went to Bret Ostranger, M. D., an internist, who removed plaintiff's stitches but she was not referred to a plastic surgeon or other doctor with respect to removal of the stitches. Plaintiff testified that, about three (3) weeks later, she began treating with Walter Mendoza, a chiropractor, complaining of pain in her neck, head and back, and saw him for eight (8) to (10) months. Dr. Mendoza sent her to Nassau Radiology for MRI and x-rays and she stated that she was told she had a pinched nerve. Dr. Mendoza referred her to Dr. Parker, an orthopedist, who saw her twice in August 2008. Plaintiff testified that she also saw a neurologist after the accident, who saw her one (1) time, but that she did not recall his name. Plaintiff stated that she last treated for her injuries in November 2008 and has no future appointments for the subject accident. Plaintiff claims that, since the accident, she cannot clean her house, lift heavy things, decorate, paint her house or garden. She testified that, at the time of the accident, she was employed at the spa twenty (20) hours per week doing facials, waxing and body treatments. She claimed that she missed one (1) week of work as a result of the accident.

Counsel for defendants now moves to dismiss the action for failure to meet the threshold requirements of Insurance Law §5102(d). In support of the instant application to dismiss, the movants contend that, based upon the medical documentation and the plaintiff's deposition testimony, she cannot prove a "serious injury" as defined by the foregoing statute.

As evidentiary support for the within application, the defendant provides the affirmed independent medical reports of Michael J. Katz, M.D. and orthopedic surgeon,

and Scott S. Coyne, M. D., a radiologist. After an examination of the plaintiff and a review of her medical records, Dr. Katz determined that plaintiff has normal range of motion of the cervical and lumbar spines. He noted that the laceration on the left side of plaintiff's scalp is healed and is covered with hair and is not visible. Dr. Katz concluded that plaintiff revealed no evidence of disability as a result of the accident, showed no signs of permanent loss of use relative to her neck and back, and is currently not disabled. He stated that plaintiff was fully capable of performing her activities of daily living and of gainful employment.

On October 22, 2009, Dr. Coyne reviewed the MRI's of plaintiff's lumbosacral and cervical spine taken in May/June 2008. Dr. Coyne concluded that the MRI of plaintiff's lumbosacral spine revealed that plaintiff did not suffer a fracture, dislocation or other acute trauma. He found that the MRI showed no evidence of focal disc herniation or displacement. Dr. Coyne found that the MRI of the cervical spine showed no evidence of a fracture, dislocation focal disc herniations, central spine stenosis, displacement of the spinal cord or other trauma. Dr. Coyne confirmed that both MRI'S demonstrated "age appropriate degenerative changes" that are "chronic and long standing, pre-existent, and causally unrelated to the accident".

The Law

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395, 165 NYS2d 498, 144 NE2d 387 [C.A. 1957]; *Bhatti v Roche*, 140 AD2d 660, 528 NYS2d 1020 [2nd Dept 1998]). To obtain summary

judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines,* 64 NY2d 1092, 489 NYS2d 884, 479 NE2d 229 [C.A.1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Doran v Mutual Benefit Life Insurance Co.*, 106 AD2d 540, 483 NYS2d 66 [2nd Dept. 1984]; *Bethlehem Steel Corp. v Solow*, 70 AD2d 850, 418 NYS2d 40 [1st Dept. 1979]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247, 428 NYS2d 665, 406 NE2d 481 [C.A. 1980]; *Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2nd Dept. 1989]).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law

§5102(d) (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A.1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury"(*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [C.A.1982]).

Within the scope of the defendant's burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Qu v Doshna*, 12 AD3d 578, 785 NYS2d 112 [2d Dept 2004]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *Mondi v Keahan*, 32 AD3d 506, 820 NYS2d 625 [2d Dept 2006]).

Applying the aforesaid criteria to defendant's submissions, the Court finds that the defendants have established a *prima facie* case that plaintiff failed to sustain a serious injury (*Gaddy v Eyler, supra; see also, Kearse v New York City Transit Authority,* 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). The affirmed medical reports of defendant's orthopedist and radiologist, and the plaintiff's deposition testimony, are sufficient to establish *prima facie* that the plaintiff did not sustain a serious injury in the motor vehicle collision, within the meaning of Insurance Law § 5102(d) (*see Jackson v Colvert*, 24 AD3d 420, 805 NYS2d 424 [2nd Dept. 2005]). The deposition testimony does not, in the Court's opinion, indicate the plaintiff sustained a "serious injury."

Counsel for plaintiff argues that defendants have not made a *prima facie* showing of entitlement to judgment as a matter of law because Dr. Coyne noted a bulging disc in

relation to plaintiff's cervical spine which he allegedly failed to find was unrelated to the subject accident. The Court finds this argument to be without merit as Dr. Coyne indicated that all positive findings, including the subject bulging disc, were degenerative in nature and not causally related to the accident. Moreover, the plaintiff's own testimony, that she only missed one (1) week of work and that none of her alleged restrictions were the result of any instructions from her treating doctors, is the basis for the Court concluding that defendants made a *prima facie* showing that plaintiff did not suffer an injury that curtailed her customary daily activities for 90 out of 180 days immediately following the accident. *See, Hamilotn v Rouse*, 46 AD3d 514, 846 NYS2d 650 (2nd Dept. 2007).

Thus, the burden now shifts to the plaintiffs to demonstrate a triable issue of fact with respect to the existence of a "serious injury" (*Licari v Elliott, supra*). The plaintiff is now required to come forward with viable, valid objective evidence to verify her complaints of pain and limitation of motion (*Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2nd Dept. 2005]).

In opposition to the motion, the plaintiff offers copies of the affirmed MRI reports of John Himelfarb, M.D., dated June 5, 2008, and Richard Rizzuti, M.D., dated May 13, 2008, who administered MRI"s to plaintiff with respect to her cervical and lumbar spines. However, these reports are insufficient to rebut defendants *prima facie* showing as they do not causally relate their findings to the subject accident nor to plaintiff's subjective complaints of pain in relation to the accident. *See, Collado v Satellite Solutions & Electronics of WNY, LLC.*, 56 AD3d 411, 868 NYS2d 74 (2nd Dept. 2008); *Collins v Sheridan*, 8AD3d 321, 778 NYS2d 79 (2nd Dept. 2004).

Next plaintiff submits the affirmed report of Richard L. Parker, M.D., an orthopedic surgeon who saw plaintiff for a consultation on October 29, 2008. At that time, Dr. Parker found pain and tenderness in plaintiff's cervical and lumbar spines together with decreased range of motion, pain and tenderness in plaintiff's pelvis, and pain and tenderness in plaintiff's right and left shoulder with decreased range of motion. However, Dr. Parker failed to set forth the objective tests performed to reach his conclusion as to decreased ranges of motion and his report is, thus, defective. *See, Schacker v County of Orange*, 33 AD3d 903, 822 NYS2d 777 (2nd Dept. 2006); *Ilardo v New York City Transit Authority*, 28 AD3d 610, 814 NYS2d 201 (2nd Dept. 2006); *Kelly v Rehfeld*, 26 AD3d 469, 809 NYS2d 581 (2nd Dept. 2006).

Next plaintiff submits the sworn affidavit (referring to the report) of Walter Mendoza, DC, plaintiff's treating chiropractor, who first saw plaintiff on April 21, 2008, shortly after the accident, and then several times a month through October 29, 2008. Plaintiff was also seen on August 26, 2009 for a "Final examination" of her injuries sustained in the April 19, 2008 auto accident. Dr. Mendoza reports, a year and a half after the accident, that plaintiff continues to experience significant pain and decreased range of motion in her cervical and lumbosacral spines and her right shoulder, increased neurological sensitivity, and abnormal findings on muscle testing. He makes reference to the MRI findings as to disc bulges and to the Electrodiagnostic study that he performed on June 3, 2009, that revealed right L5 and S1, and left L3 radiculopathies. Dr. Mendoza concludes that, based upon subjective complaints and objective findings, plaintiff's injuries are consistent with the type of motor vehicle accident she experienced on April 19, 2008. He opines that "due to the traumatic insult of the structural integrity of the muscular tendons, ligamentous, and

cartilaginous structures of the spine, the soft tissue structures attendant to the spine if they heal, do so by deposition of fibrous, non elasticity tissue causing adhesions and therefore restricting the normal inherent elasticity and contractility of the tissues leading to further abnormal motion and allowing compromise of the nerve roots". Dr. Mendoza states that plaintiff is predisposed to periods of exacerbation, and that "the normal degenerative changes of the spinal column that occur during aging become accelerated and this has a tendency to result in localized chronic pain that may be more prevalent during changes in weather, or at times of stress, fatigue or over exertion. Dr. Mendoza concludes that plaintiff's injuries that are a result of the April 19, 2008 accident are partially permanent in nature, and that plaintiff's prognosis for a full recovery is poor. Dr. Mendoza's affidavit, sworn to September 13, 2009, states that plaintiff's lapse in treatment, between October 29, 2008 and August 26, 2009, occurred because plaintiff had reached maximum benefits of treatment and he did not believe that additional chiropractic treatment would be beneficial to her. However, in his report, dated August 26, 2009, he states that plaintiff "has been advised to undergo a program of chiropractic adjustments, which may afford her symptomatic relief".

After a careful reading of the reports of Dr. Mendoza, the Court concludes that his findings are contradictory and too conclusory in nature to defeat defendant's *prima facie* showing of no serious injury. The mere parroting of language that is tailored to meet statutory requirements is insufficient to defeat the motion for summary judgment. *Grossman v Wright,* 268 AD2d 79, 707 NYS2d 233 (2nd Dept. 2000). Furthermore, the Court finds that the plaintiff has failed to adequately explain the almost one (1) year gap in treatment which occurred between her last chiropractic visit and the most recent post-

litigation appointment, and the inference to be derived therefrom is that her injuries were resolved and neither serious nor permanent in nature (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 [C.A. 2005]). While a cessation of treatment is not totally dispositive since it is not required that the plaintiff continue needless treatment in order to survive a summary judgment motion, the Court of Appeals has recently stated that a plaintiff who terminates therapeutic measures following the accident while claiming serious injury must offer some reasonable explanation for having done so. *See, Pommells v Perez, supra*; *see also Mohamed v Siffrain*, 19 AD3d 561, 797 NYS2d 532 [2nd Dept. 2005]; *Batista v Olivo*, 17 AD3d 494, 795 NYS2d 54 [2nd Dept. 2005]).

Courts that have applied *Pommells v Perez, supra,* have consistently held that to be reasonable, the explanation must be concrete and substantiated by the record. The same exacting scrutiny should be applied to the plaintiff's explanation about why the gap or cessation of treatment occurred. Moreover, "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". No affidavit of the plaintiff is presented and the Court rejects Dr. Mendoza's conflicting statements and finds that there is not an adequate explanation of plaintiff's gap in treatment (*Pommells v Perez, supra*; *see, Gonzalez v. A.V. Managing, Inc.*, 37 AD3d 175, 829 NYS2d 70 [1st Dept. 2007]; *see also, Strok v Chez*, 57 AD3d 887, 869 NYS2d 345 [2nd Dept. 2008]; *Sapienza v Ruggiero, supra*; *Besso v DeMaggio*, 56 AD3d 596, 868 NYS2d 681 [2nd Dept. 2008]; *DeSouza v Hamilton*, 55 AD3d 352, 866 NYS2d 26 [1st Dept. 2008]).

The Court notes that Dr. Mendoza's Final Report recommended that plaintiff continue her chiropractic care and the Court concludes that her failure to do so was because her injuries were not serious or had resolved.

The Court further notes that none of plaintiff's doctors specifically address the degenerative findings reported by defendant's radiologist, Dr. Coyne (*Francis v Christopher*, 302 AD2d 425, 754 NYS2d 578 [2nd Dept. 2003]; *Napoli v Cunningham*, 273 AD2d 366, 710 NYS2d 919 [2nd Dept. 2000]). Nor have plaintiff's doctors offered competent medical evidence that plaintiff sustained a medically-determined injury which prevented her, for 90 of the 180 days following the subject accident, from performing substantially all her daily activities (*Wang v Harget Cab Corp.*, 47 AD3d 777, 850 NYS2d 537 [2nd Dept. 2008]; *Hasner v Budnik*, 35 AD3d 366, 826 NYS2d 387 [2nd Dept. 2006]). The subjective complaints of the plaintiff communicated to her doctors are insufficient to raise a triable issue of fact as to whether she sustained a serious injury (*Shvartzman v Vildman*, 47 AD3d 700, 849 NYS2d 600 [2nd Dept. 2008]; *Sainte Aime v Ho,* 274 AD2d 569, 712 NYS2d 133 [2nd Dept. 2000]).

Based on the foregoing, the Court concludes that plaintiff has failed to submit any objective medical evidence in admissible form sufficient to raise a question of fact as to whether plaintiff suffered a "serious injury" as a result of the accident. *See, Parente v Kang* 37 AD3d 687, 831 NYS2d 430 (2nd Dept. 2007). It is therefore

ORDERED, that the motion by defendants for an order dismissing plaintiff's complaint is granted, and the action is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 22, 2009

WILLIAM R. LaMARCA, J.S.C.

TO: Robert K. Young & Associates
Attorneys for Plaintiffs
1321 Bellmore Avenue
North Bellmore, NY 11710

Martyn, Toher & Martyn, Esqs.
Attorneys for Defendants
330 Old Country Road
Mineola, NY 11501

mejia&correa-rizzi,#1/sumjudg