SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

JACKIE STAFFORD,

Plaintiff(s),

- against -

KENNETH RAMIREZ, ANDREW B. WILEN and LAURIE B. WILEN,

Defendant(s).

TRIAL/IAS PART 6

INDEX NO. 4209/10

MOTION SEQUENCE NO. 2

MOTION SUBMISSION DATE: September 23, 2011

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**XX**
Reply Affirmation	**XX**

Upon the foregoing papers, the motion by the defendant Kenneth Ramirez for an Order pursuant to CPLR § 3212 granting the defendant summary judgment dismissing the plaintiff's complaint on the grounds that plaintiff Jackie Stafford did not suffer a "serious injury" as defined under New York Insurance Law Section 5102(d) and as such has no cause of action under New York Insurance Law Section 5104(a) is determined as hereinafter provided:

This personal injury action arises out of two separate and distinct motor vehicle accidents involving the plaintiff. The first accident occurred on December 31, 2008 on Nostrand Avenue at its intersection with Belmont Avenue, East Meadow, N.Y. involving a vehicle driven by the defendant Kenneth Ramirez and the plaintiff's vehicle. The second accident involving the plaintiff occurred on June 24, 2009 on Prospect Avenue at or near its intersection with Chestnut Avenue, East Meadow, N.Y. between the plaintiff's vehicle and a vehicle driven by the defendant Andrew B. Wilen owned by the defendant Laurie B. Wilen.

The plaintiff commenced a single action involving both accidents. The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

Plaintiff, Jackie Stafford suffered of the following serious personal

injuries:

a. Cervical Spine
   i. Cervical radiculitis;
   ii. Displacement of cervical intervertebral disc;
   iii. Reversal of lordosis;
   iv. C5/6 disc bulge with bilateral uncovertebral joint hypertrophy;
   v. C6/7 disc bulge with bilateral uncovertebral joint hypertrophy;
   vi. Left uncovertebral joint hypertrophy at C3/4; and
   vii. On April 27, 2010, plaintiff underwent a cortisone trigger point injection of one cc's of Depo-Medrol, two cc's of 0.5% Marcaine and two cc's of 1% lidocaine over her bilateral trapezius and lower cervical paraspinal muscles.

b. Lumbar Spine
   i. Lumbar radiculopathy;
   ii. Disc bulge at L4/5; and
   iii. Impingement of the left L4 nerve roots.

c. Left Knee
   i. Contusion to the Left Knee;
   ii. Internal Derangement of Left Knee; and
   iii. Left Knee Prepatellar Bursitis.

d. Left Hand and Wrist
   i. Carpel Tunnel Syndrome;
   ii. Tenosynovitis.

The defendant Kenneth Ramirez in support of said defendant's application submits amongst other things an affirmed letter report dated October 27, 2010 of P. Leo Varriale, M.D., an orthopedist of an orthopedic examination conducted on October 27, 2010 of the plaintiff and a copy of the plaintiff's September 28, 2010 deposition transcript.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923,

501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law **(see Licaro v. Elliot, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; Palmer v. Amaker, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; Tipping-Cestari v. Kilhenny, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991)**.

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) **(see, Zoldas v. Louise Cab Corp., 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; Wright v. Melendez, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988)**.

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

> "(d) 'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, ember, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In pertinent part, the report of Dr. Varriale provides:

> "PHYSICAL EXAMINATION: Jackie Stafford is a 54 year old female who is 5' 4" tall and weighs 130 pounds. She has brown eyes and brown hair. Range of motion was determined visually.
>
> Cervical Spine: There is no tenderness or spasm in the cervical spine. There is flexion to 40° (50° normal), extension to 50° (60° normal), right and left lateral rotation to 70° (80° normal). No atrophy about the paraspinal muscles. There is no pain or radiation of pain on range of motion. There is full strength of the biceps, triceps and intrinsic muscles of the hands. There is full strength of the dorsi flexors and volar flexors of the wrists and full strength of the abductors of the shoulders. The biceps, triceps and brachloradialis reflexes are 2+ bilaterally. There are no sensory deficits in the upper extremities to light touch. There is no atrophy noted in the forearms or upper arms. There is normal skin color. There is no excessive sweating of the extremities. There is a negative Spurling's test.
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> Lumbar Spine: There is no spasm or tenderness about the lower

back. No atrophy about the paraspinal muscles. There is extension to 0° (10° normal), flexion to 80° (90° normal). There is negative straight leg raising bilaterally. There is full strength of the dorsi flexors and plantar flexors of the feet and quadriceps and hamstrings of the legs. There are no sensory deficits in the lower extremity. Knee and ankle reflexes are 2+ bilaterally. No atrophy noted about the calves or the thighs.

Left Knee: Range of motion of the knee is from 0° to 130° (0° to 130° normal). There is no effusion, no joint line tenderness. No tenderness about the femoral condyles or about the tibia. There is a negative Lachman. Negative drop back. No signs of about the tibia. There is a negative Lachman. Negative drop back. No signs of posterolateral or posteromedial instability. No medial or lateral instability. No tenderness about the patella. Good tracking of the patella. No increased warmth noted about the knee. Full strength of the quadriceps and hamstrings.

DIAGNOSIS:

1. Resolved cervical and lumbosacral strain.
2. Pre-existing osteoarthritis and degenerative disc disease of the cervical and lumbar spine.

IMPRESSION AND OPINION: It is my professional opinion, based upon a comprehensive physical examination, case history, and review of the claimant's file and the history as provided by the claimant, that the following are true:

I believe, at the present time, Ms. Stafford's complaints of pain are due to her accident of June 24, 2009 and not due to the accident of December 31, 2008, considering she specifically states she was almost completely better just before the June 24, 2009 accident.

I believe Ms. Stafford has no disability related to the accident of December 31, 2008. There is no need for any further diagnostic testing, physical therapy or orthopedic treatment as it relates to the accident of December 31, 2008.

I believe she can work full-time in her job in medical records."

A review of the plaintiff's deposition transcript sets forth that the plaintiff ceased medical treatment for the December 31, 2008 accident in June 2009 (see deposition transcript of Jackie Stafford at pgs. 37-41).

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" **(Winegrad v. New York University Medical Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694)** and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact **(see Gaddy v. Eyler,**

79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995).

The court initially observes that the defendants Andrew B. Wilen and Laurie B. Wilen submit certain records of the plaintiff's treating health care providers in opposition to the defendant Kenneth Ramirez's application that are not in admissible form. While a defendant may submit such records in support of a defendant's own application (see *Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 (Second Dept., 1992), such inadmissible records are not properly considered herein in opposition to the co-defendant's application (see *Grasso v Angerami*, 79 NY2d 813, 580 NY2d 178).

A review of the respective submissions of the plaintiff and the respective Wilen defendants in opposition do not set forth any medical evidence to establish that the injuries claimed by the plaintiff were caused by the accident of December 31, 2008 involving the defendant Kenneth Ramirez. As such the defendant Kenneth Ramirez's application for an Order pursuant to CPLR § 3212 granting the defendant summary judgment and dismissing the plaintiff's complaint, is **granted**.

SO ORDERED.

DATED: 11/30/2011

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J.S.C.