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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x TRIAL TERM PART 48

MADELINE SORRENTI.,

INDEX NO.: 016906/07

Plaintiff,

MOTION DATE:10-9-08
SUBMIT DATE: 11-24-08
SEQ. NUMBER - 003

-against-

JENAYET MELAMED, NICOLE D. ERKER, and NICOLE D. MALGIERI,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 9-9-08.....1
Affirmation in Opposition, dated 11-12-08.....2
Reply Affirmation, dated 11-20-08.....3

Motion pursuant to CPLR 3212 by defendant Jenayet Melamed (Melamed) for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d) is denied.

Plaintiff commenced this action alleging that she sustained serious injury to her back, neck, head and right knee, within the ambit of Insurance Law § 5102(d) when the

vehicle she was operating was rear ended while stopped in traffic at or near the intersection of Route 107 and MacLean Drive in Brookville, New York on October 16, 2006. According to her deposition testimony, plaintiff did not seek medical attention immediately after the accident but, instead, drove to the Milleridge Inn and had dinner with friends. It was not until October 27, 2006, that she sought treatment from her family physician. She missed approximately one week to ten days of work.

As the movant for summary judgment, defendant Melamed has the initial burden of establishing *prima facie* entitlement to judgment as a matter of law. *Hughes v Cai*, 31 AD3d 385 (2nd Dept. 2006). Defendant's medical expert must specify the objective tests on which his opinions are based and, with respect to an opinion regarding plaintiffs' range of motion, the expert must compare his findings with those ranges of motion considered normal. *Benitez v Mileski*, 31 AD3d 473, 474 (2nd Dept. 2006). It is only if defendant successfully makes the necessary showing that the burden shifts to plaintiff to proffer competent medical evidence, based on objective medical findings and diagnostic tests, to support the serious injury claim or to show, by the submission of objective proof of the nature and degree of the injury, the existence of questions of fact *vis a vis* whether the purported injury falls within the ambit of the statute. *Flores v Leslie*, 27 AD3d 220, 221 (1st Dept. 2006). Conclusions, even of an examining doctor, which are unsupported by acceptable objective proof are insufficient to defeat a summary judgment motion on the threshold issue of whether plaintiff has suffered a serious physical injury. *Mobley v Riportella*, 241 AD2d 443, 444 (2nd Dept. 1997).

To substantiate a claim under the category of either "permanent consequential limitation of use of a body organ or member," or "significant limitation of use of a body function or system," the medical evidence submitted by plaintiff must contain objective, quantitative evidence with respect to a diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body, organ, member, function or system. *DeLeon v* Ross, 44 AD3d 545 (1st Dept. 2007); *Alvarez v Green*, 304 AD2d 509, 510 (2nd Dept. 2003). The demonstrated limitation must be more than mild, minor or slight. *Licari v Elliott*, 57 NY2d 230, 236 (1982); *Palmer v Moulton*, 16 AD3d 933, 935 (3rd Dept. 2005). Whether a limitation of use or function is significant or consequential relates to medical significance, and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, use of a body part. *Dufel v Green*, 84 NY2d 795, 795 (1995). Subjective complaints of pain alone are insufficient to establish a *prima facie* case of serious injury. *Lopez v Zangrillo*, 251 AD2d 382 (2nd Dept. 1998).

According to plaintiff's bill of particulars she suffered, *inter alia*,

> internal derangement of the lumbar spine due to whiplash resulting in left foraminal disc herniation at the L5-S1 level with impingement upon the exiting left L5 nerve root; disc bulging at L4-L5 and annular tear extending towards the left neural foramen;
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> internal derangement of the cervical spine due to whiplash;
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> internal derangement of the right knee and surrounding musculature; and
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> headaches.

In support of dismissal, defendant Melamed has submitted the affirmed report of S. Murthy Vishnubhakat, M.D., a neurologist, who examined plaintiff on May 29, 2008. Dr. Vishnubhakat states that his examination revealed normal ranges of motion in plaintiff's cervical and lumbar spines, with no paravertebral muscle spasm, as well as full range of motion in her right and left knees.[1] Based on his own examination of plaintiff, and a review of the medical records of her treating healthcare providers,[2] he opined that "there is no neurologic disability or permanency related to the accident of 10/16/06 either for activities of daily living or her profession as a real estate broker." He noted the absence of any "evidence of trauma-related herniated disc or nerve root compression and further opined that there were no "mechanical signs of lumbar spine derangement of straight leg testing to suggest radicular disease." He states that plaintiff probably had a minor sprain and strain and notes that the "lack of any objective abnormality excludes injury to the cervical spine and symptoms of headache related to the accident."

Defendant having submitted sufficient evidence to make a *prima facie* showing of entitlement to summary judgment as a matter of law, the burden shifted to plaintiff to

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[1] Dr. Vishnubhakat's assessment of plaintiff's condition has an objective basis and compares the plaintiff's limitations to normal ranges of motion.

[2] The records reviewed consisted of those of: Dr. Lisa Kirshbaum, a/k/a Berger, plaintiff's family physician, who saw plaintiff on one occasion with respect to the injuries arising from the accident herein; Dr. Steven Erlanger, an orthopedist, who evaluated plaintiff on March 8, 2007, five months post accident and saw her on March 19, 2007, January 28, 2008, June 12, 2008, July 18, 2008; Dr. Charles Ventresca, a chiropractor, who evaluated plaintiff on January 7, 2007, three months post accident, and saw her from January 9th to January 16, 2007; and Gardiner Physical Therapy Service where plaintiff was treated from April 2, 2007 to July 24, 2007.

demonstrate by the submission of objective proof of the nature and degree of the injury, that she did sustain such an injury, or that there are questions of fact as to whether the purported injury was serious. *Toure v Avis Rent A Car Systems, Inc.* , 98 NY2d 345, 350 (2002); *Luckey v Bauch*, 17 AD3d 411 (2nd Dept. 2005).

In an effort to meet this burden, plaintiff has submitted the affidavit of her chiropractor, Charles Ventresca, D.C., who treated her on January 9, 2007, January 12, 2007 and January 16, 2007 and the affirmation of her treating orthopedist, Steven Erlanger, M.D., who examined/treated plaintiff between March 8, 2007 and August 26, 2008. Dr. Ventresca lists in his affidavit the tests he conducted [Jackson Compression Test, Kemps Test, Bechterew sitting Test, Laseque Test (all positive on the left); and Distraction Test (positive bilaterally), and opines that plaintiff "has a significant loss of use of the function of her spine in her back and neck" and that the injuries "are, within a reasonable degree of chiropractic certainty, solely related to this accident." He fails, however, to quantify the alleged limitations in plaintiff's range of motion or to compare said limitations to the normal function, purpose and use of the spine and neck. Moreover, he apparently has not examined plaintiff since he last saw her on January 16, 2007 and did not indicate that the opinion expressed in his affidavit was based upon a recent medical examination.

In order to establish that she suffered a significant limitation of use of a body function or system, plaintiff is required to show by objective proof evidence of the extent

or degree of the limitation and its duration based upon a recent examination. *Berkowitz v Taylor*, 47 AD3d 740, 741 (2nd Dept. 2008). In the absence of a recent examination, and a quantitative/qualitative assessment of plaintiff's alleged injuries, the opinions offered by Dr. Ventresca lack probative value. Further, although the MRI scan of plaintiff's lumbar spine (March 13, 2007) revealed, *inter alia*, slight disc bulging at the L4-L5 level; mild degenerative changes of the facet joints; and mild disc bulging at the L5-S1 level, these conditions are not, in themselves, evidence of serious injury.[3] *Gordon-Silvera v Long Island R.R.*, 41 AD3d 431, 432 (2nd Dept. 2007).

The affirmation submitted by plaintiff's treating orthopedist [4] is, however, sufficient. Dr. Erlanger sets forth range of motion findings *vis a vis* plaintiff's lumbar spine and compares those findings to what is considered normal. He opines, based upon the history, contemporaneous and more recent examinations, testing and treatment of plaintiff ,that she suffered "a significant limitation of use of the function of her lumbar spine solely related to the accident of October 16, 2006." *Toure v Avis Rent A Car Systems, Inc.*, *supra* at p. 350.

The Court finds that the plaintiff has met her burden of demonstrating that an issue of fact exits as to whether she sustained a significant limitation of use of a body function or system.

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[3] The affidavit of plaintiff's radiologist is silent on the issue of causation *vis a vis* the MRI findings.

[4] Dr. Erlanger treated plaintiff with epidural steroid injection on June 12, 2008 and July 18, 2008.

Accordingly, the motion is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: December 23, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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