SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

----------X PART 8

CHONG E. PARK and JOON S. HWANG,

Plaintiffs,

INDEX NO. 16654/09

XXX

-against-

MOTION DATE: 08/26/11

SEQUENCE NO: 02, 03

JOY A. PASTORE and THOMAS A. PASTORE,

Defendants.

----------X

Notice of Motion, Affs & Exs.....1

Affirmation in Opposition.....2

Notice of Motion, Affs & Exs.....3

Affirmation in Opposition & Exs.....4

Reply Affirmation.....5

Upon the foregoing papers, the defendants' motion for summary judgment (Seq. 03), pursuant to CPLR §3212, on the grounds that the plaintiffs did not sustain a "serious injury" within the meaning of New York State Insurance Law §5102(d), is granted. Defendants' motion (Seq. 02) for an order dismissing the plaintiff's complaint for failing to timely file a Note of Issue is denied as moot.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This action is to recover for personal injuries allegedly sustained by the plaintiffs Chong E. Park and Joon S. Hwang in a motor vehicle accident which occurred on August 1, 2009 at the intersection of Grand Central Parkway Service Road and Little Neck Parkway, in the County of Nassau, New York.

Defendants contend that plaintiffs' injuries fail to meet the "serious injury" requirements of Insurance Law §5102(d). In support of their motion, defendants submit the plaintiffs' bill of particulars, plaintiffs' deposition transcripts, examination reports of orthopedic surgeon, Dr.

Michael J. Katz for both plaintiffs, and radiology reports of Dr. Melissa Sapan Cohn relating to both plaintiffs.

With respect to plaintiff Chong E. Park, defendants contend that plaintiff Park sought treatment two to three days after the accident until February 2010, at which time she ceased all treatment in connection with this accident. Defendants also contend that plaintiff Park testified that she missed only two days from work during the first week after the accident, as well as a total of one month of intermittent days. She also testified that when she worked, she would do her normal one hour commute to New Jersey. As such, defendants argue that plaintiff Park did not suffer an injury that prevented her from performing substantially all of her customary daily activities for at least 90 of the 180 days immediately following the accident.

In addition, movants submit the orthopedic report of Dr. Michael J. Katz relating to his July 12, 2010 examination of plaintiff Park. Dr. Katz detailed the tests he performed during the examination and quantified his range of motion findings as compared with normal ranges of motion. Dr. Katz found that plaintiff had full range of motion in her cervical spine, thoracolumbosacral spine, right knee and left knee. He opined that plaintiff Park currently "shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to 08/01/09" and is not disabled. He further opined that plaintiff Park is capable of gainful employment as an office worker and of her activities of daily living. Dr. Katz further opined that it is doubtful that the bilateral knee derangement identified on the MRI is related to the accident of 08/01/09.

Movants also submit the reports of Dr. Melissa Sapan Cohn, a board certified radiologist, who conducted film review of plaintiff Park's cervical spine, lumbar spine, left knee and right knee. With respect to plaintiff's cervical spine MRI, Dr. Cohn reviewed plaintiff's cervical spine MRI of September 23, 2009 and reported that there is no evidence of disc herniation or disc bulge at any level and that there is no evidence for disc pathology or acute trauma related to injury on the submitted examination. With respect to plaintiff Park's lumbar spine, Dr. Cohn reviewed plaintiff's lumbar spine MRI of September 30, 2009 and reported that there is no evidence of disc bulge or disc herniation at any level and that there is no evidence for disc pathology or acute trauma related to injury on the submitted examination. With respect to plaintiff Park's left knee, Dr. Cohn reviewed plaintiff's left knee MRI of September 14, 2009 and reported that there were no tears, but that a minimal amount of fluid was present with the suprapatellar bursa. Dr. Cohn opined that there is normally a small amount of fluid within the joint space and this fluid does not appear pathological in nature and that there is no discernable tear of the posterior horn of the medial meniscus. She concluded that "this is essentially a

normal left knee MRI" and that "there is no evidence of acute trauma related injury on the submitted study." Lastly, with respect to plaintiff's right knee MRI, Dr. Cohn reviewed plaintiff Park's right knee MRI of September 2, 2009 and reported that there were no tears and that "this is essentially a normal right knee MRI." She also opined that "there is no evidence of an acute trauma related injury on the submitted examination."

With respect to plaintiff Joon S. Hwang, defendants contend that plaintiff Hwang sought treatment two to three days after the accident until February 2010, at which time he ceased all treatment in connection with this accident. Defendants also contend that plaintiff Hwang testified that he missed only eight days from work during the first month after the accident, as well as intermittent half days totaling less than 25 days of missed time from work. In addition, plaintiff Hwang testified that he would occasionally take time off just to stay home and relax and not to seek medical attention or treatment. As such, defendants argue that he did not suffer an injury that prevented him from performing substantially all of his customary daily activities for at least 90 of the 180 days immediately following the accident.

In addition, movants submit the orthopedic report of Dr. Michael J. Katz relating to his July 12, 2010 examination of plaintiff Hwang. Dr. Katz detailed the tests he performed during the examination and quantified his range of motion findings as compared with normal ranges of motion. Dr. Katz found that plaintiff Hwang had full range of motion in his cervical spine, lumbar spine, right shoulder and left shoulder. He opined that plaintiff Hwang currently "shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to 08/01/09" and is not disabled. He further opined that plaintiff Hwang is capable of gainful employment, full time, as a project manager and of his activities of daily living. Dr. Katz further opined that plaintiff Hwang "is capable of his pre-loss activity levels." Dr. Katz further notes that "it is significant that the MRI reports of the cervical spine, lumbar spine and both shoulders indicated changes, which are degenerative."

Movants also submit the reports of Dr. Melissa Sapan Cohn, a board certified radiologist, who conducted film review of plaintiff Hwang's cervical spine, lumbar spine, left shoulder and right shoulder. With respect to plaintiff's cervical spine MRI, Dr. Cohn reviewed plaintiff's cervical spine MRI of September 23, 2009 and reported that there are mild degenerative changes with disc desiccation at C2-3 through C6-7 which indicates that the disc has dried out and lost its normal water content. She opined that this is the commencement of degenerative disc disease. Dr. Cohn also reported that there is minimal disc bulging at the C5-6 and C6-7 levels, unrelated to trauma. She opined that plaintiff Hwang has minimal degenerative changes and no evidence for disc herniation or acute trauma related injury on the submitted study. With respect to plaintiff

Hwang's lumbar spine, Dr. Cohn reviewed plaintiff's lumbar spine MRI of September 30, 2009 and reported that there is mild degenerative changes at the L5-S1 level and mild disc bulging, unrelated to trauma. She further opined that there is no evidence for disc herniation or acute trauma related injury on the submitted examination. With respect to plaintiff Hwang's left shoulder, Dr. Cohn reviewed plaintiff's left shoulder MRI of September 2, 2009 and reported that there were no tears, but that the plaintiff Hwang has evidence of degenerative changes of the shoulder with acromioclacicular joint hypertrophic degenerative change, representing arthritis of the shoulder. She opined that "this is essentially a normal shoulder MRI with the presence of arthritis." Lastly, with respect to plaintiff's right shoulder MRI, Dr. Cohn reviewed plaintiff Hwang's right shoulder MRI of September 14, 2009 and reported that there were no tears, but that the plaintiff has evidence of degenerative changes of the shoulder with acromioclacicular joint hypertrophic degenerative change, representing arthritis of the shoulder. She opined that the plaintiff has degenerative changes of the cromioclavicular joint, but the shoulder is otherwise unremarkable in appearance without evidence for acute trauma related injury.

Based upon the foregoing, defendants contend that plaintiffs Park and Hwang did not suffer a serious injury as defined by New York Insurance Law §5102(d).

Contrary to plaintiffs' arguments, the defendant has made a prima facie showing of entitlement to summary judgment on the grounds that neither plaintiffs' injuries meet the "serious injury" requirements of Insurance Law §5102(d). (*Tourre v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 (2002); *Gaddy v. Eyler*, 79 N.Y.2d 955 (2002)). In their opposition, the plaintiffs argue, *inter alia*, that the defendants have failed to make a prima facie showing of entitlement to summary judgment because the defendants' doctors' reports are not probative on the issue of whether either plaintiff suffered a medically determined injury that prevented them from performing their usual and customary daily activities for a period of ninety days during the first one-hundred eighty days immediately following the accident, as none of the defendants' doctors conducted examinations until more than a year after the accident. The plaintiffs, themselves, however, testified to missing only minimal time from work following the accident. Accordingly, from the evidence submitted, the neither plaintiff was limited in their "usual and customary" daily activities for at least 90 days during the 180 days immediately following accident. (*See, Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008); *Charley v. Goss*, 863 N.Y.S.2d 205 (1st Dept. 2008); *McMullin v. Walker*, 68 A.D.3d 943, 892 N.Y.S.2d 128 (2d Dept. 2009); *Rodriguez v. Virga*, 24 A.D.3d 650, 808 N.Y.S2d 373 (2d Dept. 2005); *Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008); *Thompson v. Abbasi*, 15 A.D.3d 95, 788 N.Y.S.2d 48 (1st Dept. 2005)). The New York State courts have consistently held that

where pretrial evidence establishes that the plaintiff was not prevented from performing substantially all the material acts of daily living for less than the requisite 90 days, summary dismissal is warranted. *Charley v. Goss*, 863 N.Y.S.2d 205 (1st Dept. 2008) *Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008) *Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008); *Rodriguez v. Virga*, 24 A.D.3d 650, 808 N.Y.S2d 373 (2d Dept. 2005); *See also*, *Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008)(although plaintiff testified at deposition that as a result of accident she was confined to her home for two or three months and suffered certain limitations in her activities around home, there was no competent medical evidence indicating that she was unable to perform substantially all of her daily activities). To satisfy the 90/180 category of Insurance Law §5102(d), a plaintiff must be prevented from performing "substantially all" of his or her customary daily activities, and not merely a few. (See, *Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008) (dismissing claim where plaintiff was advised by physicians to refrain from landscaping and heavy lifting and was only somewhat restricted in daily activities); *See also, Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008)).

In further opposition to defendant's arguments regarding plaintiffs Chong E. Park and Joon S. Hwang, plaintiffs submit the affirmations of Dr. Marc McMahon, the affirmations of radiologist Dr. Steve Losik, the affirmations of radiologist Dr. Ayoob Khodadadi, and the plaintiffs' own affidavits. With respect to plaintiff Chong E. Park, Dr. Marc McMahon examined plaintiff Park for the first time on June 2, 2011, nearly two years after the accident. Dr. McMahon performed range of motion testing to plaintiff Park's right knee, left knee, cervical spine and lumbar spine and found that plaintiff Park had decreased ranges of motion in each area tested as compared to normal ranges. Dr. McMahon also discusses the ranges of motion determined by plaintiff Park's treating doctor, Dr. David Mun, immediately following the accident, but said records were not submitted in opposition to the instant motion, nor was it demonstrated that Dr. McMahon relied upon the sworn records of Dr. Mun.

Similarly, with respect to plaintiff Joon S. Hwang, Dr. McMahon examined plaintiff Hwang for the first time on June 2, 2011, nearly two years after the accident. Dr. McMahon performed range of motion testing to plaintiff Hwang's right shoulder, left shoulder, cervical spine and lumbar spine and found that plaintiff Hwang had decreased ranges of motion in each area tested as compared to normal ranges. Dr. McMahon also discusses the ranges of motion determined by plaintiff Hwang's treating doctor, Dr. David Mun, immediately following the accident, but said records were not submitted in opposition to the instant motion, nor was it demonstrated that Dr. McMahon relied upon the sworn records of Dr. Mun.

Dr. McMahon cannot rely upon the unsworn reports of Dr. Mun in his report regarding plaintiff's ranges of motions immediately following the accident, and said evidence regarding Dr. Mun's findings is inadmissible. *(See, Tarhan v. Kabashi*, 44 A.D.3d 847, 844 N.Y.S.2d 89 (2d Dept. 20070; *Verette v. Zia*, 44 A.D.3d 747, 844 N.Y.S.2d 71 (2d Dept. 2007). It is well settled that contemporaneous, objective proof of injury is necessary to satisfy the statutory serious injury threshold. (*Lazarus v. Perez*, 73 A.D.3d 528, 901 N.Y.S.2d 39 (1st Dept. 2010)). While plaintiff submits the affirmations of Dr. McMahon who affirms that his recent examinations of both plaintiffs revealed range of motion limitations, plaintiff has not proffered competent medical evidence that revealed the existence of significant limitations that were contemporaneous with the subject accident. (*See, Blezcz v. Hiscock*, 69 A.D.3d 890, 894 N.Y.S.2d 481 (2d Dept. 2010)). Dr. McMahon's review of the uncertified records of plaintiffs' treating physician, Dr. Mun, and his reference to the range of motion findings of Dr. Mun after the accident, is insufficient to establish that the plaintiffs sustained significant limitations contemporaneous with the accident. (*See, Calabro v. Petersen*, 82 A.D.3d 1030, 918 N.Y.S.2d 1030 (2d Dept. 2011); *Ferraro v. Ridge Car Service*, 49 A.D.3d 498, 854 N.Y.S.2d 408 (2d Dept. 2008)).

Additionally, with respect to plaintiff Park, plaintiff submits the affirmations from Dr. Losik concerning the cervical spine and lumbar spine MRI film reports and Dr. Khodadadi concerning the plaintiff's right and left knee MRI reports, however neither doctor attribute their findings to the subject accident. Similarly, with respect to plaintiff Hwang, plaintiff submits the affirmations of Dr. Losik concerning plaintiff Hwang's cervical and lumbar spine MRI film reports and Dr. Khodadadi concerning plaintiff's right and left shoulder MRI film reports. Again, neither doctor attributes their findings to the subject accident. As such, a causal relationship has not been established. (*See, Collins v. Stone*, 8 A.D.3d 321, 778 N.Y.S.2d 79 (2d Dept. 2004)(the plaintiff's radiologist, while purporting to find disc herniations, expressed no opinion with respect to causation); *Knox v. Lennihan*, 65 A.D.3d 615, 884 N.Y.S.2d 171 (2d Dept. 2009)). Further, the existence of a bulging or herniated disc alone, without evidence that it led to a period of disability, is insufficient to defeat summary judgment. (*See, Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005); *Ortiz v. Ianina Taxi Services, Inc.*, 73 A.D.2d 721 (2d Dept. 2010); *St. Pierre v. Ferrier*, 28 A.D.3d 641 (2d Dept. 2006)). Accordingly, plaintiff's submission of the affirmations of Drs. Losik and Khodadadi are insufficient to defeat defendants' prima facie showing of entitlement to summary judgment. The mere existence of a herniated or bulging disc, absent evidence of the extent of the alleged physical limitations resulting from the injury and its duration, is insufficient to defeat defendants' motion. (*See, Washington v. Mendoza*, 57 A.D.3d 972, 871 N.Y.S.2d 336 (2d Dept. 2008);

Kearse v. New York City Transit Authority, 15 A.D.3d 45 (2d Dept. 2005); *Ortiz v. Ianina Taxi Services, Inc.*, 73 A.D.2d 721 (2d Dept. 2010)). In addition, the MRI reports of Dr. Losik and Dr. Khodadadi are insufficient to establish that plaintiff sustained a significant limitation contemporaneous with the accident. (*See, Calabro v. Petersen*, 82 A.D.3d 1030, 918 N.Y.S.2d 1030 (2d Dept. 2011); *Ferraro v. Ridge Car Service*, 49 A.D.3d 498, 854 N.Y.S.2d 408 (2d Dept. 2008)).

Lastly, Dr. McMahon's explanation, with respect to both plaintiffs that neither plaintiff continued treatment for longer than six months even though more treatment was necessary because "no-fault coverage had been denied" is insufficient to explain the year and a half gap in treatment. (*See, Pommells v. Perez, et. al.*, 4 N.Y.3d 566 (Ct. of App. 2005); *Franchini v. Palmieri*, 1 N.Y.3d 536 (2003)).

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

In opposition to defendants' prima facie showing of entitlement to summary judgment, plaintiffs fail to offer sufficient evidence to make an affirmative showing that they suffered a serious injury pursuant to Insurance Law §5102(d), and as such, plaintiffs have failed to demonstrate a triable issue of fact. (*See, Kwak v. Villamar*, 71 A.D.3d 762 (2d Dept. 2010)).

Accordingly, defendants' motion for summary judgment is granted on the grounds that neither plaintiffs injuries meet the serious injury threshold as defined in New York Insurance Law §5102(d). As such, the defendants' motion (Seq. 02), for an order dismissing this action for plaintiffs' failure to timely file a Note of Issue, is denied as moot.

Dated: October 18, 2011

Anthony L. Parga, J.S.C.

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