SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

KATHY MIRANDA,

Plaintiff(s),

ORIGINAL RETURN DATE:03/23/07
SUBMISSION DATE: 04/20/07
INDEX No.: 2267/06

-against-

DANIEL SWEENEY,

MOTION SEQUENCE #1

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Reply.....	3

Motion pursuant to CPLR 3212 by defendant Daniel Sweeney for summary judgment dismissing plaintiff's complaint is granted.

On December 22, 2005 at approximately 6:00 p.m., plaintiff Kathy Miranda was operating her 1990 Toyota Camry when she pulled up to a stop sign at the end of Washington Street where it meets New Hyde Park Road at a T-type intersection in Franklin Square, NY.

Plaintiff claims that she pulled away from the stop and began executing a left-hand turn from Washington onto New Hyde Park Road (Miranda Dep., pp. 21, 24, 28).

There was no traffic control device for cars proceeding on New Hyde Park Road (Sweeney Aff., ¶ 2; Miranda Dep. p.17).

Before she completed the left-hand turn, a vehicle operated by defendant Daniel Sweeney – which was proceeding south on New Hyde Park Road – struck the rear passenger side of her car when plaintiff was partially in the southbound and northbound lanes on New Hyde Park Road (Miranda Dep., pp. 27-28).

After the accident, plaintiff informed defendant that her neck was "bothering her a little bit [but that] it was nothing major"(Miranda Dep., 39).

She also informed defendant that preferred not to involve the police and that she would pay "whatever it costs to get [his car] fixed" (Miranda Dep., 37-38, 44). However, after consulting by cell phone with her sister – who owned the Toyota – plaintiff changed her mind and decided to go to the police station, where she filed a report (Miranda Dep., 44-47, 54).

Immediately after leaving the police station, she proceeded to Winthrop Hospital Emergency Room, where she complained of dizziness, lower back pain and chest pain.

An X-ray and a CAT scan were taken – with negative results – and plaintiff was released later that night with instructions to take prescription ibuprofen and consult a doctor in the event she continued to experience pain (Miranda Dep., 49-53).

Plaintiff contacted her employer immediately after the accident and advised him that she was in an accident and that she did not know when she could return. In response, her employer allegedly told her "not to return to work" (Miranda Dep., at 7-8).

She ultimately obtained new employment in March of 2006, some three months after the accident (Miranda Dep., at 9-10).

The day after the accident, plaintiff consulted a chiropractor – a Dr. Roth – whom she saw three times a week for a period of three months immediately after the accident (Miranda Dep., 57-59).

Plaintiff later treated with a neurologist, an acupuncturist and orthopedist (Miranda Dep., 59, 66-67).

In mid-February of 2006, plaintiff consulted with the orthopedist, who recommended further physical therapy and told her that if that treatment was ineffective, her options included injections or surgery (Miranda Dep., 69-71).

Plaintiff allegedly experienced continued pain, but did not pursue either injection therapy or the surgery option (Miranda Dep., 66). She last saw the orthopedist in March or April of 2006 (Miranda Dep., 72).

As of the date of her deposition in August, 2006, plaintiff was still treating occasionally with Dr. Roth, although she is not seeing – and has no pending appointments with – any other health care providers at this juncture (Miranda Dep., 73-74).

According to plaintiff, the pain she still experiences from the accident – including shoulder, neck and lower back pain – has substantially limited her customary daily activities (Miranda Dep., 74-79, 82).

Among other things, plaintiff testified that she previously engaged in certain recreational activities which she can no longer perform, including biking, swimming and running (Miranda Dep., at 76-77).

Although no medical practitioner affirmatively told her that she could not bike or swim, she asked her treating chiropractor about running, and he suggested that she avoid that activity (Miranda Dep., at 76-77).

By summons and complaint dated January 2006, plaintiff commenced the within personal injury action alleging, *inter alia*, that as a result of the accident she sustained a serious injury within the meaning of Insurance Law § 5102[d] (Cmplt., ¶¶ 8-13). Defendant has answered and denied the material allegations of the complaint.

Plaintiff's bill of particulars identifies the injuries sustained as: posterior herniation of the C6/7 invertebral disc impinging upon the thecal sac; C5/6 radiculopathy; neck pain, bilateral shoulder pain, numbness and tingling down the right arm, mid back pain and low back pain; lumbar bulging disc at L4/5 (Def's Exh. "C", Bill of Particulars at ¶ 4A-D).

According to the bill, the cumulative effects of the above-noted injuries will be "permanent in nature."

Notably, plaintiff's examining neurologist has submitted affirmed reports dated April, 2006 and March, 2007, in which his diagnostic impressions are listed as "cervical radiculopathy secondary to herniated disc at C6/7 and lumbosacral derangement secondary to disc bulge at L4/5 ..." (Pltff's untabbed Exh., "B","D").

The reports further recite test results allegedly revealing deviations of between 10% to 30% from normal range of motion in cervical spine rotation and lumbar flexion/extension.

Defendant now moves for summary judgment, arguing that plaintiff has not suffered a serious injury and that as a matter of law, plaintiff was negligent in the occurrence of the accident (Gallo Aff., ¶¶7-15; 16-28).

In support of his application, defendant asserts that: (1) the emergency room record contains nothing which could be construed as establishing the existence of a serious injury at that juncture inasmuch as the X-rays, CAT scan and overall examination results were negative for anything other than contusion of the neck and chest (Emergency Room Report; Def's Exh., "D" Gallo Aff.,¶ 11-12); and (2) the affirmed medical reports and other evidence he has produced establish that plaintiff has not otherwise sustained a serious injury as defined by Insurance Law § 5102[d].

Upon the record presented, defendant's submissions have established his *prima face* entitlement to judgment as a matter of law with respect to the issue of serious injury (*e.g.*,

Baez v. Rahamatali, 6 NY3d 868, 859 [2006]; *Gaddy v. Eyler*,79 NY2d 955, 957 [1992]; *Porto v. Blum*,___AD3d___, 833 NYS2d 245, 246 [2nd Dept. 2007]; *Tuna v. Babendererde*, 32 AD3d 574).

More particularly, defendant's examining neurologist, Maria Audrie DeJesus, M.D., conducted an examination and concluded upon administering stated tests, that there was no muscle spasm in the cervical, thoracic and/or lumbar spine regions; that plaintiff's range of motion in each location was normal; that straight leg raising similarly revealed no relevant limitations; and that, in sum, plaintiff's neurologic examination was normal, evidencing at most, cervical and lumbar strain which had been completely and previously resolved (Def's Exh., "G")(*see, Little v. Lee Yuh Tzong*, 22 AD3d 532; *Moore v. County of Suffolk*, 6 AD3d 408, 409; *Holmes v. Hanson*, 286 AD2d 750; *see also, Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 357-358 [2002]).

Annexed in further support of the application, is the affirmed report of radiologist Melissa Sapan Cohen, M.D., who asserts, *inter alia*, that she has reviewed cervical and lumbar spine MRIs, CT scans and X-rays taken between December, 2005 and January, 2006, and that the cervical spine X-rays, CT scans and MRIs revealed no evidence of subluxation, herniations, significant disc bulges, or fractures attributable to trauma-related injury.

Similarly, upon reviewing an MRI of plaintiff's lumbosacral spine, Dr. Cohn found no relevant abnormalities or trauma-related injuries therein (Def's Exh. "F"), and further opined that insofar as plaintiff's lumbar MRI showed evidence of "mild disc bulging at the L4-L5," this finding was solely attributable to the commencement of degenerative disease unrelated to the subject accident (Report at 3).

In opposition to the motion, plaintiff has submitted, *inter alia,* an "affirmed" but unsworn chiropractor's report based on a December 23, 2005 examination (*see*, Pltff's untabbed Exh. "G"), which is not in admissible form and therefore incompetent as proof of the alleged range of motion limits and other medical assertions advanced therein (*Shinn v. Catanzaro*, 1 AD3d 195, 197; *Holmes v. Hanson, supra,* at 751; *Garvey v. Riela*, 272 AD2d 519; *Cubero v. DiMarco*, 272 AD2d 430; *Pichardo v. Blum*, 267 AD2d 441; CPLR 2106).

The additional reports affirmed by plaintiff's examining neurologist, Dr. James M. Liguori (plaintiff's untabbed Exh. "B"), do not include range of motion findings contemporaneous with the subject accident (*Rodriguez v. Cesar*, ___AD3d___, 2007 WL 1365420 [2 nd Dept. 2007]; *Umanzor v. Pineda*, 39 AD3d 539; *Earl v. Chapple*, 37 AD3d 520; *Felix v. New York City Transit Authority*, *supra*).

Nor has Dr. Liguori addressed the finding made by defendant's radiologist that the allegedly mild L4-5 lumbar disc bulges were due to degenerative changes (*Phillips v. Zilinsky,* ___AD3d___, 2007 WL 1147395 [2nd Dept. 2007]; *Sullivan v. Johnson,*___AD3d___, 2007 WL 1289568 [2nd Dept. 2007];*Passaretti v. Ping Kwok Yung*, 39 AD3d 517; *Umanzor v. Pineda*, *supra*).

Moreover, while Liguori has also generally opined that plaintiff is afflicted with a "permanent partial disability," his report does not explain how his findings support that conclusion.

Although Liguori's report and an affirmed MRI report by plaintiff's radiologist, Jeffery Chess, make reference to a herniated disc at the C6/7 level, and a "bulge" at lumbar L4/5 (Pltffs' untabbed Exh., "A"), the "mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" - or proof that automobile accident was a proximate cause of the alleged herniation (*Pommells v. Perez*, 4 NY3d 566, 574 [2005]; *Umanzor v. Pineda*, *supra*; *Waring v. Guirguis*, ___AD3d___, 2007 WL 1147331 [2nd Dept.2007]; *Earl v. Chapple*, 37 AD3d 520; *Alexander v. Felago*, 297 AD2d 762, 763; *Finkelshteyn v. Harris*, 280 AD2d 579, 580).

Here, Dr. Chess' report contains no durational or causal analysis relative to the purported bulges discerned, and Dr. Liguori's report is entirely conclusory and vague with respect to these foundational issues (*see, Earl v. Chapple*, *supra*; *Chan v. Casiano*, 36 AD3d 580).

Further, the two cryptic, one-paragraph statements submitted by a Dr. Nirmal Kade (Pltff's untabbed Exh. "C") - only one of which is affirmed (*cf., Burgos v. Vargas*, 33 AD3d 579) - are similarly conclusory and contain no explanatory or analytical discussion describing the import and precise meaning of the various test diagrams and results which precede them in the record (*see*, *Whitfield-Forbes v. Pazmino*, 36 AD3d 901).

Lastly, in the absence of any evidence properly documenting medically determined injury, plaintiff's testimony and affidavit are insufficient to raise a triable issue of fact as to whether she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident (*see, Thomason v. Thomason,*___AD3d___, 2007 WL 1289556 [2nd Dept. 2007]; *Albano v. Onolfo,* 36 AD3d 728; *Cervino v. Gladysz-Steliga,* 36 AD3d 744; *Sayas v. Merrick Transp.*, 23 AD3d 367; *see also*, *Toure v. Avis Rent A Car Systems, Inc.*, *supra,* at 357-358). It bears noting that there is nothing in the medical reports submitted by plaintiff which address the claim that her alleged injuries prevented her from engaging in stated, customary activities for any period of time.

The Court has considered plaintiffs' remaining contention and concludes that they are insufficient to defeat defendant's motion.

In light of the Court's holding, it is unnecessary to reach defendant's alternative theory that he was without negligence as a matter of law in the occurrence of the accident.

Accordingly, the motion by defendant Daniel Sweeney for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102[d], is granted. Dismissal is without costs.

This decision constitutes the order and judgment of the court.

Dated: 6-8-07

HON THOMAS P. PHELAN

J.S.C.

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