SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

RACQUEL PROFITT and FITZGERALD EARLE,

Plaintiffs,

ORIGINAL RETURN DATE:08/14/08
SUBMISSION DATE: 08/28/08
Index No. 19798/06

-against-

GARY BOSWELL, KRYSTAL McGIRR, WALSH LIMOUSINE SERVICE and JASON DUBIN,

MOTION SEQUENCE #2, 3

Defendants.

The following papers read on this motion:

Notice of Motion.....	1
Cross-Motion.....	2
Answering Papers.....	3
Reply.....	4, 5

Motion by defendants Walsh Limousine Service and Jason Dubin and cross-motion by defendant Gary Boswell ("Boswell") for summary judgment dismissing the complaint of plaintiff Racquel Profitt on the ground that she did not sustain a "serious injury" within the meaning of the Insurance Law are granted.

This is an action for personal injury and property damage arising from a motor vehicle accident. On the morning of April 18, 2006, just after plaintiff Racquel Profitt ("Profitt") entered the Belt Parkway near its intersection with Springfield Boulevard, her car was struck in the rear by a vehicle owned and operated by defendant Boswell. Almost immediately afterwards, there was a second impact as Boswell's vehicle was struck in a "chain reaction," involving a car owned and operated by defendant Krystal McGirr and a limousine owned by defendant Walsh Limousine Service and operated by defendant Jason Dubin.

Plaintiff Profitt did not seek medical treatment until three weeks after the accident. Plaintiff Profitt alleges that she sustained significant limitation of use or permanent consequential limitation of use of her cervical or lumbar spine as a result of the incident.

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in among other things "permanent loss of use of a body organ, member, 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."

Objective proof of plaintiff's injury is required to satisfy the statutory serious injury threshold (*Toure v. Avis Rent a Car Systems*, 98 NY2d 345, 350 [2002]). Subjective complaints alone are not sufficient (*Gaddy v. Eyler*, 79 NY2d 955, 957-58 [1992]). Whether a limitation of use or body 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 and use of the body part" (*Toure v. Avis Rent a Car Systems*, 98 NY2d at 353). A diagnosis of a bulging or herniated disc, by itself, does not constitute a serious injury (Id. at n.4).

On a motion for summary judgment, it is defendant's burden to present a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a matter of law (*Schultz v. Von Voight*, 86 NY2d 865 [1995]). If defendant makes that showing, the burden shifts to plaintiff to come forward with sufficient evidence to overcome defendants' motion by demonstrating that she sustained a serious injury under the No-Fault Law (*Gaddy v. Eyler*, 79 NY2d 955 [1992]).

In support of their motions, defendants submit the report of Dr. Anthony Spataro, an orthopaedist who examined plaintiff on January 7, 2008. Dr. Spataro observed that plaintiff Profitt walked with a normal heel-to-toe gait, could touch her toes without difficulty, and displayed no palpable spasm or tenderness in the spine. According to Dr. Spataro, plaintiff Profitt demonstrated a normal range of motion of the cervical and lumbar spine with respect to flexion, extension, and rotation and possessed normal motor function at all of her extremities. As part of his examination, Dr. Spataro reviewed the MRI of plaintiff Profitt's cervical spine, which was taken on May 19, 2006, and the MRI of her lumbar spine which was taken on July 2, 2006. Based upon his examination and review of the diagnostic tests, Dr. Spataro concluded that plaintiff Profitt had sustained a cervical and lumbar sprain but that she no longer needed any treatment and was able to carry out her normal activities.

Defendants also submit the report of Dr. Arthur Bernhang, an orthopaedist who examined plaintiff Profitt on February 18, 2008. At the time of the examination, plaintiff Profitt told Dr. Bernhang that she experienced pain across her lower back but that her neck was much better. Dr. Bernhang found that plaintiff Profitt's range of motion exceeded the normal as to cervical and lateral flexion and cervical extension. With respect to cervical rotation, plaintiff Profitt demonstrated a range of motion of 55 degrees, slightly less than the normal range estimated to be between 60 and 70 degrees of rotation. Dr. Bernhang noted that plaintiff Profitt's MRI of the lumbar spine showed a bulging disc at L5-S1, but opined that the MRI of

her cervical spine was "essentially negative." Based on his examination, Dr. Bernhang was of the impression that plaintiff Profitt may have sustained soft-tissue injury to the cervical and lumbar spine as a result of the accident. Dr. Bernhang's opinion, however, was that these injuries were completely resolved as of the date of his examination.

Based upon the reports of Dr. Spataro and Dr. Bernhang, the court concludes that defendants have established prima facie that plaintiff Profitt did not suffer a serious injury within the meaning of § 5102 of the Insurance Law. Accordingly, the burden shifts to plaintiff Profitt to demonstrate that she sustained a serious injury.

In opposition to the summary judgment motions, plaintiff Profitt submits the report of Dr. Richard Morgan, an osteopath who did not treat plaintiff Profitt until a year after the accident. Plaintiff Profitt first saw Dr. Morgan on April 10, 2007. Such report will not be considered on this motion as plaintiff "failed to identify the expert in pretrial disclosure, and served the affidavit, which was elicited solely to oppose the defendants' motion for summary judgment, after filing a note of issue and certificate of readiness attesting to the completion of discovery (citations omitted)" (*Safrin v. DST Russian & Turkish Bath, Inc.*, 16 AD3d 656 [2d Dept. 2005]). Plaintiff Profitt also submits her own affidavit which contradicts her deposition testimony. Plaintiff Profitt has failed to submit admissible evidence sufficient to establish a triable issue of fact

The sufficiency of plaintiff Earle's property damage claim has not been addressed on the present motion. See *Walker v. Greatheart*, 50 AD3d 893 (2d Dep't 2008).

This decision constitutes the order of the court.

Dated: 10-1-08

HON THOMAS P. PHELAN

J.S.C.

ENTERED

OCT 06 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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