SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 12
NASSAU COUNTY

KATHLEEN ANTONACCI and ANDREW ANTONACCI,

Plaintiffs,

-against-

STEVEN P. MANNEY, CHRYSLER FINANCIAL COMPANY LLC, DAIMLER CHRYSLER NORTH AMERICA LLC and CHRYSLER FINANCIAL CORPORATION,

Defendants.

MOTION DATE: 6/28/04

MOTION SEQ. NO.: 001

INDEX NO.: 005899/03

The following papers read on this motion (numbered 1- 5):

Notice of Motion 1
Affirmation in Opposition 2
Notice of Cross Motion 3
Reply Affirmation of Defendant Manney.....4
Reply Affirmation of Defendant Chrysler Financial Company, LLC and Chrysler Financial Corporation.....5

Defendants' motion for summary judgment pursuant to **CPLR §3212** is determined as follows:

Plaintiff Kathleen Antonacci alleges that on August 22, 2000, she was a pedestrian at the intersection of Atlantic Avenue and Lincoln Avenue in Oceanside, NY when she

was hit by a jeep operated by defendant Manney ("Manney"). Plaintiff alleges that as a result of the accident, she sustained injuries to her knees. The jeep was allegedly owned by defendants Chrysler Financial Company LLC, Daimler Chrysler Services North America LLC and Chrysler Financial Corporation and in turn leased to Manney. Defendants now move for an order dismissing plaintiff's complaint, pursuant to **CPLR § 3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **New York Insurance Law § 5102(d)**.

In support of their motion for summary judgment, defendants submit an affirmed report, dated November 26, 2003, of S. Farkas, MD, orthopedist, an affirmed report, dated November 19, 2003, of Burton S. Diamond, MD, neurologist and an affirmed report, dated November 18, 2003, of Harvey L. Lefkowitz, MD, radiologist. Dr. Farkas found no effusion and negative Apley's, McMurray's and Drawer's sign in both knees which the court understands to be tests to evaluate for knee meniscus and ankle sprain injuries. He commented that plaintiff complained of pain upon palpation of both knees. Dr. Farkas diagnosed plaintiff with a "resolved internal derangement of the right knee", "status-post arthroscopy" and "resolved sprain of the left knee." He concluded that plaintiff has "no orthopedic disability" and "may perform usual duties of occupation and may carry out the daily activities of living, without restriction."

Dr. Diamond, the neurologist, examined plaintiff's muscle tone, strength and coordination. With respect to the part of the exam which involves the knee area, Dr. Diamond found that plaintiff had a normal gait, intact strength in her legs, and active and equal knee and ankle jerks. Dr. Diamond concluded that his neurological exam of plaintiff was "totally normal" and that her "symptoms are causally related to the incident". He notes however that plaintiff only complained of symptoms in her knees which is outside the area of his specialty. (Dr. Diamond asserts that plaintiff denied previous injury or symptoms which is contrary to plaintiff's deposition testimony wherein plaintiff states that several years before the accident, she sprained her left knee while jogging, saw

a doctor and underwent physical therapy.) Dr. Lefkowitz examined an MRI of the right knee and stated that plaintiff had an "intrameniscal degeneration posterior medial meniscus" with "no evidence of tear". He also stated "there is small amount of effusion, and there is some minimal signal change in the medial meniscus, but this is not post traumatic." The court notes that the actual report of the MRI was not submitted by either plaintiff or defendants.

The court finds that the reports of defendants' examining physicians are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations so as to satisfy the court that an "objective basis" exists for their opinions. Accordingly, the court finds that defendants have made a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of the no-fault law. Consequently, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In her deposition testimony, plaintiff claims that on August 22, 2000, she and her eight year old son left the Oceanside post office and waited for the light to change in order to cross Lincoln Avenue. As they began to cross, a black jeep approaching from the left came into contact with their bodies which plaintiff describes as a "heavy impact." Plaintiff claims that the front part of the jeep hit both of her knees and she stumbled one or two steps forward but did not fall to the ground. She reported that she did not suffer from any lacerations, cuts or bleeding or lose consciousness. She and her son were taken by ambulance to the emergency room of South Nassau Hospital. She complained of knee pain although no x-rays were taken. She was discharged with instructions to keep ice on her knees.

In September 2000, plaintiff went to Bellmore Medical and saw Dr. Gregorace who recommended physical therapy and a consultation with an orthopedist. Dr. Gregorace also sent her to Zwanger Radiology where she had an x-ray of her right knee which was

causing her the most pain and at a later time she had an MRI of that knee at Damadian Radiology. In September 2000, she went to Dr. James Kipnis, an orthopedist who put her left knee in an immobilizer which she wore for two weeks. He also told her that she the x-ray indicated a tear in her right knee. At that time, she also began physical therapy at Bellmore Medical, two to three times a week for seven months and discontinued when her no-fault insurance no longer covered the visits. Plaintiff was also sent by Dr. Kipnis for an MRI of her left knee at Long Beach Hospital. In 2001, she began to see Dr. Livingston, a podiatrist once a month due to alleged swelling of her right ankle. As of the date of the deposition testimony (September 25, 2003), she was still seeing Dr. Livingston.

In 2002, she went to Dr. Khachadurian, another orthopedist, for a second opinion because Dr. Kipnis had recommended surgery. Dr. Khachadurian drained her right knee, prescribed Celebrex and recommended physical therapy. In 2002 (other testimony indicates 2001), plaintiff sought additional physical therapy at Metropolitan Physical Therapy and attended sessions two or three times a month for several months at which point her insurance was cancelled. In addition, she reported that she continued seeing Dr. Kipnis once a month until 2002 (beginning in 2000) and in the fall of 2002, she consulted with Dr. Carroll, also an orthopedist (although Dr. Carroll's affirmation indicates that he first saw her on October 4, 2001) whom she saw once a month. On August 4, 2003, Dr. Carroll performed an arthroscopic surgical procedure on plaintiff's right knee at New Island South Hospital in Bethpage. She reports no scarring other than the two "holes" where the scope was inserted. After the surgery, she had a follow-up appointment with his partner, Dr. Barkin and saw Dr. Carroll a few weeks thereafter. (Dr. Carroll states in his affirmation that he last examined plaintiff on May 13, 2004.)

Plaintiff testified that she continues to have pain in her right knee although not as much as she had before the surgery and that she takes Celebrex daily. She also complains of pain in the left knee and contends that Dr. Carroll suggested possible future surgery to that knee. She also testified that she is limping (which improved after the surgery) and has

right hip pain but stated that she never had physical therapy applied to the hip. Moreover, plaintiff reports that two weeks prior to her deposition testimony of September 25, 2003, she began physical therapy once again at Metropolitan Physical Therapy and attended sessions there two to three times a week. (Dr. Carroll states in his affirmation, dated July 15, 2004, that plaintiff is continuing physical therapy post surgery two to three times per week).

Several years before the August 22, 2000 accident, plaintiff went to North Shore University Hospital in Manhasset (not by ambulance) and thereafter saw Dr. Garroway, an orthopedist for a sprain in her left knee caused by jogging. Plaintiff reports that she had x-rays and also had physical therapy at Island Physical Therapy in Rockville Centre as a result of this injury.

In terms of plaintiff's quality of life, she testified that she is unable to go dancing with her husband which she enjoyed one to two times a month prior to the accident, cannot hike, run, take long walks, and pick up her son. Plaintiff testified that she is limited in her ability to do laundry, go down stairs, carry a laundry basket, do aerobic exercise on the treadmill, housework, shopping and walk around the mall. The court notes that plaintiff gives inconsistent testimony about her walking ability. She both testifies that she is totally unable to take long walks and also reports that she can walk long distances but with limitation.

At the outset, the court notes that plaintiff has submitted a paucity of medical evidence to defeat defendants' motion for summary judgment. The only evidence submitted by plaintiff is her deposition testimony and an affirmation of Michael P. Carroll, MD one of her orthopedists, dated July 15, 2004. The report of Dr. Carroll is labeled as an affidavit although must be considered an affirmation because it is not subscribed and sworn before a notary. Dr. Carroll contends that he began treating plaintiff on Octoboer 4, 2001 when plaintiff sought a second opinion as to whether surgery on her knee was necessary as a result of injuries, pain and other symptoms she sustained in the August 22,

2000 accident. Dr. Carroll states that physical therapy had not been successful. Dr. Carroll reports he reviewed plaintiff's diagnostic tests which included a "right knee MRI, dated September 19, 2000 showing a Grade II signal at the medial and lateral menisci along with a patella tilt with patella chondromalacia." On August 4, 2003, Dr. Carroll performed arthroscopic surgery on plaintiff's right knee, including patella shaving. Dr. Carroll stated that "while the menisci were found to be intact, [plaintiff] was found to be suffering from chondromalacia and had developed osteoarthritis in the right knee."

Dr. Carroll also contends that the injuries "as diagnosed by objective and subjective findings have resulted in pain, tenderness, and limitations of motion to both [plaintiff's] lower extremities." As a result of these injuries, Dr. Carroll asserts that the injuries will limit several of plaintiff's everyday activities, such as carrying and holding her son, hiking, walking, dancing and exercising. Dr. Carroll states that he discussed the possibility of future surgery in the form of "patella replacement, patellectomy and lateral release." Dr. Carroll also reports that plaintiff developed similar problems in her left knee, although to a lesser extent which he diagnosed as patellofemoral osteoarthritis. Dr. Carroll stated that the left knee was treated with medications and cortisone injections and that these problems were also causally connected to the August 22, 2000 accident. The court notes that Dr. Carroll prefaces most of his conclusions with the phrase "assuming the history is correct".

Dr. Carroll opines that the "history of [plaintiff] being struck in the knees by a motor vehicle back on August 22, 2000 is consistent with the findings post surgery." Dr. Carroll concludes, to a reasonable degree of medical certainty, that plaintiff's injuries, "as supported by the right knee diagnostic test results, the operative procedure and the residual condition/findings in the right knee," are "causally connected to the August 22, 2000 accident." Dr. Carroll makes the same causal connection between the injuries to left knee and the accident. Finally, he opines that the "restrictions and limitations caused by the August 22, 2000 motor vehicle accident, have resulted in permanent impairment."

It is the determination of this court that plaintiff has failed to submit *objective*

medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable question as to whether or not she sustained a "serious injury" within the meaning of Insurance Law, **§ 5102(d)**. Plaintiff has not offered sufficient evidence to establish that she suffered either a "significant limitation of use of a body function or system" or "a permanent consequential limitation of use of a body organ or member." At the outset, the court notes that plaintiff has failed to address the presence of chondromalacia in plaintiff's right knee as found by her own orthopedist, Dr. Carroll upon his examination of an MRI taken within one month of the accident.

The only medical report submitted by plaintiff is that of Dr. Carroll. In examining Dr. Carroll's report, the court finds that it does not present sufficient evidence to establish that plaintiff suffers from a "serious injury". Even though the Court of Appeals has held that a qualitative review of a plaintiff's condition may be sufficient to prove a serious injury, there must be objective evidence to support such evaluation. "An expert's *qualitative* assessment of a plaintiff's condition may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." **Toure v. Avis Rent A Car Systems, Inc.**, 98 NY2d 345, 350.

Dr. Carroll fails to set forth the objective medical tests he performed to support his conclusions. Dr. Carroll makes conclusory statements throughout his report such as "my review of [plaintiff's] diagnostic tests", the "injuries as diagnosed by objective and subjective findings"and "objective and subjective findings of restricted motion." With respect to range of motion findings, the court finds Dr. Carroll's assertions to be without probative value as he merely states that plaintiff's injuries "limit and restrict the motion in her knees bilaterally." A plaintiff's physician must indicate what tests, if any, were performed in measuring range of motion and objectively verifying the restriction. *See*, **Millar v. Town of Oyster Bay**, 7 AD3d 588; **Coll v. Padilla**, 5 AD3d 716; **Herman v. Church**, 276 AD2d 471; **Sainte-Aime v. Ho**, 274 AD2d 569; **Villalta v. Schechter**, 273

AD2d 299; **Grossman v. Wright**, *supra*; **Merisca v. Alford**, 243 AD2d 613; **Lincoln v. Johnson**, 225 AD2d 593.

Dr. Carroll's report in fact never identifies what tests he performs to come to any of his conclusions. He states that he treated plaintiff "via examinations, re-examinations, testing (diagnostic or otherwise)" and made a full review of the "existing medical chart held by this office" but fails to indicate the nature of these examinations, tests or charts. **Burford v. Fabrizio**, 8 AD3d 784; **Millar v. Town of Oyster Bay**, *supra*; **Sainte-Aime v. Ho**, *supra*; **Grossman v. Wright**, *supra*; **Kauderer v. Penta**, 261 AD2d 365; **Orr v. Miner**, 220 AD2d 567. The only medical evidence mentioned was an MRI dated September 19, 2000 which was not itself attached to Dr. Carroll's affirmation. *See* **Merisca v. Alford**, 243 AD2d 613. Dr. Carroll also states that plaintiff had medical care by Dr. Kipnis but does not specify the nature of that care.

In addition, there is no linking plaintiff's complaints (intermittent pain in her right and left knees) to objective testing. Dr Carroll also does not sufficiently take into account plaintiff's prior injury and relate it to her current condition. He states that because she was symptom free for the prior three years, her injuries are within a reasonable degree of medical certainty causally related to the August 22, 2000 accident. **Uber v. Heffron**, 286 AD2d 729, 730 (possibility of prior injury); **Sorriento v. Daddario**, 282 AD2d 957 (preexisting rheumatoid arthritis in knee). (The court notes that plaintiff indicated to Dr. Farkas that she had injured her knee only one year prior to Dr. Farkas' November 26, 2003 examination.) Finally, Dr. Carroll does not offer any evidence of permanency. He fails to establish a link between his conclusory statement that plaintiff's injuries caused by the accident are permanent, to any objective medical evidence. **Gaddy v. Eyler**, 79 NY2d 955. "Mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury' and [summary judgment] should be granted for defendant where plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements." **Lopez v. Senatore**, 65 NY2d 1017, 1019. *See also*, **Grossman**

v. Wright, *supra*; **Carroll v. Jennings**, 264 AD2d 494; **Orr v. Miner**, *supra.*

Plaintiff also makes a claim of "serious injury" under **Insurance Law §5102(d)** on the basis that her injury or impairment prevented her from "performing substantially all of the material acts which constitute [her] 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." The court finds that plaintiff has failed to submit competent objective medical evidence to support this claim. Plaintiff asserts that the fact that she has one son, does not work outside the home, suffers from pain in her knees and has walked with a limp since the accident, proves that she was unable to engage in her usual and customary activities for not less than ninety days of the first one hundred eighty days following the accident. Even if plaintiff's self serving statements are accepted as true, these statements without more evidence are insufficient to raise an issue of fact as to whether plaintiff was unable to perform her usual and customary tasks during this time frame. *See* **Toure v. Avis Rent A Car Systems, Inc.**, 98 NY2d 345, 357; **Gaddy v. Eyler**, *supra*; **Nolan v. Roderick**, 7 AD3d 590; **Millar v. Town of Oyster Bay**, *supra*; **Simmons v. Garofalo**, 7 AD3d 510; **Ramos v. Incorporated Village of Freeport**, 6 AD3d 687; **Taylor v. Jerusalem Air, Inc.**, 280 AD2d 466; **Davis v. Brightside Fire Protection Inc.**, 275 AD2d 298; **Sainte-Aime v. Ho**. *supra.*

The court is troubled by the fact that although plaintiff's deposition testimony indicates an extensive history of medical care for her injury, plaintiff's only medical proof in opposition to defendants' motion for summary judgment is the affirmation of Dr. Carroll. There are no affirmations from the other physicians and medical professionals mentioned in plaintiff's deposition testimony (Dr. Gregorace, presumably an internist; Dr. Kipnis, orthopedist; Bellmore Medical, physical therapy; Dr. Livingston, podiatrist; Dr. Khachadurian, orthopedist and Metropolitan Physical Therapy). Plaintiff also fails to submit reports of various x-rays and MRIs taken at Zwanger Radiology, Damadian Radiology and Long Beach Hospital. *See* **Bandoian v. Bernstein**, 254 AD2d 205.

Finally, plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. **Scheer v. Koubek**, 70 NY2d 678; **Grossman v. Wright**, 268 AD2d 79. The court notes that plaintiff's complaints of pain in her hip are not discussed by Dr. Carroll and are there no other affirmed reports to substantiate these claims.

The court has examined parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, defendant STEVEN P. MANNEY's motion for summary judgment dismissing the complaint on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law § 5102(d)** is **granted**, and it is further

ORDERED, defendants CHRYSLER FINANCIAL COMPANY, LLC's, DAIMLER CHRYSLER SERVICES NORTH AMERICA LLC's and CHRYSLER FINANCIAL CORPORATION's cross motion for summary judgment dismissing the complaint on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102** is **granted**.

This constitutes the Order of the Court.

Dated: [illegible] 2004

ENTER:

J.S.C.

ENTERED

DEC 22 2004

NASSAU COUNTY
COUNTY CLERK'S OFFICE