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6-8-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER PART 22

Justice

Index Number : 107856/2007

ALICEA, ALICIA

VS.

BUTLER, DOLORES

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendants Mohammed M. Rashid and Avner Ben-Levy (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint of Plaintiff Alicia Alicea ("Plaintiff") on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff alleges in her Verified Bill of Particulars and Supplemental Bill of Particulars that, as a result of the accident, he sustained a serious injury under NY Insurance Law §5102(d) by incurring disc abnormalities at levels C3-C4 and C5-C6, cervical and lumbar radiculopathy, right C5-C6 nerve root injury, rotator cuff tear to the right shoulder and arthoscopy right shoulder surgery.

Under New York Insurance Law §5102(d), a "serious injury" is defined as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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

Dated: _____ _____

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Defendants' Expert Reports

In support of this motion, Defendants submit the affirmed expert reports of Dr. Charles Bagley, neurologist, Dr. Robert Israel, orthopedic surgeon, and Dr. Robert Tantleff, radiologist. Dr. Bagley examined Plaintiff on February 3, 2009. Examination of the cervical spine revealed range of motion of flexion of 30 degrees compared to 50 degrees normal, extension of 60 degrees compared to 60 degrees normal, right and left lateral flexion of 45 degrees compared to 45 degrees normal, right and left rotation of 80 degrees compared to 80 degrees normal. Dr. Bagley stated that the minimal decrease in flexion carries no medical significance. Range of motion for the lumbar spine revealed flexion of 90 degrees compared to 90 degrees normal, extension of 30 degrees compared to 30 degrees normal, right and left lateral flexion of 30 degrees compared to 30 degrees normal and right and left rotation of 30 degrees compared to 30 degrees normal. Straight leg raising was negative bilaterally for radiuclopathy. Dr. Bagley reported that range of motion measurements were determined by manual palpation, visual inspection and goniometry. He concluded that Plaintiff exhibited a normal neurological examination with no evidence of permanent injury or restrictions.

Dr. Israel conducted an orthopedic examination of Plaintiff on April 17, 2009. Examination of the cervical spine revealed range of motion of flexion of 45 degrees compared to 45 degrees normal, extension of 60 degrees compared to 60 degrees normal, right and left rotation of 80 degrees compared to 80 degrees normal, right and left lateral flexion of 45 degrees compared to 45 degrees normal. Cervical compression, Spurling and Valsalva tests were all negative. Examination of the lumbar spine revealed sitting Lasegue's test as bilaterally negative to 80 degrees compared to 80 degrees normal. Straight leg raising was found to be bilaterally negative to 75 degrees compared to 75 degrees normal in both the seated and supine positions. Range of motion of the lumbar spine revealed forward flexion of 60 degrees compared to 60 degrees normal, extension of 30 degrees compared to 30 degrees normal, right and left lateral flexion of of 45 degrees compared to 45 degrees normal.

Dr. Israel also examined the right shoulder and determined that range of motion examination was anterior flexion of 170 degrees compared to 170 degrees normal, abduction of 180 degrees compared to 180 degrees normal, adduction of 45 degrees compared to 45 degrees normal, external rotation of 45 degrees compared to 45 degrees normal, internal rotation of 45 degrees compared to 45 degrees normal, and posterior extension of 45 degrees compared to 45 degrees normal. The Drop Arm, Yergason's, Apprehension, Speed and O'Briend tests were all negative. He concluded that Plaintiff's orthopedic examination was within normal limits with no positive findings. Plaintiff was found to have no permanency and no restrictions on daily activity.

On June 16, 2009, Dr. Tantleff conducted an independent review of Plaintiff's right shoulder MRI film taken on June 6, 2006. He concluded that advanced degenerative changes were present consistent with the patient's age and exacerbated by the patient's body habitus. Additionally, Dr. Tantleff reported that these findings were unrelated to the accident.

Defendants' expert reports satisfy their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]). Plaintiff must now bear the burden of overcoming Defendants' submissions by demonstrating that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as defined by New York Insurance Law §5102(d), to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Plaintiff's Expert Report

In opposition to Defendants' motion, Plaintiff submits Dr. Noel Fleischer's initial consultation report, cervical spine MRI report dated May 4, 2006, Dr. Zwi Weinberg's medical records, MRI of right shoulder dated June 6, 2006, Dr. Kevin Wright's medical records, Dr. Richard Seldes's surgical report dated October 10, 2008, Dr. Seldes's and Dr. Douglas Schwartz's expert reports, Plaintiff's deposition testimony and Plaintiff's affidavit.

Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*See Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Dr. Noel Fleischer's report, the cervical spine MRI report, Dr. Zwi Weinberg's medical records, Dr. Kevin Wright's medical records and Dr. Richard Seldes's surgical report are all unsworn and not affirmed under the penalties of perjury. Thus, these records are not sufficient to defeat a motion for summary judgment (*See Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]). Further, Dr. Thomas Kolb's affirmation of June 8, 2006 pertaining to Plaintiff's MRI of right shoulder does not affirm the actual interpretation of the MRI film and therefore the MRI report is not in admissible form. The affirmation merely seeks to identify the MRI film for the purposes of trial. Therefore, the right should MRI report is insufficient to defeat a motion for summary judgment.

On May 9, 2009, Dr. Richard Seldes examined Plaintiff and determined that the range of motion for her right shoulder was forward flexion of 130 degrees compared to 170 degrees normal, external rotation of 30 degrees compared to 60 degrees normal, internal rotation of L4 compared to T10 normal. Dr. Seldes found range of motion for Plaintiff's cervical spine of forward flexion of 40 degrees compared to 60 degrees normal, extension of 0 degrees compared to -10 degrees normal. His final impression was that Plaintiff suffered from a partial cuff tear of the right shoulder and a cervical disc bulge with persistent pain. In an addendum to his report, Dr. Seldes states that Plaintiff's prior accident of December 3, 1999 resulted in a partial tear of the infraspinatus tendon that resolved after treatment. Further, Dr. Seldes conclusively states that Plaintiff's injuries are causally related to the current accident at issue.

Dr. Schwartz examined Plaintiff on August 17, 2009. He measured range of motion on a goniometer. Cervical spine measurements were flexion of 20 degrees compared to 50 degrees normal, extension of 15 degrees compared to 60 degrees normal, left lateral bending of 15 degrees compared to 45 degrees normal, right lateral bending of 20 degrees compared to 45 degrees normal, left rotation of 20 degrees compared to 80 degrees normal and right rotation of 25 degrees compared to 80 degrees normal. Lumbar spine range of motion was flexion of 50 degrees compared to 90 degrees normal, extension of 15 degrees compared to 25 degrees normal, left and right lateral bending of 10 degrees compared to 25 degrees normal. Range of motion for Plaintiff's right shoulder was flexion of 145 degrees compared to 180 degrees normal, extension of 20 degrees compared to 50 degrees normal, abduction of 135 degrees compared to 180 degrees normal, adduction of 20 degrees compared to 50 degrees normal, internal rotation of 65 degrees compared to 90 degrees normal, external rotation of 50 degrees compared to 90 degrees normal. Dr. Schwartz diagnosed Plaintiff with cervical radiculopathy, C3-C4 and C5-C6 abnormalities and right shoulder derangement. He further opined that Plaintiff is partially disabled and will suffer from permanent limitations.

Plaintiff additionally submits her deposition transcript and an affidavit in opposition to summary judgment. However, Plaintiff's self-serving statements are entitled to little weight and are insufficient to raise triable issues of fact (*See Zoldas v Louise Cab Corp.*, 108 A.D.2d 378, 383 [1st Dept 1985]; *Fisher v Williams*, 289 A.D.2d 288 [2d Dept 2001]).

Defendants also argue that a gap in treatment interrupts the chain of causation between the accident and Plaintiff's claimed injuries. In opposition, Plaintiff contends that she was forced to discontinue therapeutic treatment because her No-Fault benefits were terminated. While a cessation of treatment is not dispositive, a Plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so (*DeLeon v Ross*, 44 AD3d 545 [1st Dept 2007]; *Pommells v Perez*, 4 NY3d 566, 574 [2005]). Plaintiff has offered a reasonable explanation and as such, Defendants' gap in treatment argument fails (*see Wadford v Gruz*, 35 AD3d 258 [1st Dept 2009]).

To qualify under the "permanent loss of use of a body organ, member, function or

system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiff has not demonstrated that she sustained a permanent and total loss of use of her shoulder or cervical spine. Therefore, Defendants' summary judgment motion as to Plaintiff's permanent loss claim under New York Insurance Law §5102(d) is granted.

Under the permanent consequential limitation and significant limitation categories of Insurance Law § 5102[d], Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to 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" (*Gorden v Tibulcio*, 50 A.D.3d 460 [1st Dept 2008] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Because Drs. Seldes and Schwartz personally reviewed the MRI films, the positive results stated in their reports are properly reviewable on this summary judgment motion (*see Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]; *Dioguardi v Weiner*, 288 AD2d 253 [2d Dept 2001]). Specifically, both reports demonstrate a limitation of range of motion supported by objective medical findings that are based upon recent examinations of Plaintiff. This evidence raises a triable issue of fact as to whether Plaintiff suffered serious injury within the permanent consequential limitation and/or significant limitation categories of Insurance Law §5102(d).

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1st Dept 1999]; *Thompson v Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that she was confined to bed for approximately one week following the accident and her deposition testimony indicates that she stayed home from work for one week following the accident. Plaintiff does not provide any additional evidence in support of her 90/180 day claim (*Santiago v Bhuiyan*, 2010 N.Y. Slip Op. 1890 [1st Dept 2010]).

Accordingly, it is hereby

ORDERED that Defendants Rashid's and Ben-Levy's motion for summary judgment is granted as to Plaintiff's claim under the permanent loss category of Insurance Law §5102(d); and it is further

ORDERED that Defendants Rashid's and Ben-Levy's motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants Rashid's and Ben-Levy's motion for summary judgment is granted as to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendants Rashid and Ben-Levy are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

This constitutes the decision and order of the court.

George J. Silver

George J. Silver, J.S.C.

GEORGE J. SILVER

Dated: JUN 04 2010
New York County