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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**
**TRIAL TERM, PART 17 NASSAU COUNTY**

**PRESENT:**
***Honorable Karen V. Murphy***
**Justice of the Supreme Court**

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**TOMMYE L. CARR,**

**Plaintiff(s),**

**-against-**

**RICHARD SACHS and JOSEPH SACHS,**

**Defendant(s).**

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**Index No. 10560/07**

**Motion Submitted: 5/26/10**
**Motion Sequence: 004**

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants move this Court for an order pursuant to CPLR §3212 granting summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102(d). Plaintiff opposes the requested relief.

The plaintiff commenced this action for personal injuries allegedly sustained in a car accident that occurred on February 22, 2007, at or near the intersection of Front and South Franklin Streets, Hempstead, New York. Plaintiff contends that defendants struck her vehicle in the rear while plaintiff was stopped at a red light. Defendant Joseph Sachs stated at the accident scene that he "took his eyes off the road to look down for something." Plaintiff claims that, as a result of the injuries sustained in the accident, she is permanently partially disabled with respect to her neck, lower back, and right shoulder, and is suffering from chronic pain in these areas caused by disc herniations and a rotator cuff tear.

The defendants must in the first instance establish their *prima facie* entitlement to summary judgment as a matter of law by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident. (***Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept. 2006]).

The defendants offer the affirmed report of Dr. John C. Killian, M.D., an orthopedic surgeon who examined the plaintiff on January 29, 2009. Dr. Killian also reviewed plaintiff's magnetic resonance imaging ("MRI") reports from March 2007, as well as a neurological consultation report prepared by one of plaintiff's physicians in May 2007.

Dr. Killian opined that the plaintiff has fully recovered from her neck and back problems, and that her right shoulder difficulties are unrelated to the car accident. Dr. Killian also stated in his report that the plaintiff is capable of working and performing all of her usual activities of daily living, without limitations, and that the plaintiff has no causally related disability from the accident with respect to her neck and back. Specifically, he reported that the plaintiff had normal range of motion in her cervical and lumbar spine areas. The plaintiff reported only mild pain when she bent her head to the right. According to Dr. Killian, the plaintiff's complaints of pain or tenderness in her neck and back were "unaccompanied by objective findings including restricted motion or muscle spasm." The doctor also noted that the plaintiff walked without evidence of a limp.

With respect to her right shoulder, Dr. Killian noted that the plaintiff complained of pain and exhibited a limited range of motion during his physical examination of her, but that there was nothing in the records submitted to him to suggest that the plaintiff injured her shoulder in the accident. Indeed, the May 1, 2007 neurological consultation report prepared by plaintiff's physician, Dr. Bernard Savella, M.D. of Garden City Rehabilitation Associates, which was submitted to Dr. Killian, does not document any complaint of shoulder pain.

The defendants also refer to plaintiff's deposition testimony in which she stated that she refused medical assistance at the scene and drove her car home following the accident. When she presented herself voluntarily at the local hospital emergency room, plaintiff was treated and released, and no x-rays were taken. The plaintiff missed only one week of work and discontinued physical therapy for her injuries in the summer of 2007. The plaintiff resumed physical therapy in July 2008, undergoing eight sessions before ceasing physical therapy completely.

While not dispositive of the matter, the fact that plaintiff discontinued treatment after only a few months of physical therapy commenced shortly after the accident requires the plaintiff to provide a reasonable explanation for having done so (***Pommels v. Perez,*** 4 N.Y.3d 566, 574, 797 N.Y.S.2d 380[2005]). Plaintiff's explanation that the therapy was painful in

and of itself, plus the fact that it did not alleviate the pain, is unreasonable in light of the fact that plaintiff apparently did not seek any alternative treatment from the time she discontinued therapy in the summer of 2007 until July 2008, when she resumed physical therapy. The resumption of physical therapy was brief (8 sessions), and has apparently ceased completely since July 2008. Plaintiff's proffered reasons for ceasing physical therapy in 2008 are contradictory, and thus, are also not reasonable. On the one hand, plaintiff states in her affidavit that the treatment was not helping, but she also states that she stopped going because her insurance had "reached its limit," and she could not afford to pay for treatment out of her "own pocket." In any case, the plaintiff has not sought other treatment.

The affirmed medical report of defendant's physician, as well as the plaintiff's deposition testimony, can be sufficient to establish *prima facie* that the plaintiff did not sustain a serious injury in a motor vehicle collision within the meaning of Insurance Law § 5102(d) (*See* ***Park v. Orellana***, 49 A.D.3d 721, 854 N.Y.S.2d 447 (2d Dept., 2008); ***Tarhan v. Kabashi***, 44 A.D.3d 847, 844 N.Y.S.2d 89 [2d Dept., 2007]).

Examining the report of defendant's physician, there are sufficient tests conducted set forth therein to provide an objective basis so that his respective qualitative assessment of plaintiff could readily be challenged by any of plaintiff's expert(s) during cross examination at trial, and be weighed by the trier of fact (***Toure v. Avis Rent A Car Systems, Inc.,*** 98 N.Y.2d 345, 350, 746 N.Y.S.2d 865 [2002]; ***Gaddy v. Eyler,*** 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

A tear in tendons, as well as a tear in a ligament, or a bulging and herniated disc, is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (***Lozusko v. Miller***, 72 A.D.3d 908, 899 N.Y.S.2d 358 (2d Dept., 2010); ***Little v. Locoh***, 71 A.D.3d 837, 897 N.Y.S.2d 183 [2d Dept., 2010]).

Thus, as noted, defendants' submission of relevant portions of plaintiff's deposition (***Jackson v. Colvert***, 24 A.D.3d 420, 805 N.Y.S.2d 424 (2d Dept., 2005); ***Batista v. Olivo***, 17 A.D.3d 494, 795 N.Y.S.2d 54 (2d Dept., 2005), affirmed examination report of defendants' physician, and the gap in, and eventual cessation of, plaintiff's treatment are sufficient herein to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (***Paul v. Trerotola***, 11 A.D.3d 441, 782 N.Y.S.2d 773 [2d Dept., 2004]). This Court is satisfied that defendants have met their burden and are entitled to summary judgment as a matter of law.

Having made a prima facie showing that plaintiff did not sustain a serious injury, the burden now shifts to plaintiff to establish that there is a triable issue of fact as to whether or not she suffered a serious injury. (***Farozes v. Kamran***, 22 A.D.3d 458, 802 N.Y.S.2d 706

[2d Dept., 2005]; ***Kaplan v. Hamilton Medical Associates, P.C.***, 262 A.D.2d 609, 692 N.Y.S.2d 674 [2d Dept. 1999]). In this Court's opinion, the plaintiff has not satisfied her burden.

In order to establish the existence of a triable issue of fact as to serious injuries, a plaintiff must provide objective evidence of the extent or degree of a physical limitation ***(Beckett v. Conte***, 176 A.D.2d 774, 575 N.Y.S.2d 102 [2d Dept. 1991]). In this case, the only affirmed reports submitted by plaintiff are those of Dr. Steven L. Mendelsohn, M.D., plaintiff's radiologist who reviewed magnetic resonance imaging ("MRI") reports concerning plaintiff's cervical and lumbar spine areas. The MRI examinations discussed by Dr. Mendelsohn in his March 2010 reports occurred in March 2007. In his reports, Dr. Mendelsohn did not proffer any opinion whatsoever that any of plaintiff's herniated discs were contemporaneous with the subject accident (***Lozusko, supra***; ***Little, supra***). Moreover, Dr. Mendelsohn opined that the plaintiff suffers from degenerative changes in the cervical and lumbar spine areas, some of which he characterized as being of "long standing duration" and "age related."

While this Court may consider Dr. Bernard Savella's unsworn report because defendants' examining physician referred to it in his affirmed medical report (***Zarate v. McDonald***, 31 A.D.3d 632, 819 N.Y.S.2d 288 [2d Dept. 2006]; ***Ayzen v. Melendez***, 299 A.D.2d 381, 749 N.Y.S.2d 445 [2d Dept. 2002]), Dr. Savella's report fails to raise a triable issue of fact. Dr. Savella conducted a neurological examination of the plaintiff on May 1, 2007, and he reviewed the March 2007 MRI reports of plaintiff's cervical and lumbar spine areas.[1] In his report, Dr. Savella did not note any complaint made by the plaintiff concerning her shoulder. Although Dr. Savella opined that the plaintiff's injuries were caused by the accident, he did not set forth with specificity the tests he conducted, especially with respect to range of motion, or how he arrived at his opinion. Furthermore, Dr. Savella's opinion is rendered speculative by plaintiff's own radiologist, Dr. Mendelsohn, who documented findings of degenerative changes in plaintiff's cervical and lumbar spine areas as the result of having reviewed the same March 2007 MRI reports reviewed by Dr. Savella (*See* ***Zarate, supra)***.

The remainder of the reports submitted by plaintiff in opposition to defendants' motion for summary judgment are not sworn, or affirmed, or certified in any manner. Therefore, those submissions are without probative value and are insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d). (*See* ***Lozusko***, ***supra***; ***Little, supra***; ***Shvartsman v. Vildman***, 47 A.D.3d 700, 849 N.Y.S.2d 600 [2d Dept. 2008]).

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[1]The March 2007 MRI reports are also unsworn, but have been referred to by defendants' examining physician in his affirmed report.

The plaintiff also failed to set forth competent medical evidence to establish that she sustained a medically determined injury or impairment of a nonpermanent nature, which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for 90 of the 180 days following the subject collision (***Ly v. Holloway***, 60 A.D.3d 1006, 876 N.Y.S.2d 482 [2d Dept., 2009]). Plaintiff's self-serving statement that the pain affects her "quality of life" and "interferes" with her daily activities is insufficient to establish that she was prevented from performing substantially all of her usual and customary activities for 90 of the 180 days following the accident. The plaintiff's own deposition testimony established that she missed only one week of work. Thus, plaintiff's affidavit is insufficient to raise triable issues of fact as to whether she sustained a serious injury (*See* ***Niles v. Lam Pakie Ho***, 61 A.D.3d 657, 877 N.Y.S.2d 139 [2d Dept., 2009]; ***Cantave v. Gelle***, 60 A.D.3d 988, 877 N.Y.S.2d 129 [2d Dept., 2009]).

Accordingly, defendants' motion for summary judgment is granted and the complaint is dismissed.

The foregoing constitutes the order of this Court.

Dated: June 3, 2010
Mineola, New York

Karen V. Murphy
J. S. C.
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ENTERED
JUN 10 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE