Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Doreen Wojtas and Allstate Insurance Company a/s/o Doreen Wojtas,

Plaintiffs,

-against-

AVF Development Corp. and Thomas D. Prisco,

Defendants.

Clerk of the Court

Motion Sequence No.: 003; MG
SETTJ

Motion Date: 6/9/10
Submitted: 6/9/10

Index No.: 2465/2008

Attorney for Plaintiff:

Siben & Siben, LLP
90 East Main Street
Bay Shore, NY 11706

Attorney for Defendant
AVF Development Corp.:

Cheven, Kelly & Hatzis, Esqs.
40 Wall Street, 15th Floor
New York, NY 10005

Attorney for Defendant
Thomas D. Prisco:

Ross & Suchoff, LLC
60 East 42nd Street, Suite 1545
New York, NY 10165

Upon the following papers numbered 1 to 19 read upon this motion for leave to renew: Notice of Motion and supporting papers, 1 - 10; Answering Affidavits and supporting papers, 11 - 17; Replying Affidavits and supporting papers, 11 - 17.

The instant action arises from a motor vehicle accident which occurred on July 30, 2007 at the intersection of Round Swamp Road and South Service Road in the Town of Huntington, New York. The accident purportedly occurred when a vehicle, owned by the defendant AVF

Development Corp. and operated by the defendant Thomas D. Prisco, failed to stop at a red traffic light signal and collided with a vehicle being operated by the plaintiff. The complaint alleges that the plaintiff sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. The bill of particulars specifies that the plaintiff sustained serious and permanent injuries including a herniated disc at C5-6 abutting the ventral surface of the cord; herniated disc at C7-T1 indenting the ventral thecal sac; disc bulges at C2-3, C3-4, C4-5 and C6-7; cervical spine sprain; cervical spine contusion; and cervicalgia. It alleges that, as a result of the accident, the plaintiff was confined to her bed and home, and incapacitated from employment, from July 30, 2007 to September 11, 2007.

In a prior motion, the defendants moved for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury within the meaning of the Insurance Law. By order dated April 6, 2010, this Court denied the motion with leave to renew based on the defendants' failure to include a complete copy of the pleadings filed in this consolidated action. The defendants now move for leave to renew their prior motion and, upon renewal, for an order granting them summary judgment dismissing the complaint.

On this motion the defendants seek to cure the defect in their prior papers. They submit a complete copy of the pleadings, including the pleadings of the consolidated property damage action. In addition, they submit evidence that the consolidated property damage action has been disposed of by settlement. Because renewal is appropriate to correct a procedural error, as here, involving the failure to submit copies of pleadings as required by CPLR §3212 (b) (cf., Gillis v. Toll Land XIII Ltd. Partnership, 309 AD2d 734 [2nd Dept., 2003]; S & D Petroleum Co. v. Tamsett, 144 AD2d 849 [3rd Dept., 1988]), leave to renew is granted.

Upon renewal, the Court grants the defendants' motion for summary judgment and dismisses the complaint on the grounds that the plaintiff did not sustain a serious injury under the Insurance Law. 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 constitutes 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" (Insurance Law §5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (see, Licari v. Elliott, 57 NY2d 230 [1982]; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence

of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (see, Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient 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 (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]; see also, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

In support of the motion for summary judgment, the defendants submitted, *inter alia*, the affirmed independent neurological evaluation report of Maria Audrie DeJesus, M.D., the affirmed report of Michael J. Katz, M.D., the affirmed report of Audrey Eisenstadt, M.D. and the plaintiff's deposition testimony. Dr. DeJesus performed a neurological examination on the plaintiff on April 21, 2009 and found no indication of neurological disability. Upon examination of the plaintiff's cervical spine she found no muscle spasm. She performed the Phalen's and Tinel's sign tests and obtained negative results. She concluded that the plaintiff had sustained a cervical spine strain which had resolved. It was her professional opinion that the plaintiff was capable of working and performing all usual and daily activities without restrictions. She found the plaintiff had not sustained any neurological limitation as a result of the accident.

Dr. Katz performed an examination of the plaintiff on April 28, 2009. Upon examination of her cervical spine he found no tenderness or spasm. He measured the range of motion of the plaintiff's cervical spine using a goniometer, compared it to normal range of motion and found it to be normal in all respects. He performed Adson's test and obtained negative results. Upon examination of the plaintiff's thoracolumbar spine he found no spasm. He measured the range of motion of her thoracolumbar spine, compared it to normal range of motion findings and found it to be normal in all respects. He obtained negative results for straight leg raising test, Babinski sign and Patrick test. He diagnosed the plaintiff with a cervical sprain with radiculitis and found that it had resolved. He found that the plaintiff currently shows no signs or symptoms of permanence relative to the musculoskeletal system and the accident. He determined that she was not currently disabled, was capable of gainful employment and was capable of performing her activities of daily living. He noted that the MRI report of the plaintiff's cervical spine indicated preexisting degenerative disc changes which may affect her recovery.

Dr. Eisenstadt affirmed that she reviewed the MRI of the plaintiff's cervical spine which was performed on August 30, 2007. Her impression was that the MRI indicated cervical

straightening; desiccation and small left paracentral C5-6 disc herniation; and bulging at C7-T1 intervertebral disc. Dr. Eisenstadt noted, with respect to the desiccation of C5-6, that drying out of disc material is a degenerative process which could not have occurred in less than three months time and which was indicative of preexisting degenerative disease. She noted that the desiccation was associated with a disc herniation and that degenerative disc disease is a common etiology for disc herniations. She asserted that further evidence of the existence of preexisting degenerative disc disease was the disc bulging at the C7-T1 interverteral disc level as disc bulging has no traumatic basis and is degenerative in origin, relating to ligamentous laxity. She stated that the presence of desiccation at the C5-6 level indicates a preexisting degenerative abnormality at the level where there is a small disc herniation likely degenerative as well.

During her deposition, the plaintiff testified that she went to the hospital following the accident complaining of pain in her arm and her neck. She was told that she had whiplash and to "take it easy." They gave her a prescription medication and told her to follow up with her regular doctor. Plaintiff testified that following the accident she was confined to her bed for approximately a week and confined to her home for a couple of weeks, that she was out of work as a dental assistant from July 30, 2007 to September 4, 2007; and that in September of 2007, she returned to her regular job duties with no limitations. The plaintiff testified that she went to physical therapy two to three times a week for approximately three months following the accident and she stopped physical therapy when no-fault insurance stopped. As a result of the accident, she now takes Celebrex approximately once or twice a week and she can no longer lift heavy things.

The evidence submitted by the defendants established their *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Saetia v. VIP Renovations Corp., 68 AD3d 1092 [2nd Dept., 2009]; Dietrich v. Puff Cab Corp., 63 AD3d 778 [2nd Dept., 2009]; DiFilippo v. Jones, 22 AD3d 788 [2nd Dept., 2005]; Casella v. N.Y. City Transit Auth., 14 AD3d 585 [2nd Dept., 2005]). In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she did sustain a "serious" injury as a result of the instant accident or that there are questions of fact as to whether she sustained such an injury as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002] at 350; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008]). The plaintiff failed to meet this burden.

In opposition to the motion, the plaintiff submitted, *inter alia*, certified copies of the plaintiff's medical records with North Shore University Hospital, certified office records for Long Island Spine Specialists, certified records for TLC Physical Therapy, the affirmed MRI report of Ronald Wagner and the plaintiff's deposition testimony. Contrary to the plaintiff's contention, this evidence was insufficient to raise a triable issue of fact as to whether she sustained a serious injury as a result of the subject accident. Initially, to the extent that the certified medical records submitted contained the doctor's opinion or expert proof, they do not constitute competent evidence because,

although they were certified, such records were unsworn (see, Matter of Fortunato v. Murray, 72 AD3d 817 [2 nd Dept., 2010]; Buntin v. Rene, 71 AD3d 938 [2nd Dept., 2010]; Matter of Bronstein-Becher v Becher, 25 AD3d 796 [2nd Dept., 2006]). In any event, the evidence submitted was insufficient to raise a triable issue of fact. It is well settled that 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 injury and its duration (see, Caraballo v. Kim, 63 AD3d 976 [2nd Dept., 2009]; Sealy v. Riteway-1, Inc., 54 AD3d 1018 [2nd Dept., 2008]; Kilakos v. Mascera, 53 AD3d 527 [2nd Dept., 2008]). The evidence submitted by the plaintiff failed to include any findings which were based on a recent examination of the plaintiff (see, Clarke v. Delacruz, 73 AD3d 965 [2nd Dept., 2010]; Ciancio v. Nolan, 73 AD3d 965 [2nd Dept., 2009]; Diaz v. Lopresti, 57 AD3d 832 [2nd Dept., 2008]; Sharma v. Diaz, 48 AD3d 442 [2nd Dept., 2008]). Furthermore, the evidence submitted was insufficient as it failed to present competent, objective medical evidence of the existence of limitation in the plaintiff's cervical spine (see, Vilomar v. Castillo, 73 AD3d 758 [2nd Dept., 2010]; Villante v. Miterko, 73 AD3d 757 [2nd Dept., 2010]; Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]; Magid v. Lincoln Servs. Corp., 60 AD3d 1008 [2nd Dept., 2009]). Many of the records presented indicate that the plaintiff sustained only a cervical sprain, that objective testing on her cervical spine resulted in negative results, that there was no spasm and that the plaintiff's cervical range of motion was normal. While the records indicate that the plaintiff sustained a loss in the range of motion of her cervical spine, they fail to document range of motion findings and/or compare the findings to normal ranges of motion (see, Sharma v. Diaz, 48 AD3d 442 [2nd Dept., 2008]). In addition, the plaintiff's submissions were inadequate as they failed to address the evidence which attributes the condition of the plaintiff's cervical spine to degenerative processes (see, Nicholson v. Allen, 62 AD3d 766 [2nd Dept., 2009]; Ciordia v. Luchian, 54 AD3d 708 [2nd Dept., 2008]).

Lastly, the plaintiff failed to submit competent medical evidence that the injuries she allegedly sustained in the subject accident rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see, Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]; Ciordia v Luchian, 54 AD3d 708 [2nd Dept., 2008]; Sainte-Aime v. Suwai Ho, 274 AD2d 569 [2nd Dept., 2000]).

Based on the foregoing, it is

ORDERED that the motion by the defendants for leave to renew their prior motion and, upon renewal, for an order granting summary judgment in their favor dismissing the complaint, is granted; and it is further

ORDERED that defendants shall settle a judgment (see, 22 NYCRR §202.48).

Dated: August 18, 2010

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.