Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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MARY-ANN KRUCK,

Plaintiff,

Index No: 13167/08
Motion Date: 3/17/10
Motion Cal. No: 17
Motion Seq. No: 2

-against-

EDMUND SPINELLI, TERESA SPINELLI, BYUNG J. KIM, ANGIE S. KIM, and DAVID J. RECKSON,

Defendants.

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The following papers numbered 1 to 21 read on this motion by defendants Angie S. Kim and Byung J. Kim, pursuant to CPLR §3212, granting summary judgment in favor of defendants and dismissing the complaint on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of sections 5102(d) of the Insurance Law; and upon these cross-motions by defendants Edmond Spinelli, Teresa Spinelli, and David Reckson, for the same relief.

	PAPERS NUMBERED
Notice of Motion-Affidavits--Exhibits.....	1 - 4
Notices of Cross-Motions-Affidavits--Exhibits.....	5 - 11
Affirmation in Opposition-Exhibits-Memorandum of Law.....	12 - 17
Reply Papers.....	18 - 21

Upon the foregoing papers, it is hereby ordered that the motion and cross-motions are disposed of as follows:

This is an action for personal injury in which plaintiff Maryann Kruck ("plaintiff") alleges that she sustained a serious personal injury on August 29, 2007, as a result of a motor vehicle accident that occurred on the Cross Island Parkway near the Northern Boulevard exit, in Queens County, New York. Plaintiff claims that, as a result of the accident, she sustained injuries, including, inter alia, subligamentous posterior disc herniations at C4-5, C5-6 and C6-7; cervical myospasm and radiculopathy. Defendants Angie S. Kim and Byung J. Kim move, and defendants Edmond Spinelli, Teresa Spinelli, and David Reckson cross move, for summary judgment on the ground that plaintiff failed to meet the "serious injury" threshold requirement of section 5102(d) of the Insurance Law,

which, in pertinent part, defines a "serious injury" as:

> a personal injury which results in ...significant disfigurement; ...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 party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. See Licari v. Elliott, 57 N.Y.2d 230 (1982). The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 (2002). By submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her prima facie burden. See Margarin v. Krop, 24 A.D.3d 733 (2nd Dept. 2005); Karabchievsky v. Crowder, 24 AD3d 614 (2nd Dept. 2005). The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendants, as the movants, make a prima facie showing that plaintiff did not sustain a serious injury. Toure v Avis Rent A Car System, 98 N.Y.2d 345 (2002).

In support of their motion and cross-motions, defendants submitted plaintiff's deposition testimony; the affirmed medical report of Dr. Robert Israel, an orthopedic surgeon who conducted an Independent Orthopedic Examination of plaintiff on May 20, 2009; and the affirmed medical report of Dr. Alan B. Greenfield, the radiologist who interpreted the MRI of plaintiff's cervical

spine.[1] Based upon his physical examination of plaintiff, Dr. Israel found that plaintiff had a normal range of motion in her cervical spine and lumbar spine, and set forth as his impression, resolved sprain of plaintiff's cervical spine and lumbar spine. Further, the January 12, 2009 report of Dr. Greenfield indicated that plaintiff has disc bulges, desiccation and dehydration associated with disc disease. He states the following as his impression:

> 1. Normal cervical lordosis.
> 2. There is diffuse degenerative disc disease at all cervical levels and associated with multilevel degenerative bony ostephytic ridging including C4-5, C5-6 and C6-7. Multilevel degenerative disc bulging is also present as above described and associated with posterior osteophytic ridge/disc complex formation indenting the dural sac at C4-C5 []. The constellations of the above noted findings are clearly longstanding and degenerative in origin, unrelated to the accident of 08/29/07. No disc herniations are seen.
> 3. There are no findings on this examination which can be attributed to the accident dated above with any reasonable degree of medical certainty, with clear evidence of longstanding degenerative disc disease, degenerative disc and bone abnormality [].

Defendants also pointed to plaintiff's deposition testimony in which she testified that following the accident, she missed two weeks of work and then resumed her normal work hours and work activities as a waitress at the Crescent Beach Club.[2] Additionally, plaintiff testified that she treated occasionally with her treating chiropractor, Patrick G. Decarolis, D.C., approximately every other month for the last 18 years, to relieve stiffness in her shoulders associated with carrying heavy trays from being a waitress.[3] She further testified that during this period, the course of treatment was spinal adjustments and massages to her back and shoulders, which was the same treatment that she had on the day of the accident.

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[1] The cross-motions by the Spinelli defendants and David Reckson, both adopt and incorporate by reference, the arguments set forth in the moving papers of the Kim defendants. Thus, this Court will render its decision accordingly.

[2] Plaintiff testified that she modified the manner in which she lifted trays for two months after the accident.

[3] Plaintiff testified that during the last 18 years, there were times that she did not maintain that schedule with regard to her chiropractic treatments, and would see Dr. Decarolis more infrequently, depending on her level of discomfort.

Through the submission of the aforementioned evidence, including the affirmed medical report of Dr. Israel, who conducted an orthopedic examination of plaintiff and found no abnormalities or permanency causally related to the accident, defendants' presented sufficient evidence to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). See, Pommells v. Perez, 4 N.Y.3d 566 (2005); Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Zhang v. Wang, 24 A.D.3d 611 (2005); Burgos v Vargas, 33 A.D.3d 579 (2nd Dept. 2006); Batista v Olivo, 17 A.D.3d 494 (2nd Dept. 2005); Sainte-Aime v Ho, 274 A.D.2d 569 (2nd Dept. 2000). They established, prima facie, that plaintiff suffered no limitation of motion as a result of the accident, and no medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her customary daily activities for not less than ninety days during the one hundred eighty days immediately following her alleged injury or impairment. Defendants thus established their entitlement to summary judgment dismissing the complaint insofar as asserted by plaintiff on the threshold issue. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Licari v. Elliott, 57 N.Y.2d 230 (1982); Djetoumani v. Transit, Inc., 50 A.D.3d 944 (2nd Dept. 2008). The burden then shifted to plaintiff to demonstrate the existence of a triable issue of fact as to whether she sustained a serious injury. See Gaddy v. Eyler, 79 N.Y.2d 955 (1992).

In opposition, plaintiff submitted the affirmation of her attorney; the February 19, 2010 affidavit of Patrick G. Decarolis, D.C., the treating chiropractor, who conducted range of motion studies on August 29 and November 30, 2007, and further examined plaintiff on October 3, 2009; the March 13, 2008 affirmation of Dr. Richard Rizzuti, the radiologist who interpreted the October 1, 2007 MRI of plaintiff's cervical spine; the September 18, 2008, the May 13, 2009 and March 3, 2010 medical reports of Dr. Paul Lerner, a neurologist; and her own affidavit. From the outset, it is noted that plaintiff's attorney's affirmation is insufficient to show that plaintiff sustained a serious injury, as it is well recognized that an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance. See, Codrington v. Ahmad, 40 A.D.3d 799 (2nd Dept. 2007); Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455 (2nd Dept. 2006); Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980). Similarly, although plaintiff describes her persistent pain and limitations, the self-serving affidavit of plaintiff also is insufficient to raise a triable issue of fact as to whether he sustained a serious injury. Carrillo v. DiPaola, 56 A.D.3d 712 (2nd Dept. 2008); Gastaldi v. Chen, 56 A.D.3d 420 (2nd Dept. 2008); Silla v. Mohammad, 52 A.D.3d 681 (2nd Dept. 2008); Hargrove v. New York City Transit Authority, 49 A.D.3d 692 (2nd Dept. 2008); Verette v. Zia, 44 A.D.3d 747 (2nd Dept. 2007); Iusmen v. Konopka, 38 A.D.3d 608 (2nd Dept. 2007); Mejia v. DeRose, 35 A.D.3d 407 (2nd Dept. 2006).

With regard to plaintiff's medical evidence, Dr. Rizzuti, in his March 13, 2008 affirmation, affirmed that he was the radiologist who interpreted the October 1, 2007 MRI of plaintiff's cervical spine, and found "subligamentous posterior disc herniations at C4-5, C5-6 and C6-7 abutting the anterior aspect of the spinal cord." Notwithstanding, this submission is not competent medical evidence sufficient to raise a triable issue of fact with regard to the threshold issue, as the mere

existence of a herniated 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 disc injury and its duration. Pommells v. Perez, 4 N.Y.3d 566, 574 (2005); Sutton v. Yener, 65 A.D.3d 625, 626 (2nd Dept. 2009); Chanda v. Varughese, 67 A.D.3d 947 (2nd Dept. 2009); Byam v. Waltuch, 50 A.D.3d 939 (2nd Dept. 2008); Endzweig-Morov v. MV Transp., Inc., 50 A.D.3d 946 (2nd Dept. 2008); Wright v. Rodriguez, 49 A.D.3d 532 (2nd Dept. 2008); Patterson v. N.Y. Alarm Response Corp., 45 A.D.3d 656 (2nd Dept. 2007); Waring v. Guirguis, 39 A.D.3d 741 (2nd Dept. 2007); Iusmen v. Konopka, 38 A.D.3d 608 (2nd Dept. 2007); Cerisier v. Thibiu, 29 A.D.3d 507 (2nd Dept. 2006). This evidence, standing alone, is not competent medical evidence showing the existence of significant limitations in plaintiff's spine that was contemporaneous with the subject accident. See, McMullin v. Walker, 68 A.D.3d 943 (2nd Dept. 2009); Sutton v Yener, supra; Sorto v. Morales, 55 A.D.3d 718 (2nd Dept. 2008); Casas v. Montero, 48 A.D.3d 728, 729 (2nd Dept. 2008); Morris v. Edmond, 48 A.D.3d 432, 433 (2nd Dept. 2008). The affidavit of Drs. Decarolis and Lerner are equally unavailing.

Dr. Decarolis, in his February 19, 2010 affidavit, stated plaintiff presented to his office on August 29, 2007, complaining of headaches, neck pain and stiffness with radiation into the shoulders bilaterally. Range of motion testing revealed the following limitations in plaintiff's cervical spine: Flexion 20° (normal 50°); Extension 10° (normal 60°); Right Rotation 40° (normal 80°); Left rotation 35° (normal 80°); Left Lateral Flexion 10° (normal 45°) and Right Lateral Flexion 10° (normal 45°). Thereafter, Dr. Decarolis stated that plaintiff presented with complaints of pain on November 30, 2007 and again on October 3, 2009, and he found that plaintiff continued to experience decreased range of motion in her cervical spine. Dr. Decarolis concluded:

> It is my opinion, with a reasonable degree of chiropractic certainty, that Mrs. Kruck sustained injuries including cervical myospasm, disc herniations at the C4-5, C5-6 and C6-7 levels and cervical radiculopathy. I also opined, with a reasonable degree of chiropractic certainty, that the injuries sustained are causally related to her accident on August 29, 2007. [] It is my opinion that [] that Mrs. Kruck sustained a permanent partial disability to her cervical and lumbosacral spine.

Further, Dr. Lerner, who examined plaintiff on March 5, 2008, May 13, 2009 and March 3, 2010, and found range of motion deficits, stated that his impression was plaintiff suffers from a cervical strain with disc herniations. He opined:

> The above condition results in a mild to moderate degree of disability and impairment at the cervical spine associated with pain and restricted range of motion. Based upon the history, medical records and time elapsed without clinical resolution, it is my opinion, to a reasonable degree of medical certainty, that this condition and associated impairment is permanent and causally related to the motor vehicle accident of 8/28/07.

Nevertheless, the medical submissions of Drs. Decarolis and Lerner are insufficient to defeat defendants' motion and cross-motions for summary judgment. Firstly, neither of the medical submissions address the findings of defendants' experts which reveal no post-traumatic indications, but only longstanding degenerative changes. See, Singh v. City of New York, 71 A.D.3d 1121 (2nd Dept. 2010); Chery v. Jones, 62 A.D.3d 742 (2nd Dept.2009); Ciordia v. Luchian, 54 A.D.3d 708 (2nd Dept. 2008); Abreu v. Bushwick Bldg. Prods. & Supplies, LLC, 43 A.D.3d 1091 (2nd Dept. 2007); Phillips v. Zilinsky, 39 A.D.3d 728 (2nd Dept. 2007); Albano v. Onolfo, 36 A.D.3d 728 (2nd Dept. 2007). Secondly, although Dr. Decarolis treated plaintiff on numerous occasions over the last 18 years with regard to the same areas she currently complains, the lack of reference to, and context regarding, those treatments, render speculative Dr. Decarolis' opinion that the subject accident was the competent producing cause of plaintiff's alleged limitations. See, generally, Silla v. Mohammad, 52 A.D.3d 681 (2nd Dept. 2008). Indeed, this Court finds it rather disingenuous, at best, that Dr. Decarolis failed to mention and account for the 18 years of prior treatment resulting from plaintiff's previous complaints of pain and stiffness attendant to her job as a waitress. Moreover, notwithstanding plaintiff's unsubstantiated contention that she would have continued to seek treatment despite the cessation of no-fault benefits, these reports fail to sufficiently address, and make no reference to the gap in treatment. See, Dantini v. Cuffie, 59 A.D.3d 490 (2nd Dept. 2009); Waring v. Guirguis, 39 A.D.3d 741 (2nd Dept. 2007). Lastly, plaintiff has also failed to proffer competent medical evidence showing that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the subject accident. See, Singh v. City of New York, 71 A.D.3d 1121 (2nd Dept. 2010); Sparacino v. Incorporated Village of Port Jefferson, 71 A.D.3d 758 (2nd Dept. 2010); Chery v. Jones, 62 A.D.3d 742 (2nd Dept.2009); Spence v. Mikelberg, 66 A.D.3d 765 (2nd Dept. 2009); Sealy v. Riteway-1, Inc., 54 A.D.3d 1018 (2nd Dept. 2008).

Accordingly, based upon the foregoing, the motion by defendants Angie S. Kim and Byung J. Kim, and the cross-motions by defendants Edmond Spinelli, Teresa Spinelli, and David Reckson, pursuant to CPLR §3212, granting summary judgment in favor of defendants on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of sections 5102(d) of the Insurance Law is granted and the complaint hereby is dismissed.

Dated: June 28, 2010

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J.S.C.