

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 12-12-08
ADJ. DATE 1-30-09
MNEMONIC: # 001 - MG; CASEDISP

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JESSICA PULEIO, :
 :
 Plaintiff, :
 :
 - against - :
 :
 THOMAS M. MESSINA and C.T. MESSINA, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 14 - 21; Replying Affidavits and supporting papers 22 - 23; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants for an order pursuant to CPLR §3212 granting summary judgment in their favor dismissing the complaint because the plaintiff Jessica Puleio (hereinafter plaintiff) did not sustain a "serious injury" as defined in Insurance Law §5102 (d) is granted

This is an action to recover damages for injuries allegedly sustained on June 16, 2006 by the then 19 year old plaintiff when her vehicle was struck in the rear by a vehicle owned by the defendant Thomas M. Messina and operated by the defendant C.T. Messina (hereinafter defendants) while the plaintiff's vehicle was stopped while southbound on the Robert Moses Causeway approximately 30 feet north of the Inlet Bridge in Babylon, New York. In her bill of particulars, the plaintiff alleges that as a result of the subject accident she sustained serious injuries including, post-traumatic headaches; cervical sprain/strain, subluxation; C5-6 posterior disc bulge; bilateral shoulder tendonitis and contusions; thoracic and lumbar sprain/strain, subluxations; L5-S1 posterior central disc herniation; bilateral hip tendonitis, derangement and contusions; and bilateral knee tendonitis, bursitis, contusion and derangement. In addition, the plaintiff alleges that following the accident she was treated at the emergency room of Mather Memorial Hospital in Port Jefferson, New York and released and thereafter she was not confined to bed but she was confined to home and incapacitated from household duties for approximately two weeks. At the time of said accident, the plaintiff was employed as a waitress and was incapacitated from employment for approximately two weeks. The plaintiff also seeks to recover economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Insurance Law §5102 (d) defines "serious injury" 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 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (see, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2nd Dept 2006]).

At her pre-trial deposition on May 22, 2008, the plaintiff testified that following the subject accident, she did not request an ambulance, she returned home and her mother took her to the Mather Memorial Hospital emergency room. In addition, the plaintiff testified that her complaints consisted of a headache and neck and back soreness; that she underwent x-rays at the emergency room and that she was released with the recommendation that she take Motrin. The plaintiff also testified that she did not injure her shoulder, hips or knees as a result of the subject accident. According to the plaintiff, within one week after said accident, she went just once to see her primary care physician with the same complaints. The plaintiff further testified that about 2 weeks thereafter she went to Island Wide Medical for physical therapy and chiropractic care where she received treatment 3 times a week for about 6 months and then 1 or 2 times a week for several months and then once a week for about 2 months at which time she moved and the insurance no longer covered her. The plaintiff stated that she last received medical treatment with respect to the subject accident in August 2007. The plaintiff also stated that she underwent MRI's of her neck and her back and was told that she had herniated and bulging discs. In addition, the plaintiff stated that at the time of the subject accident she was a server at Red Lobster and that she missed two weeks and then returned for the same number of hours. She described the activities that she can no longer do at all following said accident as lifting, playing basketball, going frequently to the gym, doing many exercises, sitting for a long period of time and wearing high heels for an extended period of time.

In his affirmed report, dated September 5, 2008, the defendants' examining orthopedic surgeon, Marc Chernoff, M.D., indicated that he examined the plaintiff on that date; that the plaintiff informed him that she had neck and upper and lower back pain; and that he reviewed various medical records as well as the plaintiff's bill of particulars. The defendants' examining orthopedic surgeon reported that he performed range of motion testing by goniometer and visual inspection of the plaintiff's lumbar spine with the following results: lumbar flexion was fingers to toes (normal within 6 inches of fingers to toes) and lumbar hyperextension was 30 degrees past neutral (normal 30 degrees). He also noted that the plaintiff had a negative straight leg raise bilaterally. With respect to range of motion testing of the plaintiff's cervical spine, the defendants' examining orthopedic surgeon found that the plaintiff's cervical flexion was chin to chest (normal chin to chest); hyperextension was 30 degrees past neutral (normal 30 degrees); and lateral rotation was chin to shoulder 80 degrees bilaterally (normal 80 degrees). Among the other findings of the defendants' examining orthopedic surgeon were that an examination of the plaintiff's bilateral knees revealed that she had full range of motion from 0 to 140 degrees of flexion (normal 0-140 degrees) with a negative Lachman test, negative anterior drawer test, and negative medial or lateral jointline tenderness as well as a negative patella grind resulting in a completely normal examination of the knees. The defendants' examining orthopedic surgeon further reported that the plaintiff had full range of motion of the hips with painless internal and external rotation of the hips and hip flexion 120 degrees (normal 120 degrees) as well as a full range of motion of bilateral shoulders. In conclusion, the defendants' examining orthopedic surgeon diagnosed cervical, thoracic and lumbar sprain causally related to the subject motor vehicle accident with no permanent effects. He opined that the plaintiff was currently asymptomatic with respect to her shoulders, hips and knees without any extremity pain and that although the plaintiff subjectively noted pain to the neck and upper and lower back, there were no objective findings upon examination. The defendants' examining orthopedic surgeon added that there were no signs of any radiculopathy in the upper or lower extremities. He further opined that there was no objective evidence of any disability and noting that the plaintiff was currently a full-time student and working once per week, he stated that she could continue her usual activities of daily living including work activities without any restrictions.

The defendants' examining radiologist, Stephen W. Lastig, M.D., indicated in his affirmed report, dated August 22, 2008, that he reviewed the plaintiff's MRI studies of the cervical and lumbar spine that were performed on July 31, 2006 and noted for both that no focal disc herniations or annular bulges were identified. He opined that they were normal and unremarkable MRI studies of the lumbar spine and the cervical spine. The defendants' examining radiologist stated that with respect to the MRI study of the lumbar spine, he disagreed with the original radiologist's interpretation and that he did not see evidence of a posterior central disc herniation at the L5-S1 level or evidence of mass effect upon the thecal sac. He further opined that there were no findings on either study that were causally related to the subject accident.

Here, the defendants' submissions were sufficient to establish, prima facie, their

entitlement to judgment as a matter of law dismissing the complaint because the plaintiff did not sustain a "serious injury" as defined by Insurance Law §5102 (d) (see, **Staff v Yshua**, 59 AD3d 614, 874 NYS2d 180 [2nd Dept 2009]).

Once the defendants made their prima facie showing that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, the burden shifted to the plaintiff to produce sufficient evidence to raise a triable issue of fact (see, **Dantini v Cuffie**, 59 AD3d 490, 873 NYS2d 189 [2nd Dept 2009]).

In opposition to the defendants' motion, the plaintiff failed to raise a triable issue of fact (see, **Garcia v Lopez**, ___ AD3d ___, 872 NYS2d 719 [2nd Dept 2009]; **Joseph v A and H Livery**, 58 AD3d 688, 871 NYS2d 663 [2nd Dept 2009]; **Sealy v Riteway-1, Inc.**, 54 AD3d 1018, 865 NYS2d 129 [2nd Dept 2008]). The proffered affirmed report of the MRI scan of the plaintiff's cervical spine indicated posterior subligamentous disc bulge C5/6 and the affirmed report of the MRI scan of the plaintiff's lumbar spine indicated posterior central disc herniation at L5/S1 indenting the thecal sac without central canal or foraminal stenosis. The mere existence of 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 disc injury and its duration (see, **Sealy v Riteway-1, Inc.**, *supra*; **Kilakos v Mascera**, 53 AD3d 527, 862 NYS2d 529 [2nd Dept 2008]; **Cerisier v Thibiu**, 29 AD3d 507, 815 NYS2d 140 [2nd Dept 2006]).

The plaintiff's treating physician Joseph Perez, M.D. (hereinafter Perez) in his affirmed report, dated December 11, 2008, provided recent computerized range of motion testing results for the plaintiff's cervical, thoracic and lumbar spine from November 28, 2008. The report indicated the plaintiff's cervical spine range of motion testing results to be as follows: flexion 36 degrees (normal 50+ degrees); extension 36 degrees (normal 60+ degrees); left lateral flexion 36 degrees (normal 45+ degrees); right lateral flexion 36 degrees (normal 45+ degrees); left rotation 62 degrees (normal 80+ degrees); and right rotation 61 degrees (normal 80+ degrees). With respect to the plaintiff's thoracic spine, the range of motion testing results were, flexion 49 degrees (normal 60+ degrees); left lateral flexion 5 degrees (normal 10+ degrees); right lateral flexion 6 degrees (normal 10+ degrees); left rotation 19 degrees (normal 30+ degrees); right rotation 20 degrees (normal 30+ degrees). The plaintiff's lumbar range of motion testing results were as follows: left lateral flexion 17 degrees (normal 25+ degrees); right lateral flexion 17 degrees (normal 25+ degrees); left rotation 1 degree (normal 0 degrees); right rotation 1 degree (normal 0 degrees); flexion 56 degrees (normal 60+ degrees); and extension 23 degrees (normal 25+ degrees). He noted that there was pain and spasm associated with said range of motion testing. Perez also indicated positive test results for among other things Jackson Compression and Foraminal Compression for nerve root encroachment; Cervical Distraction for capsular, disc, ligamentous damage; Kemp's for facet syndrome and nerve root irritation; and Heel/Toe Walk for weakness in L5/S1 nerve. In conclusion, Perez diagnosed post head contusion; post traumatic headaches; cervical radiculopathy with spasm; cervical disc displacement and myofascial derangement and pain; thoracic

myofascial derangement; lumbar herniated disc with indenting of the thecal sac; and lumbar pain and myofascial derangement.

Although Perez provided recent range of motion findings showing that the plaintiff had significant range of motion limitations in the cervical, thoracic and lumbar regions of her spine, there was no competent objective medical evidence demonstrating range of motion limitations in said regions of her spine that were roughly contemporaneous with the subject accident (see, **García v Lopez**, *supra*; **Joseph v A and H Livery**, *supra*; **Sealy v Riteway-1, Inc.**, *supra*). The plaintiff did submit reports dated July 12, 2006, August 9, 2006, September 20, 2006, October 16, 2006 and January 11, 2007 containing results in tabular form of computerized range of motion testing by dual inclinometer with an attached affirmation by the treating physician, Soccoro Vicente, M.D. (hereinafter Vicente). However, Vicente failed to explain the significance of those findings, which were presented in an unclear fashion, many of the results being much higher than the numbers given as normal (see, **Francis v Christopher**, 302 AD2d 425, 754 NYS2d 578 [2nd Dept 2003]; **Watt v Eastern Investigative Bureau, Inc.**, 273 AD2d 226, 708 NYS2d 472 [2nd Dept 2000]). The proffered affirmed reports, dated July 7, 2006, July 18, 2006, August 22, 2006 and September 25, 2006, based on Vicente's physical examinations failed to provide any contemporaneous objective medical evidence demonstrating range of motion limitations in the plaintiff's cervical, thoracic and lumbar spine, failed to make any reference to or clarify the computerized range of motion tabular findings, and merely repeated that there was decreased range of motion in all directions due to pain. The affirmed reports, dated July 12, 2006, August 2, 2006 and August 23, 2006, of the plaintiff's treating physician, David Khanan, M.D. failed to remedy this deficiency.


The plaintiff's radiologist, Samuel Mayerfield, M.D., did not provide an opinion as to the cause of the posterior central disc herniation and the disc bulge in either his affirmation or his reports (see, **García v Lopez**, *supra*; **Collins v Stone**, 8 AD3d 321, 778 NYS2d 79 [2nd Dept 2004]). Moreover, the plaintiff failed to adequately explain the gap between the time that she stopped treatment in August 2007 and her most recent examination by Perez on December 11, 2008 (see, **García v Lopez**, *supra*; **Sealy v Riteway-1, Inc.**, *supra*).

Furthermore, 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, **Kaminski v Kawamoto**, 49 AD3d 501, 853 NYS2d 588 [2nd Dept 2008]).

Finally, the plaintiff failed to establish economic loss in excess of basic economic loss (see, **Diaz v Lopresti**, 57 AD3d 832, 870 NYS2d 408 [2nd Dept 2008]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: April 8, 2009



J.S.C.