SHORT FORM ORDER

INDEX NO: 19317/07

Supreme Court of the State of New York
IAS Part 43 - County of Suffolk

PRESENT: HON. ARTHUR G. PITTS

SHARON R. LIPPMAN,

Plaintiff

-against-

SEAN FLAHERTY,

Defendant.

ORIG. RETURN DATE: 11/23/09
FINAL SUBMIT DATE: 3/4/10
MOTION SEQ. NO.003-MD

PLTF'S/PET'S ATTY:
FERRO, KUBA, MANGANO, SKLYAR, GACOVINO & LAKE, P.C.
350 Parkway, Suite 200
Hauppauge, New York 11788

DEFT'S/RESP'S ATTY:
DAVID J. SOBEL, P.C.
811 West Jericho Turnpike, Suite 105 W
Smithtown, New York 11787

Upon the following papers numbered 1-27 to read on this motion summary judgment Notice of Motion/OSC and supporting papers 1-17 Notice of Cross-Motion and supporting papers __; Affirmation/affidavit in opposition and supporting papers 18-24 ; Affirmation/affidavit in reply and supporting papers 25-27 ; Other __(~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that defendant Sean Flaherty's motion for summary judgment is denied under the circumstances presented herein. (CPLR 3212; Insurance Law 5102 (d))

The matter at bar is one for personal injuries sounding in negligence which arose out of a motor vehicle accident that occurred on June 17, 2005 on Brook Street at or near of its intersection with Cherry Avenue, Sayville Suffolk County, New York. As a basis of the instant motion the defendant asserts that the plaintiff has not sustained a serious injury as defined by Insurance Law 5102 (d).

Said section provides in part that "serious injury means 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 and eighty days immediately following the occurrence of the injury or impairment." (Insurance Law 5102 (d)) In the context of the plaintiff's claims, the term "consequential" means important or significant (***Kordana v. Pomellito,*** 121 A.D.2d 783, 503 N.Y.S.2d 198 , 200 [3rd Dept. 1986] , App. Dis. 68 N.Y.2d 848, 508 N.Y.S.2d 425) The term, "significant" as it appears in the statute has

been defined as "something more than a minor limitation of use" and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment" (***Licari v. Elliott,*** 57 N.Y.2d 230, 455 N.Y.S.2d 570 [1982])

On a motion for summary judgment to dismiss the complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law 5102 (d), the initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action." (***Rodriguez v. Goldstein,*** 182 A.D.2d 396, 582 N.Y.S.2d 395, 396 [1st Dept. 1992]) Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists. (***DeAngelo v. Fidel Corp. Services, Inc.,*** 171 A.D.2d 588, 567 N.Y.S.2d 454, 455 [1st Dept. 1991]) Such proof in order to be in a competent or admissible form, shall consist of affidavits or affirmations. (***Pagano v. Kingsbury,*** 182 A.D.2d 268, 587 N.Y.S.2d 692 [2nd Dept. 1992]) The proof must be viewed in a light most favorable to the non-moving party. (***Cammarere v. Villanova,*** 166 A.D.2d 760, 562 N.Y.S.2d 808, 810 [3rd Dept. 1990])

The plaintiff has alleged by way of her bill of particulars that she has sustained the following injuries: Marked rotatory levoscoliosis with T12-L1 central disc herination; L3-L4, L4–L5 and L5-S1 disc bulges encroaching on right neural foramen; left knee partial tear of the medial collateral ligament, supra patellar effusion and diffuse anterior subcutaneous edema; left knee derangement; post traumatic headaches; and head and facial contusions with scarring.

The defendant in support of the instant motion has submitted the affirmed report of Robert I. Michaels, M.D., an orthopaedic surgeon who conducted an examination of the plaintiff on May 18, 2009 which included various range of motion tests and the review of the plaintiff's relevant medical records. The range of motion testing resulted in a finding that her motion was in the normal range for her shoulders, knees, cervical spine and the thoracolumbar spine as well as negative findings as to the "patrick test" on her hip, negative crepitus as to her knees and "minimal vertebral tenderness but no paravertebral spasm noted " as to her thoracolumbar spine. Dr. Michaels diagnosed her with having a cervical sprain, resolved, lumbar sprain resolved, left knee sprain resolved and scoliosis, unrelated. He further concluded that the plaintiff's prognosis is good, her diagnosis is causally related to the subject accident and there is no objective evidence of an orthopedic disability or permanency. Furthermore, his examination of the plaintiff's shoulders, knees and right hip all were within the normal range and there is no evidence of cervical or lumbar radiculopathy. Accordingly, based upon the foregoing, the movants have demonstrated, as a matter of law that the plaintiff has not sustained a serious injury. (see ***Reeves v. Scopaz,*** 227 A.D.2d 606, 643 N.Y.S.2d 620 [2nd Dept. 1996] ; ***Horan v. Mirando,*** 221 A.D.2d 506, 633 N.Y.S.2d 402 [2nd Dept. 1995])

In order to successfully oppose the motion for summary judgment, the plaintiff must set forth 'competent medical evidence based upon objective medical findings and diagnostic tests to support his claim .... because subjective complaints of pain .... absent other proof are insufficient to establish a serious injury'. (***Eisen v. Walter & Samuels,*** 215 A.D.2d 149, 150, 626 N.Y.S.2d 109)" (***Tankersley v. Szesnat.*** 235 A.D.2d 1010, 1012, 653 N.Y.S.2d 184 [3rd Dept 1997])

In opposition thereto the plaintiff has proffered the affirmed report of the plaintiff's treating physician, Joseph Perez, M.D., and two affirmed MRI reports prepared by Allen Rothpearl, M.D. a radiologist regarding an MRI taken of the plaintiff's left knee on July 1, 2005 and an MRI taken of the plaintiff's lumbar spine taken on July 15, 2005. Dr. Perez conducted an examination of the plaintiff on January 22, 2010 wherein he reviewed the plaintiff's medical records, MRI films and conducted computerized range of motion testing. He concluded that the there was a decreased range of motion in the thoracic and lumbar spine as well as in the left knee and diagnosed her with "lumbar radiculopathy with spasm, lumbar herniated disc with encroachment of the right neural faramen, partial tear of medial collateral ligament of the left knee and derangement as a consequence of the motor vehicle accident of the right pelvis." He found her to be permanently disabled marked at between 75 and 99 per cent and stated that "it is my opinion with the findings stated above that there is permanent consequential limitation in the lumbar spine, right pelvis and left knee."

Dr. Rothberg's MRI report dated July 1, 2005 and affirmed on January 5, 2010 concluded that the plaintiff sustained a partial tear of the medial collateral ligament, suprapatellar effusion and diffuse subcutaneous edema present anteriorly. The MRI report dated July 15, 2005, found as to the plaintiff's lumbar spine that she had marked rotatory levoscoliosis, asymmetric right posterolateral disc bulges at L3-L4, L4-L5 and L5-S1 encroaching on the right neural foramen, and shallow central disc herniation at T12-L1 encroaching on the thecal sac.

As set forth above, it is well settled that "mere subjective complaints of pain alone, as well as medical opinions clearly based upon such complaints, are insufficient to raise a triable issue of fact," (***Barrett v. Howland,*** 202 A.D.2d 383, 608 N.Y.S.2d 681, 682 [2nd Dept.1994]) however a finding by a medical expert that describes the qualitative nature of the plaintiff's limitations (including specific designation of numeric percentages of the plaintiff's loss of range of motion after testing) based on the normal function, purpose and use of the body part and attributing such limitations to the injuries sustained together with further medical evidence such as observations of spasms during physicalexamination are collectively sufficient to raise a triable issue of fact as to whether such serious injury was sustained as defined in Insurance Law 5102 (d).(***Toure v. Avis Rent a Car,*** 98 N.Y.2d 345,746 N.Y.S.2d 865[2002]) Herein, the plaintiff has set forth such competent medical evidence based upon objective medical findings and diagnostic tests (***Tankersley v. Szesnat,*** supra) and accordingly, the defendant's motion to dismiss is denied.

This shall constitute the decision and order of the Court

Dated: Riverhead, New York
May 24, 2010

J.S.C.

CHECK ONE: ___ FINAL DISPOSITION _XX_ NON-FINAL DISPOSITION _____ DO NOT SCAN