SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

X

EILEEN HUGHES,

Plaintiff,

-against

WELSBACH ELECTRIC COMPANY
AND MICHAEL ZEFFER,

Defendants.

X

Index No.: 015150/06
Motion Sequence...01
Motion Date...02/08/10
XXX

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Reply Memorandum of Law.....x

Upon the foregoing papers, the Defendants' motion seeking an order granting summary judgment pursuant to CPLR §3212 and dismissing the Plaintiff's complaint on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) and thus the complaint for non-economic loss is barred by Insurance Law § 5104 (a) is determined as hereinafter provided. The plaintiff opposes the motion.

This action arises out of a three vehicle accident that occurred on October 13, 2005 on Old Country Road, 350 feet west of the Carmen Avenue Extension, Westbury, New York in the County of Nassau. One vehicle was operated by the Defendant Michael Zeffer with permission of the Co-defendant Welsbach Electric Company. One of the other two vehicles was operated by the Plaintiff Eileen M. Hughes and the other was operated by Dawn Young Flynn. As a result of the accident, the Plaintiff alleges numerous injuries, including but not limited to; left cervical strain and paraspinal muscle spasm, a disk bulge at the L5-S1 impinging on the right S1 root and canal and a left foot contusion.

It is noted at the outset that the Defendant is not required to disprove any category of serious injury which has not been pled by the Plaintiff (*Melino v. Lauster*, 82 N.Y.2d 828 [1993]). Whether the plaintiff can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc*, 297 A.D.2d 519 [1st Dept, 2002]).

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 [1988]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986], *Rebecchi v. Whitmore*, 172 A.D.2d 600 [2nd Dept. 1991]). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact" (*Frank Corp. v. Federal Ins. Co., supra*, at 967; *GTF Mktg. v. Colonial Aluminum Sales*, 66 N.Y.2d 965 [1985]; *Rebecchi v.*

Whitmore, supra at 601). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see, Frank Corp. v. Federal Ins. Co., supra*).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*Barr v. County of Albany*, 50 N.Y.2d 247 [1980]; *Daliendo v. Johnson*, 147 A.D.2d 312, 317 [2nd Dept. 1987]).

In a personal injury action, a summary judgment motion seeking a dismissal requires that a defendant establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d) (*Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence in admissible form to demonstrate the existence of a question of fact on the issue (*Gaddy v. Eyler, supra*). The court must then decide whether the plaintiff has established a prima facie case of sustaining serious injury (*Licari v. Elliot*, 57 N.Y.2d 230 [1983]).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians (*see Pagano v. Kingsbury*, 182 A.D.2d 268 [(2nd Dept. 1992]). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for

summary judgment (*Grasso v. Angerami*, 79 N.Y.2d 813 [1991]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002), stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v Vasquez*, 301 AD2d 438 [1st Dept. 2003]).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 N.Y.3d 566 [2005]).

Insurance Law § 5102 (d) defines serious injury to mean "a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) 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".

The non-severity of Plaintiff's condition is set forth in the reports of Dr. Roger Bonomo and Dr. Edward Crane, who performed independent medical examinations of the Plaintiff. Dr. Crane reported the Plaintiff's prognosis as "excellent," finding that the range of motion in her neck, back and left foot was normal. In fact, Dr. Crane's report specifically notes that, while Plaintiff's MRI showed a bulging disc, bulging discs do not cause pain. Accordingly, the Plaintiff's subjective complaints of pain are insufficient to satisfy the criteria for a permanent injury. *See, e.g., Kauderer v. Penta*, 261 A.D.2d 365 (2d Dept. 1999).

Upon examination of the Plaintiff and review of her medical records, Dr. Bonomo reported that her history and normal neurological exam are consistent with resolved muscle strains and an unrelated left ankle/foot trauma. He also reported that the Plaintiff's degenerative disc bulge was not caused by any specific trauma. *See also Becerril v. Sol Cab Corp.*, 50 A.D. 3d 261 (1st Dept. 2008) (defendant established prima facie entitlement to summary judgment by submitting affirmed report of a radiologist who opined that plaintiff's MRI films revealed degenerative disc disease and no evidence of post-traumatic injury to the disc structures); *Agard v. Bryant*, 24 A.D. 3d 182 (1st Dept. 2005) (defendant entitled to summary judgment where sworn radiologist's report opined that plaintiff's knees were

affected by degenerative processes and there was no evidence of any traumatic injury). Finally, Dr. Bonomo found absolutely no evidence of neurological abnormalities, emphasizing that the reported electro-diagnostic studies did not even reach an affirmative finding of radiculopathy.

The Plaintiff's alleged injuries do not meet the threshold requirements. The objective medical evidence in this case shows that the Plaintiff is not suffering from any permanent limitation. Nor does the Plaintiff's testimony that she can no longer ski or go on roller coasters establish anything other than a slight limitation. Moreover, there has been no competent medical evidence admitted to show that the Plaintiff suffered anything more than a mild, minor, or slight limitation of use *as a result* of the accident at issue.

All indications of the Plaintiff's alleged "permanent" injuries are merely based on either her pre-existing ankle injury or her own subjective complaints. There is no objective evidence before the Court that the Plaintiff suffered at any time from a meaningful impairment or limitation. At her deposition, the Plaintiff testified that she did not lose any salary as a result of the subject motor vehicle accident. Although she did not return to work in her New York City office until January 2006, the Plaintiff had been working from home before the October 13, 2005 motor vehicle accident occurred. The reason the Plaintiff was working out of her home was related to her September 12, 2005 slip-and-fall accident, not the motor vehicle accident herein. Indeed, the evidence set forth by the Plaintiff's own treating physicians reveal that the Plaintiff's left foot and ankle injuries were sustained just

one month prior to the motor vehicle accident at issue in this case. The ankle injuries alleged by the Plaintiff here are the same injuries which existed before the motor vehicle accident which occurred on September 12, 2005.

In addition, the Plaintiff's own physician's reports indicates that her condition is improving and that the Plaintiff is "happy with her progress."

Therefore, the Plaintiff's alleged injuries are not causally related to the subject motor vehicle accident and do not meet the standard of a "serious injury" under Insurance Law § 5102 (d). Rather, the Plaintiff's injuries are chronic and degenerative in nature. Moreover, if they were exacerbated at all, it was the result of a previous accident on September 12, 2005, where the Plaintiff missed a step while exiting a CVS and fell to the ground.

In the instant matter, the Defendant has succeeded in making a prima facie showing that the Plaintiff did not sustain a serious injury pursuant to the Insurance Law, and the Plaintiff was unable to successfully counter this showing with sufficient medical evidence which would demonstrate the existence of material issues of fact that she has sustained a "serious injury" pursuant to the aforementioned insurance law.

Accordingly, based on the foregoing, the motion by the Defendant for summary judgment dismissing the Plaintiff's complaint must be **GRANTED**.

This decision constitutes the decision and order of the court

DATED: Mineola, New York
April 7, 2010

Hon. Randy Sue Marber, J.S.C.
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