

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

PRESENT: Hon. ARTHUR G. PITTS

WHITNEY L. JORDAN,

Plaintiff,

- against-

WALTER ROSALES, SUFFOLK
COUNTY DEPARTMENT OF PUBLIC
WORKS TRANSPORTATION
DIVISION, COUNTY OF SUFFOLK and
EVELYN R. ZAVALA,

Defendants.

ORIG. RETURN DATE: 2/9/17; 4/20/17

ADJOURNED DATE: 5/25/17

MOTION SEQ. NO.: 001 - MG

002 - MG

003 - MD

PLTF'S/PET'S ATTY:

PETER R. GARCIA, P.C.

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DEFT'S/RESP'S ATTY:

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Upon the following papers numbered 1 to 63 read on these motions for summary judgment Notice of Motion and supporting papers 1-11 Notice of Cross-Motion and supporting papers 12-34; 35-53 Affirmation/affidavit in opposition and supporting papers 54-55; 56-59; 60-61 Affirmation/affidavit in reply and supporting papers 62-63 Other memorandum of law; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the defendant Evelyn R. Zavala's motion and defendants Walter Rosales, Suffolk County Department of Public Works Transportation Division, County of Suffolk and Suffolk Bus Corporation's cross motion, each for summary judgment are granted under the circumstances presented herein. (CPLR 3212; Insurance Law 5102 (d)) It is further

ORDERED that the plaintiff Whitney L. Jordan's cross motion for summary judgment as to the issue of liability only' is denied as being moot.

The matter at bar is one for personal injuries sounding in negligence which arose from a motor vehicle accident that occurred on December 26, 2016 at the intersection of Motor Parkway and Yalta Drive, Central Islip, Suffolk County, New York. Plaintiff Whitney L. Jordan was a passenger in a bus owned by defendant County of Suffolk and operated by defendant Walter Rosales when it came in contact with a vehicle owned and operated by defendant Evelyn R. Zavala. As a result thereof, the plaintiff now alleges that she has sustained serious personal injuries.

As a basis of the instant motion and cross motion, the defendants assert that the plaintiff has not sustained such 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 in her verified bill of particulars that she sustained the following injuries: Cervical-aggravation exacerbation of a previous quiescent cervical spine injury which consists of the following; slight straightening of the normal lordosis; cervicgia with paresthesia down right arm. New injuries, findings and procedures: C2-C3 annular tear; C4-C5 central bulge and annular tear; C5-C6 broad based disc bulge with subligamentous in opposition which is minimally indenting the thecal sac; straightening of the cervical lordosis; sensory neuropathy; loss of range of motion; cervical radiculopathy / radiculitis; cervical strain/sprain; severe pain at the bilateral trapezius; spinal subluxation at C1; decreased perception of pinprick at right C6-C7; trigger points active at the bilateral trapezius; tenderness in the paraspinal muscles; tightness in bilateral cervical area and right trapezius. Thoracic- disc bulge at T3-T\$ centrally with flattening of the ventral thecal sac; disc bulge at T4-T5 to the right with flattening of the ventral thecal sac; thoracic sprain/strain; thoracic spine pain radiating to right posterior scapula; spinal subluxation at T2; spinal subluxation at T3; spinal subluxation at T4; spinal subluxation at T7; spinal subluxation at T8; spinal subluxation at T9; trigger points active in the right thoracic paraspinal area; paravertebral muscle spasms; tenderness on palpation to the thoracic paraspinals; tightness in the bilateral thoracic paraspinal areas. Lumbar-aggravation exacerbation reactivation of a previously quiescent lumbar

spine injury which consisted of the following: L5-S1 disc desiccation with mild disc space narrowing as well as concentric disc bulge with central broad based disc herniation and annular fissure; bilateral superficial peroneal neuropathy; lumbago; sciatica. New injuries, findings and procedures: L5-S1 there is facet hypertrophy with bulging and broad based central herniation, slightly eccentric toward the right; there is a flattening of the ventral thecal sac and mass effect on the right S2 nerve root; L4-L5 facet hypertrophy and diffuse bulging with flattening of the ventral sac; loss of range of motion; lumbar sprain/strain; lumbar radiculopathy/radiculitis; spinal subluxation at T12; spinal subluxation at L1; spinal subluxation L2; spinal subluxation at L5; spinal subluxation at sacrum; spinal subluxation at left and right S1; decreased perception of pinprick at right L5-S1; trigger points active at right paraspinal; spasms in the paraspinal muscles; tenderness in the paraspinal muscles; tightness in bilateral lumbar and bilateral buttock areas. Right knee- aggravation exacerbation reactivation of a previously quiescent right knee injury which consisted of the following: unstable right knee; right knee discomfort. New injuries, findings and procedures: Arthroscopy of the right knee, chondroplasty of patellofemoral joint with abrasion chondroplasty; arthroscopic synovectomy, right knee multiple compartments; arthroscopic removal of loose body, right knee, injection of right knee; joint effusion; probable bone island in the posterior aspect of the medial femoral condyle; chondral injury of the patellofemoral joint with mechanical symptoms; derangement of the right knee; loss of range of motion; sprain/strain of the right knee; trigger points are active in the right knee; spasm in the muscles surrounding the right knee joint; severe right knee pain; catching of the right knee; popping of the right knee. General- pain in head; severe headaches; nausea; severe right shoulder pain; severe right elbow pain; severe sternal chest wall pain.

In support of the instant motion and cross motion the defendants have proffered the affirmed report of Noah S. Finkel, M.D., an orthopedic surgeon. After conducting an examination of the plaintiff on February 22, 2016 as well as reviewing all relevant medical records, Dr. Finkel diagnosed the plaintiff with having sustained a cervical strain resolved and a lumbosacral strain, resolved. Said examination included range of motion testing which he states yielded normal range of motion and negative test results. He concluded that there was no significant finding relative to the plaintiff's right knee injury. There was evidence of patellofemoral dysfunction not causally related to the motor vehicle accident. He found no objective findings as to the shoulders and only subjective findings of pain and slight subjective limitations of range of motion of the cervical and lumbar spines. He further opined that the reviewed medical records contained evidence of pre-existing bilateral patellofemoral dysfunction not causally related to the subject accident and that the plaintiff's pre-accident records reveal that any injuries to her lumbar spine pre-dated the subject accident. Accordingly, pursuant to the foregoing, the defendants have met their burden of establishing, prima facie, that the plaintiff has not sustained a serious injury as set forth in Insurance Law 5102. (see i.e. *Fathi v. Sodhi*, 146 A.D.3d 445, 44 N.Y.S.3d 406 [1st Dept 2017])

“In order to successfully oppose the motion for summary judgment, 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])

Herein, in opposition, the plaintiff has proffered her counsel's affirmation and an MRI study of her lumbar spine which indicates bulging at L4-5 and L5-S1. The MRI report was neither sworn to or affirmed to and as such, will not be considered. (*Sandt v. NYRA*, 289 A.D.2d 218, 734 N.Y.S.2d 183 [2nd Dept. 2001]) Said affirmation together with an inadmissible MRI report clearly do not constitute objective medical findings to raise a triable issue of fact. Accordingly, pursuant to the foregoing and under the circumstances presented, the defendants' motion and cross motion are granted and the complaint is dismissed.

This shall constitute the decision and order of the Court.

Settle judgment.

So ordered.

**Dated: Riverhead, New York
August 28, 2017**



ARTHUR G. PITTS, J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION