Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

MEVLUDIYE BASAR,

Plaintiff,

-against-

APOGEE TRUCKING, LLC, APOGEE RETAIL NY, LLC, CHRISTIAN O. GUZMAN and RYDER TRUCK RENTAL, INC.,

Defendants.

Index No. 601625/2013

Motion Submitted: 12/20/16
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	X

Defendants, Apogee Trucking, LLC, Apogee Retail NY, LLC and Christian O. Guzman move this Court for an Order awarding them summary judgment, and dismissing the complaint on the ground that plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d).[1] Plaintiff opposes the requested relief.

[1] This action was discontinued against defendant Ryder Truck Rental, Inc., by stipulation dated May 26, 2015. The third-party action previously commenced against the Town of Hempstead and County of Nassau was also discontinued, by stipulations dated February 17, 2016 and March 14, 2016, respectively.

The motor vehicle accident giving rise to this action occurred on October 9, 2012, at approximately 1:25 p.m., at the intersection of Meacham and Post Avenues, in Elmont, New York. Plaintiff alleges that the defendant Guzman failed to obey the stop sign controlling his direction of travel. Ultimately, the right side of plaintiff's car and the front left side of the defendants' truck came into contact.

In her Bill of Particulars, plaintiff claims, *inter alia*, that she sustained the following serious and permanent injuries as a result of this accident; to wit, disc herniation at L5-S1 with downward extrusion and torn annulus fibrosis; bulging disc at L4-L5; lumbar radiculitis; bulging discs at C4-5, C5-6 and C6-7; left C6 radiculopathy; cervical radiculitis, and cervical nerve root impingement. In her Supplemental Bill of Particulars, plaintiff claims that she also sustained a miscarriage as a result of this accident.

Plaintiff further claims that her injuries fall within four of the nine categories of the serious injury statute: to wit, 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 persons' usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment (90/180 claim).

Notably, despite her supplemental claim that she sustained a miscarriage as a result of this accident, nowhere in her Supplemental Bill of Particulars does she amend her claims that her injuries also satisfy the "loss of a fetus" category of the Insurance Law §5102(d). Although the Court is not required to consider claims that are not alleged (*see* ***Sharma v. Diaz***, 48 AD3d 442 [2nd Dept. 2008]; ***Ifrach v. Neiman***, 306 AD2d 380 [2nd Dept. 2003]), defendants have addressed the loss of a fetus issue in their moving papers; accordingly, the Court will consider that claim as well.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York Univ. Med. Center***, 64 NY2d 851 [1985]; ***Zuckerman v. City of New York***, 49 NY2d 557 [1980]). Here, the defendants

must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident *(**Felix v. New York City Transit Auth.**,* 32 AD3d 527 [2d Dept 2006]).

In support of their motion, defendants submit, *inter alia*, the pleadings, plaintiff's deposition testimony, the unsworn MRI reports of plaintiff's cervical and lumbosacral spine from Southwest Radiology dated October 17, 2012 and January 21, 2013, the unsworn hospital records from Winthrop University Hospital, the unsworn EMG/NCV report of plaintiff's neck dated March 14, 2013, the unsworn physical therapy notes of Michael Valdellon, PT and others, the unsworn report of Paul Lerner, MD, the unsworn reports from New York Spine Specialist, the unsworn notes and records from Premier Physical Medicine & Rehabilitation P.C., the sworn report of Richard Lechtenberg, MD, who performed an independent neurologic examination of the plaintiff on July 9, 2015, the sworn report of Alan A. Kessler, MD, defendants' examining obstetrician/gynecologist, and the unsworn employment records of the plaintiff from Hazma Academy School.[2]

The sworn reports of Richard Lechtenberg, MD, who performed an independent neurologic examination of the plaintiff on July 9, 2015, and the sworn report of Alan A. Kessler, MD, the examining obstetrician/gynecologist, establishes the defendants' *prima facie* entitlement to judgment as a matter of law as to the following categories of injury: 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, and loss of a fetus.

Specifically, in his affirmed report, Dr. Lechtenberg avers that following his examination of the plaintiff, which included quantified range of motion testing with a goniometer and a comparison to normal ranges of motion, he found that plaintiff exhibited normal ranges of motion in her cervical, thoracic, and lumbar spine areas, as well as in her shoulders, knees, elbows, ankles, feet, wrists, and hips. Of all the measurements taken of plaintiff's ranges of motion, the only restriction noted was a five-degree restriction in left lateral flexion of the lumbar spine. "[A] minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute" (***Licari v. Elliott***, 57 NY2d 230, 236 [1982]).

According to Dr. Lechtenberg, plaintiff's cervical and lumbar spine sprains were resolved as of the date of the independent examination on July 9, 2015. Dr. Lechtenberg

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[2] The unsworn reports of plaintiff's treating physicians submitted by defendants are admissible and will be considered by this Court in the determination of the instant motion (***Pagano v. Kingsbury***, 182 AD2d 268 [2d Dept 1992]). In addition, defendants' examining neurologist reviewed Exhibits B, D, E, F, G, J, O and P in issuing his affirmed report (*see* ***Williams v. Clark***, 54 AD3d 942 [2d Dept 2008]). Plaintiff's employment file (Exhibit N) is not in admissible form, and in any event, is irrelevant to the determination of the instant motion.

further stated that his "impression is that this woman had no objective, clinical, neurologic deficits on my examination. From a neurologic standpoint, she is not disabled and is currently working. She has no permanent, neurologic impairment or disability causally related to the accident of 10/09/12. Her neurologic prognosis is good." He further states that, "[t]he Verified Bill of Particulars alludes to injuries of the cervical spine, lumbar spine, and spinal roots. There was no objective, clinical, neurological deficits on my examination substantiating these claims." Thus, based upon Dr. Lechtenberg's independent medical examination of plaintiff, defendants have established their *prima facie* entitlement to summary judgment as a matter of law as to the following categories of injury: permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, and significant limitation of use of a body function or system.

Moreover, the reports of plaintiff's treating physicians submitted for the Court's consideration further establish defendants' entitlement to summary judgment. The MRI reports related to plaintiff's cervical and lumbosacral spine (Exhibit B) do not causally relate any of the findings to the subject accident. The first report dated October 17, 2012 notes "minimal degenerative changes of the lower [cervical] spine," no compression or deformity, and an otherwise unremarkable cervical spine study. The report also notes that there is mild L5-S1 narrowing, but usual lumbar lordosis, no compression deformity, or evidence of spondylolisthesis or spondylolysis.

In the January 21, 2013 reports, there is no evidence of fracture, or disc herniations. There are some bulging discs and diffuse disc desiccation, but no causal relation to the subject accident. The lumbosacral spine study of the same date also notes that there is no fracture, and none of the findings therein are related to the accident giving rise to this action.

The nerve study dated March 14, 2013 (Exhibit D) notes "left C6 radiculopathy," but also that "[a]ll nerve conduction parameters were within normal limits. All left vs. right side differences were within normal limits." Moreover, there is not statement in that report relating the nerve study findings to the subject accident.

The physical therapy records (Exhibit E) do not mention the subject accident, or relate any of the findings/therapy to the subject accident. Moreover, the records show that plaintiff did not attend physical therapy for four months, from May 2013 to September 2013, during the span of her fourteen-month therapy regimen. Apparently, plaintiff had been "traveling."

Dr. Lerner's report (Exhibit F) from November 21, 2012 notes that plaintiff's sensory examination was normal, as were her reflexes and gait. The only post-traumatic finding he notes on his report is "[p]ost-traumatic vertigo," which plaintiff does not claim in either of her Bills of Particulars. In fact, in the November 21, 2012 note in plaintiff's

chart, Dr. Lerner wrote that plaintiff's "head and neck are normal and atraumatic in appearance," and that plaintiff was working at that time.

The New York Spine Specialist reports from 2013 (Exhibit G) include the initial examination conducted on January 31, 2013, more than three months after the accident, and the reports of the epidural steroid injections administered to plaintiff. The operative reports do not relate the treatment to the subject accident. The initial examination report also fails to relate the diagnosis of cervical nerve root impingement and lumbar disc herniation with radiculopathy to the subject accident. The only mention of the subject accident is made by plaintiff herself, as she reported her history to the treating physician. Yet, despite her complaints, Dr. Lattuga does not himself relate his findings to the accident, or to any trauma.

The submitted records from Premier Physical Medicine and Rehabilitation (Exhibit J) contain the affirmed reports of plaintiff's treating physician, Hasan Chughtai, D.O., who first evaluated plaintiff on October 16, 2012, one week after the subject accident. According to the history presented by plaintiff, she advised Dr. Chughtai that she was involved in the subject accident, and that she had not sought medical attention until that day. She also advised the doctor that she had not missed work due to the accident.

Dr. Chughtai noted limitations in plaintiff's range of motion in her cervical and lumbar spine areas. Although Dr. Chughtai assessed her as having cervical and lumbar spine strains/sprains post-accident, and opined that there is a causal relationship between plaintiff's complaints and the accident, he did not restrict her activities, stating only that plaintiff "may continue to work as tolerated," and "to be careful and mindful of her injuries and not to do any activities that would further exacerbate them." Aside from this general caution, and instead of restricting any of plaintiff's particular activities, Dr. Chughtai essentially left the decision as to whether to engage in various activities, including working, up to the plaintiff's own discretion. This language appears in every report authored by Dr. Chughtai that is contained in defendants' Exhibit J. Upon the occasion of the last submitted report dated May 13, 2013, Dr. Chughtai does not note any permanent disability, only that plaintiff may "continue to work as tolerated," and to be "mindful" of her injuries.

Accordingly, and although plaintiff suffered cervical and lumbar sprains/strains during the several months following the subject accident, and apparently as a result thereof, there is no evidence that plaintiff's injuries prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities. Plaintiff's failure to make the showing that the curtailment of any such activities was "to a great extent" is fatal to her claim that her injuries satisfy the 90/180 category of the Insurance Law §5102(d) (***Licari v. Elliott, supra*** at 236).

In addition, although defendant's examining physician did not address plaintiff's 90/180 claim, a defendant may establish through presentation of a plaintiff's own

deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (***Kuperberg v Montalbano***, 72 AD3d 903 [2d Dept 2010]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664 [2d Dept 2008]).

Moreover, a plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of her customary daily activities for not less than 90 days during the 180 days immediately following the accident (***Omar v Goodman***, 295 AD2d 413 [2d Dept 2002]; ***Lauretta v County of Suffolk***, 273 AD2d 204 [2d Dept 2000]).

Plaintiff testified that as a result of the impact, her chest struck the steering wheel and she injured her lower back. Specifically, she testified that as a result of this accident, she injured her neck, lower back and left leg – body parts that she had never previously injured. She stated that despite the impact, the airbags did not deploy, that she was not bleeding after the impact, and that she did not lose consciousness as a result of the impact. Plaintiff remained in her car until the police arrived, and then simply walked to her home from the accident scene. Plaintiff did not seek medical attention at the scene of the accident; instead, she first sought treatment two or three days after this accident. As noted above, plaintiff advised her treating doctor, Dr. Chughtai, that she had not sought any treatment until seven days after the accident.

Plaintiff further testified that one or one-and-one-half months after the accident, she first learned that she was eight or nine weeks pregnant. Ultimately, on December 1, 2012, she had a miscarriage. As to the cause of her miscarriage, plaintiff testified that while the doctors "did not give [her] anything specific, [ ] they did say that the accident could have caused it." Plaintiff testified that a female doctor told her this, but plaintiff admitted that the doctor never said what specifically about the accident could have caused the miscarriage. Plaintiff also testified that she did not have any further testing done to actually determine the cause of her miscarriage. Plaintiff did not tell any of her treating physicians that she was pregnant, nor did she tell any of the facilities where she went for radiological testing, because, according to plaintiff, she did not know she was pregnant at that time. Even if they asked her if she was pregnant, she likely responded that she "didn't know. I probably said no."

According to her testimony, the doctors advised her not to lift heavy objects, but to do exercises at home and to rest. Plaintiff missed less than a week of work from her employment as a teacher's assistant at the Hazma Academy; she stated, however, that when she returned to her job, she was not able to bend down to teach her five-year old students. In her Verified Bill of Particulars, plaintiff claims that she was only confined to her bed

and home for three and four days, respectively, immediately following the date of this accident. While the plaintiff did testify that the doctors advised her not to lift heavy objects, she stated that this "restriction" was the consequence of her pregnancy – rather than the result of injuries sustained from this accident. In addition, plaintiff testified that she was no longer able to walk a distance, or jog; she also testified that she has difficulty reading because she is limited in her ability to move her head from side to side. Plaintiff did not receive any disability benefits as a result of the subject accident, and one year after the accident plaintiff was able to travel to Turkey to visit her family.

Dr. Chughtai's report dated October 16, 2012 states that plaintiff "has not missed work due to this accident," and none of the reports following the initial evaluation note that plaintiff missed any work at all; the entries under the category "vocational history" state that plaintiff "works as a nursery teacher."

Based upon plaintiff's own deposition testimony, the Court finds that it, too, is sufficient to establish a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), under the 90/180 category of injury (***Batista v Olivo***, 17 AD3d 494 [2d Dept 2005]).

Based upon a plain reading of the papers submitted herein, it is also evident that the plaintiff's injuries do not satisfy the "permanent loss of use of a body organ, member, function or system" category of the serious injury statute. Indeed, there is no evidence at all that the plaintiff has sustained a "total loss of use" of any body organ, member, function or system (***Oberly v. Bangs Ambulance, Inc.***, 96 NY2d 295 [2001]). Accordingly, summary judgment is granted to defendants as to this category of injury as well.

As to the claim concerning the loss of a fetus, defendants' examining obstetrician/gynecologist, Dr. Kessler, avers that following his review of the Bill of Particulars, the deposition transcript, and medical records referable to this matter, including the pelvic ultrasounds performed on November 20, 2012 and on November 30, 2012, that "[b]ased on a reasonable degree of medical certainty, it is more likely than not that plaintiff's miscarriage was caused by underlying medical issues inherent to the plaintiff and not as a result of any trauma sustained in the motor vehicle accident of October 9, 2012."

According to Dr. Kessler, plaintiff could have either conceived five days prior to the subject accident, or she did not conceive until after the motor vehicle accident, depending on whether the gestational age was accurately represented by her last menstrual period, or by the ultrasound of November 30, 2012. Accordingly, there is no definitive proof that plaintiff was even pregnant on the date of the accident.

Notably, plaintiff's hospital records from December 1, 2012 are devoid of any mention of the subject motor vehicle accident. Those records show that plaintiff was

examined at Winthrop University Hospital on November 30, 2012, and that the November 30, 2012 sonogram put the fetus' gestational age at six weeks to six week and five days. This calculation establishes that plaintiff was not pregnant at the time of the subject accident that occurred on October 9, 2012. It is noted in the hospital records that the ultrasound findings are "discordant" with the estimated gestational age that was calculated based on plaintiff's report of her last menstrual period in late September 2012. The Court notes that during her deposition, plaintiff acknowledged that she did not really keep track of her menstrual cycle on a calendar.

Based upon all of the foregoing proof, this Court finds that the defendants have established their *prima facie* showing of entitlement to judgment as a matter of law as to all categories of injury alleged to have been suffered by plaintiff (***Greenberg v. Macagnone***, 126 AD3d 937 [2nd Dept. 2015]; ***John v Linden***, 124 AD3d 598 [2nd Dept. 2015]; ***Jilani v Palmer***, 83 AD3d 786 [2nd Dept. 2011]). As such, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions, in admissible form, to support her claim for "serious injury" (***Licari v. Elliot, supra***).

In opposition, the plaintiff offers the following two submissions; to wit, her own affidavit, and the sworn report of Hasan Chugtai, D.O.

These submissions, however, fall short of raising a triable issue of fact. Plaintiff's "affidavit" is entirely in English, but it is not accompanied by a translator's affidavit, which is required of foreign language witnesses. At her deposition, plaintiff required the services of a Turkish language interpreter. The lack of a translator's affidavit renders plaintiff's English affidavit facially defective and inadmissible (***CPLR § 2101 [b]***; ***Saavedra v. 64 Annfield Court Corp.***, 137 AD3d 771 [2d Dept 2016]; ***Raza v. Gunik***, 129 AD3d 700 [2d Dept 2015]; ***Eustaquio v. 860 Cortlandt Holdings, Inc.***, 95 AD3d 548 [1st Dept 2012]; ***Reyes v. Arco Wentworth Management Corporation***, 83 AD3d 47 [2d Dept 2011]; *see also* ***Ramos v. Bartis***, 112 AD3d 804 [2d Dept 2013]). Plaintiff's defective and inadmissible affidavit is insufficient to raise a triable issue of fact.

Also, plaintiff's opposition papers do not make a single reference to her claim concerning loss of a fetus; accordingly, plaintiff has failed to raise a triable issue of fact as to that specific category of injury.

Plaintiff submits the affirmation of Dr. Chugtai, who re-examined plaintiff on September 27, 2017, approximately three months after defendants moved for summary judgment.

Initially, this Court notes that nowhere in his report does Dr. Chugtai ever mention that he examined, much less treated, the plaintiff in the interim period from the date of his last examination on May 13, 2013 to the date of his re-examination on September 27, 2016.

Dr. Chugtai fails to explain this three-year and four-month gap in treatment. The Court of Appeals in ***Pommels v. Perez*** (4 NY3d 566, 574 [2005]) has held that, while "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment." Moreover, courts that have applied ***Pommels, supra***, have consistently held that to be reasonable, the explanation for the gap in treatment must be concrete and substantiated by the record. The plaintiff has failed to offer any proof in this regard; instead, it appears to this Court that plaintiff ceased treatment in 2013.

Under such circumstances, the gap in treatment present with respect to the plaintiff is fatal to her claim, as this gap – completely unexplained – renders any conclusion as to causation entirely speculative (***Pommels v. Perez, supra***; *see also*, ***Phillips v. Zilinsky***, 39 AD3d 728 [2nd Dept. 2007]; ***Rivera v. Francis***, 7 AD3d 690 [2nd Dept. 2004]; ***Slasor v. Elfaiz***, 275 AD2d 771 [2nd Dept. 2000]).

Therefore, in light of the plaintiff's failure to present any competent or admissible evidence supporting her claim for serious injury, the defendants' motion for summary judgment dismissal of plaintiff's complaint is granted, and the complaint is dismissed in its entirety against Apogee Trucking, LLC, Apogee Retail NY, LLC, and Christian O. Guzman.

The foregoing constitutes the Order of this Court.

Dated: February 27, 2017
Mineola, NY

Karen V. Murphy
J.S.C.
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ENTERED
MAR 01 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Hon. Karen V. Murphy