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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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DONIELLE KELLY,

MOTION DATE: 11/2/07
INDEX NO.: 2859/05

Plaintiff,

-against-

JAMES BRENNAN and ROSALINE BRENNAN,

Defendants.
-----X

The following papers numbered 1 to 7 were read on this motion by defendants for an Order dismissing the complaint based upon plaintiff's not having sustained a serious injury within the meaning of Insurance Law Section 5102, subdivision (d).

Papers Numbered

Notice of Motion - Affirmation (Zecca) - Affirmation (Elkin)	
Exhs. (A-E)	1-4
Answering Affirmation (Roth) - Exhs. (A-E)	5-6
Replying Affirmation (Zecca)	

Upon the foregoing papers, it is Ordered and adjudged that this motion is disposed of as follows:

This is an action wherein plaintiff, presently 27 years of

age, seeks to recover for personal injuries allegedly sustained on August 10, 2003, as a result of a two-vehicle collision which occurred when plaintiff backed her vehicle out of her driveway and was struck by defendant's speeding vehicle. Plaintiff claims in her bill of particulars that she causally has sustained, inter alia, closed head and brain injury, a lumbar disc herniation at L4-L5, post traumatic headaches and seizures, memory problems, facial bruising and pain.

Defendants presently are moving for summary judgment dismissing the complaint, arguing that plaintiff has failed to sustain a compensable injury as set for the Insurance Law Section 5102, subdivision (d). Defendants note that plaintiff, when questioned at her examination before trial about her claimed back injury, had testified that "it doesn't bother [her] like it used to," stating that just her head currently hurts her.

Also in support of their motion, defendants submit the affirmed IME report of Dr. Rene Elkin, a Board Certified Neurologist, who had examined plaintiff approximately three and one-half years post-accident. Dr. Elkin states that, prior to her conduction her own examination of plaintiff, she was provided copies of plaintiff's bill of particulars, emergency hospital records, MRI lumbar spine and MRI brain reports, dated October 23, 2003, MRI cervical spine report, dated August 28, 2003, and a

number of records from various examining and treating physicians post-accident. Following Dr. Elkin's examination of plaintiff's neck, at which time plaintiff complained of tightness and there was tenderness upon palpation, Dr. Elkin determined that plaintiff had "slight restriction of end range with forward flexion to 30 degrees (normal is 45 degrees), retroflexion to 20 degrees (normal is 30 degrees) and lateral rotation to either side to 40 degrees (normal is 60 degrees)." Examination of plaintiff's lower back revealed full range of motion in all areas. Dr. Elkin reported that the MRI of the lumbar spine reports "nonspecific disc degeneration that I do not believe is related to this accident ..."

The neurological examination revealed no objective findings "for any neurologic injury directly attributable to the subject accident." However, Dr. Elkin noted the reported brain MRI findings, "and the relationship of these findings to the subject accident and her subsequent development of neurocognitive deficits ...". According to Dr. Elkin, it is "inconsistent that these symptoms would have evolved and worsened in the post accident period, which would be unlike that of a traumatic brain injury as described in this case. I do not believe that a left cheek injury would be sufficient to cause right hippocampalatrophy and left frontal white matter injury as implied by the MRI fo the brain performed on October 28, 2003." Notably, Dr. Elkin states the MRI

study should be reviewed and that further psychiatric treatment and neuropsychological evaluation be undertaken with regard to the persistent symptomatology ... I would like the opportunity to review the records of Dr. Boppana so that I may further assess her symptoms in the immediate post accident period."

In sum, Dr. Elkin found no objective findings of neurologic dysfunction caused by this accident and no abnormalities that would explain the cognitive difficulties that plaintiff experiences. She believes that "there is a psychiatric component to her symptomatology, possibly even embellishment and malingering, that renders her unable to function with no structural pathophysiologic component to support these symptoms.

The foregoing, defendants submit, entitle them to judgment as a matter of law dismissing this action.

Plaintiff submits vigorous opposition, arguing that defendants have failed in the first instance to establish entitlement to judgment where their evidence is comprised solely of one medical examination of limited duration, and Dr. Elkin admittedly never read the MRI of plaintiff's brain, although she had recommended that a review of same be undertaken. Moreover, plaintiff argues that Dr. Elkin admitted to not having made a full review of Dr. Boppana's treating records of plaintiff, which she had noted she would have liked to have read.

In any event, plaintiff further argues that she has sustained a serious injury in that she has a permanent consequential limitation of use of a body function or system and a significant limitation of use of a body function or system, as established by the Radiologist Michael Lipton's interpretation of plaintiff's October 28, 2003, MRI, as set forth in his report, wherein he states there is "a localized area of diminished anisotropy in the left deep frontal white matter. This finding is suggestive of axonal disruption, which may be due to injury." Further, Dr. Lipton's stated "Impression" is "Right hippocampal atrophy and left frontal white matter injury implied by diffusion abnormalities."¹

Plaintiff also submits the affirmed medical report of Dr. Leslie Seiden.² Dr. Seiden states therein that a review of

¹Although Dr. Lipton further finds that the MRI taken of plaintiff's lumbar spine reveals a L4-5 small herniation, no causation of this condition to the subject accident is set forth, and the only other medical evidence offered regarding this injury is from defendants wherein Dr. Elkin had found full range of lumbar spine motion and plaintiff herself had testified that her back no longer bothers her.

²To the extent that plaintiff argues in her affirmation in opposition only that she too has sustained "a permanent loss of use of a body organ, member, function or system," such claim is hereby dismissed since case law makes clear that that type of serious injury requires a demonstration that there has been a total loss of use of that organ, member, function or system, which the record at bar does not support. See Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295 (2001).

plaintiff's earlier medical reports establishes that she had struck her head on the car window upon impact and that she suffers from headaches ever since, as well as having experienced a grand mal seizure just several weeks post-accident. The MRI of plaintiff's reveals that she has sustained a causally-related brain injury, specifically "damage to the left frontal white matter ...". According to Dr. Seiden, injury to the hippocampus effects memory and cognitive functioning and plaintiff's reports of memory and concentration problems, lack of interest in things, sleep difficulty, headaches and severe depression are consistent with the MRI's findings. According to Dr. Seiden, the limited treatment that plaintiff underwent post-accident for this injury had no effect on her condition because there is no medicine, treatment or cure that can restore the type of damage that plaintiff sustained, which is a permanent partial injury. She opines within a reasonable degree of medical certainty that plaintiff's condition is permanent and that plaintiff "in all likelihood" will either remain unemployed or have difficulty obtaining and maintaining employment through out the rest of her life. Also, Dr. Seiden opines that plaintiff is "in severe emotional pain and depression due to the accident" and she will require care of a supportive nature on an indefinite bases for help in dealing with her cognitive and emotional impairments.

Plaintiff offers her own deposition testimony wherein she stated that while she used to have the hobbies of reading, painting ("I am an artist") and writing, she no longer does these activities because she "can't concentrate or focus on words." She does not go out, not even socially, but stays home to help take care of her grandmother. Plaintiff also testified that she was not working at the time of her deposition, that she cannot return to her old work of department store make-up application because she cannot focus and she has a hard time getting to work, she stays home a lot and often would be late getting to work.³

Finally, plaintiff argues that defendant's IME report, with stated range of motion limitations, supports the finding that plaintiff has sustained a serious injury to her cervical spine.

In their replying papers, defendants argue that the fact that limitations of plaintiff's cervical spine were noted by Dr. Elkin in his IME report is of no moment since plaintiff never claimed injury to her cervical spine and she admits that she does not experience pain in her back. Although the MRI establishes that plaintiff has a small lumbar herniation, defendants argue that this, by itself, is insufficient to establish serious injury.

³The Court notes that plaintiff's Bill of Particulars states that plaintiff was confined to home and bed ten days post-accident, that she had missed a full 10 days' work post-accident, and that she had left work early many days thereafter.

Finally, defendants argue that Dr. Seiden, upon whom plaintiff has relied in establishing her brain injury, was not plaintiff's treating physician and first had examined her more than three years after the subject accident. Defendants argue that plaintiff has failed to submit any evidence other than the radiologist's report from any treating doctors and she fails to explain the significant gap in her treatment.


After this Court's careful consideration of the record at bar and the parties' respective arguments, and upon application of the proper principles of law, the Court denies defendants' motion for summary judgment finding that defendants have failed to prima facie demonstrate entitlement to judgment where their physician's report indicates that, on the relevant issue of whether plaintiff has sustained a brain injury, she has not reviewed what she herself deemed to be a pertinent record, i.e., the treatment records of Dr. Boppana, and she did not review the MRI film, nor did defendants have another radiologist view said MRI, in accordance with Dr. Elkin's recommendation that said additional review be undertaken. Moreover, the Court finds that Dr. Elkin fails to specifically explain and state, other than in wholly conclusory terms, why the type of brain injury plaintiff sustained as identified by the radiologist on the MRI would not account for plaintiff's claimed neurocognitive deficits. Indeed, she fails to indicate what type

of effect, if any, the identified brain injury would likely have on plaintiff. Moreover, to the extent that defendants' expert opines that plaintiff has a psychiatric component to her symptomology, including possible embellishment and malingering, which may explain it, the Court notes that no psychological evaluation was asked for, nor undertaken, by defendants.

In any event, the Court finds that plaintiff successfully has raised a triable issue of fact regarding whether she has sustained a serious injury within the meaning of Insurance Law Section 5102, subdivision (d), specifically as to whether she has sustained a permanent consequential limitation of use of a body function or system, and/or a significant limitation of use of a body function or system, and/or a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of his material acts which constituted his usual and customary activities for not less than 90 days during the 180 days immediately following the accident.

A note of issue previously having been filed, this action is respectfully referred back to the Central Calendar Part for trial assignment.

Dated: November 14, 2007
White Plains, New York



MARY H. SMITH
J.S.C.

Law Office of Susan B. Owens
Attys. For Defts.
140 Grand Street, Suite 707
White Plains, New York 10601

Roth & Roth, LLP
Attys. For Pltf.
32 Court Street, Suite 128
Brooklyn, New York 11201