Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - PART TT-34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T :

HON. ROBERT J. McDONALD,
Justice

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SANDRA SINGH and MAHARANIAN SINGH,,	:	Index. No.:17182 - 2007
Plaintiff(s)	:	Motion: 06.18.09
- against -	:	
	:	Cal.: 20
UNIVERSAL LEASING, INC. and TAGINDER SINGH,	:	
	:	Sequence No. 1
Defendant(s).	:	

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The following papers numbered 1 through 7 were read on this motion by defendant for summary judgment is resolved as follows:

	Papers Numbered
Notice of Motion, Affirm., and Exhibits	1 - 4
Affirmation in Opposition and Exhibits	5 - 7
Reply Affirmation.....	8
Defendants' Memorandum of Law	

Upon the foregoing papers this motion is resolved as follows:

On April 14, 2006 at 8:30 p.m. at the intersection of the VanWyck Expressway Service Road and Atlantic Avenue Street, in Queens County, New York there was an accident between the plaintiff and defendant.

Defendants allege that Sandra Singh failed to meet the serious injury threshold requirement as set forth in Insurance Law 5102(d) the "No Fault" standard and pursuant to CPLR 3211 and CPLR 3212 moves for summary judgment dismissing the complaint of Ms. Singh (*see,* Article 51 of the New York Comprehensive Motor Vehicle Insurance Reparations Act).

Ms. Singh's testimony from her pretrial deposition dated August 7, 2008 indicate that on April 14, 2006 at around 8:30 p.m. as she was leaving Church on Good Friday at the intersection of

the Van Wyck Expressway Service Road and Atlantic Avenue, she had come to a complete stop waiting to merge onto the Service Road [Singh 15, 18] when she felt "One big impact" [Singh 14] which struck the rear end of her car. As soon as the car was struck she was "thrown forward, and right away I felt the severe burning and pain in my neck and my lower back" [Singh 18]. When asked whether the airbags in the defendant's vehicle were deployed she said "I don't know what happened with the car. I'm not sure whether the airbag was deployed or not. I was in too much pain to look at anything like that. I couldn't stand up. Once I got out of my car, I couldn't stand because the pain was excruciating. It was going down from by back. And my legs, they were very numb, and I couldn't fell like I could stand." [Singh 20]. She was taken to Jamaica Hospital where she was given an x-ray and upon her release was told to see a specialist and have MRIs. Upon her release she saw Dr. Michael Brass, D.C., on the Monday following the accident where she received treatment, which she continued even after her no-fault benefits were terminated [Singh 23]. She was treated for her lower back and neck. "At the time I was experiencing headaches, and my eyes were hurting me very badly, and my neck was hurting very bad. I couldn't bend to do anything. My lower back was killing me, and the pain was going down by legs and everything." [Singh 26]. She had an MRI ans was told of herniated discs in her beck and lower back. She saw Dr. Mallin who prescribed pain medication. And Dr. Mallin referred her to an eye specialist, Dr. Paul Svitra.. Ms. Singh complained that "My eyes were hurting a lot and severe headaches after the accident. After the accident I had a headache that never went away for a couple of months. I went for the eyes and the headaches." [Singh 27]. She was out of work for six months following the accident [Singh 32]. The nature of her employment requires her to stand and she has been unable to work for the same length of time [Singh 34]. Ms. Singh complained that as of the date of the deposition her "neck is unbearably painful. I can't bend over to read because the pain is very excruciating. It goes down the back of my spine and onto my shoulders, and the pain is unbearable. It goes all the way in the back of my head. Right now I'm in a lot of pain. The lower back, I can't do anything at all, no physical activities. It kills me. I can't exercise. I can't go jogging. I can't even mop the floor of my house because the pain is unbearable. I have to constantly use pain patches, take pain medication. I can't wear heels."[Singh 36-37]. She did say that in recent months "My headaches are not bad since – for a while now. [Singh 41]. Her eyes have been "okay" in recent months Singh 42]. Ms. Singh stated that prior to the accident she did not have any injuries, and that after the accident she had no aggravation of the injuries she sustained in the accident [Singh 43].

The defendants rely on the reading of Ms. Singh's MRI examination of July 5, 2006 by Dr. Audrey Eisenstadt, M.D., a radiologist, who reviewed the MRI of Ms. Singh's cervical and lumbar spine and issued her Affirmations dated June 24, 2007. Dr. Eisenstadt stated with regard to her examination of the MRI of Ms. Singh's cervical spine "IMPRESSION: CERVICAL STRAIGHTENING. OSTEOPHYTE FORMATION C3-4 AND C5-6 LEVELS. DISC DEGENERATION C5-6 LEVEL. DISICCATION C3-4 AND C7-7 INTERVERTEBRAL DISCS. BULGING C3-4 AND C5-6 INTERVERTEBRAL DISCS. SMALL RIGHT PARACENTRAL C4-5 DISC HERNIATION. SMALL CETNRAL C-6-7 DISC HERNIATION." It was Dr. Eisenstadt's opinion that "Degenerative disc disease is a frequent etiology for disc herniations, and there is clear evidence of pre-existing, degenerative disease in the cervical spine. The straightening seen is nonspecific, most frequently related to patient position and comfort for the examination." Dr.

Eisenstadt stated with regard to her examination of the MRI of Ms. Singh's lumbar spine "IMPRESSION: EARLY OSTEOPHYTE FORMATION L2-3 AND L4-5 LEVELS. DESICCATION L4-5 AND L5-S1 LEVELS. BULGING L4-5 INTERVEREBRAL DISC. CENTRAL L5-S1 DISC HERNIATION." It was Dr. Eisenstadt's opinion that "Bulging has no traumatic basis. It is degenerative in origin, related to ligamentous laxity. These findings suggest that the disc hernation at the L5-S1 level is degeneratively induced. Degenerative disc disease is a common etiology for disc hernations, and the L5-S1 level is one of the most common levels in the population for degenerative disc disease to occur."

There is an Affirmation by Dr. Edward M. Weiland, M.D., a Neurologist, dated October 16, 2008 states in his "CONCLUSION: The claimant relates to experiencing multiple trauma associated with pain and mechanical dysfunction as it relates to the incident date under review. However, no objective evidence of any neuromuscular dysfunction was noted to substantiate the claimant's claim of any injury to the central or peripheral nervous system as it relates to the incident date under review. The claimant is not disabled at the time form a neurological point of view. The claimant is able to perform normal activities of daily living, as well as occupational duties, without any restrictions. There is no permanency or residuals. There is no need for further neurological treatments. In my opinion, treatment is no longer medically necessary and further treatment would be excessive."

There is an Affirmation from Dr. Michael J. Katz, M.D., an Orthopedic Surgeon, dated January 22, 2009 about his examination of Ms. Singh on the same date. Dr. Katz wrote: "Impression: Cervical strain with radiculitis - now resolved. Thoracolumbosacral strain with radiculitis - now resolved. Bilateral shoulder contusion - resolved. Comment: The claimant is a 46-year-old female who alleges an injury of 04/014/06 as a seatbelted driver. Currently, she shows no signs or symptoms of permanence relative to the musculoskeletal system. She is currently not disabled. She is capable of her gainful employment as a model full-time. She is capable of her activities of daily living."

Ms. Singh submits the affirmation of Dr. Jorge A. Rivero, M.D., dated May 12, 2009 in which he affirms that he examined and evaluated the plaintiff on May 8, 2009 and examined the MRI report dated July 5, 2006. With regard to Ms. Singh's cervical spine it was Dr. Rivero's opinion that "The MRI findings or herniation and bulges are casually related to the accident. There is no evidence that the bulges and herniation were the result of any desiccation or degenerative disc disease." With regard to his examination of her lumbosacral spine that "The MRI findings of bulges and herniation are casually related to the accident. There is no evidence to suggest these findings are degenerative."

There is a report dated September 27, 2006 from Michael Brass. D.C. sworn to April 27, 2009, which relates to the treatment he provided Ms. Singh from April 18, 2006 concerning the limitations she had because of the accident on April 14, 2006. This report relates to an MRI which was not attached to the papers and can not be considered with regard to any findings made which rely on these MRI reports.

There are attached as Plaintiff's Exhibit "E", copies of letters from Dr. Jeffrey E. Mallin,

M.D. to Dr. Michael Brass, D.C., supported by Dr. Mallin's affirmation dated April 9, 2009. Dr. Mallin considered that Ms. Singh should continue with her chiropractic treatment and his recommendation that she undergo and MRI. Dr. Mallin had prescribed and "re-prescribed" Voltaran 100mg XR.

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that she has sustained a "serious injury" which is defined as follows pursuant to the Insurance Law 5102:

> Serious injury means a personal injury which result in ... 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 constitutes 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott,* 57 NY2d 230). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.,* 98 NY2d 345; *Grossman v Wright,* 268 AD2d 79). If the defendant 's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler,* 79 NY2d 955; *Bryan v Brancato,* 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.,* 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller,* 258 AD2d 783; *Burnett v Miller,* 255 AD2d 541). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the

body part (*Dufel v Green,* 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has raised triable factual issue as to whether the plaintiff has "permanent consequential" and "significant limitation" categories.

A diagnosis of permanency having been sustained by the plaintiff obviates the need for further treatment and, therefore, there is no "gap" in treatment (*Pommells v Perez,* 4 NY3d 566).

With regard to the 90/180 rule, the defendant's medical expert must relate specifically to the 90/180 claim made by the plaintiff before dismissal is appropriate (*See, Scinto v Hoyte,* 57 AD3d 646; *Faun Thau v Butt,* 34 AD3d 447; *Lowell v Peters,* 3 AD3d 778)

Regarding the "permanent loss of use" of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff's life (*Oberly v Bangs Ambulance, Inc.,* 96 NY2d 295). The finding of "Permanency" is established by submission of a recent examination (*Melino v Lauster,* 195 AD2d 653 *aff'd* 82 NY2d 828).

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang,* 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyler,* 79 NY2d 955).

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green,* 84 NY2d 795; *Fung v Uddin,* 60 AD3d 992; *Hoxha v McEachern,* 42 AD3d 433; *Barrett v Howland,* 202 AD2d 383).

Summary judgment is a drastic remedy which will be granted solely when the party seeking summary judgment establishes that there are no triable issues of fact (*Alvarez v Prospect Hospital,* 68 NY2d 329; *Andre v Pomeroy,* 35 NY2d 361).

The party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital, supra; Zuckerman v City of New York,* 49 NY2d 557).

When deciding a motion for summary judgment, the court must determine whether triable issues of fact exist (*Matter of Suffolk Department of Social Services v James M.,* 83 NY2d 178; *Sillman v Twentieth Century Fox Film Corp,* 3 NY2d 395). A motion for summary judgment must be denied if the court has any doubt as to the existence of triable issues of fact (*Freese v Schwartz,* 203 AD2d 513; *Groger v Morrison Knudsen Co., Inc,* 184 AD2d 620).

The court must view the evidence in a light most favorable to the party opposing the motion for summary judgment and give that party the benefit of every reasonable inference

which can be drawn from the evidence (*Negri v Stop & Shop,* 65 NY2d 625; *Gray v New York City Transit Authority*, 12 AD3d 638; *Louniakow v M.R.O.D. Realty Corp,* 282 AD2d 657).

In the instant case, while the defendant's experts cast some doubt on the ability of the plaintiff to ultimately demonstrate whether he was sustained "serious injury" as defined in Insurance Law 5102(d), the plaintiff's experts have demonstrated that the matter is one which must be determined by the trier-of-fact. This is particularly so given the plaintiff's profession of modeling and the changes due to the residual effects of the accident.

Accordingly, defendant's motion for summary judgment on the basis that the plaintiff has not sustained "serious injury" is denied.

So Ordered.

Dated: June 23, 2009
Long Island City, NY

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Robert J. McDonald, J.S.C.