

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

HYACINTH MOORE

Plaintiff

-against-

ADELPHI UNIVERSITY, MELVIN N. BROOKS
and MOHAMMED KHAN

Defendant

Index No: 13466/05
Motion Date: 2/14/07
Motion Cal. No: 17,18
Motion Seq. No: 2, 3

The motions bearing calendar number 17 and 18 are combined for disposition.

The following papers numbered 1 to 21 read on the motions by defendants for summary judgment dismissing the complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of Sections 5102 and 5104 of the Insurance Law, and motion by defendants, ADELPHI UNIVERSITY and BROOKS for summary judgment dismissing the complaint insofar as it is asserted against him on the issue of liability.

	<u>PAPERS NUMBERED</u>
Cal. #17 Notice of Motion-Affidavits-Exhibits	1 - 4
Cal. #18 Notice of Motion-Affidavits-Exhibits	5 - 8
Answering Affidavits-Exhibits.....	9 - 11
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Upon the foregoing papers it is ordered that these motions are denied in all respects.

This action to recover for personal injuries arises out of an automobile accident which occurred on March 24, 2004 at the intersection of Merrick Boulevard and 109th Ave. when the vehicle owned and operated by Khan, traveling south on Merrick Blvd. was struck by the vehicle, owned by Adelphi University and operated by Brooks (hereinafter collectively referred to as Brooks) traveling north on Merrick Blvd., as the Khan vehicle made a left

turn across the northbound lanes. Plaintiff was an unrestrained back seat passenger in the Khan vehicle.

The defendants, Brooks, move for summary judgment dismissing the complaint insofar as it is asserted against them, on the ground that the sole proximate cause of the accident was the defendant's, Khan's, violation of Vehicle and Traffic Law § 1141 by making a left turn into the path of the Brooks vehicle and submitted the deposition testimony of the drivers and the plaintiff in support. Khan testified that he was traveling south on Merrick Blvd. and he saw that the traffic light ahead on 110th Ave. was red and the only vehicle traveling northbound was the Brooks vehicle which would have to stop for the red light allowing sufficient time to make the left turn. Kahn further testified that Brooks failed to stop at the red light and thus, struck his vehicle. Brooks testified that he was traveling in the right lane of Merrick Blvd., and that the light at 110th Ave. was green when he went through. He further testified that he first saw the Khan vehicle when he tried to avoid hitting the Khan vehicle. Brooks testified that he swerved into the left lane to try to avoid hitting Khan head on, but could not totally avoid a collision. A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see, Cathey v. Gartner, 15 AD3d 435 [2005]; Williams v. Bonowicz, 296 AD2d 401 [2002]; Scott v. Long Island Power Auth., 294 AD2d 348 [2001]). The conflicting testimony of the drivers raise questions of fact as to how the accident happened and the relative culpability of the drivers which precludes granting summary judgment.

The defendants, Brooks, and Khan also separately move for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury within the meaning of the insurance law. The defendants failed to establish, prima facie, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (see Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955[1992]).

In support of the motions the defendants submitted the affirmed reports of their examining orthopedist, Dr. Katz, and neurologist, Dr. Mesh, regarding their examination of the plaintiff on June 6, 2006, over two years after the accident, asserting that the plaintiff has full range of motion in her cervical and lumbar spine and right shoulder, she is not disabled and no permanency or residuals. While both doctors indicate that plaintiff has not returned to work since the accident, neither doctor addressed the plaintiff's claim, set forth in her verified

bill of particulars, that she sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (see Torres v. Performance Auto. Group, Inc., 36 AD3d 894 [2007]; Lopez v. Geraldino, 35 AD3d 398 [2006]). In addition, to the extent that the conclusions and opinions expressed by the defendants' doctors as to causation, lack of permanency or residuals, particularly the plaintiff's right shoulder rotator cuff tear, are based upon an alleged independent review of the plaintiff's MRIs by Dr. Berg, such opinions are without evidentiary value and insufficient to sustain defendants' burden since they failed to submit sworn copies of the reports (see Flores v. Stankiewicz, 35 AD3d 804 [2006]; Sammut v. Davis, 16 AD3d 658 [2005]; Diaz v Wiggins, 271 AD2d 639 [2000]).

Finally, plaintiff's submissions in opposition, including her deposition testimony and affidavit together with the affidavits of her treating physicians are sufficient to raise a questions of fact, inter alia, as to whether the rotator cuff tear and the resultant limitations in the range of motion of her shoulder constitute a serious injury within the meaning of the insurance law.

Dated: March 9, 2007
D# 30

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J. S. C.