

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN  
Justice

IAS PART 6

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YVONNE E. LEE,

Plaintiff,

-against-

JOE C. CHAN,

Defendant,

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JOE C. CHAN,

Third-Party Plaintiff,

- against -

OCEANIA TRUCKING, INC.

Third-Party Defendant.

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The following papers numbered 1 to3 read on this motion by defendant, Joe C. Chan, for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” as defined by Insurance Law §5102(d).

PAPERS  
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1
Affirmation in Opposition - Exhibits .....	2
Replying Affirmation.....	3

Upon the foregoing papers it is determined as follows:

The defendant’s moving papers establish that the plaintiff was involved in an automobile accident on August 19, 2004 and commenced this action to recover for her alleged injuries. The defendant contends that the plaintiff’s injuries do not meet the serious injury threshold set forth by New York Insurance Law §5102(d), and her complaint should be dismissed.

In support of his argument, defendant has offered the affirmations of Isaac Cohen, M.D., orthopedic surgeon, Benzion Benatar, M.D., orthopedic surgeon, Frank Oliveto, M.D., orthopedic surgeon, Alan J. Zimmerman, M.D., orthopedic surgeon, Michael J. Katz, M.D. orthopedic surgeon, and Robert April, M.D., neurologist.

Dr. Cohen's affirmations set forth that he conducted orthopedic evaluations of the plaintiff on September 9, 2004 and October 6, 2004. Dr. Cohen observed during his physical examinations of plaintiff that she had full range of motion of her right shoulder and he specified the ranges of motion he observed during his exam and compared it with what is, in his opinion, the normal range of motion in the affected area. Dr. Cohen concluded that plaintiff sustained cervical spine sprain and a resolved right shoulder sprain, and he opined that plaintiff had a temporary mild orthopedic disability, but could return to work with some restrictions.

Dr. Benatar's affirmation set forth that he conducted an orthopedic evaluation of the plaintiff on November 2, 2004. During his physical examination of plaintiff, Dr. Benatar observed that plaintiff's right shoulder was within the normal ranges of motion, indicating the ranges of motion he observed during his exam and compared it with what is, in his opinion, the normal range of motion. Dr. Benatar concluded that plaintiff sustained a resolved right shoulder sprain and a cervical spine sprain. Further, Dr. Benatar opined that plaintiff had a temporary mild orthopedic disability, and plaintiff could return to work with some restrictions.

Plaintiff was also examined by Dr. Oliveto on November 30, 2004. During Dr. Oliveto's physical examination of the plaintiff, he observed that plaintiff had full range of motion of the cervical spine and he specified the ranges of motion he observed during his exam and compared it with what is, in his opinion, the normal ranges of motion in the affected area. Dr. Oliveto also examined plaintiff's right shoulder and observed that plaintiff had full range of motion of the right shoulder and he specified the ranges of motion he observed during his exam and compared it with what is, in his opinion, the normal range of motion. It was concluded by Dr. Oliveto that plaintiff sustained cervical strain syndrom and resolved right shoulder sprain. Dr. Oliveto opined that plaintiff had no orthopedic disability, and was able to return to work without any restrictions. Dr. Oliveto further concluded that a MRI of the right shoulder, aqua therapy and acupuncture is not indicated.

Dr. Zimmerman examined the plaintiff on August 16, 2005. During Dr. Zimmerman's physical examination of the plaintiff, Dr. Zimmerman observed that plaintiff had full range of motion of the cervical spine and he specified the ranges of motion he observed during his exam and compared it with what is, in his opinion, a normal range of motion. Additionally, he observed that plaintiff had full range of motion of the right shoulder and specified the ranges of motion he observed during his exam and compared it with what is, in his opinion, the normal ranges of motion. Dr. Zimmerman concluded that plaintiff had full range of motion of the cervical spine, and the right shoulder sprain was resolved, with a zero percent loss of the use of the right shoulder. Dr. Zimmerman's affirmation noted that plaintiff had returned to work at her regular job.

On January 29, 2007 plaintiff was examined by Dr. Michael Katz. During his physical examination of the plaintiff, Dr. Katz observed that plaintiff had full range of motion of the cervical spine and he specified the ranges of motion he observed during his exam and compared it with what

is, in his opinion, the normal ranges of motion in the affected area. Dr. Katz also examined plaintiff's right shoulder and observed that plaintiff had full range of motion of the right shoulder and he specified the ranges of motion he observed during his exam and compared it with what is, in his opinion, the normal range of motion. Dr. Katz concluded that plaintiff sustained a resolved cervical strain and a resolved right shoulder sprain. Dr. Katz further opined that plaintiff was not disabled, was capable of gainful employment as a driver and supervisor, and was capable of her activities of daily living. It was noted that plaintiff was working as a supervisor.

Dr. Robert April examined plaintiff on April 12, 2007. During his neurological examination of plaintiff, Dr. April concluded that plaintiff had full range of motion of her neck, and he specified the ranges of motion that he observed during his exam and compared it with what is, in his opinion, the normal range of motion. It was further concluded by Dr. April, after conducting a full neurological exam, including but not limited to a cranial nerve examination, motor examination, mechanical exam, and sensory examination, that there was no objective evidence of any neurological abnormality. Dr. April concluded that the accident did not produce a neurological diagnosis, limitation or disability, and plaintiff needed nor further neurological treatment, and opined that plaintiff was not disabled, and she was working.

These affirmations and records established prima facie that the plaintiff did not sustain a serious injury as the result of the motor vehicle accident that is the subject of this action. (See, Licari v Elliott, 57 NY2d 230; Guzman v Paul Michael Management, 266 AD2d 508). Thus, the burden shifted to the plaintiff to come forward with sufficient evidence that she sustained a serious injury. (See, Gaddy v Eycler, 79 NY2d 955).

In opposition to the motion, the plaintiff offered the affidavit of Mehran Manouel, M.D., and the affirmation of Richard Rizzuti, M.D.

Dr. Manouel's affirmation failed to raise an issue of fact for plaintiff since he does not indicate what objective tests he relied on during his examination. (See, Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345). Accordingly, his opinions are not based upon objective tests, but rather predominantly founded in plaintiff's subjective complaints of pain which is insufficient (See, Toure v Avis Rent A Car, *supra*; Picott v Lewis, 26 AD3d 319).

Dr. Manouel indicates he ordered a MRI and the same showed evidence of partial rotator cuff tear. However, he does not state whether he actually reviewed the films, as opposed to just the radiologist's report. (See, Wagman v Bradshaw, 292 AD2d 84). While a MRI can constitute objective proof, a review of Dr. Rizzuti's affirmation and MRI report does not state that the existence of a partial rotator cuff tear. Rather, it states symptoms "consistent" with an intrasubstance tear.

The plaintiff's proof failed to establish that any of her injuries were serious as there was no "medical proof [submitted] in admissible form that was contemporaneous with the accident showing any initial range of motion restrictions" in the plaintiff's shoulder. (See, Suk Ching Yeung v Rojas, 18 AD3d 863; Nemchyonok v Peng Liu Ying, 2 AD3d 421; Jason v Danar, 1 AD3d 398; Pajda v Pedone, 303 AD2d 729). Dr. Manouel examined plaintiff September 19, 2005 and October 3, 2005, more than one year after the incident.

Moreover, the evidence presented by plaintiff is insufficient to raise a triable issue of fact in that the medical reports relied upon by plaintiff were based upon examinations conducted two years prior to defendant's motion. (See, Moore v Edison, 25 AD3d 672, 811 NYS2d 724; Colon v Vargas, 27 AD3d 512, 811 NYS2d 755; Mejia v DeRose, 35 AD3d 407, 825 NYS2d 722).

Consequently, the proof fails to establish that plaintiff sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system". (See, Toure v Avis Rent A Car Systems, Inc., supra; Chinnici v Brown, 295 AD2d 465). Also, since plaintiff has not adduced any evidence that she has totally lost the use of her spine or her right shoulder, she has failed to establish a "permanent loss of use of a body organ, member, function or system". (See, Oberly v Bangs Ambulance, Inc., 96 NY2d 295).

The plaintiff's deposition testimony failed to establish that she was "curtailed from performing [her] usual activities to a great extent rather than some slight curtailment". (Licari v Elliott, supra). Specifically, the work, household, educational and recreational activities along with the generally described restrictions of motion allegedly incurred by the plaintiff does not meet the "substantially all" threshold (See, Omar v Goodman, 295 AD2d 413; Delgado v Hakim, 287 AD2d 592). Despite the fact that plaintiff testified she missed three months of work, the medical proof offered herein clearly indicated plaintiff was able to return to work. The fact plaintiff opined to stay home does not satisfy the "substantially all" threshold.

Accordingly, after considering the evidence in a light most favorable to the plaintiff, (Kelly v Media Services Corp., 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the defendant's motion for summary judgment is granted.

A copy of this Order is being faxed to all parties.

Dated: November 21, 2007

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LAWRENCE V. CULLEN, J.S.C.