Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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SONYA BLOUNT,

Plaintiff,

Index No: 805/06
Motion Date: 4/18/07
Motion Cal. No: 9

-against-

ALICIA DOMINGUEZ, FANTASTIC TRANSPORTATION CORPORATION, SEAN J. COCHRANE and DENNIS J. COCHRANE,

Defendants.

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The following papers numbered 1 to 36 read on this motion by plaintiff Sonya Blount for an order, pursuant to CPLR § 3212, granting summary judgment in her favor on the issue of liability against defendants Alicia Dominguez and Fantastic Transportation Corporation; on this cross motion by defendants Sean J. Cochrane and Dennis J. Cochrane for an order, pursuant to CPLR § 3212, granting summary judgment in their favor on the issue of liability dismissing the complaint and all cross claims against them; on this cross motion by defendants Alicia Dominguez and Fantastic Transportation Corporation for an order dismissing the complaint on the ground that plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law Section 52102(d); and on cross motion by defendants Sean J. Cochrane and Dennis J. Cochrane for an order dismissing the complaint on the ground that plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law Section 52102(d).

	PAPERS NUMBERED
Plaintiff's Notice of Motion-Affidavits-Exhibits-Memorandum of Law in Support.....	1 - 6
Defendants Alicia Dominguez and Fantastic Transportation Corporation's Notice of Cross Motion(Threshold)-Affidavits-Exhibits.....	7 - 10
Defendants Sean J. Cochrane and Dennis J. Cochrane's Notice of Cross Motion(Liability)-Affidavits-Exhibits..	11 - 14
Defendants Sean J. Cochrane and Dennis J. Cochrane's Notice of Cross Motion(Threshold)-Affidavits-Exhibits.	15 - 17

Defendants Alicia Dominguez and Fantastic Transportation Corp.'s Affirmation in Opposition to Plaintiff's Motion-Exhibits ..... 18 - 20
Defendants Alicia Dominguez and Fantastic Transportation Corp.'s Affirmation in Opposition to Co-Defendants' Cross Motion -Exhibits..... 21 - 23
Plaintiff's Affirmation in Opposition-Memorandum of Law-Affidavits-Exhibits..... 24 - 30
Defendants Sean J. Cochrane and Dennis J. Cochrane's Affirmation in Reply..... 31 - 32

Plaintiff's Reply Affirmation..... 33 - 34
Defendants Alicia Dominguez and Fantastic Transportation Corp.'s Affirmation in Reply..... 35 - 36

Upon the foregoing papers, it is ordered that the motion and cross motions are disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff Sonya Blount ("plaintiff"), a passenger in a taxi operated and owned by defendants Alicia Dominguez and Fantastic Transportation Corp. ("Dominguez"), respectively, that struck in the rear a vehicle owned and operated by defendants Sean J. Cochrane and Dennis J. Cochrane ("Cochrane defendants"), on June 25, 2004, while traveling on Uniondale Avenue near Newton Avenue in Nassau County, New York. Plaintiff moves for summary judgment on the issue of liability against Dominguez; the Cochrane defendants cross move for the same relief, seeking dismissal of the complaint and all cross claims against them; and all defendants cross move for an order dismissing the complaint on the ground that plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law Section 52102(d). The cross motions raising the serious injury question will be addressed first.

Plaintiff alleges in her Bill of Particulars that she sustained injury to the patella of the right knee, central disc herniation at C#-4 and C4-5, sprains of the cervical and lumbar spines, and cervical and lumbar myofascitis. Defendants, on their cross motion, contend that these injuries do not meet the "serious injury" threshold requirement of section 5102(d) of the Insurance Law. The aforementioned statute states, in pertinent part, that a"serious injury"is defined as:

> a personal injury which results in ...significant disfigurement; ...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 party from performing substantially all of the material acts which constitute such person customary daily

> activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The issue of whether the injuries allegedly sustained by plaintiff fall within the definition of a "serious injury," in the first instance, must be decided by the court. See, Licari v. Elliot, 57 N.Y.2d 230, 238 (1982). In order for a summary judgment motion to be granted by the court, the defendant must establish that there are no triable issues of facts in dispute. Inherent in the court's consideration of a motion for summary judgment for lack of serious injury is the requisite determination that there are no issues of fact with regard to the injuries sustained by a plaintiff. Thus, the threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendant makes a prima facie showing that plaintiff did not sustain a serious injury.

When a defendant moves for summary judgment to dismiss the action, the burden is placed upon the defendant to prove, through admissible evidence, that the plaintiff failed to meet the statutory threshold of "serious injury" (Lagois v. Public Administrator of Suffolk County, 303 A.D.2d 644 [2003]; Gaddy v. Eyler, 79 N.Y.2d 955 [1992]); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986). To satisfy this requirement, a defendant must make a prima facie showing that the plaintiff failed to sustain a serious injury within the purview of the statute through the submission of "affidavits or affirmations of medical experts who examined the plaintiff, and conclude that no objective medical findings support the plaintiff's claim." Grossman v. Wright, 268 A.D.2d 79. These affidavits and affirmations must contain the original signatures of the affiants. Moreover, any medical reports submitted as evidentiary proof must be sworn. See, Grasso v. Angerami, 79 N.Y. 2d 813; Williams v. Hughes, 256 A.D.2d 461; Fernanadez v. Shields, 223 A.D.2d 666. Once the defendant has shown, prima facie, that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff who then must present a triable issue of fact through admissible evidence to successfully oppose defendant's summary judgment motion (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 N.Y.2d 851 [1985]; Monette v. Keller, 281 A.D.2d 523 [2001]; Ocasio v. Henry, 276 A.D.2d 611 [2000]). Thus, to be successful herein, defendants, as the movants, must initially establish, prima facie, that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d). Toure v Avis Rent A Car Sys., 98 N.Y.2d 345 (2002); Gaddy v Eyler, 79 N.Y.2d 955 [1992]; Rainey v Smith, 300 A.D.2d 383 (2d Dept. 2002); Duldulao v City of New York, 284 A.D.2d 296 (2d Dept. 2000). In this case, defendants made a prima facie showing for summary judgment and plaintiff failed to show a triable issue of fact.

In support of their respective motions,[1] defendants submit the medical affirmations and affirmed medical reports of Dr. Yab Q. Sun, an orthopedic surgeon who examined plaintiff on December 14, 2006; Dr. Edward M. Weiland, a neurologist who also examined plaintiff on

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[1]The Cochrane defendants "adopt the arguments and proof submitted by the co-defendants.

December 14, 2006; and Dr. David L. Milbauer, a radiologist who reviewed plaintiff's MRI's on December 9, 2006. Dr. Sun, upon examination and after objective testing, found that plaintiff sustained no disability as a result of her accident, in that she had a full range of motion with respect to her cervical and lumbar spines, and her right shoulder, hip and knee; and that she was capable of performing her activities of daily living, as well as working full duty. Dr. Weiland, upon neurological examination and objective testing, similarly found plaintiff's range of motion to be within normal limits with respect to her cervical spine, lumbar spine, shoulders; stated that he could find "no evidence of any lateralizing neurological deficits;" concluded that he could "see no reason [plaintiff] should not be able to perform activities of daily living and continue gainful employment activities, without restrictions, from a neurologic perspective" since there was "no finding of any neurologic residual or permanency based upon her physical examination findings noted today." Dr. Milbauer, upon review of the July 7, 2004 MRI of plaintiff's cervical spine, formed the impression of "degenerative disc bulges," concluding that there were "no specific findings to indicate that a traumatic injury to the cervical spine was sustained in the accident of June 25, 2004." These affirmed medical reports are sufficient to establish a prima facie case that the plaintiff did not sustain a serious injury as a result of the underlying accident. Yudkovich v Boguslavsky, 11 A.D.3d 607 (2d Dept. 2004); Funderburk v Gordon, 273 A.D.2d 196 (2d Dept. 2001); Harewood v Aiken, 273 A.D.2d 199 (2d Dept. 2001).

The burden thus shifted to the plaintiff to raise a triable issue of fact by presenting "objective medical proof of a serious injury causally related to the accident..." Pommells v Perez, 4 N.Y.3d 566, 574 [2005]; Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Noble v Ackerman, 252 A.D.2d 392 (2d Dept. 1999). See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Echeverri v. Happe, 256 A.D.2d 304 (2d Dept. 1998); Licari v. Elliott, 57 N.Y.2d 230 (1982). Plaintiff, in opposition to defendants' cross motions, submitted, in relevant part, the affirmations of Dr. Ben Benatar, her treating orthopedist, dated April 3, 2007; Dr. Elizabeth P. Maltin, a radiologist, dated August 16, 2006, and the affirmed narrative report of Dr. Jill A. Bressler, also a treating neurologist, dated June 24, 2006; and plaintiff's affidavit of merit, dated March 22, 2007. It is well recognized that a plaintiff's deposition or affidavit consisting of merely subjective complaints of pain, is insufficient to raise a triable issue of fact. See, Dyagi v. Newburgh Auto Auction, 251 A.D.2d 619 (2d Dept. 1998).

The medical submissions are equally unavailing, as they are less than probative on the issue of serious injury as the assessments are based upon treatments of plaintiff for a few months immediately following the June 25, 2004 accident; and reexaminations on April 3, 2007 (Dr. Benatar) and June 24, 2006 (Dr. Bressler), do not sufficiently account for the two to three year "gap in treatment immediately preceding the submission of the report [see, Dimenshteyn v. Caruso, 262 A.D.2d 348, 694 N.Y.S.2d 66 (2nd Dept. 1999)]." Borino v. Little, 273 A.D.2d 262 (2nd Dept. 2000); See, Pommells v. Perez, 4 N.Y.3d 566 (2005); Thompson v. Abbasi, 15 A.D.3d 95 (1st Dept. 2005). Neither Dr. Benatar's April 3, 2007 affirmation nor Dr. Bressler's June 24, 2006 affirmations alleges any objective tests performed subsequent to their 2004 examination. Nor does either state unequivocally that the recent submissions were even based upon a physical examination of plaintiff. Additionally, the submissions do not establish a pattern of continuous treatment. See, Mejia v. Thom, 280 A.D.2d 528 (2nd Dept. 2001); see, also, Garces v. Yip, 15 A.D.3d 375 (2nd Dept. 2005).

Plaintiff's claim that she stopped medical treatment within months of the accident because no-fault benefits were stopped is insufficient to explain the absence of continuous treatment.

Plaintiff thus has failed to meet her burden by submitting sufficient evidence creating a triable issue of fact with regard to her claim that she sustained a serious injury within the meaning of Insurance Law § 5102 (d). See, Ventura v. Moritz, 255 A.D.2d 506 (2nd Dept. 1998); see, also, Gaddy v. Eyler, 79 N.Y.2d 955 (1992). Accordingly, the cross-motions for summary judgment on the threshold issue are granted, and the complaint hereby is dismissed. Based upon the foregoing, the court need not consider plaintiff's motion for summary judgment on the issue of liability.

Dated: June 4, 2007

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J.S.C.