SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART 21**

Justice

LOPEZ, LESLIE

INDEX NO. 112104/05

Plaintiff,

MOTION DATE

-v-

MOTION SEQ. NO. 001

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL NO.

The following papers, numbered 1 to 3 were read on this motion for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2
Replying Affidavits	3

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided as follows:

Defendant New York City Transit Authority (hereinafter the "Authority"), move pursuant to CPLR § 3212, for summary judgment dismissing the compliant on the ground that plaintiff Leslie Lopez has not sustained a serious injury as defined by New York's No-Fault Law (Insurance Law § 5102 [d]) after being injured while she was a passenger on a bus being operated by the Authority. Plaintiff contends that summary judgment must be denied as there are issues of fact raised by certified medical records

and the report of her treating physician as to the seriousness of her injuries.

BACKGROUND

This is an action arising out of personal injuries allegedly sustained by plaintiff on June 11, 2005 at 8:30 a.m. while she was a passenger on an Authority bus. Plaintiff claims she sustained injuries to her cervical and lumbar spine, left shoulder and left knee. As a result of the accident plaintiff had medical treatment from neurologist Noel Fleischer, M.D. Dr. Fleischer examined plaintiff initially on June 24, 2005 and examined her two other times shortly thereafter.

In support of their motion for summary judgment, the Authority rely on the affirmed medical report of Dr. Andrew N. Bazos, who conducted an independent orthopedic examination of the plaintiff on January 18, 2007. Dr. Bazos' report indicates that his examination of the plaintiff included a complete physical examination and a review of medical records. Range of motion testing was performed and all results were set forth in the Doctor's report. He found that all range of motion results were within normal limits with no limitations and no evidence of pain. He concluded that the plaintiff sustained cervical, lumbar, and thoracic sprains/strains, all of which had been resolved. Further, Dr. Bazos opined that the examination of the plaintiff evidenced no objective evidence of injury and no causally related orthopedic disability. He also opined that the plaintiff was able to perform pre-accident status level of living activities with no

restriction.

The Independent physiatrist examination of the plaintiff conducted by a doctor designated by the Authority was held on September 29, 2005 by Dr. Randolph Rosarion. Dr. Rosarion stated in his report that all results of the testing of plaintiff were either normal or within normal limits. The independent chiropractic examination of the plaintiff conducted by a doctor designated by the Authority was held on September 29, 2005 by Dr. Rachel Beth Weissman. Similarly, Dr. Weissman found that all range of motion results were within normal limits with no limitation and no evidence of pain.

In opposition to the motion for summary judgment, plaintiff relies on the affirmed medical report of Dr. Fleisher. According to his report, his physical examination of June 24, 2005 found cervical, dorsal and lumbar spinal tenderness and impaired flexion, extension and rotation. Based upon this examination he diagnosed that the plaintiff, as a result of the accident, sustained a traumatic cervical radiculopathy, post concussion syndrome, traumatic lumbar radiculopathy and myofascial pain syndrome. He re-examined plaintiff on November 20, 2007 and his physical examination of plaintiff, found with regard to her cervical spine a 33% loss of extension, a 31% loss of right and left rotation and a loss of 22% of right and left lateral flexion. With regard to her lumbosacral spine he found there was a 33% loss of flexion, a 33% loss of extension, a 44% loss of right and left rotation and a 20% loss of right lateral flexion. In conclusion, he found permanent restrictions of motion and opined that they were causally related to

the subject accident.

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

New York State Insurance Law §'s 5102 and 5104 prevent actions arising out of

negligence in the use or operation of a motor vehicle, except in the case of a "serious injury" (Toure v Avis Rent a Car Systems, Inc., 98 NY2d 345 [2002]). "[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the 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 AD2d 79, 83-84 [2d Dept. 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (Id. at 83-84).

The Authority argues that upon viewing the facts most favorable to the plaintiff, it is clear that plaintiff's injuries are not serious as defined by section 5102(d) of the Insurance Law as plaintiff does not have a significant limitation of use of a body function or system.

Defendant has met its burden of establishing that plaintiff did not sustain a serious injury by submitting the report of their independent examining physicians who concluded plaintiff had recovered from her injuries and had no current disability as a result of the subject accident.

As defendants have met their burden, the burden shifts to the plaintiff to come forward with evidence to prove that she sustained a serious injury within the meaning of the Insurance Law (Gaddy v Eyler, 79 NY2d 955, 957 [1992]; Shinn v Catanzaro, 1

AD3d 195, 197 [1st Dept 2003]). Viewing the evidence in the light most favorable to the plaintiff, there is a triable issue of fact as to whether plaintiff has permanent motion limitations.

The Court of Appeals has held that whether a limitation of use or function is significant or consequential "involved a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part." (Toure v Avis Rent a Car Sys., 98 NY2d 345, 353 [2002], quoting Dufel v Green, 84 NY 2d 795, 798 [1995]). "In order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of plaintiff's loss of range of motion or may make a qualitative assessment of plaintiff's condition, provided that the latter evaluation has an objective basis and compare the plaintiff's limitations to the normal use of the affected body system or function." Shinn v Ctanzaro, 1 AD3d at 198. In addition, the Court of Appeals has held that a significant limitation must be something more than a "minor, mild or slight limitation of use." (Gaddy v Eyler, 79 NY2d at 957 quoting Licari v Elliott, 57 NY2d 230, 236 [1982]).

Here, Dr. Fleischer's conclusions regarding plaintiff's range of motion differ greatly from the conclusions of the Authority's experts. As Dr. Fleischer's affirmation contains medical evidence to raise a triable issue as to whether plaintiff sustained a serious injury, inasmuch as he conducted range of motion tests and leg raising tests

and determined that there were limitation on plaintiff's range of motion, summary judgment must be denied (Ramos v Dekhtyar, 301 AD2d 428, 429 [1st Dept 2003]).

Accordingly, it is

ORDERED that the defendants' motion seeking summary judgment dismissing the Complaint is denied.

Dated: 1-14-08

J.S.C.

Check one: ____ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

DONNA M. MILLS, J.S.C.