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

PRESENT : DONNA M. MILLS PART 21
Justice

JOHNSON, CHERAE

INDEX NO. 113615/06

Plaintiff,

MOTION DATE

-v-

MOTION SEQ. NO. 002

NEW YORK CITY TRANSIT AUTHORITY,
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 "Authority"), seek summary judgment dismissing the complaint against them pursuant to CPLR § 3212 and Insurance Law § 5101. Plaintiff opposes the motion and contends that there are questions of fact that need to be resolved at trial.

BACKGROUND

This is an action to recover monetary damages for personal injuries suffered by the plaintiff as the result of an alleged accident that occurred on September 23, 2005 when plaintiff was injured when she was struck by an Authority bus on Astoria Boulevard at 31st Avenue in Queens County, when she was attempting to board the bus. The Authority contends that plaintiff's injuries are not serious injuries as required by law (see New York State Insurance Law § 5102 and 5104).

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).

In support of their motion for summary judgment, the Authority relies on plaintiff's pleadings, verified bill of particulars and supplemental bill of particulars. According to plaintiff's bill of particulars, plaintiff claims that she sustained a "left shoulder contusion and cervical strain." Additionally, plaintiff was examined on behalf of the Authority by Dr. Wayne Kerness, an orthopedist. In his report he indicated that the cervical range of

motion testing was within normal limits in all planes with comparisons with normal ranges provided. Moreover, Dr. Kerness averred that the range of motion testing of the plaintiff's lumbosacral spine was normal with normal ranges of motion provided. The diagnosis was "resolved cervical, thoracic and lumbar sprain/strain, resolved left shoulder injury."

The medical report of Dr. Kerness submitted by the Authority obliged plaintiff to come forward with evidence that she has sustained a "serious injury" (Insurance Law § 5102[d]; Gaddy v Eyler, 79 NY2d 955 [1992]).

In opposition to the subject motion, Plaintiff relies on two doctors' reports to rebut the Authorities contentions. Plaintiff references that part of Dr. Kerness report in which he does find a 10% limitation in forward elevation and abduction of the left shoulder, however, his diagnosis is that plaintiff's injuries are resolved, and that she has no disability or restriction. Plaintiff also relies on the report of Dr. Raghava Polavarapu, a Board Certified Orthopedist who examined the plaintiff on July 12, 2007 on behalf of the Authority. Dr. Polavarapu however indicates that plaintiff has no permanency.

Plaintiff's proffered evidence falls to demonstrate a "permanent consequential limitation of use of a body organ or member," or a "significant limitation of use of a body function or system." Minimal restrictions on functioning do not constitute a serious injury, (Gaddy v Eyler, supra at 957). Whether a reduction in range of motion or other functioning is a minimal restriction depends on various factors. A low

percentage of loss in range of motion or functioning limited to a single area or to several areas, but not affecting overall ability to function does not raise a factual issue as to a serious injury (Arrowood v Lowinger, 294 AD2d 315, 316 (1st Dept 2002]). In contrast, a low percentage of loss in range of motion with atrophy and requiring surgery may constitute a serious injury (Wong v Tanyee-Sing, 247 AD2d 356, 357 [2nd Dept. 1998]). In the instant action, Dr. Kerness, indicated that plaintiff's functioning is not significantly limited, and Dr. Polavarapu concurs with this diagnosis.

Lastly, plaintiff relies on Dr. Polavarapu's report to show that she suffered an injury which prevented her from performing substantially all of her daily activities for a period of 90 days out of the 180 days after the accident. In order to prove "serious injury" under the 90-out-of-180-day rule, plaintiff must prove that she was "curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" (Licari v Elliott, 57 NY2d 230, 236 [1982]). Here, plaintiff as reported in Dr. Polavarapu's report was out of work for six months after the accident. As such, plaintiff met its burden to establish a question of fact as to whether she suffered an injury which prevented her from performing substantially all of her daily activities for at least 90 out of 180 days following the accident (see Brown v Achy, 9 AD3d 30, 34 [1st Dept 2004]).

Accordingly, it is

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

Dated: 12/4/08

J.S.C.

Check one: ___ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

DONNA M. MILLS, J.S.C.