SUPREME COURT OF THE STATE OF NEW YORK **Index No.:103020/07**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:001 & 002**

LORNA ROMEO,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

EDWARD W. SKLAR,
PETER R. JULIANO,
COURT PHIL PROVISIONS INC.,
METROPOLITAN TRANSPORTATION AUTHORITY,
NEW YORK CITY TRANSIT AUTHORITY, *and*
MTA BUS COMPANY,

Defendants

The following items were considered in the review of this motion for summary judgment:

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Notice of Cross-Motion and Affidavits Annexed	**2**
Answering Affidavits	**3**
Replying Affidavits	**4**
Exhibits	**Attached to Papers**

Defendants New York City Transit Authority, Metropolitan Transportation Authority and MTA Bus Company ("Authority") move this court pursuant to *CPLR* §§3211 and 3212 to dismiss the plaintiff's complaint and to grant the Authority summary judgment on the grounds that the plaintiff did not sustain a "serious injury" as defined by *Insurance Law* §5102(d). Co-defendants Peter R. Juliano and Court Phil Provisions, Inc. make a cross-motion pursuant to *CPLR* §§3211(a)(7) and 3212 to also dismiss the complaint on the grounds that the plaintiff did not sustain a serious injury as defined by *Insurance Law* §§5102 and 5104. The defendants' motion and cross-motion are denied in their entirety.

Facts

This action arises out a motor vehicle collision between Authority Bus Number 6197 and Court Phil Provisions' truck on October 26, 2006 at about 8:15am near the intersection of New Dorp Plaza South and New Dorp Lane in Staten Island, New York. The plaintiff, a passenger sitting on the rear left-side part of the Authority bus, claims to sustain serious personal injuries as a result of the accident.

Discussion

The defendants seek summary judgment on the ground that the plaintiff has not sustained a "serious injury" as defined by *Insurance Law* § 5102.[1] The serious injury threshold set forth in *Insurance Law* § 5104(a) can only be established under these categories.[2] Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[3] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness, or disease,[4] that results in one of the nine serious injury threshold categories.[5]

---

[1] A serious injury must be a personal injury, "[W]hich results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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 person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (*Insurance Law* § *5102* [d]).

[2] *Coon v. Brown*, 192 AD2d 908 [3d Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3d Dept 1982].

[3] *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].

[4] 11 NYCRR §65-2.1[e].

[5] *Van Norstrand v. Regina*, 212 AD2d 883 [3d Dept 1995].

Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind.[6] It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury."[7]

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.

In the case before this court, the Authority defendants bring forth the affirmed statements of Dr. Alvin M. Bregman, an orthopedic surgeon and Dr. Lourdes P. Esteban, a neurologist. After reviewing the plaintiff's medical records, Dr. Bregman concluded that the plaintiff has recovered from a cervical spine sprain, lumbar spine sprain, right and left shoulder sprain, and left and right knee sprain. Dr. Esteban also found that the plaintiff has no neurological disability.

Where defendants' motion for summary judgment raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.[8] The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.[9] The plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury.[10]

---

[6] *Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].

[7] *Licari v. Elliott*, 57 NY2d 230, 237 [1982].

[8] *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

[9] *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2d Dept 2000].

[10] *Grossman v. Wright* 268 AD2d 79 [2d Dept 2000].

The plaintiff alleges injuries that are consistent with a permanent consequential limitation of her cervical spine. This category of injury involves any "limitation" of use which is more than "minor, mild or slight," as contrasted to the loss-of-use category which requires proof of a "total loss" of use.[11] The "consequential limitation of use" category requires that the limitation be permanent, whereas the "significant limitation of use" category does not require that the limitation be permanent.[12] Furthermore, the "consequential limitation of use" must be with respect to a body organ or member, whereas the "significant limitation of use" must be with respect to a body function or system.

A designation set forth by medical proof of a numeric percentage or degree of a plaintiff's loss of range of motion can be used to establish a limitation of use.[13] An unspecified percentage or degree of restricted range of motion is not enough.[14] This requirement relates to the medical significance of the claimed limitation of use. The analysis involves a comparative determination of the degree or qualitative nature of the limitation based on the normal function, purpose, and use of the affected body part.[15] In other words, a medical expert must describe the qualitative nature of the plaintiff's limitation based on the normal function, purpose, or use of the plaintiff's affected body part.[16]

---

[11] *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 [2001]; *Gaddy v. Eyler*, 79 NY2d 955 [1992].

[12] *Lopez v. Senatore*, 65 NY2d 1017 [1985]; *Lanuto v. Constantine*, 192 AD2d 989 [3d Dept 1993]; *Decker v. Rassaert*, 131 AD2d 626 [2d Dept 1987].

[13] *Toure v. Avis Rent a Car Systems*, 98 NY2d 345 [2002]; *Molina v. Nosa Choi*, 298 AD2d 508 [2dDept 2002].

[14] *Herman v. Church*, 276 AD2d 471 [2d Dept 2000]; *Barbarulo v. Allery*, 271 AD2d 897 [3d Dept 2000]; *Owens v. Nolan*, 269 AD2d 794 [4th Dept 2000].

[15] *Route v. Avis Rent A Car System*, 98 NY2d at 353, *supra*.

[16] *Id.* at 355.

As to the causation element, it will be necessary for the plaintiff to establish this element by expert opinion, namely, that the specified degree or percentage of loss of range of motion or limitations in plaintiff's physical activities are a natural and expected medical consequence of plaintiff's injuries, which injuries are demonstrated by competent medical proof.[17]

When supported by objective evidence, an expert's qualitative assessment of the seriousness of a plaintiff's injuries can be tested during cross-examination, challenged by another expert and weighed by the trier of fact. By contrast, an expert's opinion unsupported by an objective basis may be wholly speculative, thereby frustrating the legislative intent of the No-Fault Law to eliminate statutorily-insignificant injuries or frivolous claims.[18]

The plaintiff submits the affirmed statements of Dr. Bhim S. Nangia, a neurologist and Dr. John P. Piazza, a chiropractor. Dr. Nangia states that the plaintiff began treatment with him on November of 2006, the month after the accident. When he examined the plaintiff, Dr. Nangia concluded that the plaintiff was disabled, consequently referring her to MRI and EMG testings. As suggested by Dr. Nangia, the plaintiff underwent physical therapy and a regimen of chiropractic treatment. During the course of the plaintiff's treatment, Dr. Nangia found that the plaintiff did not show much improvement of her symptoms. The plaintiff's most recent range of motion test, conducted on September 29, 2007, revealed that the plaintiff's cervical spine had a range of motion of 30 degrees when the normal range of motion is 50 degrees. The examination of the plaintiff's lumbar spine region also revealed a restricted range of motion of 40 degrees when the normal range is 90 degrees. Dr. Nangia opines that the accident caused serious injuries to the plaintiff's cervical spine in the form of disc bulging at C3-4, C4-5 and C5-6 with radiculopathy at the C5-6 level and lumbar radiculopathy at the L5-S1 level. He confirmed that these injuries have limited the plaintiff's ability to lift, push, pull, climb stairs, or other mechanical activities, as well as sit and stand for extended periods of time.

---

[17] *Toure v. Avis Rent A Car System*, 98 NY2d at 353, *supra*.

[18] *Id.*

After examining the plaintiff's medical history and conducting a physical examination, Dr. Piazza also held that the plaintiff suffers "a significant consequential limitation of use of her cervical and lumbar spine, in the form of disc bulging at C3-4, C4-5 and C5-6 with left-sided C5-6 radiculopathy and L5-S1 left radiculopathy caused by the subject accident." At the presentation of this evidence, the plaintiff raises at least an issue of fact regarding the nature of his injury.

The defendants maintain that Dr. Nangia's affirmed statement cannot defeat their motion for summary judgment because the plaintiff's most recent examination was not conducted close to the time Dr. Nangia rendered his medical opinion. The Appellate Division, Second Department had held that medical tests that form the basis of doctors' opinions must be conducted recently and close to the time that the medical statement is made.[19] The same court in *Covington v. Cinnirella* ruled that a medical report conducted two years before the submission of the medical opinion was insufficient to defeat summary judgment.[20] The Court also found that in addition to the timing of the medical report, the report failed to supply measurements of limitations of motion or any course of treatment. The contents of Dr. Nangia's affirmed statement vastly differ from the contents of the *Covington* report. Dr. Nangia's affirmation is accompanied by eight neurological treatment reports, starting from the plaintiff's first visit to Dr. Nangia's office in November 2006 to September 2007. Each of them include measurements of motion limitations, Dr. Nangia's personal observations, and recommendations for treatment.

The defendants also challenge the plaintiff's claim of injury by asserting that the plaintiff did not account for a gap in the treatment. A plaintiff must offer some explanation when he terminates treatment following an accident that caused him a "serious injury."[21] Dr. Nangia explained that after the plaintiff had undergone physical therapy and chiropractic treatment for approximately nine months, the plaintiff showed no improvement of the symptoms for which she

---

[19] *Grossman v. Wright,* 268 AD2d 79, *supra*.

[20] *Covington v. Cinnirella*, 146 AD2d 565 [2d Dept 1989].

[21] *Pommels v. Perez*, 4 NY3d 566 [2005].

was initially evaluated and treated. The court considers this explanation as well as Dr. Nangia's and Dr. Piazza's affirmed statements as sufficient evidence to raise an issue of fact and survive a summary judgment motion.

Conclusion

As there is at least one genuine issue of fact raised in opposition to defendants' motion, summary judgment must be denied. A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact.[22] Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."[23] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[24] Here, there is an issue of fact as to whether or not the plaintiff has suffered a "serious injury" as defined in *Insurance Law* §5102.

Accordingly, it is hereby:

ORDERED, that the defendants New York City Transit Authority, Metropolitan Transportation Authority, and MTA Bus Company's motion to dismiss the plaintiff's complaint and to grant the defendants summary judgment pursuant to *CPLR* §§ 3211 and 3212 is denied in its entirety; it is further

ORDERED, that the defendants Peter R. Juliano and Court Phil Provisions, Inc.'s cross-

---

[22] *CPLR* §3212[b].

[23] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

[24] *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

motions to dismiss the plaintiff's complaint pursuant to *CPLR* §§ 3211(a)(7) and 3212 is denied in its entirety; and it is further

ORDERED, that the parties shall return to DCM Part 3 on **July 23, 2009 at 9:30 A.M.** for a Compliance Conference.

ENTER,

DATED: May 22, 2009

Joseph J. Maltese
Justice of the Supreme Court