Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - PART TT-34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T :
HON. ROBERT J. McDONALD,
Justice

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OVIDE AUJOUR,	:	Index. No.: 30914 / 2008
Plaintiff(s),	:	Motion: 05.27.10
- against -	:	
	:	Cal. No. 4
SARWON SINGH,	:	
	:	Sequence No. 1
Defendant(s).	:	

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The following papers numbered 1 to 11 read on this motion by the defendant for summary judgment pursuant to CPLR 3212 on the ground that the plaintiff has not sustained a "serious injury" as defined in Insurance Law 5102(d).

	Papers Numbered
Notice of Motion, Affirmation, and Exhibits	1 - 4
Supplemental Affirmation and Exhibit	5 - 7
Affirmation in Opposition and Exhibits [Plaintiff]	8 - 10
Reply Affirmation.....	11
Memorandum of Law	

Upon the foregoing papers it is ordered that this motion is determined as follows:

The underlying action deals with a automobile accident on July 21, 2008 at the intersection of Route 24 and Hillside Avenue, Nassau County, New York.

The moving defendant assert that the plaintiff has not sustained a "serious injury" as a result of the accident.

In order to maintain an action for personal injury in an automobile case a plaintiff must establish, after the defendant has properly demonstrated that it is an issue, that the plaintiff has sustained a "serious injury" which is defined as follows:

"Serious Injury" Insurance Law §5102(d)

In order to maintain an action for personal injury in an automobile case a plaintiff must

establish that he has sustained a "serious injury" which is defined as follows:

> Serious injury means a personal injury which result in ... 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott,* 57 NY2d 230). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.,* 98 NY2d 345; *Grossman v Wright,* 268 AD2d 79). If the defendant 's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler,* 79 NY2d 955; *Bryan v Brancato,* 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.,* 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

The defendant submits three affirmations of Dr. Audrey Eisenstadt, M.D., a Board Certified Radiologist, each dated May 3, 2009. The first deals with her review of an MRI of the plaintiff's left knee performed August 31, 2008. It is Dr. Eisenstadt's opinion that "[n]o fracture is seen, and no effusion is noted to suggest any acute joint injury." Dr. Eisenstadt did see evidence of a sprain as well as hypoplasia in the posterior horn of the medial menisucs and mucoid degenerative signal change which is a "degenerative process without traumatic basis". The second deals with her review of an MRI of the plaintiff's Lumbar Spine performed August 25, 2008. There bulging at the L4-5 intervertebral disc level which is "not a traumatic process [i]t is degenerative in origin, related to ligamentous laxity." Finally, there is an affirmation relating to Dr. Eisenstadt's review of an MRI of the plaintiff's cervical spine performed July 21, 2008. There is osteophyte formation and minimal bulging at the C5-6 and C6-7 intervertebral disc levels. Dr. Eisenstadt finds that the bulging was not a traumatic process but simply degenerative in origin which pre-dates the accident.

The defendant submits the affirmation of Dr. Gregory Montalbano, M.D., a Board Certified Orthopedic Surgeon relating to his examination of the plaintiff on December 4, 2009. Dr.

Montalbano found the plaintiff's cervical spine, thoracic spine, lumbar spine, and right knee to be essentially normal. Dr. Montalbano writes with regard to the plaintiff's left knee: "Left Knee: 3 healed portals, scarring over the knee cap 0.75 inches (from accident). There is no detectible effusion. Tenderness is absent. No pain with patella compression. Moderate Patellofemoral crepitus noted. Range of motion: Extension 0 degrees (normal 0 degrees). Flexion 130 degrees (normal 130 degrees). Stability examination is normal including a negative Lachman, negative anterior and posterior drawer, no varus or valgus instability McMurray Test is negative." Dr. Montalbano takes particular note of the fact that the description of the left knee arthroscopic surgery performed October 13, 2008 by Dr. Remer is limited to his notation of the plaintiff's tear without any further explanation. With regard to the plaintiff's injury to her cervical and lumbar spine it was Dr. Montalbano's opinion that she did not sustain substantial or permanent injury and the observations made relate to pre-existing degenerative disc disease.

The defendant submits a "Supplemental Affirmation in Support" which contains an Addendum dated February 23, 2010 of Dr. Montalbano. The affirmation related back to his physical examination dated December 4, 2009.

The defendant also submits a copy of the "Final Report" from the Franklin Hospital Department of Radiology dated July 21, 2008 relating to the plaintiff's left knee in which it states: "INTERPRETATION: There is no evidence of fracture, dislocation or bone destruction. The soft tissues and osseous structures are otherwise unremarkable."

The defendant submits a copy of the "OPERATIVE REPORT" by Dr. Stuart S. Remer, M.D., a Board Certified Orthopedic Surgeon, dated October 13, 2008 from the Ambulatory Surgery Center of East Tremont Medical Center. The extent to which Dr. Remer speaks of the injury is as follows: "The medial meniscal tear was traumatic and the synovitis was traumatic. The motor vehicle accident was causally related to the left knee injury and the patient is not better with conservative management, and the left knee arthoscopy is medically necessary."

Here the defendant has come forward with sufficient evidence to support her claim that the plaintiff has not sustained a "serious injury" (*Gaddy v Eyler,* 79 NY2d 955). A bare conclusory statement by the defendant's orthopedist such as the plaintiff's "decreased range of motion is due to degenerative changes that are pre-existing" fails to adequately challenge the plaintiff's position and the plaintiff, therefore, need not respond (*Alvarez v Dematas,* 65 AD3d 598; *Landman v Sarcona,*63 AD3d 690; *Powell v Prego,* 59 AD3d 207).

The plaintiff submits the affirmation of Dr. Stuart S. Remer, M.D., a Board Certified Orthopaedic Surgeon, dated April 15, 2010. Dr. Remer states that he has seen the plaintiff since December 2, 2008. He first saw the plaintiff in regard to left knee, an x-ray of which did not show any fracture. He notes that she has a past history of "significant" hypertension and has had eye surgery, not related to the accident. Without any indication as to whether measurement of her limitation was subjective, Dr. Remer notes that the plaintiff has pain with attempts to knee or squat. He states that she has "possible meniscal tear" in the knee. She had surgery performed on October 13, 2008 on her left knee and her postoperative diagnosis was "left knee traumatic torn lateral

meniscus and traumatic synovitis." The surgery performed was a "partial lateral meniscectomy as well as a major synovectomy of the medial and lateral compartment." On October 23, 2008 Dr. Remer notes "her wounds were well-healed". He saw her again November 6, 2008 "[s]he had only done one session of physical therapy." She still had pain, but "was able to fully extend the knee". He "reinforced the need for therapy" and told the plaintiff to return "as needed." Dr. Remer notes that the injury to her left knee was due to the accident and that the surgery was "medically necessary." "She did sustain permanent injuries to the left knee due to the accident including permanent scars and loss of motion to the knee."

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller,* 258 AD2d 783; *Burnett v Miller,* 255 AD2d 541). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green,* 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has failed to raise triable factual issue as to whether the plaintiff has "permanent consequential" and "significant limitation" categories.

Generally, an unexplained cessation of medical treatment may be fatal to the plaintiff's claim of a significant or permanent consequential limitation *(Baez v Rahamatali,* 24 AD3d 256 *aff'd* 6 NY2d 868) Also, a finding by the treating physician that continued treatment would be merely palliative can be considered a sufficient explanation for cessation of treatment (*Toure v Avis Rent A Car Systems,* 98 NY2d 345; *Turner-Brewster v Arce,* 17 AD3d 189). No such statement was presented by the plaintiff.

The plaintiff has failed to demonstrate that she has a "medically determined" injury or impairment which has prevented his from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio,* 81 NY2d 1062; *Johnson v Berger,* 56 AD3d 725;*Roman v Fast Lane Car Service, Inc.,* 46 AD3d 535).

Regarding the "permanent loss of use" of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff's life (*Oberly v Bangs Ambulance, Inc.,* 96 NY2d 295). The finding of "Permanency" is established by submission of a recent examination (*Melino v Lauster,* 195 AD2d 653 *aff'd* 82 NY2d 828).

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that she has sustained such permanent limitation (*Mickelson v Padang,* 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyler,* 79 NY2d 955).

The "significant limitation of use of a body function or system" requires proof of the

significance of the limitation, as well as its duration (*Dufel v Green,* 84 NY2d 795; *Fung v Uddin,* 60 AD3d 992; *Hoxha v McEachern,* 42 AD3d 433; *Barrett v Howland,* 202 AD2d 383).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact. (*see, Zuckerman v City of New York*, 49 NY2d 557). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 ; *Pizzi by Pizzi v Bradlee's Div of Stop & Shop, Inc.*, 172 AD2d 504, 505) .

In the instant case it is apparent that the plaintiff had surgery to repair a "possible meniscal tear" however after such surgery she had recovered and there is no evidence that she had any problems related to surgery. There is no evidence of the need for additional therapy or treatment. That she complains of pain as indicated in her pretrial deposition dated April 16, 2009 is insufficient to independently establish the necessary proof to find that she has any permanency or limitation associated with the accident.

Accordingly, the defendant's motion to dismiss the complaint is granted.

So Ordered.

Dated: May 27, 2010

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Robert J. McDonald, J.S.C.