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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

DAN SUN,	:	Index. No.: 28712 / 2008
Plaintiff,	:	Motion: 07.22.10
- against -	:	Sequence No. 1
EMPIRE SHUTTLES, INC., and DOU-TIAN LI,	:	
	:	Cal: 21
Defendant.	:	

The following papers numbered 1 to 11 read on this motion by the defendants Empire Shuttles, Inc., and Dou-Tian Li (hereafter "Shuttles") for summary judgment pursuant to CPLR 3212 upon the basis that the plaintiff has not sustained a "serious injury" as defined in Insurance Law 5104.

	Papers Numbered
Notice of Motion, Affid., and Exhibits	1 - 5
Affidavit in Opposition and Exhibits.....	6 - 9
Reply Affirmation	10 - 11

Upon the foregoing papers it is ordered that these motions are determined as follows:

The underlying action is for personal injuries sustained by the plaintiff in an motor vehicle accident on May 9, 2007 which occurred at Division Street at or near the intersection with Bowery Street, County of New York, State of New York. The plaintiff a 58 year old woman.

The moving defendants 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; *Lowe v Bennett,* 122 AD3d 718 *aff'd* 69 NY2d 701; 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 defendants submit the affirmation of Dr. Alan J. Zimmerman, M.D., a Board Certified Orthopaedic Surgeon, dated May 28, 2009. Dr. Zimmerman conducted an evaluation of the plaintiff to determine whether she had sustained a "serious injury". Dr. Zimmerman used as reference the "NYS Worker's Compensation Board Guidlines, 1996". Her "PRESENT COMPLAINTS" were "dizziness, fatigue, neck, mid back, left shoulder, left arm, left wrist, left hand and lower back pain. She states she has numbness and tingling in her fingers." Dr. Zimmerman conducted a range of motion tests with regard to the plaintiff's cervical spine, left and right shoulder, left and right elbow, left and right wrist, thoraco-lumbar spine, left and right ankles and feet, and plaintiff's muscle strength. All the tests conducted revealed that the plaintiff was within the "Normal" range or better. It is noted that with regard to the plaintiff's radial deviation on her right and left wrists her reading was 20○ where the normal was 2-35○. Dr. Zimmerman noted that "[p]ercussing the left wrist caused

entire left upper extremity numbness for where there is no medical explanation." Similarly, with regard to Dr. Zimmerman's test of the plaintiff's muscle strength he notes "SENSATION: Non-Anatomic response to pin-The claimant alleges no response to pin over the entire left upper extremity for which there is no medical explanation." Dr. Zimmerman's conclusion is that "[a]ll the cervical and lumbar MRI findings are degenerative and pre-existing as evidenced by the multiplicity of the levels involved."

The defendants attach a copy of the MRI performed on the plaintiff's cervical spine signed by Dr. John T. Rigney, M.D., a Board Certified Radiologist on June 22, 2007. That report states that it was Dr. Rigney's "IMPRESSION" that the plaintiff had sustained the following: "Proximal straightening with curvature resumed more distally and subsequently distal straightening extended into the upper thoracic spine. Posterior midline herniation at C2-C3. Posterior osteophytes and bulges, to varying degrees, C3-C4, C4-C5, C5-C6, and C6-C7 most pronounced at C4-C5 where there is cord compression. Levels of central stenosis and foraminal narrowing in locations described above."

The defendant also attaches a copy of the pre-trial deposition of the plaintiff taken on May 8, 2009. She stated that prior to the accident she was not suffering any type of condition [9]. She had apparently just walked onto a bus toward a seat when "the vehicle came to a sudden stop" and she "was holding onto the seat but the seat moved and I fell. My head fell onto where the driver, his seat was" [10]. This was near an elementary school located at Division Street and Bowery Street [11].The bus driver told the plaintiff to go the back and sit (14). As soon as the plaintiff got on the bus it started to move and she fell back [15-16]. The only reason she fell was the bus' movement [18]. "Q When you were still on this bus after the incident, were you feeling pain to any part of your body? At that time my head was numb. Q Did you loose consciousness? A I felt sick." [22] She was picked up by ambulance [28]. She was taken to Flushing Hospital Emergency Room [29]. She complained of pain to her lower back and nausea and she "had pain everywhere" [30]. She then went to Cornell Medical near her house the next day [30]. She had physical therapy there for eight or nine months [31]. The plaintiff went back to China twice "[f]or the head, neck and lower back, I went back to China twice. They refused to let me see the doctor and I did not have insurance" [33]. That is the reason that treatment was stopped at Cornell Medical requiring her to go back to China for treatment [36]. She complained of daily pain and numbness [34]. She had physical therapy in China in the Zen Young medical hospital [34]. She can not do her work as a casino card dealer because of the injury to her hand [40]. She has taken over-the-counter pain medication [43]. She has numbness in five fingers [44]. She also has a loss of strength in her foot which prevents her from walking up stairs [45]. She fell on the stairs of her apartment building after the accident because she was not holding onto the railing [45]. Thereafter she went to the Queens Hospital Emergency Room [46]. She had twisted and sprained her ankle but no fracture [47]. This last accident was around April 2009, one month before her deposition [48]. "Q Other than what you've already mentioned, are there any activities in your life that either you cannot do anymore at all or you can do but with limitation, because of the accident? A Right now the biggest problem is the head. I have a problem with the head. I used to like to read and I cannot. When I read for a little while I get headaches. At work I can see the numbers but I cannot add them up and at home my child has a heart problem. I don't let him

work right now. My child has to help me. When I go to work my son has to bring the stuff for me to the vehicle." [48] Her back feels as if there is big piece of stone pressing on her back [49]. She felt faint twice at her work [50].

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).

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 raised triable factual issue as to whether the plaintiff has "permanent consequential" and "significant limitation" categories.

The plaintiff has submitted the affirmation of Dr. Jay Komerath, M.D., dated February 19, 2010. Dr. Komerath indicates that he initially saw the plaintiff May 11, 2007, two days after the accident. Dr. Komerath indicates that the plaintiff received physical therapy, chiropractic treatment, and acupuncture for nine months from May 10, 2007 through January 1, 2008, and "do [*sic*] to the continuing severity of the patient's symptoms and positive physical findings as well as to provide a basic measure for the patient's progress diagnostic testing was performed." Dr. Komerath states that "Ms. Sun has not demonstrated a full and complete recovery, and she is only partially able to perform many tasks at her previous capacity." Dr. Komerath opines that Ms. Sun "has sustained significant limitation of function of her neurologic and musculoskeletal system." Dr. Komerath notes that upon "examination of the cervical spine" her range of motion was "limited" and revealed moderate tenderness and tightness. The examination of her cervical spine and lumbosacral spine revealed her range of motion was "limited" to "slightly limited". The Komerath indicated that the cause of the plaintiffs injuries was the accident which is the basis of the instant suit. "The patient has been symptomatic for 33 months. She has received sufficient rehabilitation and it is unlikely that she will develop any further benefit from restorative therapy. The patient has reached maximal medical improvement and prognosis is poor for any further recover [*sic*]. With a reasonable degree of medical certainty, her condition is permanent in nature. Ms. Sun has an abnormal evaluation including subjective complaints that are verified by the findings on the physical exam. There is objective evidence of cervical impairment including clinically significant restriction of mobility and abnormal MRI findings. There is objective evidence of lumbosacral impairment including clinically restriction of mobility positive [*sic*]. The NCV/EMG study confirms objective evidence of nerve damage. With a reasonable degree of medical certainty Ms. Sun has sustained a permanent consequential limitation of use of her cervical spine." This report was made under penalty of perjury and is therefore admissible (*Niazov v Corlean Cab Corp,* 71 AD3d 749).

The plaintiff also submits two affirmations by Dr. John T. Rigney, M.D., a Board Certified Radiologist, dated June 30, 2010. The first affirmation relates to an MRI he conducted June 21, 2007 which demonstrate that the plaintiff had "proximal straightening with curvature...extending into the upper thoracic spine." There was changes of vertebral spondylosis and loss in fluid most pronounced at the C3-C4, C4-C5, C5-C6, and C6-C7 discs. It was Dr. Rigney's impression that there was a midline herniation at C2-C3 and posterior osteophytes and bulges which was most pronounced at the C4-C5 level. The second affirmation related to the MRI conducted July 9, 2007 which revealed "slight-to-mild" loss in fluid content of the lower three lumbar disc. The disc bulges that Dr. Rigney observed was at L3-L4, L4-L5, and L5-S1.

Where a plaintiff alleges soft-tissue injury to the spine, range-of-motion testing is used to determine whether the plaintiff has sustained a "serious injury". In order to demonstrate that the plaintiff has not sustained a serious injury the defendant must initially demonstrate that the plaintiff's range-of-motion is "normal" (*Chiara v Dernago,* AD3d [2010 NY Slip Op 915]; *Knopf v Sinetar,* 69 AD3d 809).

The question presented as to the difference between the conflicting measurements of plaintiff's ability to move creates an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.,* 48 AD3d 306). When the findings reported by one physician are assessed by application of the standard of "normal" stated by the other, the reports present "contradictory proof" (*Dettori v Molzon,* 306 AD2d 308). The use of the word "normal" should not differ between physicians (*Ortiz v S&A Taxi Corp,* 68 AD3d 734).

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).

With regard to the 90/180 rule, the defendant's medical expert must relate specifically to the 90/180 claim made by the plaintiff before dismissal is appropriate (*See, Scinto v Hoyte,* 57 AD3d 646; *Faun Thau v Butt,* 34 AD3d 447; *Lowell v Peters,* 3 AD3d 778).

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). The mere existence of a herniated disc even a tear in a tendon is not evidence of serious physical injury without other objective evidence (*Sapienza v Ruggiero,* 57 AD3d 643; *Piperis v Wan,* 49 AD3d 840; *Meely v 4G's Truck Rental Co, Inc.,* 16 AD3d 26). Merely referring to the plaintiff's "subjective quality of the plaintiff's pain does not fall within the objective definition of serious physical injury" (*Saladino v Meury,* 193 AD2d 727, *see, Craft v Brantuk,* 195 AD2d 438). Here, the plaintiff has submitted the examination of Dr. Komerath of February 19, 2010 in which he gives his opinion with regard to the plaintiff based upon seeing the plaintiff over a period of time from May 11, 2007 until the date of his affirmation.

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that he 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). Once the question has been raised, in order for the plaintiff to sustain proof of permanency, he must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (*Gobas v Dowigiallo,* 287 AD2d 690).

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). It is Dr. Komerath's opinion that the plaintiff's injures are significant and permanent.

Accordingly, the defendant's motion is denied in its entirety.

So Ordered.

Dated: July 23, 2010

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Robert J. McDonald, J.S.C.