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

PRESENT: Hon. George J. Silver, Justice PART 22

NANCY CARTER

vs.

TENO CAB CORP., SYED ALI and EDGAR ARONSON

INDEX NO. 103031/2009

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/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

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendants Teno Cab Corp., and Syed Ali (collectively "Defendants Teno and Ali") move pursuant to CPLR §3212 for summary judgment on the issue of liability and dismissing Plaintiff Nancy Carter's ("Plaintiff") complaint as to them. Additionally, Defendants move pursuant to CPLR §3212 for an order granting summary judgment on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Defendant Edgar Aronson ("Defendant Aronson"), a passenger in Defendants Teno and Ali's taxi cab, moves for summary judgment pursuant to New York Insurance Law §5102(d) incorporating by reference all arguments, exhibits and affirmations submitted by Defendants Teno and Ali. Similarly, Plaintiff submits identical papers in opposition to both Defendants Teno and Ali's and Defendant Aronson's motions. As such, both motions will be discussed jointly.

Plaintiff is seeking to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on November 4, 2008 at East 47th Street at the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER/JUDG.

intersection of Park Avenue.[1] Defendant Ali contends that he was stopped on the right side of 47th Street in the westbound direction discharging a passenger when Plaintiff came in contact with the right passenger door of his vehicle.

Defendants Teno and Ali's Liability Motion

In support of their motion, Defendants submit the affidavit of Defendant Ali, Plaintiff's deposition transcript, Defendant Ali's deposition transcript and an inadmissible copy of the motor vehicle accident report.

Defendant Ali states that he was heading westbound on 47th Street with two adult male passengers when he stopped his vehicle at the intersection of Park and Vanderbilt Avenue to allow his passengers to exit. One of the passengers opened the right rear door. At this time, Plaintiff was traveling on her bicycle and came into contact with the door. Defendant Ali further stated that he turned on his right turn signal and looked in his rear view mirror when he pulled to the curb to discharge his passengers. He stated that he was almost one and one half feet away from the curb. Defendant Ali's affidavit additionally states that Plaintiff was traveling in the wrong direction at the time of the accident, against the flow of traffic. In contrast, Plaintiff testified that she was riding her bicycle in the correct direction, with traffic, when the accident occurred. She also stated that the cab stopped four feet away from the curb and did not have its hazard lights or turning signal activated.

The moving party must make a *prima facie* showing of entitlement to judgment as a matter or law, tendering sufficient evidence to demonstrate the absence of any material issue of fact to win on a summary judgment motion (*See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Further, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*See Bank of New York v Granat*, 602 NYS2d 942, 943 [2d Dept 1993]; *Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Royal v Brooklyn Union Gas Co.*, 122 AD2d 132, 504 NYS2d 519 [2d Dept 1986]; *Stone v Goodson*, 8 NY2d 8 [1960]). Specifically, under the Rules of the City of New York §4-11, section (c), "[t]axis . . .while engaged in picking up or discharging passengers must be within 12 inches of the curb and parallel thereto." There remain several questions of fact regarding the distance away from the curb Defendants' taxi stopped and the direction Plaintiff was traveling down 47th Street. As such, Defendants have not met their required burden and have failed to demonstrate that they are entitled to summary judgment as a matter of law.

Defendants Teno and Ali's and Defendant Aronson's Serious Injury Motions

Plaintiff alleges in her Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury including L2-S1, C4-C5, C5-C6 and C6-C7 disc herniations, partial rotator cuff tear of left shoulder, tear of left shoulder glenoid labrum, left shoulder sprain/strain, left forearm sprain/strain, left knee anterior cruciate ligament rupture associate with subchondral impaction fracture and left knee joint effusion.

Under New York Insurance Law §5102(d), a "serious injury" is defined as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a

[1]Defendants Teno and Ali mistakenly describe the accident as occurring on July 5, 2007 at 319 Depot Road, Huntington Station, in Suffolk County.

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 constitute 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.

Defendants' Expert Reports

"[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 [1st Dept 2000]). Reports by a defendant's own retained physician must be in the form of sworn affidavits or affirmations because a party may not use an unsworn medical report prepared by the party's own physician on a motion for summary judgment. Defendant may also rely upon plaintiff's sworn testimony or plaintiff's unsworn treating physician's records (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Nelson v Distant*, 308 AD2d 338, 339 [1st Dept 2003]; *McGovern v Walls*, 201 AD2d 628, 628 [2d Dept 1994]). 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" (*Grossman v Wright*, 268 AD2d at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In support of this motion, Defendants submit the medical affirmations of Dr. Kuldip Sachdev, Dr. Robert Israel and Dr. Robert Tantleff. Defendants additionally submit Plaintiff's medical records from Bellevue Hospital and her deposition testimony. Dr. Sachdev performed a neurological examination of Plaintiff on December 7, 2009. Range of motion testing was conducted with a goniometer using the NYS Division of Disability Determination and the American Medical Association guidelines of normal range. Dr. Sachdev no limitations in motion for Plaintiff's neck and lumbar spine. Straight leg raising was normal in both supine and sitting positions. Dr. Sachdev concluded that Plaintiff has suffered from a cervical and lumbar sprain/strain, which had resolved.

Dr. Tantleff reviewed the MRI film of Plaintiff's cervical spine that was taken on February 1, 2009. He determined that were advanced discogenic changes with degeneration and stated that these changes require years to decades to develop and are consistent with Plaintiff's age. Dr. Tantleff also reviewed the MRI film of Plaintiff's left shoulder that was taken on February 3, 2009. He determined that there degenerative changes present and no evidence of supraspinatus tendon tear. Dr. Tantleff concluded that the MRI findings on both films were not causally related to the present accident. Dr. Tantleff also reviewed a December 8, 2008 film of Plaintiff's left knee. He stated that there was no definitive fracture of the tibia plateau and that there were long standing degenerative changes of the anterior cruciate ligament with possible degenerative partial tear of the anterior cruciate ligament. Further, Dr. Tantleff did not find any evidence of acute injury. Dr. Tantleff's and Dr. Sachdev's expert reports satisfy Defendants' burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

Dr. Israel conducted an orthopedic examination of Plaintiff on December 21, 2009. Range of motion testing for the cervical spine, lumbar spine, left shoulder and left hip revealed no limitations when compared to normal. Further, Dr. Israel concluded that Plaintiff's evaluation was entirely within normal limits. However, Dr. Israel's report does not indicate what objective testing he utilized to conclude that Plaintiff had normal range of motion when compared to normal. Therefore, this report is insufficient to establish Defendants' *prima facie* entitlement to summary judgment (*Beazer v Webster*, 2010 NY Slip Op 1584 [1st Dept]).

Plaintiff's Expert Reports

In opposition to Defendants' motion, Plaintiff submits the expert affirmations of Dr. David Milbauer, Dr. Thomas Kolb and Dr. Joyce Goldenberg. Dr. Milbauer supervised the taking of Plaintiff's left knee MRI films on December 8, 2008. Upon reviewing these films, he concluded that Plaintiff had a subchondral impaction fracture involving the lateral femoral condyle and lateral tibial plateau. Dr. Milbauer further stated that this fracture was no caused by degenerative changes, but is consistent with the present accident. He also explained that as an occult fracture, it would not be visible in the x-ray imaging taken immediately after the accident.

Dr. Kolb supervised the taking of Plaintiff left knee MRI film on December 1, 2000, prior to the current accident. He determined that there was no evidence of fracture and that if she had sustained an occult fracture it would have been visible on the film and noted in his report. Dr. Goldenberg treated Plaintiff both after her prior 2000 accident and after the present accident. She stated that Plaintiff's injuries from her prior accident had resolved and she had been pain-free for years prior to the present accident. Dr. Goldenberg therefore concluded that Plaintiff's current injuries were caused by the present accident.

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyler*, 79 NY2d 955 [1992]). The Court of Appeals has held that a minor, slight or mild limitation of use is considered insignificant within the meaning of the Insurance Law (*Licari v. Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]). Dr. Milbauer, Dr. Kolb and Dr. Goldenberg have all provided sufficient medical proof to support Plaintiff's claim of serious injury. The evidence presented raises a triable issue of fact as to whether Plaintiff suffered serious injury within the permanent consequential limitation and/or significant limitation categories of Insurance Law §5102(d).

A defendant can establish the nonexistence of a serious injury under the 90/180 category of Insurance Law §5102(d) by citing to evidence, such as plaintiff's own testimony, demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting his usual and customary daily activities for the prescribed period *(see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Further, Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that she was confined to bed and home for

approximately three weeks after the accident. This time period is far less than the 90/180 category requires (*see Copeland*, 6AD3d at 253 [1st Dept 2004] [home and bed confinement for less than the prescribed period evinces lack of serious injury]).

Further, To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiff has not demonstrated that she sustained a permanent and total loss of use of her spine, shoulder, knee or any other body function. Therefore, Defendants' summary judgment motion as to Plaintiff's permanent loss claim under New York Insurance Law §5102(d) is granted.

Accordingly, it is hereby

ORDERED that Defendant Teno and Ali's motion for summary judgment as to liability is denied; and it is further

ORDERED that Defendants' motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further`

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff's claim under the permanent loss category of Insurance Law §5102(d); and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

This constitutes the decision and order of the court.

Dated: August 13, 2010
New York, New York

George J. Silver, J.S.C.
George J. Silver, J.S.C.

GEORGE J. SILVER

FILED
AUG 17 2010
COUNTY CLERK'S OFFICE
NEW YORK