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SHORT FORM ORDER

INDEX No. 08-17636
CAL. No. 10-00495-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 001 - MD

SU JIN CHA,	:	SIM & PARK, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	450 Seventh Avenue, Suite 1805
	:	New York, New York 10123
- against -	:	
	:	MORENUS, CONWAY, GOREN & BRANDMAN
MICHAEL LACHANCE,	:	Attorneys for Defendant
	:	58 South Service Road, Suite 350
Defendant.	:	Melville, New York 11747

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 11 ; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 12-18; Replying Affidavits and supporting papers 19-20 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Michael Lachance, pursuant to CPLR 3212 dismissing the complaint as asserted by plaintiff, Su Jin Cha, on the basis that plaintiff's injuries do not meet the serious injury threshold as defined by Insurance Law §5102(d), is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Su Jin Cha, when she was involved in a motor vehicle accident on December 26, 2007, on Route 495, when her vehicle and the vehicle operated by the defendant, Michael Lachance, came into contact.

In her bill of particulars, the plaintiff has claimed that as a result of the accident she has been caused to suffer, inter alia, bulging discs at C2-3, C3-4; central disc herniation at C4-5, C6-7; possible need for cervical spine surgery and bone graft, fusion of the vertebrae and discectomies, laminectomies, and hemilaminectomies; complete tear of the supraspinatus tendon which encroachment syndrome; numbness and tingling from the shoulder radiating down the arms and into the wrists; restriction of motion with lack of internal rotation; bulging discs at L1-2, L3-4, L4-5; central disc herniation at L5-S1; possible need for lumbar spine surgery and bone graft, fusion of the vertebrae, discectomies, laminectomies and hemilaminectomies; tear of posterior horn lateral meniscus with pain and restriction of movement.

The defendant in motion (001) seeks summary judgment dismissing the complaint on the basis the plaintiff has not sustained a serious injury within the definition of Insurance Law §5102(d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means a personal injury which 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein,*** 182 AD2d 396 [1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588 [1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268 [1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760 [1990]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute

(***Licari v Elliott*** (supra).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955 [1992]).

In support of this application, the defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, answer and verified bill of particulars; copy of the transcript of the examination before trial of Su Jin Cha dated March 26, 2009; a copy of the report of the independent orthopedic examination performed by Dr. Raghava Polvarapu dated March 25, 2008; a copy of the report of the independent neurological examination performed by Dr. Howard B. Reiser dated December 18, 2009; a copy of the report of the independent orthopedic examination performed by Frank D. Oliveto dated January 6, 2010; and reports from Dr. Stephen Mendelsohn concerning the MRI's of the plaintiff's left shoulder, left knee, cervical spine and lumbar spine dated November 30, 2009.

Based upon a review of the defendant's submissions, it is determined the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint in that the defendant's submissions raise multiple factual issues which preclude summary judgment.

Ms. Cha testified that she was involved in an accident at about 10:30 p.m. on December 26, 2007 on the Long Island Expressway after having left her church where she played the piano at a service. As she was traveling east bound in the far right lane in the vicinity of exit 48, the right side of a trailer suddenly hit her car on the left side with a heavy impact, dragging her vehicle forward before stopping. Her neck, left shoulder and back were pitched against the back of her seat and her left knee was against the driver's side door. The following day she received medical treatment at the Sanford Medical Center in Flushing and was examined for complaints of pain in her neck, back, left knee and left shoulder, consisting of acupuncture, massage, hot packs, and low frequency wave treatment. She was treated three times a week for about four to five months. MRI's were taken of her neck, back, left knee and left shoulder. She was confined to bed for about a month after the accident. She additionally received chiropractic treatment from Dr. Park. Surgery was recommended as she stated she was not improving, but did not have the surgery as she was "scared" and learned that she would be unable to play the piano for a considerable period of time and was preparing for graduation and recitals. She plays the piano professionally and has a bachelor's degree with a specialty in piano. Prior to the accident she jogged three times a week, and now she cannot jog as the pain prevents her from doing so. She cannot lift things due to the injuries sustained in the accident. She has difficulty walking, standing and sitting for long periods of time. Prior to the accident she would sit and practice at the piano for eight to ten hours continuously, but since the accident has been unable to do so. She can only play the piano for about two hours and then cannot continue any longer. At times she cannot play the piano for two hours as she has to let her left shoulder rest. She stated she should be practicing playing the piano for fifteen hours.

Dr. Polavarapu performed an independent orthopedic examination of the plaintiff on March 25, 2008 and stated the plaintiff offered complaints of pain in the neck, lower back, left shoulder and left knee. Examination of the plaintiff's cervical spine range of motion findings were compared to the normal range of motion and no deficits were noted, however, it is not set forth how the measurements were obtained. Normal neurological findings were set forth, but Dr. Polavarapu does not set forth what the neurological examination

consisted of. Dr. Polavarapu performed an examination of the plaintiff's lumbar spine and set forth range of motion findings which were compared to the normal range of motion, however, it is not set forth how the measurements were obtained. It is noted that a five degree deficit in extension of the lumbar spine was found. Upon examination of the plaintiff's left shoulder, range of motion findings were set forth and compared to normal range of motion values with 10 degree deficits set forth for left shoulder abduction, forward flexion, and external rotation. Upon examination of the plaintiff's left knee, normal findings were set forth, including range of motion findings which were compared to the normal range of motion values. Dr. Polavarapu reviewed the MRI reports of the left knee dated 2/8/08, lumbar spine dated 2/29/08, left shoulder dated 2/1/08, and cervical spine dated 2/15/08, but does not comment on the findings set forth in those reports. Although no orthopedic disability was found and Dr. Polavarapu states the plaintiff's cervical and lumbar, left shoulder and left knee sprains and contusions are resolved, Dr. Polavarapu sets forth that there is a causal relationship between the accident and the plaintiff's reported symptomatology.

Dr. Mendelsohn sets forth in his four reports that he reviewed the plaintiff's MRI's of her left shoulder, left knee, cervical spine and lumbar spine, and in each report he states that he takes issue with the interpretation of the MRI's provided by Dr. Richard Heiden insofar as he finds no evidence of a supraspinatus tendon tear, lateral meniscal or anterior cruciate ligament tear, bulging or herniated cervical discs, or bulging or herniated lumbar discs, however, he does find very mild L4-5 degenerative changes, thus raising factual issues, leaving the court to speculate on the findings set forth in those reports of Dr. Heiden. The reports of Dr. Heiden have not been provided by the moving defendant. Additionally, although Dr. Mendelsohn sets forth that the lumbar MRI reveals no evidence of focal disc herniation or any abnormality causally related to the trauma of 1/26/ 07, and finds very mild L4-5 degenerative changes, Dr. Mendelsohn does not set forth the basis for his conclusory opinions or to what he attributes the degenerative changes or when they began, raising further factual issue.

An additional independent orthopedic examination was performed on the plaintiff by Dr. Frank Oliveto on January 6, 2010. Dr. Oliveto set forth that he reviewed Dr. Mendelsohn's review of the MRI's of the plaintiff's cervical spine, lumbar spine, left knee and left shoulder, with negative findings except for mild degenerative L4-5 changes. Dr. Oliveto set forth that he reviewed the narrative report of Dr. Berkowitz, M.D. dated 3/13/08 in which it is noted that the MRI report of the left knee is for positive for a left lateral meniscus tear and the MRI report of the left shoulder is positive for a complete tear of the rotator cuff. He stated the MRI report of the lumbar spine dated 2/29/08, reviewed by Dr. Heiden, sets forth that there are bulging discs at L1-2, L2-3, and L4-5, with a central disc herniation at L5-S1; the MRI report of the cervical spine dated 2/15/08 signed by Dr. Heiden reveals bulging discs at C2-3, C3-4, C5-6 with central disc herniation at C4-5 and C5-6; MRI report of the left knee dated 2/8/08 signed by Dr. Heiden revealed a tear of the posterior horn of the lateral meniscus with a high grade, partial tear of the anterior cruciate; and the MRI report of the left shoulder dated 2/1/08 signed by Dr. Heiden reveals a complete tear of the supraspinatus tendon with encroachment syndrome. Accordingly, factual issues are raised in Dr. Oliveto's report due to the differing radiological interpretations concerning the findings on the lumbar, cervical, left shoulder and left knee and the injuries claimed by the plaintiff. Further, Dr. Oliveto performed range of motion examinations of the plaintiff's cervical spine and compared his findings to the normal range of motion values. However, the normal value for cervical rotation of 80 degrees set forth by Dr. Oliveto, differs from the normal value for cervical rotation of 70 degrees set forth by Dr. Polavarapu, leaving it to this court to speculate as to the normal value and whether the plaintiff has a deficit. It is additionally noted that Dr. Oliveto set forth range of motion values for left knee flexion as being 145 degrees whereas Dr. Dr. Polavarapu sets forth the normal value as 130 degrees, again leaving it to this court to speculate as to the normal range of motion value and whether the plaintiff exhibits a deficit in knee flexion upon examination.

The report by Dr. Reiser concerning his independent neurological examination of the plaintiff on December 18, 2009 does not set forth that he performed any range of motion studies and compared them to the normal values. His examination of the cranial nerves, sensory examination, motor examination and cerebellar examination are conclusory and unsupported with a statement concerning what his examination consisted of. Dr. Reiser indicates that he reviewed the findings of the MRI's of the plaintiff's cervical, lumbar, left knee and left shoulder with those of the independent reviewer and indicates that the reviews show different interpretations with regard to the findings. Again, factual issue is raised as to what the MRI results are in that there are differing interpretations.

The reports of the examining physicians submitted in support of this motion do not exclude the possibility that the plaintiff suffered serious injury within the meaning of Insurance Law §5102 and do not establish that the plaintiff's injuries were not causally related to this accident; therefore, the moving parties are not entitled to summary judgment (*see*, ***Peschanker v Loporto***, 252 AD2d 485 [2d Dept 1998]). As indicated above, the affirmed report of defendant's examining orthopedist did not show that plaintiff had full range of motion and no disabilities although conclusory statements setting forth a finding of no disabilities and resolution of the injuries were made by the defendant's examining physicians. Thus, the proof submitted by the defendant revealing deficits as set forth, and differences in range of motion values and MRI interpretations failed to objectively demonstrate that plaintiff did not suffer a permanent consequential or significant limitation of use of her, left shoulder, left knee, or cervical and lumbar spine as a result of the subject accident (*see*, ***Fudol v Sullivan***, 38 AD3d 593, 831 NYS2d 504 [2d Dept 2007]; ***Abraham v Bello***, 29 AD3d 497 [2d Dept 2006]). In any event, the range of motion testing results for the plaintiff's lumbar spine revealed that the plaintiff had significant restrictions in motion as set forth above belying the diagnosis of the defendant's examining physicians that the plaintiff's spine, knee and shoulder sprains had resolved (see, ***Hurtte v Budget Roadside Care***, 54 AD3d 362 [2nd Dept 2008]; ***Moorer v Amboy Bus Co., Inc.***, 52 AD3d 587 [2nd Dept 2008]). Another deficiency in the defendants' examining physicians' reports was the failure to specify any objective testing used to obtain the listed range of motion measurements, such as by goniometer or inclinometer or arthroidal protractor (***Staff v Yshua***, 59 AD3d 614 [2nd Dept 2009]; ***Geliga v Karibian, Inc.***, 56 AD3d 518 [2nd Dept 2008]; ***Martin v Pietrzak***, 273 AD2d 361[2nd Dept 2000]).

Accordingly, the defendants failed to satisfy their burden of establishing, prima facie, that the plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 33 AD3d 737 [2nd Dept 2006]; *see also*, ***Walters v Papanastassiou***, 31 AD3d 439 [2d Dept 2006]).

In that the burden has not shifted to the plaintiff in that the defendant has not established prima facie entitlement to summary judgment dismissing the complaint, it is not necessary to consider plaintiff's papers to determine if they were sufficient to raise a triable issue of fact (*see*, ***Agathe v Tun Chen Wang***, *supra*; ***Walters v Papanastassiou***, *supra*; ***Nembhard v Delatorre***, 16 AD3d 390 [2d Dept 2005]; ***McDowall v Abreu***, 11 AD3d 590 [2d Dept 2004]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538 [2d Dept 2001]).

Accordingly, motion (001) for summary judgment dismissing the complaint on the issue that the plaintiff did not sustain serious injury within the definition of Insurance Law §5102(d) is denied.

Dated: September 8, 2010

HON. JOSEPH C. PASTORESSA.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION