| **Xiu Qin Lin v Islam** |
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| 2019 NY Slip Op 31992(U) |
| June 19, 2019 |
| Supreme Court, Kings County |
| Docket Number: 509808/2017 |
| Judge: Carl J. Landicino |
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of June, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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XIU QIN LIN,

*Plaintiff,*

Index No.: 509808/2017

DECISION AND ORDER

- against -

MOHAMMED T. ISLAM and ABU SALEH SIKDER,

*Defendants.*

Motion Sequence #1

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**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:**

| | Papers Numbered |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed..... | 1/2, |
| Opposing Affidavits (Affirmations)..... | 3, |
| Reply Affidavits (Affirmations)..... | 4, |

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle incident that occurred on February 6, 2017. The Plaintiff Xiu Qin Lin (hereinafter "the Plaintiff") alleges in her Complaint that on that date she suffered personal injuries after she was struck, while a pedestrian crossing the intersection of 65th Street, at or near its intersection with 14th Avenue, Brooklyn, New York. By way of a summons and verified complaint, the Plaintiff asserts a cause of action against Defendant Mohammed T. Islam and Abu Saleh Sikder (hereinafter "the Defendants") alleging the negligent operation of the Defendants' vehicle. The Plaintiff claims in his Verified Bill of Particulars (Defendants' Motion Exhibit B, Paragraph 11), that as a result of the incident she sustained a number of serious injuries, including but not limited to, injuries to her right knee, cervical spine, and lumbar spine. The Plaintiff also alleges (Defendants' Motion Exhibit B, Paragraph 20) that she was prevented from "performing substantially all of the material acts which constitute plaintiff'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 Defendants now move (motion sequence #1) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d).

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

*Insurance Law § 5102(d)*

The Defendants contend that the affirmed reports of Dr. Scott A. Stringer, Dr. Chandra M. Shamra and Dr. Joseph C. Elfenbein, support their contention that Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). In making a motion for summary judgment on threshold grounds a defendant has the initial burden of demonstrating that the Plaintiff did not sustain a "serious injury" as that term is defined by Insurance Law § 5102.

The Defendant's Doctors' Reports

Dr. Scott A. Springer, a radiologist, did not conduct a medical examination but instead reviewed the MRI records related to examinations of the Plaintiff's right knee, lumbar spine, and cervical spine. In relation to these reviews, as to the right knee (MRI dated 2/6/17), Dr. Springer opined that "[t]here is no posttraumatic change casually related to the incident of 2/6/2017." As to the lumbar spine (MRI dated 3/7/17), Dr. Springer opined that "[t]here is no posttraumatic change casually related to the incident of 2/6/2017." As for the examination of the MRI related to the cervical spine (MRI approximately one year prior to the accident) Dr. Springer concluded that the MRI "reveals prior anterior spinal fusion of C4 through C6 as well as preexisting degenerative changes with no evidence of posttraumatic changes." (See Defendants', Examination by Dr. Springer, Attached as Exhibit F).

Dr. Chandra M. Sharma, conducted an examination of Plaintiff on June 26, 2018. Dr. Sharma conducted a range of motion examination of the Plaintiff's, lumbar spine and cervical spine, using a goniometer. Dr. Sharma found limited range of motion in the cervical and lumbar spine, but opined that this was due to "subjective mechanical limitations due to perception of pain not confirmed on objective examination and do not represent neurological problems." Dr. Sharmas's diagnosis was that despite Ms. Lin's subjective complaints, there was no objective

findings to support them." (See Defendants', Examination by Dr. Sharma, Attached as Exhibit G).

Dr. Joseph C. Elfenbein, conducted an neurologic examination of Plaintiff on June 26, 2018. Dr. Elfenbein conducted a range of motion examination of the Plaintiff's right knee, lumbar spine and cervical spine and found normal ranges of motion. Dr. Elfenbein opined that "[t]he orthopedic examination is objectively normal and indicates no findings which would result in orthpedic limitations in use of the body parts examined." (See Defendants', Examination by Dr. Sharma, Attached as Exhibit H).

Turning to the merits of the motion by the Defendants, the Court is of the opinion that the instant motion papers do not adequately address as a matter of law the Plaintiff's claim as set forth in the subject Verified Bill of Particulars (Defendant's Motion, Exhibit B, Paragraph 20). Plaintiff alleged in her deposition that she was confined to her home for eight weeks and was unable to return to work after the accident (See Defendants' Motion, Exhibit D Pages 47-52). None of the Defendants' doctors examined the Plaintiff during this period and none make any reference to the Plaintiff's condition during this ninety day period. Although Dr. Springer reviewed MRI films taken of the Plaintiff in relation to her lumbar spine and right knee, the MRI of the Plaintiff's cervical spine was taken one year prior to the accident. "The injured plaintiff was not examined by the defendants' examining neurologist and orthopedist until more than one year after the accident, and both failed to relate their findings to the 90/180 category of serious injury for the period of time immediately following the accident." *Rouach v. Betts*, 71 A.D.3d 977, 977, 897 N.Y.S.2d 242, 243 [2nd Dept, 2010]; *see also Epstein v. MTA Long Island Bus*, 161 A.D.3d 821, 823, 75 N.Y.S.3d 532, 534 [2nd Dept, 2018]; *Stead v. Serrano*, 156 A.D.3d 836, 837, 67 N.Y.S.3d 244 [2nd Dept, 2017]; *Nembhard v. Delatorre*, 16 A.D.3d 390, 791 N.Y.S.2d 144 [2nd Dept, 2005]; *Peplow v. Murat*, 304 A.D.2d 633, 758 N.Y.S.2d 160, 161 [2nd Dept,

2003]; *Frier v. Teague,* 288 A.D.2d 177, 732 N.Y.S.2d 428 [2nd Dept, 2001]. "Since the defendants failed to meet their *prima facie* burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact." *Trivedi v. Vural*, 90 A.D.3d 1031, 1032, 934 N.Y.S.2d 861 [2nd Dept, 2011].

Even assuming, *arguendo*, that the Defendant had met his *prima facie* burden, the Plaintiff's opposition to Defendant's motions raises issues of fact regarding the injuries allegedly sustained by the Plaintiff. The Plaintiff proffers the affirmations of Drs. Wei Wang, Arden M. Kaisman, Mark S. McMahon and Victor Katz. Each physician performed an orthopedic examination of the Plaintiffs cervical spine, lumbar spine and right knee with the use of a hand held goniometer and found, *inter alia*, limited range of motion causally related to the subject accident, notwithstanding an acknowledgment of degenerative disease of the spine. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green,* 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]. Accordingly, the Defendants' motion is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant's motion (motion sequence #1) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



**Carl J. Landicino**
**J.S.C.**