SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 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

- x

RAMALA DEVI LIMBU,

Plaintiff,

- against -

ERNEST V. LAUTH,

Defendant.

- x

Index No.: 712423/2017

Motion Date: 10/31/19

Motion No.: 22

Motion Seq.: 4

The following electronically filed documents read on this motion by defendant for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 27
Affirmation in Opposition-Exhibits	EF 31 - 37
Reply Affirmation	EF 38

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on November 11, 2014. As a result of the accident, plaintiff alleges that she sustained serious injuries to her cervical spine, bilateral shoulders, and lumbar spine.

Plaintiff commenced this action by filing a summons and complaint on September 26, 2017. Defendant joined issue by service of an answer on October 5, 2017. Defendant now moves for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff appeared for an examination before trial on March 11, 2019 and testified that she was involved in the subject accident. She did not lose consciousness. She did not sustain

bleeding. She felt pain on her right-hand side of her body, from the shoulder to lower back. She was able to slowly stand up from the sidewalk after the accident. She complained of pain to ambulance personnel. She was taken to Elmhurst Hospital Emergency Room. She did not have any diagnostic testing performed. She was in the hospital for five hours. Two to three weeks after the accident, she presented to Dr. Guha's office. She had X-rays and MRIs taken. She received electronic stimulation and exercise. She received treatment three times per week. Plaintiff ended treatment in 2015. Plaintiff began treating with Dr. Susan at Corona Chiropractic in 2016. Injections were recommended, but she did not undergo any. At the time of the accident, she was employed with a salon on Steinway Street. She left her employment for one year following the accident. No doctor told her to refrain from working. She returned to the salon in August or September 2015.

Carl Weiss, M.D. performed an independent orthopedic examination on plaintiff on April 12, 2019. Plaintiff presented with current complaints of pain in her right shoulder and arm. Dr. Weiss identifies the records reviewed prior to rendering the report. Dr. Weiss performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's thoracic spine, bilateral shoulders, bilateral elbows, bilateral wrists, bilateral hips, bilateral knees, bilateral ankles/feet, and bilateral hands/fingers. Dr. Weiss did note limitations regarding plaintiff's cervical spine and lumbar spine. All other objective testing was negative and within normal limits. Dr. Weiss opines that the cervical spine, thoracic spine, lumbar spine and right shoulder injuries are causally related to the subject accident. The left shoulder is not causally related to the subject accident. Dr. Weiss opines that symptom magnification was observed and the decreased range of motion findings were not substantiated by any objective abnormalities on neurologic examination. Dr. Weiss concludes that there is no causally related orthopedic disability based on the physical examination. Plaintiff is capable of performing all the tasks of daily living and maintaining full employment with no causally related restrictions.

Based on the submitted evidence, defendant contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body organ, member, function or system. Defendant also contends that plaintiff did not sustain a medically determined injury or

impairment of a nonpermanent nature which prevented her for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of her usual daily activities.

In opposition, plaintiff submits her own affidavit dated October 9, 2019. Plaintiff affirms that she was struck by a vehicle while walking on the crosswalk located at the intersection of 55th Avenue and Van Horn Street. She was unable to work from the date of the accident on November 17, 2014 to August 2015. The doctor advised her not to go to work. Since the accident, she is still unable to take care of her child, take her child to day care, cook, clean, take her child to the park, and purchase groceries. She is still unable to move or use her neck, back and right shoulder fully. She is unable to bend, twist her back, pull and push. She cannot use the blow dryer, work without restrictions, stand or sit for long periods of time, and do pedicures, manicures and massages.

David Guha, M.D. submits an affirmation stating that he first examined plaintiff on December 5, 2014. Plaintiff presented with initial complaints of neck pain, back pain, right shoulder pain, and right plank pain. Plaintiff had restricted ranges of motion in her cervical spine and lumbar spine. Most recently, Dr. Shah examined plaintiff on May 1, 2019. Range of motion testing revealed decreased ranges of motion in plaintiff's cervical spine and right shoulder. Dr. Guha opines that plaintiff has had only a moderate level of improvement. It is unlikely that she will further benefit from restorative therapy. Her condition is permanent in nature. There is a causal relation between the subject accident and the injuries. Dr. Guha concludes that plaintiff was totally disabled from November 17, 2014 to July 2015, including her ability to work and daily living activities . After September 2015 to present, plaintiff is 60% disabled.

Suzanne Plotnik, D.C. submits an affirmation stating that she initially examined plaintiff on February 29, 2016 and most recently on July 15, 2019. The most recent range of motion testing revealed decreased ranges of motion in plaintiff's lumbar and cervical spine. Other objective testing was positive. Dr. Plotnik opines that plaintiff's condition is directly related to the subject accident. Plaintiff has reached maximum medical improvement. Plaintiff is having difficulty in performing functions of daily living and work, which is directly related to the subject accident.

Plaintiff also submits certified records from Corona Chiropractic and Elmhurst Hospital Center Emergency Services.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Here, the conclusion that plaintiff did not suffer a disability or impairment as a result of the subject accident was directly contradicted by Dr. Weiss who examined plaintiff almost five years after the subject accident and recorded objectively-measured limitations in range of motion (see Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985][finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants]). Although Dr. Weiss opines that symptom magnification was observed, he never opines as to what extent the positive findings were self-imposed or limited due to certain factors.

Thus, defendant failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]).

In any event, this Court finds that in opposition, plaintiff raised triable issues of fact as to whether she sustained a serious injury by submitting, inter alia, the affidavits from David Guha, M.D. and Suzanne Plotnik, D.C. attesting to the fact that plaintiff sustained injuries as a result of the subject accident and finding that plaintiff had limitations in ranges of

motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 AD2d 367 [2d Dept. 2009]).

Moreover, issues of fact exist regarding the 90/180 day category as Dr. Guha opined that plaintiff was totally disabled from November 17, 2014 to July 2015.

Accordingly, and for the reasons set forth above, it is hereby

ORDERED, that defendant's motion for summary judgment is denied.

Dated: November 6, 2019
Long Island City, N.Y.

ROBERT J. McDONALD
J.S.C.