SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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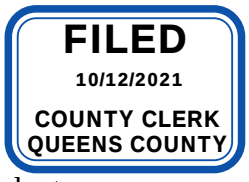
AEKYUNG KIM, Index

Plaintiff, Number: 703710/2019

-against-



Motion Date: July 12, 2021

MICHELE M. KENNY,

Defendant. Motion

----------X Seq. No.: 1

The following electronically filed (EF) papers read on this motion by Defendant for an Order: pursuant to CPLR 3212, granting Defendant's motion for summary judgment and dismissing all of the plaintiff's claims and cross claims against Defendant as Plaintiff has failed to sustain a serious injury as defined by the Insurance Law as a result of the subject accident, together and granting with such other and further relief as this Court may deem just and proper.

	Papers Numbered
Notice of Motion – Affirmation – Exhibits……	EF 8-9, 11-18
Opposition to Motion – Affirmation – Exhibits…….	EF 22, 24-27
Affirmation in Reply……..	EF 29

Upon the foregoing papers, it is Ordered that Defendant's Motion is determined as follows:

Plaintiff commenced the above-entitled action seeking to recover for personal injuries arising from a motor vehicle collision on or about December 30, 2018 and as a result of the collision, Plaintiff alleges to have sustained serious injuries as defined pursuant to Insurance Law §5102(d).

Defendant filed this motion seeking inter alia for summary judgment pursuant to CPLR 3212 and dismissing all of the plaintiff's claims and cross claims against Defendant as plaintiff has failed to sustain a serious injury as defined by the Insurance Law as a result of the subject accident. Defendant avers plaintiff's injuries relating to his shoulder, back, and neck do not constitute a serious injury as defined pursuant Insurance Law 5102 (d).

Plaintiff opposes Defendant's motion and avers that Defendant has failed to meet his prima facie burden to be entitled for summary judgment as a matter of law; there are numerous issues of fact raised by Plaintiff that would justify denial in its entirety; Plaintiff suffered serious injuries

within the meaning of Insurance Law §5102(d); and Plaintiff has demonstrated with sufficiency that the injuries sustained are permanent and any medical treatments are palliative in nature.

"It is well settled that 'the proponent of a summary judgment motions must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' "(see *Pullman v. Silverman,* 28 NY3d 1060 [2016]) quoting (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Failure to make such prima facie "showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851[1985]). The burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Lopez v. Senatore*, 65 NY2d 1017 [1985]). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". (*Licari v. Elliott,* 57 NY2d 230 [1982]). A medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury is deemed competent medical evidence (see *Yunatanov v Stein*, 69 AD3d 708 [2d Dept 2010]. Thus, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Pursuant to New York Insurance Law § 5102(d), " 'serious 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 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."

The Court of Appeals has long recognized that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (see *Toure v Avis Rent A Car Sys., Inc.,* 98 NY2d 345, 350 [2002] citing (*Dufel v Green,* 84 NY2d 795 [1995]; *see also Licari v Elliott,* 57 NY2d 230, 234-235 [1982]). As such, objective proof of a plaintiff's injury is required in order to satisfy the statutory serious injury threshold (*see e.g. Dufel,* 84 NY2d at 798; *Lopez v Senatore,* 65 NY2d 1017 [1985]); subjective complaints alone are not sufficient (*see e.g. Gaddy v Eyler,* 79 NY2d 955 [1992]; *Scheer v Koubek,* 70 NY2d

678 [1987]). "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury *Toure v Avis Rent A Car Sys., Inc.,* 98 NY2d 345 [2002] citing (*see e.g. Dufel,* 84 NY2d at 798; *Lopez,* 65 NY2d at 1020). "As such, we have required objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold" [citations omitted](see *Toure v Avis Rent A Car Sys., Inc.,* 98 NY2d 345, 350 [2002]). "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" (see *Toure v Avis Rent A Car Sys., Inc.,* 98 NY2d 345 [2002] citing *Dufel v Green,* 84 NY2d 795 [1995]).

In this action, Defendant submits *inter alia* a report dated August 26, 2020, affirmed by Doctor Ernesto D. Seldman, M.D. (hereinafter " Dr. Seldman"), who examined the Plaintiff on August 26, 2020. The aforementioned report in relevant part states:

> "There is no evidence of an orthopedic disability. The claimant is able to perform all activities of daily living and is able to work without restrictions or limitations."

In opposition, plaintiff submits *inter alia* an affirmation affirmed by Doctor Richard Seldes, M.D. (hereinafter "Dr. Seldes") who examined the Plaintiff several times including on May 26, 2021. The report in relevant part states:

> " 20. The positive objective medical findings with respect to the right shoulder upon the examinations on February 6, 2019, March 6, 2019 and May 26, 2021 are consistent with the MRI findings.
> 21. Based upon my review of all relevant medicals, including MRI films, and objective medical findings on February 6, 2019, March 6, 2019 and May 26, 2021, the prognosis is as follows: Prognosis for Plaintiff is guarded at this time. The injuries Plaintiff sustained to the left shoulder and right shoulder from the accident of December 30, 2018 are permanent in nature and are all causally related to the motor vehicle accident of December 30, 2018, Specifically, the injuries patient sustained to the left shoulder and right shoulder are solely caused by the accident of December 30, 2018.
> 22. The patient will likely have lifelong orthopedic problems including: pain, difficulty with activities of daily living, and activity and lifestyle modifications. This may lead to office-based treatment with corticosteroid injections or physical therapy periodically. Plaintiff's injuries to the left shoulder and right shoulder are permanent and she has a permanent partial orthopedic disability."

The Court finds that the conflicting medical reports submitted by the parties raises triable issues of fact as to whether Plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see Kraemer v Henning,* 237 AD2d 492 [1997])".*Garcia v. Long sland MTA,* 2 AD3d 675 [2d Dept 2003]; *Wilcoxen v. Palladino,* 122 AD3d 727, 728 [2d Dept 2014][finding that "in light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident"]. See also *Cariddi v. Hassan,* 45 A.D.3d 516 (2007); *Gaviria v. Alvardo,* 65 A.D.3d 567 (2009).

Defendant also avers that Plaintiff did not sustain a medically determined injury or impairment that prevented her from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the alleged accident.

To establish a serious injury under the 90/180 category of NYIL § 5102(d), a "plaintiff must establish that he or she 'has been curtailed from performing his [or her] usual activities to a great extent'" rather than "some slight curtailment" (*Lanzarone v Goldman*, 80 AD3d 667, 669 [2d Dept 2011]; *DeFilippo v White*, 101 AD2d 801, 803 [2d Dept 1984]).

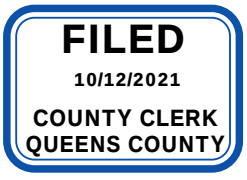
Here, Defendant has failed to establish, *prima facie*, that Plaintiff did not suffer a serious injury under the 90/180 category of NYIL § 5102(d). Defendant rely on Plaintiff's deposition testimony to establish, *prima facie*, entitlement to judgment as a matter of law under the 90/180 category. However, Plaintiff's testimony did not address its usual and customary daily activities "during the specific relevant time frame" and "did not compare . . . pre-accident and post-accident activities during that relevant time frame" (*see, Hall v Stargot*, 187 AD3d 996, 996 [2d Dept 2020]; *Reid v Edwards-Grant*, 186 AD3d 1741, 1742 [2d Dept 2020]; *Jong Cheol Yang v Grayline N.Y. Tours*, 186 AD3d 1501, 1502 [2d Dept 2020]).

As a consequence of Defendant failing to establish its *prima facie* entitlement to judgment as a matter of law as to Plaintiff's claim of a serious injury under the 90/180 category, the Court "need not consider the sufficiency" of Plaintiff's opposition papers (*see, Hall*, 187 AD3d at 996, supra; *Owens-Stephens v PTM Mgmt. Corp.*, 191 AD3d 691 [2d Dept 2021*]; Ali v Williams*, 187 AD3d 1107 [2d Dept 2020]). Accordingly, the branch of Defendant's motion seeking summary judgment dismissing Plaintiff's claim of a serious injury under the 90/180 of NYIL § 5102(d) is denied (*see, id.).*

Accordingly, Defendant's motion for an Order pursuant to CPLR 3212 is hereby denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Date: October 7, 2021



LOURDES M. VENTURA, J.S.C.