Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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MIHEE CHUNG,

Plaintiff,

Index No.: 715089/17
Mot. Date: 1/26/21
Mot. Seq. 3

-against-

MUHAMMAD TANVEER,

Defendant.

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The following papers were read on the motion by defendant for an order, pursuant to CPLR 3212, granting summary judgment in his favor dismissing the complaint of plaintiff on the basis that plaintiff did not sustain a "serious injury" under Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 32-39
Answering Affidavits-Exhibits.....	EF 42-48
Replying Affidavits.....	EF 49

Upon the foregoing papers, it is ordered that the motion is denied.

In this action wherein the plaintiff is seeking damages for personal injuries allegedly sustained in a motor vehicle accident, that occurred on February 8, 2017, the defendant moves for an order granting summary judgment dismissing plaintiff's complaint on the basis that the plaintiff did not sustain a "serious injury" under Insurance Law §5102(d).

As a general proposition, the proponent of a summary judgment motion of this type must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the

case. (*See Licari v Elliot*, 57 NY 2d 230 [1982]; *Alvarez v Prospect Hospital*, 68 NY2d 320 1986]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]). The defendant's motion papers must demonstrate, through admissible medical evidence, which may include medical reports and records and affidavits and/or affirmed reports of medical examinations, including range-of-motion testing, that address all of the plaintiff's claims, that the plaintiff did not sustain functional limitations which would constitute either a permanent consequential limitation of use of a body organ, member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material, acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (*See Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Choi v Guerrero*, 82 AD3d 1080 [2d Dept 2011]; *Jilani v Palmer*, 83 AD3d 786 [2d Dept 2011]). The failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see e.g. Reed v Righton Limo, Inc*., 82 AD3d 1070 [2d Dept 2011]; *Joris v UMF Car & Limo Service*, 82 AD3d 1050 [2d Dept 2011]; *Keenum v Atkins*, 82 AD3d 843 [2d Dept 2011]; *Pero v Transervice Logistics*, 83 AD3d 681 [2d Dept 2011]).

Here, the defendant's moving papers present proof in admissible form via, *inter alia*, the affirmed reports of the defendant's examining orthopedic surgeon, Dr. Thomas P. Nipper, M.D. and independent evaluating radiologist, Dr. Mark J. Decker, M.D. Based upon the foregoing, the defendant provided proof demonstrating, *prima facie*, the absence of any condition that might have arguably met the serious injury threshold of Insurance Law § 5102(d). Thus, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*See Gaddy v Eyler, supra*).

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of the plaintiff is an acceptable method to provide a doctor's opinion regrading the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (*see Kociocek v Chen*, 283 AD2d 554 [2d Dept 2001]; *Pommels v Perez*, 4 NY3d 566 [2005]). Plaintiff

submitted medical proof that was contemporaneous with the accident showing, *inter alia,* range of motion limitations of the plaintiff's lumbar spine and a partial tear of the right shoulder (*Pajda v Pedone*, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the plaintiff's lumbar spine and right shoulder injuries. The record reflects that the plaintiff underwent a right shoulder arthroscopic surgery, in June 2017. Furthermore, the plaintiff has provided a recent medical examination detailing the status of her injuries at the current point in time (*Kauderer v Penta*, 261 AD2d 365 (2d Dept 1999). The affirmation of plaintiff's physician, Dr. Barbara C. Steele, M.D. provides that a recent examination of the plaintiff was conducted, on September 30, 2020, by Dr. Steele and sets forth the objective examination, tests, and review of medical records which were performed to support her conclusion that the plaintiff suffers from significant injuries, to wit, *inter alia*, range of motion limitations of the lumbar spine and a partial tear of the right shoulder, for which surgery was performed. Dr. Steele concludes that the injuries to plaintiff's lumbar spine and right shoulder are permanent in nature and causally related to the motor vehicle accident of February 8, 2017. Clearly, the plaintiff's experts' conclusions are not based *solely* on the plaintiff's subjective complaints of pain, and therefore are sufficient to defeat the motion (*DiLeo v Blumber, supra*, 250 AD2d 364 [1st Dept 1998]).

Additionally, despite the defendant's contentions that there is an unexplained gap or cessation in treatment (the Court of Appeals held in *Pommells v Perez*, 4 NY3d 566 [2005], that a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so), the Court finds that any gap or cessation in treatment is adequately explained by the plaintiff in her own affidavit wherein she avers that: she stopped treating "because the insurance company stopped making payments and [she] had no other way of paying for medical care." Such is a sufficient explanation (*See Jules v Barbecho*, 55 AD3d 548 [2d Dept 2008]).

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to her lumbar spine and right shoulder, plaintiff is entitled to seek recovery for *all* injuries allegedly incurred as a result of the accident (*Marte v New York City Transit Authority*, 59 AD3d 398 [2d Dept 2009]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact on "serious injury" grounds (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Accordingly, it is

ORDERED that the defendant's motion for summary judgment on "serious injury" grounds is denied.

This constitutes the decision and order of the Court.

Dated: January 29, 2021

TIMOTHY J. DUFFICY, J.S.C.