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

JENNY Y. CASTILLO,

Plaintiff,

- against -

ANHEUSER-BUSCH DISTRIBUTORS OF NEW YORK, INC. AND RAYMOND A. VOGT,

Defendants.

- x

Index No.: 716682/2017
Motion Date: 5/12/22
Motion No.: 9
Motion Seq.: 4

The following electronically filed documents read on this motion by plaintiff for an Order restoring this case to the active calendar; pursuant to CPLR 5015 and/or 2221 vacating renewing and rearguing the prior order of this Court dated March 10, 2022; and upon such relief, denying the motion for summary judgment:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 75 - 94
Affirmation in Opposition	EF 95
Affirmation in Reply	EF 96 - 97

This is a negligence action to recover damages for personal injuries allegedly sustained by plaintiff arising out of a motor vehicle accident that occurred on June 9, 2017. In the verified bill of particulars, plaintiff alleges serious injuries to her back, neck, and left shoulder.

Plaintiff commenced this action by filing a summons and complaint on November 30, 2018. Defendants joined issue by service of an answer on February 1, 2018. Thereafter, defendant moved for summary judgment on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. Plaintiff did not oppose the motion. By Short Form Order dated March 10, 2022, this Court granted defendant's summary judgment motion. Plaintiff now moves, pursuant to CPLR 5015(a), to vacate the prior Order, restore the prior motion for summary judgment, and upon restoration, deny defendants' motion.

A party seeking to vacate an order entered upon a default in opposing a motion must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion (see Dokaj v Ruxton Tower Ltd. Partnership, 91 AD3d 812 [2d Dept. 2012]; Karamuco v Cohen, 90 AD3d 998 [2d Dept. 2011]; Donovan v Chiapetta, 72 AD3d 635 [2d Dept. 2010]). The determination of what constitutes a reasonable excuse lies within the trial court's sound discretion, and if no reasonable excuse is found, the court need not consider whether meritorious opposition was sufficiently shown (see Diaz v Ralph, 66 AD3d 819 [2009]; Tribeca Lending Corp. v Correa, 92 AD3d 770, 771 [2d Dept. 2012]; Maida v Lessing's Rest. Servs., Inc., 80 AD3d 732, 733 [2d Dept. 2011]). A claim of law office failure must be supported by a detailed and credible explanation of the default at issue (see Neilson v 6D Farm Corp., 123 AD3d 676 [2d Dept. 2014]; Eastern Savings Bank, FSB v Charles, 103 AD3d 683 [2d Dept. 2013]; Henry v Kuveke, 9 AD3d 476 [2d Dept. 2004]).

In support of the motion, plaintiff submits the affidavit of Jenna Aronsky, a manager for the Law Offices of William Pager. Ms. Aronsky affirms that her office uses and relies upon a system called Saga Practice Manager, which is a case management, calendaring, and document assembly software package. Attorneys, paralegals, and calendar staff enter calendar information into Saga. This information would include the return date for motions. In or about September or October 2021, the system had suffered a continuing corruption, which had gone unnoticed until very recently. The calendaring of the prior motion and all other critical dates were erased by the system's corruption. Upon learning the problem, the office retained several software and hardware computer experts in order to attempt a recovery of deleted information. The office has been unable to retrieve the lost information. Based on such, the office defaulted and failed to oppose the prior motion. Ms. Aronsky also submits an Invoice from File Savers Date Recovery dated March 28, 2022.

In opposition to this branch of the motion, defendants contend that plaintiff failed to set forth a reasonable excuse as plaintiff's counsel was able to timely litigate other actions during the time period in which Ms. Aronsky affirms that the system was corrupted.

Upon a review of the motion papers and opposition thereto, and as public policy favors a disposition on the merits rather than on default, (see Billingly v Blagrove, 84 AD3d 848 [2d Dept. 2011]; Centennial Elevator Indus., Inc. v Ninety-Five Madison Corp., 90 AD3d 689 [2d Dept. 2011]; Dimitriadis v Visiting Nurse Service of New York, 84 AD3d 1150 [2d Dept. 2011]), this Court

finds that plaintiff's counsel has set forth a detailed and credible explanation for the default in opposing the prior motion for summary judgment (see Cazeau v Paul, 2 AD3d 477 [2d Dept. 2003]; Goldman v Cotter, 10 AD3d 289 [2d Dept. 2004]).

Regarding a potentially meritorious defense, plaintiff submits medical records and affirmations from her treating doctors to establish that she did sustain a serious injury under the Insurance Law.

Based on the above, the prior Order of this Court dated March 10, 2022 is vacated pursuant to CPLR 5015(a). The motion seeking summary judgment on the ground that plaintiff did not sustain a serious injury pursuant to Insurance Law Section 5102(d) will be determined herein.

In support of the motion for summary judgment, defendants submit the transcript of the examination before trial of plaintiff. Plaintiff testified that she did not remember whether she was confined to her bed or home following the accident. She was confined to her home following the left shoulder arthroscopy performed on October 25, 2017.

On July 23, 2017, plaintiff visited Dr. Kanter, who assessed plaintiff with lumbar and cervical radiculitis, and with left shoulder rotator cuff tear, not specified as traumatic.

On June 16, 2021, plaintiff appeared before Dr. Adam Bender for an independent neurological examination. He noted that her gait was normal with symmetric arm swing; ophthalmoscope examination was normal; there was no head, neck or spinal tenderness or palpitation; spinal curvature was normal, and all cervical and thoraco-lumbar ranges of motion were normal; no tremors or abnormal movements; reflexes were normal; vibration and position sensation were normal; and coordination was normal. Dr. Bender noted that plaintiff had a history of multiple preexisting injuries; neurological injuries if any were relatively minor given that plaintiff denied hitting her head and had no head or neck pain at the time; MRI's showed degenerative disk disease, a preexisting condition which could not have resulted from the subject incident; no neurological problem casually related to the incident; no disability due to any neurological problem; and that plaintiff is able to carry on her usual and daily activities without limitation.

On June 15, 2021, plaintiff appeared before Dr. Ramesh Gidumal for an orthopedic independent examination. On his examination, there was no evidence of a left shoulder injury– her

range of motion was intact, no bruising, swelling, etc. Dr. Gidumal also found that plaintiff was found to have impingement syndrome, which he noted was not a traumatic condition, but rather a degenerative, congenital, or developmental one. Accordingly, he concluded there was no evidence of traumatic injury occurring from the accident on June 9, 2017.

Defendants' counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained 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 function or system; and that plaintiff's alleged injuries are not causally related to the accident. Counsel also contends that plaintiff, who missed only a week of work following the accident and who stopped treating her alleged injuries as early as January, 2018, 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 to defendants' motion for summary judgment, plaintiff submits her own affidavit, affirming that she was taken from the scene of the accident by ambulance to Mount Sinai Queens. At the hospital, she was examined and given tests and medication. The examining physicians noted that she was experiencing pain. She had limitations in some of her ranges of motion because of pain from the accident. She was prescribed medications for pain and released. Her pain did not resolve, but progressed and became worse. She sought treatment with Miriam Kanter, M.D, and was prescribed a program of physical therapy and chiropractic treatment. After about four months of therapy, her condition stabilized, and she reached a point in her physical condition where therapy was simply not helping. On October 25, 2017, she underwent left shoulder arthroscopy. To date, she still suffers some pain everyday as a result of the accident. She continues to experience numerous limitations in her everyday life. She has not regained full range of motion or full function in her shoulder. She is unable to do necessary heavy physical work. She still has neck, back, and left shoulder pain. Carrying and lifting heavy objects causes pain. She can no longer exercise as she used to. She has to stretch every morning before getting dressed. She experiences difficulty with household chores. Regarding her prior accidents, she had a slip and fall accident on March 6, 2015, but did not injure her shoulder in that accident. She did sustain injuries to her neck and back in the slip and fall accident, which were exacerbated and aggravated in

the subject accident. Before the subject accident, she was fully recovered from the injuries she had previously sustained, and was completely pain-free and asymptomatic. She was also able to function normally and without pain.

Plaintiff submits the records from Miriam Kanter, M.D. Dr. Kanter first examined plaintiff on July 24, 2017. Plaintiff complained of left shoulder, neck, and low back pain. Range of motion testing revealed decreased ranges of motion in plaintiff's cervical spine, lumbar spine, and left shoulder. Plaintiff continued to treat with Dr. Kanter through November 29, 2017. Dr. Kanter noted continued restricted range of motion in plaintiff's cervical spine, lumbar spine, and left shoulder.

The Operative Report from Pamela Melissa Levine, M.D. indicates that plaintiff underwent a left shoulder arthroscopy on October 28, 2017. At a follow-up visit, Dr. Levine indicated that plaintiff may return to work full-duty on November 30, 2017. Plaintiff had improving range of motion in her shoulder.

Mark Kostin, M.D. submits an affirmation, affirming that he recently examined plaintiff on March 22, 2022. Dr. Kostin reviewed plaintiff's reports and records, which confirmed and corroborated his own independently reached conclusions. The subject accident caused plaintiff's neck, back, and left shoulder injuries. Plaintiff's left shoulder injury and surgery were caused directly by the subject accident. The subject accident also caused injuries superimposed upon the previous condition of her spine. Upon examination, plaintiff had limited range of motion in her cervical spine, lumbar spine, and left shoulder. The injuries are permanent in nature, and plaintiff suffers from permanent moderate partial disability with permanent limitations. The permanent residual of the injury cannot be completely resolved by way of further palliative medical intervention.

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]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, plaintiff raised triable issues of fact as to whether she sustained a serious injury by submitting her medical records and physician affirmations indicating that she sustained injuries as a result of the subject accident, finding that she had significant 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]).

As such, plaintiff demonstrated issues of fact as to whether she sustained serious injuries at least under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]). Moreover, based on Dr. Kostin's conclusion that plaintiff has a permanent moderate partial disability with permanent limitations and plaintiff's own testimony that she still is limited in certain activities, issues of fact remain as to the 90/180-day category.

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

ORDERED, that the motion by plaintiff for an order vacating this Court's prior Order dated March 10, 2022 is granted, and this matter is restored to active status; and it is further

ORDERED, that defendants' motion for summary judgment on the ground that plaintiff did not sustain serious injuries pursuant to Insurance Law Section 5102(d) is denied.

Dated: May 12, 2022
Long Island City, NY

FILED

5/17/2022
11:49 AM

COUNTY CLERK
QUEENS COUNTY

Robert J. McDonald

ROBERT J. McDONALD
J.S.C.