SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

----------X

JAHSHAWNA MCPHERSON,

Plaintiff,

- v -

ANNE LI, THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, ELLIS DAVIAN

Defendants.

----------X

INDEX NO. 154833/2015

MOTION DATE 12/31/2021, 01/10/2022

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 53, 55, 57, 59, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 103, 105, 106

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 54, 56, 58, 60, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 107, 108

were read on this motion to/for JUDGMENT - SUMMARY.

Pending before the Court is a motion filed by defendant Ellis Davian ("Davian") seeking summary judgment in Davian's favor, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, and dismissing plaintiff's complaint on the grounds that the injuries plaintiff allegedly sustained as the result of a motor vehicle accident on June 17, 2014, fail to meet the "serious injury" threshold requirement of Section 5102(d) of the Comprehensive Motor Vehicle Insurance Reparations Act of the State of New York.

Defendants, Anne Li, the City of New York, and the New York City Fire Department (collectively "the City defendants"), also filed their own summary judgement motion, (Motion #003), seeking dismissal of the complaint, pursuant to CPLR 3212, and joined in the reasons asserted by defendant Davian in his motion.

The complaint alleges that on June 17, 2014, plaintiff was a passenger in a vehicle that was owned and operated by defendant Davian when suddenly, and without any notice or warning, the motor vehicle operated by defendant Anne Li and owned by the City defendants, struck Davian's vehicle, causing plaintiff to sustain severe, grievous and permanent injuries. Plaintiff contends that the collision and her resulting injuries were caused wholly and solely by defendants without any contributory negligence on the part of plaintiff.

In her Bill of Particulars, plaintiff specifically claims that her injuries include: "disc bulges at T6-T9, increase of thoracic kyphosis, disc bulges at L5-S1 level where disc material is seen to approximate the ventral epidural fat, diffuse soft tissue edema is seen overlying the medial and lateral malleoli (ankle), there is fluid in the tension sheath of the flexor hallucis longus tendon at the level of the malleoli consistent with tenosynovitis (left ankle), diffuse soft tissue edema is seen overlying the medial lateral malleoli (right ankle) along with tibiotalar joint effusion (right ankle), medial suprapatellar plicae (left knee), joint effusion (left knee) and trace joint effusion (right knee"). (NYSCEF Doc. No. 15).

In her "Supplemental Bill of Particulars" plaintiff further alleges that her injuries include: "disc displacement, radiculopathy in the cervical and lumbar spine, intervertebral disc displacement in the lumbar and lumbosacral spine and bursitis of the right and left knee." (NYSCEF Doc. No. 35).

CONCLUSIONS OF LAW

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" *(Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" *(Zuckerman v City of New York*, 49 NY2d 557, 560, [1980]).

In his summary judgment motion, defendant Davian contends that plaintiff failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law.

Section 5102 (d) of the Insurance Law defines “serious injury” as: “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.”

A moving defendant must first establish a *prima facie* entitlement to summary judgment by submitting evidence demonstrating that plaintiff did not sustain a serious injury arising from an accident involving the parties. Once this is established, the burden then shifts to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law.

Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint. *See* Gaddy v Eyler, 79 NY2d 955 (NY Ct, of Appeals); Thompson v Abbasi, 15 AD3d 95 (1st Dept 2005).

Courts have continually held that the question of whether a plaintiff has established a *prima facie* case for a "serious injury," as described in section 5102 (d), remains an issue of law (Licari v Elliott, 57 NY2d 230, 235 [1982]). Claims of "serious injury" are to be supported by objective medical evidence demonstrating a significant physical limitation resulting from the accident (Pommells v Perez, 4 NY3d 566, 574 [2005]).

In support of his motion, defendant Davian attached the report of Orthopedist, Dr. Greg Chiaramonte (NYSCEF Doc. No. 44), which is based on an independent medical examination ("IME") of plaintiff on October 1, 2020. According to Dr. Chiaramonte's report, plaintiff possessed a "normal range of motion of the thoracic and lumbar spine, right and left knee, and right and left ankle/foot" (*id.*). Dr. Chiaramonte concluded that "there were no objective findings of permanency or residuals" (*id).* Dr. Chiaramonte also found that there was no need for orthopedic treatment including physical therapy and that plaintiff could work without limitations. Dr. Chiaramonte also concluded that plaintiff was able to perform her activities of daily living as she was doing prior to this accident.

Based on Dr. Chiaramonte's report, this court finds that defendant Davian has made a *prima facie* showing of entitlement to summary judgment on the issue of serious injury. The burden now shifts to plaintiff.

In order to satisfy her burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that to establish serious injury in a negligence action arising from a motor vehicle accident

plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

In opposition plaintiff argues that the defendants' motions should be denied in their entirety because plaintiff suffered a serious injury as defined by Section 5102(d) of the Insurance Law. Specifically, plaintiff claims that her injuries prevented her from performing substantially all of her usual and customary daily activities for 90 out of 180 days and that defendants have not met their burden in showing that plaintiff does not meet the serious injury threshold.

In support of her argument, plaintiff submitted the following certified medical records:

The report of Dr. Ednan S. Sheik who examined plaintiff on September 11, 2014, following her accident (NYSCEF Doc. No. 68). Dr. Sheik found a decrease of range of motion to both the cervical spine, thoracic and lumbar spine. Dr. Sheik also performed neurological and orthopedic tests which reflected serious medical concerns which the doctor opined that "the accident is the causative factor of the patient's symptomatology" (*Id.*).

The report of Alex Khait, a licensed chiropractor who examined plaintiff on September 8, 2014, following her accident (NYSCEF Doc. No. 69). Dr. Khait found a decrease of range of motion to both the cervicothoracic spine, and the lumbopelvic spine (*Id.*).

Multiple MRI's were performed on plaintiff on September 23, 2014, by board certified radiologist Allan Rothpearl, whose report reflects "disc bulges to the thoracic and lumbosacral spine, effusion to the right and left knee, and edema to right and left ankle" (NYSCEF Doc. No. 70).

The report of Dr. Michael K.O., a licensed physician who also examined plaintiff diagnosed her with "lumbosacral neuritis radiculopathy, lumbar disc displacement, lumbar facet syndrome and subsequently with minimal improvement of pain relief." (NYSCEF Doc. No. 71).

Dr. K.O. performed a lumbar epidural steroid on March 12, 2015 and concluded that "no preexisting conditions exist that affects the causality" and opined that "there is a direct causal relationship between the accident and the patient's current injuries." (*Id.*).

In addition to the above reports, plaintiff submitted additional certified medical records of doctor's visits and testing which reflected continued limitations. Dr. McCulloch, an orthopedic specialist, examined plaintiff on March 2, 2015 revealing "traumatic low back pain and disc bulge at L5-S1 with recommended PT and anti-inflammatories" (NYSCEF Doc. No. 72). During a follow-up visit on July 6, 2015, plaintiff was advised to remain under care of Dr. Gerling a board-certified spine surgeon (*Id.*).

On July 15, 2015, plaintiff met with Dr. Gerling, an orthopedic spine surgeon, who found "occipital cervical headache, restricted range of motion with pain and a sign was reproducing pain to the upper extremities" (NYSCEF Doc. No. 73).

Moreover, on November 2, 2016, plaintiff was seen by Dr. Ahmed, a pain management specialist, who recommended continued physical therapy, lumbar injections and medications. Dr. Ahmed Dr. Ahmed performed neurological and range of motion tests that showed limitations in the cervical and lumber spine and in the left knee and ankle. Dr. Ahmed also opined that to a reasonable degree of certainty that "plaintiff's conditions were causally related to the accident." (NYSCEF Doc. No. 74).

On July 18, 2019, plaintiff was also seen by Dr. Kosharskyy from BL Pain Management PLLC, who similarly found that plaintiff suffered from "limited range of motion involving rotation, lateral bending, extension'" and "limited range of motion of lumbar spine and pelvis, especially with flexion (pain)" (NYSCEF Doc. No. 75).

Here, plaintiff provides amble medical evidence of her ongoing treatment after the accident, and limited range of motion to raise triable issues of fact, precluding summary judgment. Importantly, this court notes that Dr. Chiaramonte's report was based on an examination conducted six years after the alleged incident, whereas the reports of the medical examiners provided by plaintiff were closer in time to the alleged incident. Defendants' motion for summary judgment seeking dismissal of the complaint is denied on this ground. *See Hayes v. Gaceur* 162 A.D.3d 437 (1st Dep't 2018) (finding that issues of fact exist where plaintiff claimed cervical spine, shoulder, and left knee injuries through the report of her treating orthopedic surgeon as the physician examined plaintiff the day after the accident and on several occasions thereafter. The physician found limitations in range of motion ("ROM") of the cervical spine the day after the accident and on recent examination; he examined plaintiff's shoulders and left knee within a month after the accident and found limitations in ROM at the initial examination and recently. In addition, he personally reviewed the MRI examinations of plaintiff's cervical spine, shoulders and left knee, and opined that they revealed objective evidence of injuries caused by the accident, rather than by degeneration).

The burden is on defendants to show that plaintiff was not prevented from performing her usual activity for 90/1980 days. Defendants assert that plaintiff failed to explain her gap in treatment and that cessation of all treatment interrupts the chain of causation and is fatal to her claims of permanency.

With regard to the 90/180 claim, plaintiff testified at her deposition that she was unable to get out of bed on almost every other day during the six-month period after the accident; that she was confined to the bed for four days immediately following the accident; and was confined to her home for approximately fifteen (15) additional days after the accident.

Specifically, plaintiff averred:

> Q: Okay. Now I understand that your pregnancy and giving birth to your child might complicate this question, so if you need an explanation, please let me know. But solely as a result of the accident, was there a period of time afterwards where you physically couldn't get out of bed unless you needed to use the toilet?
>
> A: Yes.
>
> Q: And what period of time was that?
>
> A: It's still happening now. I have extreme back pain, ankle pain, knee pain.
>
> Q: Okay. So let's start with the first six months after the accident.
>
> A: Uh-huh.
>
> Q: During that time period, how many days or weeks were there where you physically were unable to get out of bed unless you needed to use the toilet?
>
> A: Almost every other day.
>
> [. .]
>
> Q: Okay. What do you mean by "almost every other day"?
>
> A: I still feel the pain. It's been ongoing since the accident.

At her EBT, plaintiff testified that she was gainfully employed prior to the accident and she was out of work for almost a year after the accident. While she did not testify that her reason for departure was due solely to the accident, there is evidence on this record that plaintiff has been prevented from performing her usual and customary daily activities, without pain, which include jogging, going to the gym, walking and doing household chores that require lifting heavy objects, doing laundry and carrying groceries.

CONCLUSION

For all of the reasons set forth herein, it is hereby

ORDERED that defendants' motions for summary judgment (Motion #002 and Motion #003) are DENIED

This constitutes the Decision and Order of the Court.

1/10/2023
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**