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

JUANA M. ORTIZ,

Plaintiff,

- against -

A ONE ANTENNA SERVICES INC., and "JOHN DOE,"

Defendants.

- x

Index No.: 14021/09

Motion Date: 1/12/2012

Motion No.: 29

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by defendants, A ONE ANTENNA SERVICES INC., and "JOHN DOE," for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of JUANA M. ORTIZ on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memorandum of Law	1 - 5
Affirmation in Opposition-Affidavits-Exhibits	6 - 10
Reply Affirmation	11 - 12

This is a personal injury action in which plaintiff, JUANA M. ORTIZ, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on April 15, 2008 at the intersection of 14th Avenue and 149th Street in Queens County, New York.

The plaintiff commenced this action by filing a summons and complaint on May 28, 2009. Issue was joined by service of defendant's verified answer dated November 2, 2009.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Teresa Campano, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of orthopedic surgeon, Dr. Robert Israel and neurologist, Dr. Maria Audrie De Jesus; and a copy of the transcript of the examination before trial of plaintiff JUANA M. ORTIZ.

In her verified bill of particulars, plaintiff, age 47, states that as a result of the accident she sustained, inter alia, disc herniations at L3-L4 and L4-L5 as well as disc bulges at C4-C5, C5-C6 and C6-C7. At the time of the accident, plaintiff was employed as a house cleaner. She testified at her examination before trial that she missed one week from work as a result of the accident. She states in her bill of particulars that she was confined to bed for 1 week following the accident and confined to her home for two weeks following the accident.

Plaintiff contends that she sustained a serious injury as defined in Insurance Law § 5102(d)in that she sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

Dr. Robert Israel, a board certified orthopedic surgeon, retained by the defendants, examined Ms. Ortiz on June 7, 2011. Plaintiff presented with pain in her neck, upper back, lower back and right shoulder. Dr. Israel performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, thoracic spine, lumbar spine, right and left shoulders and right foot and right ankle. He concluded that the plaintiff had a resolved sprain of the cervical spine, resolved sprain of the lumbar spine, resolved sprain of the thoracic spine, resolved sprain of the bilateral shoulders and resolved sprain of the right foot. He states that based upon his examination, the plaintiff has no disability as a result of the accident in question and that she is capable of work activities.

Ms. Ortiz, was examined by Dr. Maria Audrie De Jesus, defendant's neurologist on May 23, 2011. In her affirmed report, she states that the plaintiff presented with complaints of occasional lower neck pain radiating to the right leg. Dr. De Jesus performed a neurological and objective range of motion exam and found that the plaintiff exhibited full range of motion of the neck, thoracic spine, and lumbar spine. She diagnosed the plaintiff as "status post cervical and lumbar sprain/strain."

In her examination before trial held on March 30, 2011, the plaintiff testified that after the accident she sought treatment with Dr. Paez and Dr. Aleman at the clinic in Rego Park. She went for physical therapy and chiropractic care for her back and right leg approximately twice a week for over six months. After her physical therapy ended she was treated by Dr. Rodriguez for pain and she was also treated with further chiropractic care at Queens Hands On Physical Therapy, P.C. for about one month. Her last treatment for this accident was in 2009. She had no treatment in 2010 and no treatment in 2011. Plaintiff testified that she still experiences pain at certain times as a result of this accident in her lower back area and right leg.

Defendant's counsel contends that the medical reports of Drs. De Jesus and Israel as well as the deposition testimony of the plaintiff are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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.

In opposition, plaintiff's attorney Elliot Lewis, Esq., submits his own affirmation as well as the unsworn statement of the plaintiff; the affidavit of chiropractor Dr. Emilio Paez; the affirmed medical report of Dr. Aleman and the unsworn reports of radiologist Mark Shapiro and unsworn medical records from Altamira Medical Center.

Dr. Aleman states that he examined the plaintiff on April 16, 2008 at Altamira Medical one day after the accident. She presented with neck pain, middle and lower back pain, right foot pain, right ankle pain and chest pain. Dr. Aleman's objective and quantified range of motion testing established that one day after the accident the plaintiff had significant loss of range of motion in the cervical spine,

lumbar spine and right ankle. He stated that the plaintiff's symptoms were causally related to the accident and referred her for MRIs and chiropractic care.

Dr. Paez, a chiropractor states in his affidavit dated December 7, 2011, that he reviewed the records of his office which indicated that the plaintiff was first examined at Altamira Medical on April 16, 2008 one day after the accident in question. Objective and comparative range of motion testing on that date showed that the plaintiff had significant range of motion limitations of the cervical spine and lumbar spine. He states that the plaintiff treated in his office from April 2008 until August 2008 when she stopped treating because her no fault insurance refused to pay for the additional treatment and she was not able to pay for it herself. In addition Dr. Paez states that plaintiff had reached maximum improvement.

Dr. Paez also states that he reviewed the unaffirmed MRI reports of Dr. Shapiro concerning the plaintiff's lumbar spine and cervical spine which indicated that the plaintiff had disc herniations at L3-L4 and L4-L5 as well as disc bulges at C4-C5, C5-C6 and C6-C7.

Dr. Paez states that Ms. Ortiz was last seen in his office on September 9, 2011 by chiropractor, Dr. Richard Filipkowski. Dr. Filipkowski's notes are included with the plaintiff's submissions but the notes are not in affidavit form. According to Dr. Paez, Dr. Filopkowski's range of motion testing indicated that the plaintiff still exhibited significant range of motion limitations of the cervical and lumbar spines. Dr Paez states that based upon Dr. Filipkowski's report his opinion was that the injuries sustained by the plaintiff were causally related to the accident of April 15, 2008 and are permanent and significant in nature.

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]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' 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, the proof submitted by the defendants, including the affirmed medical reports of Drs. Israel and Maria Audrie De Jesus was sufficient to meet its prima facie burden by demonstrating 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 Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]).

In opposition, the plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 006]). Although the affirmed report of Dr. Aleman regarding his April 16, 2008 examination was sufficiently contemporaneous with the accident and demonstrated that the plaintiff sustained injuries in the accident (see Perl v Meher, 2011 NY Slip Op 8452 [2011]), the plaintiff failed to submit a medical report in admissible form regarding a recent examination of the plaintiff. Here, Dr. Paez submits an affidavit in which he provides an opinion which is based on his review of the findings of Dr. Filipkowski's examination of September 9, 2011. The plaintiff has not provided an affidavit from Dr. Filipkowski indicating the results of his examination which was relied upon by Dr. Paez.

The court finds that the unaffirmed medical records and reports submitted by the plaintiff in opposition to the motion for summary judgment are not in proper evidentiary form and therefore lack probative value (see Claude v Clements, 301 AD2d

554 [2d Dept. 2003]). Further, as Dr. Paez states that his opinion is based on his review of the unsworn MRI reports prepared by other doctors and the unsworn medical records and reports of other doctors such medical evidence is inadmissible and rendered his affirmation without probative value in opposing the motion (see Casiano v Zedan, 66 AD3d 730 [2d Dept. 2009]; Gonzales v Fiallo, 47 AD3d 760 [2d dept. 2008]; Marziotto v Striano, 38 AD3d 623 [2d Dept. 2007]; Iusmen v Konopka, 38 AD3d 608 [2d Dept. 2007]; Sammut v Davis, 16 AD3d 658 [2d Dept. 2005]; Mahoney v Zerillo, 6 AD3d 403[2d Dept. 2004] [plaintiff's physician impermissibly relied upon unsworn reports of other doctors]; Friedman v. U-Haul Truck Rental, 216 AD2d 266 [2d Dept. 1995]).

Without an admissible medical report indicating the plaintiff's current physical condition, the plaintiff's submissions were insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury (see Harris v Ariel Transp. Corp., 55 AD3d 323[2d Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barrzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005][in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]; Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]).

With respect to the 90/180 category, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained in the subject accident rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569[2d Dept. 2000]). In this regard, the plaintiff admitted in her deposition testimony that she missed only one week from work as a result of the subject accident (see Bleszcz v Hiscock, 69 AD3d 890 [2d Dept. 2010]).

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

ORDERED, that the defendant's motion for an order granting summary judgment dismissing plaintiff's complaint is granted.

Dated: January 26, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.