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

SHARON SCHOLFIELD,

Plaintiff,

- against -

POLIN RAHMAN,

Defendant.

- x

Index No.: 23268/2010

Motion Date: 03/01/12

Motion No.: 32

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by defendant, POLIN RAHMAN, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of SHARON SCHOLFIELD 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	1 - 5
Affirmation in Opposition-Affidavits-Exhibits	6 - 10
Reply Affirmation	11 - 12

This is a personal injury action in which plaintiff, SHARON SCHOLFIELD, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on June 11, 2010, at or near the intersection of Edgerton Boulevard and Wexford Terrace, Queens County, New York.

At the time of the accident, the plaintiff, age 60, was going home from her job at Hillcrest High School. Her vehicle was stopped for five to ten seconds at a red traffic signal on Wexford Terrace at the intersection of Edgerton Road when her vehicle was struck in the rear by the vehicle owned and operated by the defendant. The plaintiff commenced this action by filing a

summons and complaint on September 14, 2010. Issue was joined by service of defendant's verified answer dated October 4, 2010.

Defendant now moves 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, William B. Stock, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of radiologist, Dr. Jessica Berkowitz; orthopedic surgeon, Dr. Robert Israel, and neurologist, Dr. Ravi Tikoo; a copy of the transcript of the examination before trial of plaintiff, Sharon Scholfield; and a claims search report of the plaintiff's prior accidents indicating prior accidents on March 18, 1994, June 25, 2003 and July 27, 2009.

In her verified Bill of Particulars, plaintiff states that as a result of the accident, she sustained, inter alia, a disc bulge at C6-C7 and disc herniations at L3-L4, L4-L5 and L5-S1 with impingement. At the time of the accident, plaintiff was employed as a school security aide at Hillcrest High School.

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 defendant, examined Ms. Scholfield on June 20, 2011. Plaintiff presented with pain to the neck, lower back, left hip and left arm. 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, lumbar spine, right and left shoulder and left hip. He concluded that the plaintiff had a resolved sprain of the cervical spine and resolved sprain of the lumbar spine. 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 without restriction.

Ms. Scholfield, was examined by Dr. Tikoo, defendant's neurologist on May 25, 2011. In his affirmed report, he states that she presented with complaints of low back, left leg and left hip pain. Dr. Tikoo performed a neurological exam and diagnosed the plaintiff with a history of lumbosacral strain and a history of soft tissue injuries to the left leg and left hip. Based upon his examination, he concludes that the neurological examination of the plaintiff was essentially normal. The report states that "despite his subjective complaints, there were no objective findings to substantiate these complaints. Sharon does not need any further treatment or diagnostic testing" Dr. Tikoo also stated that the plaintiff is not disabled from a neurological basis and it was his opinion that the plaintiff did not sustain a permanent injury.

Dr. Jessica F. Berkowitz, a radiologist reviewed the MRI studies of the plaintiff's cervical spine and lumbar spine. She found a minimal disc bulge at C5-C6 and L1-L2, L3-L4 and L4-L5 which she states are all chronic and degenerative in origin. She states that her examination revealed no evidence of acute traumatic injury to the lumbar spine and no causal relationship between the plaintiff's accident and the findings on the MRI examinations.

Defendant's counsel contends that the medical reports of Drs. Berkowitz, Israel and Tikoo 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 her examination before trial, taken on April 25, 2011, plaintiff testified that she left the scene by ambulance and was taken to the emergency room at Long Island Jewish Hospital where she was treated and released the same day. She stated that she was confined to her home and out of work for two weeks. Two days after the accident she sought treatment with Dr. Hannanian and Dr. Reddy for pain in her lower back, left leg and left shoulder. She was treated with acupuncture and physical therapy. She was continuously treated for a year at the rate of two times per week. Plaintiff testified that she was involved in a prior automobile accident in 2003 in which she injured her lower back.

She was also involved in a prior motor vehicle accident in July 2009. She states that as a result of the latest accident she has problems walking, sitting and cleaning.

In opposition, plaintiff's attorney Francesco Pomara, Esq., submits his own affirmation as well as the affidavits of plaintiff Sharon Scholfield and Drs. Hannanian, Reddy and Rizzuti.

In her affidavit, dated January 23, 2012, plaintiff states that on June 11, 2010, her vehicle was hit in the rear by the defendant's vehicle while she was stopped at a red traffic signal. She states that the impact was very hard causing injuries that required her to seek treatment with several physicians. She states that she was involved in prior motor vehicle accidents on March 18, 1994, June 25, 2003 and July 27, 2009. She states that despite the prior accidents she was pain free and leading a normal lifestyle including going to work everyday. She states that following the subject accident she stayed home from work for two weeks and returned to work in the same capacity although she could not sit or stand for too long.

Dr. Hannanian states in his affirmed report dated January 23, 2012, that he first examined the plaintiff on June 16, 2010. His examination of the plaintiff on that date indicated significant limitations of range of motion of the cervical and lumbar spines. He referred the plaintiff for MRI studies and for physical therapy for treatment of pain in her back, neck and upper and lower extremities. After reviewing the MRI reports he determined that the disc pathology was causally related to the subject accident and that the plaintiff's injuries are significant and permanent in nature. Dr. Hannanian states that he is aware that the plaintiff was involved in prior accidents but that her symptoms from injuries sustained in the prior accidents had abated prior to the subject accident. Therefore, he states that the prior accidents had no causal relation to the injuries sustained during the subject accident. Dr. Hannanian re-evaluated the plaintiff on December 5, 2011, at which time he performed objective range of motion testing. At that time he found that the plaintiff still exhibited significant limitations of range of motion of the cervical spine and lumbar spine.

Dr. Reddy submits an affirmation stating that he examined the plaintiff on June 16, 2010, and using objective testing, found that she had limitations of range of motion of the cervical spine and lumbar spine. He subsequently treated her with physical therapy up to the present time one to three times per week. He

found her disc pathology to be causally related to the accident and to be permanent and not subject to resolution without surgery. On reevaluation in January 2012, he found the plaintiff to still have significant limitations of range of motion of the cervical and lumbar spines. He states that in his opinion the plaintiff will have a 15-20% permanent restriction of range of motion and function in the lower back and 10-15% permanent restriction of range of motion and function in her neck.

The affirmation of Dr. Richard Rizzuti, a radiologist, states that he reviewed the MRI studies of the plaintiff and found disc herniations at L3-L4, L4-L5 and L5-S1 and disc bulge at C6-C7 all of which impinge on the spinal canal.

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 defendant, including the affirmed medical reports of Drs. Israel, Tikoo and Berkowitz 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]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Hannanian, Reddy and Rizzuti attesting to the fact that the plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury 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 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

In addition, both of the defendant's treating doctors acknowledged and adequately addressed the significance of the fact that the plaintiff was involved in prior accidents and therefore, their conclusions that the plaintiff sustained significant limitations of a permanent nature as a result of the subject accident are not merely speculative (see Keum Lee Jeong v Imperial Contract Cleaning, Inc., 63 AD3d 795 [2d Dept. 2009]; cf. Yun v. Barber, 63 AD3d 1140 [2d Dept. 2009]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

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 denied.

Dated: March 13, 2012
Long Island City, N.Y.

_____

ROBERT J. MCDONALD
J.S.C.