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

ELVIA BUNAY a/k/a ROSA ELVIA BUNAY,

Plaintiff,

- against -

FELIX DELGADO,

Defendant.

- x

Index No.: 19261/2010

Motion Date: 04/05/12

Motion No.: 6

Motion Seq.: 1

The following papers numbered 1 to 17 were read on this motion by defendant, FELIX DELGADO, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of ELVIA BUNAY 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 - 7
Affirmation in Opposition-Affidavits-Exhibits	8 - 13
Reply Affirmation	14 - 17

This is a personal injury action in which plaintiff, ELVIA BUNAY, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on November 18, 2009, at or near the intersection of Hart Street and Knickerbocker Avenue, Kings County, New York.

At the time of the accident, the plaintiff, age 21, had just gotten off a bus and was crossing Hart Street, heading to work. After walking about 3 - 5 feet she was struck in the right knee by the vehicle operated by the defendant. She left the scene in an ambulance that transported her to Wycoff Hospital.

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, Matthew Lyons, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of radiologist, Dr. David A, Fisher; orthopedic surgeon, Dr. Gregory Montalbano, the surgical and medical reports of orthopedic surgeon, Dr. Ernesto Seldman; and a copy of the transcript of the examination before trial of plaintiff, Elvia Bunay.

In her verified Bill of Particulars, plaintiff states that as a result of the accident, she sustained, inter alia, post-traumatic chondromalacia patella of the right knee requiring arthroscopic surgery, posterior disc protrusion at L5-S1, and a herniated and protruded disc at L4-L5. At the time of the accident, plaintiff was employed as a pedicurist at Anny Nail Salon and states that she has been disabled and incapacitated from employment up to the present time.

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. Fisher reviewed the MRI studies of the plaintiff's right knee and lumbar spine and in affirmed reports, dated March 26, 2011, states that there was evidence of a bone contusion of the medial femoral condyle caused by recent traumatic injury. With respect to the lumbar spine MRI, he states that the study was normal with the exception of mild dehydration of the L5-S1 disc caused by mild degeneration.

Dr. Gregory Montalbano, a board certified orthopedic surgeon, retained by the defendant, examined Ms. Bunay on August 12, 2011. Dr. Montalbano performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine. With

respect to the lumbar spine, he found a 50% loss of range of motion in flexion. Dr. Montalbano also found a significant loss of range of motion in flexion of the right knee of 37%. He states that the plaintiff complained of pain throughout the examination. With respect to the right knee, Dr. Montalbano finds that plaintiff did not sustain an substantial or permanent injury but rather a bone contusion as a result of the accident. With respect to the lumbar spine his opinion was that she had a pre-existing condition of degenerative disc disease affecting her lumbar spine which was unrelated to the accident in question. He states that plaintiff's objective abnormal findings as well as the diagnostic studies performed, complaints of pain were subjective and under her control. He states in his opinion the loss of range of motion is inconsistent with the lack of objective abnormal findings.

Defendant also submits the records of plaintiff's treating orthopedist, Dr. Seldman who found that upon his examination three weeks post-accident plaintiff displayed pain in range of motion of the cervical spine, lumbosacral spine and right knee. On March 24, 2010, Dr. Seldman performed arthroscopic surgery in which in found a lesion on the medial facet of the patella. On June 21, 2011, Dr. Seldman examined the plaintiff who exhibited full range of motion of the lumbosacral spine and full range of motion of the right knee.

In her examination before trial, taken on May 17, 2011, the plaintiff testified that she began treatments with Dr. Seldman approximately one week after the accident. She stated that she continued physical therapy at his office for approximately one year. She underwent arthroscopic surgery on her right knee on March 24, 2010. After the surgery she went for physical rehabilitation treatments at Physical Medicine and Rehabilitation. She stated that she never returned to her job as a pedicurist because she could not bend her knee and because her back hurt. Following the accident she stayed home for fourteen months during which time she was confined to bed for 2 weeks. She stated that she still has constant pain in her back and knee preventing her from working.

Defendant's counsel contends that the medical reports of Drs. Fisher and Montalbano as well as plaintiff's own medical records 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. Counsel contends that the records of her own treating physician showed full range of motion of the knee indicating that the restriction in range of motion which she exhibited during Dr. Montalbano's examination are explained by a lack of subjective cooperation at defendant's physical examination.

In opposition, plaintiff's attorney Marvin I. Meyerson, Esq., submits his own affirmation as well as the affidavits of plaintiff Elvia Bunay, and the affirmed medical records of Drs. Seldman, Schwartz, Polavarapu, Khakhar and Gelber.

In her affidavit, dated March 19, 2012, plaintiff states that while crossing Hart Street on November 18, 2009 she was struck by the motor vehicle operated by defendant. The vehicle struck her on her right knee and leg knocking her to the ground and injuring her knee, neck and back. She was first treated by Dr. Seldman and continued physical therapy with him through October 20, 2010. In March 2010, Dr. Seldman performed arthroscopic surgery on plaintiff's right knee. She states that she was also treated by Dr. Khakhar in January and February 2011 and then again received treatments with Dr. Seldman from April through June 2011. She was re-examined by Dr. Seldman in January 2012.

Dr. Seldman, an orthopedist, states in his affirmation dated March 16, 2012, that he first examined plaintiff on December 7, 2009 with regard to her accident of November 18, 2009. At that time she displayed pain on range of motion testing of the cervical spine, lumbosacral spine and right knee. Her MRI of December 10, 2009 showed bone contusion of the right knee and herniated disc at L5-S1. He performed arthroscopic right knee surgery in March 2010. In April 2010 plaintiff had restricted range of motion of the knee but in May 2010, October 2010 and June 2011 he states that she had full range of motion of the knee. However, in a re-examination of January 2012, plaintiff had significant limitations of range of motion of the right knee and lumbosacral spine. Dr. Selden states that the condition of the right knee had deteriorated with a worsening of the chondromalacia condition. He concludes that the plaintiff's injuries were causally related to the motor vehicle accident and that her impairments are significant and permanent.

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]).

As stated above, the affirmed medical report of the defendant's examining orthopedist, Dr. Montalbano, relied on by the defendant, clearly set forth that upon his examination of the defendant he found significant limitation in the range of motion of the defendant’s lumbar/thoracic spine and right knee. Therefore, Dr. Montalbano’s report is insufficient to eliminate all triable issues of fact (see Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736 [2d Dept. 2010]; Leopold v New York City Tr. Auth., 72 AD3d 906 [2d Dept. 2020]; Catalan v G & A Processing, Inc., 71 AD3d 1071[2d Dept. 2010]; Croyle v Monroe Woodbury Cent. School Dist., 71 AD3d 944 [2d Dept. 2010]; Kim v Orourke, 70 AD3d 995 [2d Dept. 2010]; Kjono v Fenning, 69 AD3d 581[2d Dept. 2010]; Loor v Lozado, 66 AD3d 847 [2d Dept. 2009]). While Dr. Montalbano explained that the plaintiff’s decreased range of motion is subjective and under the control of the plaintiff and that the disc injury was pre-existing and degenerative, his conclusion with respect to the limitations of the right knee are speculative

as he failed to explain or substantiate, with any objective medical evidence, the basis for his conclusions that she had fully recovered and the limitation was self- controlled by the plaintiff(see Iannello v Vazquez, 78 AD3d 1121 [2d Dept. 2010]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept. 2010]; Quiceno v Mendoza, 72 AD3d 669 [2d Dept. 2010]; Bengaly v Singh, 68 AD3d 1030 [2d Dept. 2009]; Moriera v Durango, 65 AD3d 1024 [2d Dept. 2009]). Thus, the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact(see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851[1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

In any event, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of plaintiff's treating orthopedist, Dr. Selden, attesting to the fact that the plaintiff had significant limitations in range of motion of the lumbar spine and right knee 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 she 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]).

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: April 30, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.