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

DOREEN NURSE,

Plaintiff,

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS CO., and "JOHN DOE," Person Intended to be the Operator of Defendant's bus

Defendant.

- x

Index No.: 16445/2009

Motion Date: 02/07/13

Motion No.: 5

Motion Seq.: 2

The following papers numbered 1 to 16 were read on this motion by defendants MTA BUS COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY, for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the plaintiff's complaint 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 - 7
Affirmation in Opposition-Affidavits-Exhibits-Memo.....	8 - 13
Reply Affirmation.....	14 - 16

This is a personal injury action in which plaintiff, Doreen Nurse, seeks to recover damages for injuries she allegedly sustained on September 22, 2008 at a bus stop located at 108th Avenue and Guy R. Brewer Boulevard. Plaintiff alleges that as she was entering the bus in a wheelchair, she fell backwards on the ramp which she was using to enter the bus and sustained personal injuries. Plaintiff claims that the bus operator was negligent in refusing to properly kneel the front of the bus, in misplacing the wheelchair ramp in the street rather than on the sidewalk of

the bus stop, and in placing the ramp at too steep of an angle causing plaintiff's wheelchair to tip over and fall off the ramp.

The plaintiff, age 62, commenced this action by filing a summons and complaint on June 22, 2009. Issue was joined by service of defendants' verified answer dated August 27, 2009. Defendants 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, John V. Wynne, Esq., a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of plaintiff's records from the Hospital for Special Surgery; records from Jamaica Hospital; the affirmed neurological report of Dr. Daniel Feuer; the affirmed orthopedic medical report of Dr. Leon Sultan; and a copy of the transcript of the examination before trial of plaintiff, Doreen Nurse.

In her verified bill of particulars, plaintiff states that as a result of the accident she sustained, inter alia, brain contusion, concussion, exacerbation of L4-L5-S1 vertebral fusion; exacerbation of denervation at L5-S1; exacerbation of osteo-arthritis of the bilateral hips and lower extremities; right knee derangement. Plaintiff claims she was confined to bed for three months after the accident and intermittently thereafter.

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.

In her examination before trial, taken on March 22, 2011, plaintiff testified that she is confined to a wheelchair as a result of two lumbar spinal fusion operations which took place thirteen or fourteen years ago. She states that in her house she is able to walk using a walker. She testified that on the date of the accident she intended to get on the 111 bus at Guy R. Brewer Boulevard on her way to a doctor's appointment on Sutphin Boulevard in Jamaica, Queens. She stated that when the bus pulled

up it was not close to the curb. She asked the driver to lower the bus but he would not lower it. However, he extended the wheelchair ramp and she proceeded to go up the ramp in her motorized wheelchair. She believes that the ramp was tilted at too great an angle and as a result as she was proceeding up the ramp she fell backwards in the wheelchair. She does not recall anything after that moment other than regaining consciousness at Jamaica Hospital where she had been taken by ambulance. She testified that while in the hospital she felt pain to her head, both shoulders and neck. Two weeks after the accident she was experiencing pain in her head, shoulders and lower back and she returned to Jamaica Hospital. She stated that she had no other pain from the date of her spinal surgeries up until the date of the accident. Since the accident she has received treatment for pain in her hips, legs, toes and shoulders at Jamaica Hospital, Long Island Jewish Hospital and with Dr. Raysen. She stated that she attended physical rehabilitation at Jamaica Hospital for two weeks. She now has the services of a home health care attendant seven days a week. She was confined to bed for two weeks after the accident and confined home for six months. She states that she still feels pain associated with the bus accident. She takes oxycodone for pain management.

The defendant submits the affirmed medical report of Dr. Daniel J. Feuer, a neurologist retained by the defendants, who examined the plaintiff on October 18, 2011. Plaintiff told Dr. Feuer that she was in her usual state of health until she fell from her wheelchair on the bus lift on September 22, 2008. She presented with head pain, neck pain, low back pain, right shoulder pain, right hip pain and right knee pain. Dr. Feuer noted that her past medical history includes two lumbosacral spine fusions and hip surgery. Dr. Feuer performed objective and comparative range of motion testing and found that the plaintiff had no limitations of range of motion of the cervical spine. He could not test range of motion of the lumbar spine as the plaintiff could not stand. His impression was that there were no objective clinical deficits referable to the central or peripheral nervous system which appear to be causally related to the accident of September 22, 2008. He states that she is status post lumbosacral spine surgery and was relatively immobile prior to the accident. He states that the plaintiff does not demonstrate any objective neurological disability or neurological permanency causally related to the subject accident.

Dr. Sultan, a board certified orthopedic surgeon examined the plaintiff on October 17, 2011. She presented with pain in her right hip and leg, headaches, neck pain and right knee pain. On examination Dr. Sultan found no loss of range of motion of the

cervical spine. She could not stand to permit testing of the thoracolumbar spine. She had significant limitation of range of motion of the right knee. The hips could not be examined. He attributed the right knee limitation to preexisting advanced right knee osteoarthritis and arthritis. He states that the plaintiff has a permanent orthopedic disability in regard to her lumbar spine and right knee that predates the occurrence of the subject accident.

Defendants' counsel contends that the medical reports of Drs. Sultan and Feuer as well as the plaintiff's deposition testimony and records of prior medical treatment 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 asserts that the records demonstrate that the plaintiff had a history of left hip pain as well as two lumbar surgeries with nerve injury and has been confined to a wheel chair since 1996. Counsel asserts that all of the plaintiff's injuries including those to her back, hips, knees and legs predate the bus accident.

In opposition, plaintiff's attorney, Cary Hunter Kaplan, Esq., submits her own affirmation as well as an aided report; records from Jamaica Hospital; no fault physical reports of Dr Jacqueline Emmanuel dated November 3, 2008 and February 2, 2009 and no-fault physical report of Dr. Curran dated November 3, 2008.

Dr. Emmanuel examined the plaintiff for no-fault on November 3, 2008 and states in her affirmed report that the plaintiff had limitations of range of motion of the cervical spine and bilateral shoulders. The report of Dr. Curran, a licensed chiropractor who examined the plaintiff for no-fault was not in affidavit form and therefore is not admisible for purposes of the motion.

Defendants' counsel contends that the motion was filed more than 120 days following the filing of the first note of issue on July 5, 2011. However, that note of issue was vacated in the Trial Scheduling Part by order dated June 5, 2012 on the ground that significant discovery remained outstanding. The order states that the action was restored to

pre-note of issue status. A second note of issue was filed by plaintiff on June 11, 2012. As this motion was served on June 28, 2012, less than 60 days after filing the note of issue, it was timely made.

Initially, it is defendants' 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 defendants' examining orthopedist, Dr. Sultan, clearly set forth that upon his examination of the defendant he found significant limitation in the range of motion of the defendant’s right knee. Therefore, Dr. Sultan’s’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. Sultan explained that the plaintiff did not sustain an injury to her right knee and lumbar spine as a result of this accident and that both conditions were not trauma related but rather were due to a osteoarthritis predating the accident of September, 2008, he did not demonstrate that the limitation noted was the result of a prior condition rather than from exacerbations caused by the subject accident as alleged by the plaintiff in her bill of particulars (see Little v Ajah, 97 AD3d 801 [2d Dept. 2012]; Edouazin v Champlain, 89 AD3d 892 [2d Dept. 2011]; Pero v Transervice

Logistics, Inc., 83 AD3d 681 [2d Dept. 2011]; Washington v Asdotel Enters., Inc., 66 AD3d 880 [2d Dept. 2009]).

In addition, Dr. Feuer also found that the plaintiff could not provide a full effort for testing the right lower extremity due to pain and he did not evaluate the plaintiff's lumbar spine as she was unable to stand. Although he stated that plaintiff did not demonstrate clinical deficits which appear to be causally related to the subject accident, he did not, however, provide an opinion within a reasonable degree of medical certainty. Moreover, Dr. Feuer also failed to rule out whether plaintiff's deficits were due to exacerbations caused by the subject accident.

Thus, the defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury as a result of the subject accident 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]; Keenum v Atkins, 82 AD3d 843, [2d Dept 2011]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

Inasmuch as defendants failed to meet their prima facie burden of showing that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d), the Court need not determine whether the papers submitted by plaintiff in opposition were sufficient to raise a triable issue of fact (see Grisales v City of New York, 85 AD3d 964 [2d Dept. 2011]; Cues v Tavarone, 85 AD3d 846 [2d Dept. 2011]; Pero v Transervice Logistics, Inc., 83 AD3d 681 [2d Dept. 2011]).

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

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

Dated: April 1, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.