Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

x

DINA M. MORAN

Plaintiff(s)

-against-

WUJUN HUAI and QING WANG,

Defendant(s)

x

Index Number 700786/2017

Motion Date February 5, 2019

Motion. Cal No. 17

Motion Seq. No. 1

The following papers numbered EF6, EF12, and EF17 read on this motion by defendants to dismiss the complaint on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102[d].

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF6
Answering Affidavits - Exhibits	EF12
Reply Affidavits	EF17

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained in a motor vehicle accident on May 13, 2014. The complaint alleges that plaintiff was struck by a vehicle owned and operated by the defendants, as the vehicle was backing up. In the Verified Bill of Particulars, plaintiff alleges injuries which include: herniated discs of the cervical spine, herniated and bulging discs of the lumbar spine, complex tear of the posterior horn, and significant attenuation and degeneration of the anterior horn of the body of the medial meniscus of the left knee. Although plaintiff is not claiming lost wages, plaintiff alleges that she was confined to bed for approximately two (2) weeks and to her home for approximately three (3) weeks following the accident. Defendants, in moving to dismiss the complaint, contend that the alleged injuries are not "serious" and/or causally-related to the subject accident. Plaintiff opposes the motion.

Plaintiff testified at her deposition that she was involved in the subject motor vehicle accident as a pedestrian crossing a street when she was struck and knocked down by a

vehicle which was backing up. She hit her right hand on the vehicle, and the impact with the car knocked her to the ground. Although she does not remember which part of her body was contacted by the car, her entire left side hit the ground first. Plaintiff testified that she was able to stand on her own without leaning on anyone for about a minute; she was not bleeding and did not lose consciousness. Plaintiff presented to the hospital with complaints of pain to her left knee, left side of her back, left arm and hip and right hand. While x-rays were taken, plaintiff was never told that she had broken any bones. She was discharged that night with one prescription for painkillers, and told to see her regular doctor.

Three days after being discharged from the hospital, plaintiff sought treatment at Yellowstone Medical Rehabilitation ("Yellowstone"), for physical therapy, where she saw Dr. McGreen. A schedule of treatment was set up at Yellowstone at a frequency of three times a week. Plaintiff testified that her treatment at Yellowstone changed after about two months, when the bicycle and ball were added along with weights. Plaintiff was no longer treating at Yellowstone at the time of her deposition. She stopped treating there after five or six months when the facility told her she could stop. Plaintiff has not seen any doctors since December 2014, because "[she] wasn't going to pay" for it as she does not have any money, and the health insurance would not allow it.

As a result of the subject accident, plaintiff cannot "reach up high", or "pick up anything heavy", climb ladders or "walk too much." Plaintiff admitted that none of her doctors instructed her not to reach up high, or to avoid cleaning her house or climbing ladders. Her doctors told her to rest for two weeks after the accident. Plaintiff also testified that she was never instructed to stay in bed or at home by any of her doctors.

Finally, plaintiff testified that she was diagnosed with diabetes in 2010, and was taking insulin and Tramadol for her arthritic pain in her knees (which was diagnosed about ten years ago). Further, she stated that she had previously broken her right foot in a trip and fall accident, and had to use crutches and a cane thereafter.

Discussion

It is well settled that the proponent of a motion for summary judgment, where the issue is whether a plaintiff has sustained a serious injury as defined by Insurance Law §5102[d], has the initial burden of establishing, by competent evidence, that a plaintiff did not sustain a serious injury causally-related to the subject accident (*Franchini v Palmieri*, 1 NY3d 536 [2003]). Once a defendant meets this initial threshold, the burden shifts to plaintiff to offer proof, in admissible form, which creates a material issue of fact requiring a trial (*Id.*). "[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 [2000]).

Here, the proof submitted by the defendants, including the affirmed medical report of Dr. Jay Eneman, a board-certified orthopedic surgeon, are sufficient to meet their prima facie burden (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]). Although Dr. Eneman did find limitations of range of motion in the plaintiff's cervical, thoracic and lumbar spine, right and left shoulders, both knees and hips, ankles and feet, Dr. Eneman diagnosed plaintiff with resolved sprains/strains of the cervical, thoracic and lumbar spine, and a resolved left knee sprain/contusion. He also fully explained that the limitations were not causally connected to the accident in question but rather, were voluntary and fully under the control of plaintiff being examined and, therefore, was not a truly objective finding; and that there were no objective orthopedic findings which would provide the basis for the displayed limitations or which would indicate any disability, impairment, or limitation resulting from the accident (*see Perl v Meher*, 74 AD3d 930 [2010]; *Park v Shaikh*, 82 ADd 1066 [2011]; *Gonzales v Fiallo*, 47 AD3d 760 [2008]; *cf. Burns v. Stranger*, 31 AD3d 360 [2006]). Furthermore, he notes that, "anatomically, some individuals will have motion restrictions that are not related to injury but may be physiologic in nature, such as related to age, body habitus and pre-existing arthritis. . . these individuals will not be able to achieve the AMA Guideline ranges that are considered normal." Dr. Eneman concluded that plaintiff is capable of performing all tasks of daily living and maintaining full employment without restrictions.

Notably, as a matter of law, mild, slight, or minor limitations are insufficient to constitute a serious injury under this section of the insurance law (*Licari v Elliot*, 57 NY2d 230 [1982]). The word "significant," means that the injury is important and relates to medical significance (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]). The medical significance of an injury, "involves a comparative determination of the degree or qualitative nature of an injury based on normal function, purpose and use of the body part" (*Id.* at 353).

The plaintiff's submissions in opposition are insufficient to raise a triable issue of fact. Plaintiff failed to submit any affirmations or affidavits of her treating physicians, or medical records in an admissible form indicating what treatment, if any, she received for her alleged injuries in the four-year period between the time of the accident and the examination conducted by her expert. Plaintiff's expert also failed to set forth what objective tests he performed in arriving at his conclusion that plaintiff is totally and painfully disabled (*see Kauderer v Penta*, 261 AD2d 365 [2d Dept 1999]; *Lobo v Singh*, 259 AD2d 523 [1999]), failed to explain the four-year gap between the accident and his examination of plaintiff, and he failed to set forth the treatment, if any, that plaintiff received for her alleged injuries during that time *(see* see *Bruce v New York City Tr. Auth.*, 16 AD3d 608, 609 [2005]; *Smith*

v Askew, 264 AD2d 834 1999]). In addition, it is clear that the neurologist partially based his conclusions on inadmissible, unsworn medical records (*see Friedman v U-Haul Truck Rental*, 216 AD2d 266 [1995]; *cf.*, *Cruse v Berman*, 276 AD2d 580 [2000]).

Furthermore, the plaintiff's allegation that she was forced to curtail recreational and household activities is insufficient to demonstrate that she had sustained a medically-determined injury or impairment which prevented her from performing substantially all of the material acts constituting her normal daily activities for not less than 90 of the first 180 days following the accident (*see*, Insurance Law § 5102 [d]; *Rum v Pam Transp.*, 250 AD2d 751 [2d Dept 1998]).

Accordingly, the motion to dismiss is granted.

Dated: APR 16 2019

J.S.C.

FILED
APR 25 2019
COUNTY CLERK
QUEENS COUNTY