



Hospital Emergency Room. By that time her back was hurting. She took Motrin, left the hospital wearing an "orthopedic devise" and told to see her doctor. The next day she went to Elmont Medical, P.C. where she was still being treated as a result of an earlier accident which occurred January 5, 2006. She complained of pain in her neck and shoulder. She testified that after the accident on January 5, 2006 she saw her private physician Dr. Khan Shaheed for pain she felt in her neck shoulders, knees and body. She then took physical therapy the need for which was "decreasing". As a result of the instant accident she commenced seeing a Chiropractor. As a result of the April 5, 2006, she was given a prescription for "pain or muscle relaxants," later giving the date of April 7, 2006, accident. She had an MRI of her "whole body" as a result of the earlier accident. As result of the instant action she had an MRI of her neck, shoulders, and knees at "Elmont P.C.". She then saw an orthopedist in Valley Stream, a Dr. Richard, who took x-rays of her shoulder and knee. She had "outpatient" surgery of her right shoulder performed by Dr. Lanzone on June 7, 2006 at the "Day-Op in Long Island" and was given a sling. She still needs surgery for her left knee. She did seek a second opinion prior to the shoulder surgery at a facility on Jamaica Avenue. She then moved to Florida in 2007. It appears that there is testimony about her bringing suit as a result of an incident which occurred January 5, 2006 and April 7, 2006. She testified about having an accident in 2000 or 2001 on the Belt Parkway and Conduit in which her back and neck were injured. She said that she was sideswiped in May 2003 but did not sue. She also has a work related accident in 2004, 2005 for which she saw Dr. Khan. She said that she was treated by a "Dr. Castillo" in Florida. She claims to have constant pain as a result of the last accident. She claims that she can not walk too long currently.

The plaintiff submits an affirmation of Dr. Garcia Mayard, M.D., dated June 22, 2009, which states that he first saw the plaintiff on February 6, 2006 as a result of an accident she had sustained on January 6, 2006. She sustained a second accident on April 27, 2006. Without any reference to a date Dr. Mayard affirms

3. Ms. Donna McDonald presented to my office with complaints of pain she developed instantly. Her constant complaint of pain were the following:

- left knee
- cervical
- lower back
- right shoulder
- right knee

Pain aggravated by movement. She also stated that pain is exacerbated by going up/down stairs, weather changes, carrying heavy objects and bending down. She state her work, household duties, recreation and sports have been affected by the accident.

Dr. Mayard refers to "the results of the MRI findings" in that he states:

11. With a reasonable degree of medical certainty, I can state that based upon the history of the patient, and objective and subjective findings, the injuries, as diagnosed, were causally related to the accident of April 27, 2006.

Dr. Mayard's "current diagnosis" contained in paragraph "18" relies on "the MRIs conducted" and he then lists the various findings he made with regard to the plaintiff's injuries. At paragraph "22"

he states that it is his opinion that with regard to the plaintiff's "use of her lumbar spine, right shoulder and left knee" that the "above-mentioned injuries are causally related to the motor vehicle accident of April 27, 2006, and are significant, as well as, permanent in nature."

Attached as plaintiff's Exhibit "E" are four affirmations of Dr. Richard J. Rizzuti, M.D. a radiologist, all dated June 1, 2009, which relate to various dates on which he conducted MRIs of the plaintiff, all of which are prior to the date of the subject accident. This exhibit contains copies of Mr. Rizzuti's MRI reports to Dr. Garcia, dated February 6, 2006, February 10, 2006, February 15, 2006, and February 13, 2006.

The defendant relies on the affirmation of Dr. Jacquelin Emmanuel, M.D., a Board Certified Orthopedic Surgeon, dated April 9, 2008 the date she conducted an examination of the plaintiff. Every test measured by a Goniometer of the plaintiff's Cervical Spine, Right Shoulder, Lumbosacral Spine, Bilateral Knees, and Right Ankle indicate that based on all the measurements the plaintiff has not sustained any disability. Dr Emmanuel states "**Impression:** Based on today's examination, there is no evidence of disability."

The defendant also relies on the affirmation of Dr. Marie Audrie DeJesus, M.D., a neurologist, dated October 9, 2008 that the plaintiff's Range of Motion is normal, and that the doctor found that the plaintiff's mental state, cranial nerves, motor activities, reflexes, sensory responses, gait and coordination, and cerebellar state were all normal. Dr. DeJesus states "**Disability:** There is no objective evidence of any disability."

#### "Serious Injury" Insurance Law §5102(d)

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that he has sustained a "serious injury" which is defined as follows:

Serious injury means a personal injury which result in ... permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott*, 57 NY2d 230). 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 (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Grossman v Wright*, 268 AD2d 79). If the defendant's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eycler*, 79 NY2d 955; *Bryan v Brancato*, 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to “weed out frivolous claims and limit recovery to serious injuries” (*Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350).

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than “a mild, minor or slight limitation of use” and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller*, 258 AD2d 783; *Burnett v Miller*, 255 AD2d 541). Resolution of the issue of whether “serious injury” has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green*, 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has failed to demonstrate that she has sustained a “permanent consequential” and “significant limitation”.

The plaintiff has failed to demonstrate that she has a “medically determined” injury or impairment which has prevented his from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio*, 81 NY2d 1062; *Johnson v Berger*, 56 AD3d 725; *Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535).

Upon the defendant’s properly raising this issue the plaintiff must submit competent medical evidence that the injuries sustained rendered her unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days subsequent to the subject accident as well as the other categories enumerated under the “no fault” laws (*Vicers v Francis*, \_\_\_AD3d\_\_\_ [2009 NY Slip Op 05540; *Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535).

Regarding the “permanent loss of use” of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff’s life (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295). The finding of “Permanency” is established by submission of a recent examination (*Melino v Lauster*, 195 AD2d 653 *aff’d* 82 NY2d 828). The plaintiff has not demonstrated that she has sustained such injury.

Regarding “permanent limitation” of a body organ, member or system the plaintiff must demonstrate that she has sustained such permanent limitation (*Mickelson v Padang*, 237 AD2d 495). The word “permanent” is by itself insufficient, and it can be sustained only with proof that the limitation is not “minor mild, or slight” but rather “consequential” (*Gaddy v Eyer*, 79 NY2d 955). The plaintiff has failed to demonstrate such limitation.

The “significant limitation of use of a body function or system” requires proof of the significance of the limitation, as well as its duration (*Dufel v Green*, 84 NY2d 795; *Fung v Uddin*, 60 AD3d 992; *Hoxha v McEachern*, 42 AD3d 433; *Barrett v Howland*, 202 AD2d 383). The plaintiff has failed to demonstrate such limitation.

The MRI’s submitted by the plaintiff fail to demonstrate that the plaintiff sustained injuries as a result of the accident which occurred on April 27, 2006.

Accordingly, the defendant's motion to dismiss the instant action based on the fact that the plaintiff has failed to demonstrate that she has satisfied any of the categories set forth in Insurance Law 5102 is granted.

So Ordered

Dated: July 24, 2009

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Robert J. McDonald, J.S.C.