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**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ARTHUR M. DIAMOND**  
**Justice Supreme Court**

-----x  
**WOOBONG LEE AND JUNGSOOK LEE,**

**Plaintiff,**

**-against-**

**CRYSTAL CARPET & UPHOLSTERY CLEANING  
INC., ELMER BATRES, DEEPAK ARORA, AND  
MONICA ARORA,**

**Defendants,**

-----x

**TRIAL PART: 14**

**NASSAU COUNTY**

**INDEX NO: 21729-09**

**MOTION SEQ. NO: 1**

**SUBMIT DATE: 07/25/11**

**The following papers having been read on this motion:**

**Notice of Motion .....1**  
**Opposition.....2**  
**Reply.....3**

Motion by defendants Elmer M. Batres and Crystal Carpet & Upholstery Cleaning Inc. (hereinafter collectively referred to as the "movants") for an order pursuant to CPLR § 3212 granting them summary judgment dismissing the second cause of action set forth in the complaint on the grounds that plaintiff Jungsook Lee did not sustain a serious injury as defined by Insurance Law § 5102(d) is denied.

This is an action to recover damages for personal injuries alleged sustained by plaintiffs in a motor vehicle accident in September 19, 2007.

In her Bill of Particulars, Ms. Lee alleges that she sustained the following MRI and EMG confirmed injuries:

- Straightening of the cervical spine;
- C4-C5 Anterior protrusion;
- C2-C3 Focal, left lateral herination indenting the thecal sac;
- C3-C4 Disc bulge indenting the thecal sac;
- C4-C5 Disc bulge indenting the thecal sac;
- C5-C6 Broad-based, right para-central herniation indenting the thecal sac narrowing the right lateral recess;

C7 Nerve root radiculopathy in the cervical spine;  
C6-C7 Central herniation indenting the thecal sac;  
C7-T1 Central, focal herniation indenting the thecal sac;  
L3-L4 Left para-central, focal herniation indenting the  
thecal sac;  
L4-L5 Disc bulge indenting the thecal sac:  
L5-S1 Central herniation indenting the thecal sac  
narrowing both lateral recesses;  
S1 Nerve root radiculopathy in the lumbar spine;  
Multiple tears within the supraspinatus tendon in the right  
shoulder;  
Subacromial bursal fluid noted in the right shoulder;  
Tear of the posterior horn medial meniscus inferior  
surface in the right knee;  
Sprain of the anterior cruciate ligament manifested as  
thickening, edema and poor definition in the right knee;  
Radiculopathy in the cervical spine;  
Radiculopathy in the lumbar spine  
Loss of range of motion i the right shoulder;  
Arthroscopic surgery of the right shoulder recommended;  
Traumatic arthritis necessitating further treatment  
including surgery;  
Need for future surgery.

In support of their motion, the movants submit the affirmed medical reports of Isaac Cohen, M.D. FAAOS, an orthopedist who performed an independent orthopedic evaluation on March 16, 2011; and Melissa Sapan Cohn, a radiologist who reviewed the cervical spine MRI, right shoulder MRI, and lumbosacral spine MRI of plaintiff.

As a proponent of the summary judgment motion, movants had the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories. (*See Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). Defendants' medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion

considered normal for the particular body part. (*Browdame v. Candura*, 25 AD3d 747, 748 [2<sup>nd</sup> Dept 2006]).

Defendants established their *prima facie* entitlement to judgement as a matter of law by submitting, *inter alia*, the affirmed medical reports of Dr. Isaac Cohen, an orthopedist and Dr. Melissa Sapan Cohn, a radiologist. They found no significant limitations in the ranges of motion with respect to any of plaintiff's claimed injuries, and no other serious injury within the meaning of Insurance Law § 5102(d) causally related to the collision (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eycler*, 79 NY2d 955, 956-957 [1992]).

Dr. Isaac Cohen, a board certified orthopedist, examined the plaintiff, performed quantified range of motion testing on her cervical spine, lumbar spine, right knee and right shoulder, compared his findings to normal ranges of motion values and concluded that plaintiff had normal ranges of motion of these body parts; conducted motor, sensory and reflex testing, which revealed no deficits; and concluded that plaintiff had resolved cervical and lumbar sprains and contusions of her right knee and shoulder with no functional disability or residual limitations. Dr. Cohen's quantified range-of-motion findings and comparisons are sufficient to sustain the movants *prima facie* burden. *Staff v Yshua*, 59 AD3d 614 [2<sup>nd</sup> Dept. 2009].

Further, plaintiff's MRI films were reviewed by defendant's radiologist, Dr. Melissa Sapan Cohn, who opined that the conditions revealed on these MRI studies were degenerative in origin, not trauma related. Specifically, Dr. Sapan Cohn concluded that the MRI of plaintiff's cervical spine revealed "diffuse multilevel degenerative changes" including "disc desiccation throughout the cervical spine" with mild disc bulging at the C3-4 and C4-5 levels and small disc herniations at the C5-6 and C6-7 levels, which she concluded were degenerative in origin because they "are associated with underlying disc desiccation," a marker for degenerative disease. Dr. Sapan Cohn also reviewed plaintiff's right shoulder MRI films and found evidence of degenerative changes as well as degeneration of the rotator cuff and evidence of bursitis commonly associated with arthritis of the shoulder. Dr. Sapan Cohn also reviewed plaintiff's lumbar spine MRI films and found evidence of degenerative changes at the L5-S1 level including disc desiccation and mild disc bulging unrelated to trauma. The affirmed report of defendant's orthopedist that plaintiff had no range-of-motion limitations of her cervical spine, right shoulder, right knee or lumbar spine together with the affirmed findings of defendant's radiologist that plaintiff had no trauma-related abnormalities, constitute *prima facie* proof that plaintiff did not sustain a "serious injury" in the accident. *Brown v Tairi Hacking Corp.*, 23 AD3d 325 [2<sup>nd</sup> Dept. 2005].

The burden now shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she sustained a serious injury or there are questions of fact

as to whether the purported injury, in fact, is serious. *Flores v Leslie*, 27 AD3d 220, 221 [1<sup>st</sup> Dept 2006].

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law §5102(d). See *Toure v Avis Rent A Car Sys., Inc.*, *supra*; *Scheeer v Kioubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 279 [1<sup>st</sup> Dept 2005].

Plaintiff must come forth with objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 AD3d 978 [2<sup>nd</sup> Dept 2010]; *Cornelius v Cintas Corp.* 50 AD3d 1085 [2<sup>nd</sup> Dept 2008]; *Sharma v Diaz*, 48 AD3d 442 [2<sup>nd</sup> Dept 2007]; *Amato v Fast Repair, Inc.*, 42 AD3d 447 [2<sup>nd</sup> Dept 2007] and upon medical proof contemporaneous with the subject accident. (*Perl v Mehr*, 74 AD3d 930 [2<sup>nd</sup> Dept 2010]; *Ferraro v Ridge Car Service*, 49 AD3d 498 [2<sup>nd</sup> Dept 2008]; *Manning v Tejada*, 38 AD3d 622 [2<sup>nd</sup> Dept 2007]; *Zinger v Zylberberg*, 35 AD3d 851 [2<sup>nd</sup> Dept 2006]).

Even when there is medical proof, when contributory factors interrupt the chain of causation between the accident and the claimed injury, summary dismissal of the complaint may be appropriate. *Pommells v Perez*, 4 NY3d 566, 572 [2005]. Whether a limitation of use or junction is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of a body part. *Dufel v Green*, 84 NY2d 795, 798 [1995].

It has been repeatedly held that “[t]he mere existence of herniated or bulging discs, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration” (*Catalano v Kopmann*, 73 AD3d 963 [2<sup>nd</sup> Dept 2010]; *Vilomar v Castillo*, 73 AD3d 758 [2<sup>nd</sup> Dept 2010]; *Ortiz v Iania Taxi Services, Inc.*, 73 AD3d 721 [2<sup>nd</sup> Dept 2010]; *Stevens v Sampson*, 72 AD3d 793 [2<sup>nd</sup> Dept 2010]; *Luizzi Schwenk v Singh*, 58 AD3d 811, 812 [2<sup>nd</sup> Dept 2009]).

Moreover, “[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and she or he suffers from no disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of insurance Law § 5102(d), despite the existence of an MRI which shows herniated or bulging discs’ ” (*Johnson v County of Suffolk*, 55 AD3d 875, 877 [2<sup>nd</sup> Dept 2008], quoting from *Kearse v New York City Transit Authority*, 16 AD3d 45, 49-50 [2<sup>nd</sup> Dept 2005]).

In opposition to the motion, plaintiff submits, *inter alia*, her statement of facts, an affidavit

of an affirmed medical report of Marc J. Rosenblatt, D.O., dated May 18, 2011 and an undated affirmation of Ayoob Khodadadi, a radiologist who reviewed the MRI films and report prepared by Dr. Richard Heiden at KMI Radiology Center.

#### Plaintiff's Statement of Facts

Jungsook Lee went to Nassau University Medical Center via ambulance on a backboard immediately following this collision. Jungsook Lee was treated by Marc Rosenblatt, M.D soon after the collision occurred. Jungsook Lee made initial complaints of pain with radiation originating from neck, lower back, right shoulder and right knee to Dr. Rosenblatt. Jungsook Lee was able to work from the date of this incident until November 26, 2007. Jungsook Lee was referred for MRIs which included imaging studies of the cervical spine, lumbar spine, right shoulder and right knee. Jungsook Lee underwent treatment consisting of physical therapy, massage and acupuncture, for approximately seven months, consisting of five sessions per week. After seven months, she continued to treat but at a reduced frequency of two to three times a week. She stopped treatment because she had reached maximum medical improvement. On or about August 26, 2008 she aggravated her back injury while lifting a tray. She did not see any doctors for the injury resulting from lifting the tray, a worker's compensation claim was not filed, she was not receiving treatment at the time, she did not injure any other parts of her body as a result of lifting the tray. In her recent consultation with Dr. Rosenblatt on May 18, 2011, severe restrictions were noted to the cervical and lumbar spine, restrictions were also noted to the right shoulder and right knee. Dr. Rosenblatt found Jungsook Lee's injury to be permanent and found her to have sustained a marked disability which the doctor causally related to the September 19, 2007 collision and not related to any pre-existing degenerative conditions.

As noted above, Dr. Rosenblatt first evaluated plaintiff on October 24, 2007 and noted the following:

Range of motion of the cervical spine revealed flexion 30 degrees (normal 45 degrees), extension 15 degrees (normal 45 degrees), right lateral side bending 25 degrees (normal 60 degrees), left lateral side bending 20 degrees (normal 60 degrees), rotation 35 degrees to the right (normal 45 degrees) and 35 degrees to the left (normal 45 degrees).

Range of motion of the thoracolumbar spine revealed flexion 40 degrees (normal 90 degrees), extension 10 degrees (normal 25

degrees), right lateral side bending 20 degrees (normal 35 degrees), and left lateral side bending 25 degrees (normal 35 degrees).

Straight leg raising was positive on the right at 40 degrees and negative on the left.

Evaluation of the right shoulder revealed full range of motion; however, the patient did have weakness with range of motion in all planes at approximately 4 to 4+/5.

Evaluation of the right knee revealed a negative drawer sign. There was, however, a positive McMurray sign and a positive Apley's compression sign.

The patient because of the injuries sustained in the motor vehicle accident was demoted at work. The patient was also most upset because she was an avid hiker, and she has had to discontinue hiking because of these injuries.

The patient had undergone comprehensive radiological studies.

MRI of the cervical spine done on October 30, 2007, revealed:

1. Left-sided herniation at C2-3
2. Bulges at C3-4 and C4-5
3. Right-sided herniation at C5-6
4. Central herniation at C6-7 and C7-T1

MRI of the lumbar spine done on November 6, 2007, revealed:

1. Left-sided herniation at L3-4
2. Bulge at L4-5
3. Central herniation at L5-S1

MRI of the right shoulder done on October 16, 2007, revealed multiple supraspinatus tears bursal fluid.

MRI of the right knee on October 23, 2007, revealed:

1. Tear of the posterior horn of the medial meniscus
2. Sprain of the anterior cruciate ligament.

The patient today informs me that she is continuing to utilize non-steroidal anti-inflammatory medications. The patient does do a home exercise program; however, her quality of life has markedly diminished since the time of the trauma.

Neurological Examination:

The patient today is alert and oriented x 3. Cranial nerves II through XII are intact.

Evaluation of the right shoulder reveals there is still weakness at 4/5.

Deep tendon reflexes are symmetrical. the patella remains 0 on the right.

Tinel sign is negative. Phalen sign is negative. Spurling sign is positive.

Evaluation of the cervical, dorsal and lumbosacral regions all reveal bilateral paraspinal spasm with multiple trigger points, and there are limitations of range of motion seen in multiple planes.

Range of motion of the cervical spine today reveals flexion 35 degrees (normal 45 degrees), extension 10 degrees (normal 45 degrees), right lateral side bending 20 degrees (normal 60 degrees), left lateral side bending 20 degrees (normal 60 degrees), rotation 25 degrees to the right (normal 45 degrees) and 30 degrees to the left (normal 45 degrees).

Straight leg raising is positive on the right at 50 degrees and negative on the left.

Evaluation of the right shoulder continues to reveal weakness at 4/5.

Evaluation of the right knee reveals a positive McMurray sign and Apley's compression sign.

Right shoulder revealed right shoulder supraspinatus tears of the subacromial fluid bursitis.

Right knee revealed tear of the posterior right knee medical meniscus, sprain of the anterior cruciate ligament.

Dr. Rosenblatt concludes that "the above findings are causally related to the motor vehicle accident of September 19, 2007, and the patient has sustained a permanent, marked disability, not related to any pre-existing degenerative conditions. The patient as a result of this motor vehicle accident will continue to have marked difficulties with activities of daily living. The patient has been demoted at work and likewise concerning the patient's leisure time, she can no longer hike. The patient cannot lift objects from the ground, nor can she lift objects above shoulder height. The patient has marked difficulties with activities of daily living. Based on patient's history, any additional treatment would be palliative in nature because she has reached maximum medical improvement."

Based on the record submitted, plaintiff has raised a triable issue of fact by submitting, among other things, affirmed reports describing medical examinations conducted contemporaneously with the collision, as well as affirmed reports describing medical examinations conducted in 2011. These reports demonstrate that there are triable issues of fact as to whether the collision caused injuries to the plaintiff that were serious injuries under the "permanent consequential limitation" or "significant limitation" of use categories of Insurance Law §5102(d) (*see Evans v Pitt*, 77 AD3d 611 [2<sup>nd</sup> Dept 2010], *lv to app dismiss*. 16 NY3d 736 [2011]; *Sanevich v Lyubomir*, 66 AD3d 665 [2<sup>nd</sup> Dept. 2009]; *Noel v Choudhury*, 65 AD3d 1316 [2<sup>nd</sup> Dept. 2009]; *cf. Husbands v Levine*, 79 AD3d 109 [2<sup>nd</sup> Dept. 2010]).

Since plaintiff established that at least some of her injuries satisfy the "no-fault" threshold, "it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment." *Linton v Nawaz*, 14 NY3d 821, 822 [2010]; *McLelland v Estevez*, 77 AD3d 403 [2<sup>nd</sup> Dept. 2010].

Finally, plaintiff has not sustained her burden under 90/180 day category which requires



plaintiff to submit objective evidence of a “medically determined injury or enforcement of a non-permanent nature which prevents the injured person from performing substantially all of the natural acts which constitute 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.” (Insurance Law §5102[d]).

“When construing the statutory definition of a 90/180 day claim, the words ‘substantially all’ should be construed to mean that the person has been prevented from performing her usual activities to a great extent, rather than some slight curtailment.” (*Thompson v Abbasi*, 15 AD3d 95 [1<sup>st</sup> Dept 2005]; *Gaddy v Eyer*, *supra*).

Specifically, plaintiff has no admissible medical reports stating that she was disabled, unable to work or unable to perform daily activities for the first ninety (90) days out of one hundred eight (180) days. *Judd Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1<sup>st</sup> Dept 2010]. At her examination-before-trial, plaintiff testified that at the time of the accident she worked full time as an operator for IWCO Direct. Plaintiff testified that following the accident she was out of work for approximately two months: “I had not worked for about two months. After that, I went back to work.”

Therefore, the second cause of action on behalf of Jungsook Lee, as amplified by paragraph 16 of the bill of particulars, claiming a serious injury under the 90/180 category is dismissed only.

In view of the foregoing, the motion for summary judgment is denied as to the second cause of action for serious injuries under the “permanent consequential limitation” or “significant limitation” categories under Insurance Law § 5102(d).

This constitutes the order and judgment of this Court.

DATED: September 8, 2011

ENTER

  
HON. ARTHUR M. DIAMOND  
J. S.C.

**ENTERED**  
SEP 12 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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