SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ALLAN L. WINICK,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

DAISY JOHNSON,

Plaintiff,

MOTION DATE: December 14, 2001
MOTION SEQUENCE: 002
INDEX NO. 9632/97

-against-

PEDRO A. FUENTES,

Defendant.

The following papers read on this motion:
Notice of Motion/ Order to Show Cause
Answering Affidavits
Replying Affidavits
Briefs: Plaintiff's/Petitioner's
Defendant's/Respondent's

Defendant Pedro A. Fuentes moves for summary judgment in that plaintiff has failed to sustain a serious injury pursuant to Insurance Law § 5102(d).

Plaintiff alleges that she was injured in an automobile accident that took place on January 26, 1994.

In support of defendant's motion defendant has furnished the original affirmed report of their examining orthopedist, Dr. Leon Sultan. According to the independent medical examination conducted by Dr. Sultan on May 1, 2001 at the request of the defendant, there was no causal relationship between the plaintiff's mild bony prominence located at the right sterno clavicular articulation and the accident of January 26, 1994.

Dr. Sultan found that plaintiff did not demonstrate any functional impairment in regard to the cervical spine or right shoulder region. The impingement test performed was negative. Cervical spine movements testing was intact. Range of motion testing revealed no complaints. Grip strength and pinch mechanism testing was intact. Upper extremity reflexes and sensory testing of the upper extremity was normal.

The affirmed medical report of the physician who examined plaintiff on behalf of defendant was sufficient to establish a *prima facie* case that the plaintiff did not sustain such serious injury as a result of the underlying condition (Guzman v Paul Mitcheal Management, 266 AD2d 508, 2nd Dept. 1999).

The burden, therefore, shifted to the plaintiff to come forward with sufficient evidence that she sustained a serious injury caused by the collision (Licari v Elliott, 57 NY2d 230).

The plaintiff submitted a copy of an affirmed report of her examining physician, Dr. Irving M. Etkind, who examined plaintiff on March 7, 2000 and November 15, 2001. The second exam took place one month after the instant motion was served on plaintiff's counsel. Accordingly to Dr. Etkind's report, his impression was based upon his examination of the plaintiff on those two occasions, upon the history obtained from the plaintiff and upon the sworn medical records which he reviewed. However, Dr. Etkind's report only refers to two MRI reports dated June 13, 2001 and June 26, 2001. Additional records were not specified by Dr. Etkind nor submitted for review in plaintiff's affirmation in opposition to defendant's motion. Dr. Etkind's physical exam on both dates found a 15% permanent cervical range of motion restriction and a 20% permanent shoulder range of motion restriction. Dr. Etkind did not specify what objectives tests were performed. He relied on an MRI report dated June 13, 2001 which found multilevel degenerative disc

disease of the cervical spine and a CT scan report dated June 26, 2001 of the right shoulder which showed degenerative changes of the acromioclavicular joint.

As such, plaintiff has not submitted any evidence that injury was the result of the accident. Absent proof of a causal connection between the injury and the accident, the medical evidence is insufficient to show "serious injury" within the meaning of the No-Fault Law (Ceglian v. Chan, 283 AD2d 536, 2nd Dept., 2001).

Dr. Etkind's report was insufficient to establish that plaintiff sustained "serious injury".(Pierre v. Nanton, 279 AD2d 621, 2nd Dept., 2001) (Slasor v Elfaiz, 275 AD2d 771, 2nd Dept., 2000). The first examination was done 6 years after the accident and the second exam, MRI and CT Scan were performed 7 years after the accident. No explanation was offered for the gap in treatment between the date of the accident and Dr. Etkind's exam, nor did Dr. Etkind indicate the type of treatment prescribed to plaintiff for injuries sustained as a result of the January 26, 1994 car accident.

Plaintiff failed to establish *prima facie* that her injuries were causally related to the accident (Saracco v. Key Ford of White Plains, 282 AD2d 732, 2nd Dept., 2001).

Summary judgment is granted and the plaintiff's complaint is dismissed.

This constitutes the order and judgment of the court.

Dated: January 17, 2002

Allan L. Winick

Allan L. Winick J.S.C.

XXX ENTERED

JAN 25 2002

NASSAU COUNTY
COUNTY CLERK'S OFFICE