

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/IAS, PART 6
NASSAU COUNTY**

WENDY POPP,

Plaintiff,

INDEX NO.: 14756/03

-against-

**MOTION SEQ. NO.: 003
MOTION DATE: 10/23/09**

ANDREW TAXI CORP. AND JERRY IMPINI,

Defendants.

The following papers read on this motion (numbered 1-3):

- Notice of Motion.....1**
- Affirmation in Opposition.....2**
- Reply Affirmation.....3**

The motion of defendants ANDREW TAXI CORP. and JERRY IMPINI for summary judgment pursuant to CPLR §3212 is determined as follows.

Plaintiff Wendy Popp, age 26 at the time of the accident, alleges that on September 30, 2000 at approximately 8:30 p.m., a vehicle owned and operated by her was involved in an accident with a vehicle owned by defendant Andrew Taxi Corp. and operated by defendant Jerry Impini. The accident occurred on the Cross Bronx Expressway at Boston Road, Bronx County. Defendants now move for an order dismissing plaintiff's complaint pursuant to CPLR §3212, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d).

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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 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 or impairment" (numbered by the Court).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated December 30, 2008, of orthopedist S. Farkas, MD covering an examination conducted on that date, an affirmed report of examination, December 30, 2008, of neurologist Sarasavani Jayaram, MD covering an examination conducted on that date, and an unaffirmed report of plaintiff's radiologist Steven Mendelsohn, MD, dated December 7, 2000, covering a CAT Scan of plaintiff's cervical spine. The Court notes that since the unaffirmed report of plaintiff's radiologist Dr. Mendelsohn was submitted by defendants in support of their motion for summary judgment, it may be considered by the Court. *See Passaretti v. Ping Kwok Yung*, 39 AD3d 517; *Kearse v. NYC Transit Authority*, 16 AD3d 45; *Meely v. 4 G's Truck Renting Co., Inc.*, 16 AD3d 26; *Mantila v. Luca*, 298 AD2d 505; *Pagano v. Kingsbury*, 182 AD2d 268.

Plaintiff alleges in her bill of particulars, dated December 11, 2007, that following the accident, she was confined to home for twelve weeks and to bed for two weeks, was incapacitated from her usual and customary activities for approximately sixteen weeks, and for six weeks thereafter, she was limited in the conduct of her daily activities. In her deposition, plaintiff testified that she was out of work for seven months as a result of the accident (deposition testimony, p. 11). Plaintiff also testified at her deposition that following the accident, she was confined to bed for two weeks and confined to home for three months as a result of her injuries (deposition testimony, pp. 64-65).

Defendants' medical experts, Dr. Farkas and Dr. Jayaram, conducted examinations of plaintiff more than eight years after the accident. Dr. Farkas noted that "plaintiff is a hairdresser and was out of work for three months" and that "she works now." Dr. Jayaram noted that "at the time of the accident [plaintiff] was employed as a hairdresser/colorist," "miss[ed] 3-6 months from work" and "is currently working part-time and does light duty." The Court finds, however, that neither physician adequately addressed plaintiff's claim that she sustained a medially determined injury or impairment of a nonpermanent nature which prevented her from performing all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. **Insurance Law §5102(d)**. *See Menezes v. Khan*, 2009 WL 3648067; *Negassi v. Royle*, 65 AD3d 1311; *Alvarez v. Dematas*, 65 AD3d 598; *Ismail v. Tejada*, 65 AD3d 518; *Takaroff v. A.M. USA, Inc.*, 63 AD3d 1142; *Rahman v. Sarpaz*, 62 AD3d 979; *Smith v. Quicci*, 62 AD3d 858; *Delayhaye v. Caledonia Limo & Car Service, Inc.*, 61 AD3d 814; *Neuburger v.*

Sidoruk, 60 AD3d 650; **Miller v. Bah**, 58 AD3d 815; **Monkhouse v. Maven Limo, Inc.**, 44 AD3d 630. The Court notes that plaintiff's statement in her bill of particulars that she was not employed at the time of the accident raises an issue with the Court, to be resolved at trial, as to the credibility of both her deposition testimony and her purported statements to defendants' physicians, that she missed work as a result of the accident.

Defendants also failed to address plaintiff's allegation in her supplemental bill of particulars, dated November 25, 2008, which was not reviewed by either Dr. Farkas or Dr. Jayaram, that in addition to the cervical and concussion injuries claimed in her bill of particulars, she sustained an "internal derangement of the left shoulder, possible rotator cuff injury" and had "steroid injections into the left shoulder." Dr. Farkas reported that plaintiff had left shoulder pain and occasional numbness in her left shoulder but provides no medical evidence pertaining to an examination of that area. Dr. Jayaram states that plaintiff complained of left shoulder pain, but that he "deferred" examination of plaintiff's shoulders "to the appropriate specialty." Other than reporting on plaintiff's complaints of left shoulder pain and numbness, Dr. Farkas and Dr. Jayaram failed to address plaintiff's alleged injury to her left shoulder. *See Menezes v. Khan, supra; Takaroff v. A.M. USA, Inc., supra; Rahman v. Sarpaz, supra; Lopez v. Felton*, 60 AD3d 822; *Sajid v. Murzin*, 52 AD3d 493; *Monkhouse v. Maven Limo, Inc., supra; O'Neal v. Bronopolsky*, 41 AD3d 452; *Hughes v. Cai*, 31 AD3d 385; *Loadholt v New York City Transit Authority*, 12 AD3d 352.

Accordingly, the Court finds that defendants have failed to make a *prima facie* demonstration that plaintiff Wendy Popp did not sustain a serious injury within the meaning of §5102(d). Since defendants failed to make a *prima facie* showing that plaintiff did not suffer from a serious injury, it is unnecessary for the Court to consider whether plaintiff's opposition is sufficient to raise a triable issue of fact. *See Park-Lee v. Voleriaperia*, 2009 WL 3766572; *Menezes v. Khan, supra; Loor v. Lozado*, 2009 WL 3384060; *Negassi v. Royle, supra; Alvarez v. Dematas, supra; Ismail v. Tejada, supra; Takaroff v. A.M. USA, Inc., supra; Hossain v. Singh*, 63 AD3d 790; *Smith v. Quicci, supra; Coscia v. 938 Trading Corp.*, 283 AD2d 538.

The Court notes that if a *prima facie* case were made by defendants, the Court would find that all plaintiff's proffered medical reports are not properly affirmed pursuant to CPLR §2106 and, therefore, could not be considered. The report of a physician or osteopath which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. CPLR §2106; *Grasso v. Angerami*, 79 NY2d 814; *Shaji v. City of New Rochelle*, 66 AD3d 760; *Vickers v. Francis*, 63 AD3d 1150; *Maffei v. Santiago*, 63 AD3d 1011; *Caraballo v. Kim*, 63 AD3d 976; *Niles v. Lam Pakie Ho*, 61 AD3d 657; *Ponciano v. Schaefer*, 59 AD3d 605; *Pompey v. Charney*, 59 AD3d 416;

Sapienza v. Ruggiero, 57 AD3d 643; **Marrache v. Akron Taxi Corp.**, 50 AD3d 973;
Patterson v. NY Alarm Response Corp., 45 AD3d 656; **Verette v. Zia**, 44 AD3d 747;
Nociforo v. Penna, 42 AD3d 514.

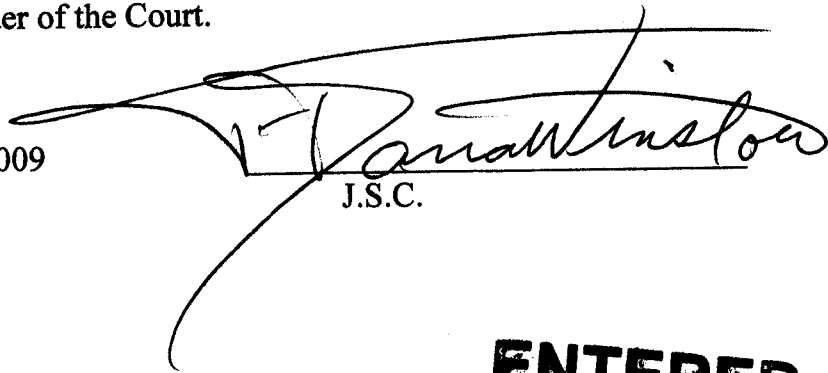
On the basis of the foregoing, it is

ORDERED, that the motion by defendants ANDREW TAXI CORP. and JERRY IMPINI for summary judgment pursuant to CPLR §3212 dismissing the complaint of plaintiff WENDY POPP on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d) is denied.

This constitutes the Order of the Court.

Dated. Dec 23

, 2009



J.S.C.

ENTERED
JAN 26 2010
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