

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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GWENDOLYN DUNN,

Plaintiff,

Index #: 13955/2005

-against-

ORDER WITH NOTICE
OF ENTRY

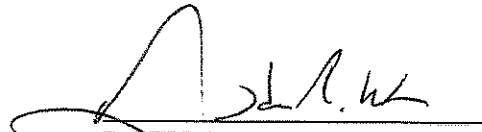
Public Administrator of Kings County as the Administrator
of the estate of CHUNG FONG a/k/a CHUNG FONG CHU,

Defendants.

-----X
COUNSELORS:

PLEASE TAKE NOTICE, that annexed is a true copy of an Order duly entered in the
office of the Clerk of the within named Court on January 26, 2012.

Dated: New York, New York
February 8, 2012



ROTH & ROTH, LLP
By: Audra R. Roth
Attorneys for Plaintiff
192 Lexington Avenue, Suite 802
New York, New York 10016
(212) 425-1020
Our File No.: 8008

TO:
CHEVEN, KEELY, HATZIS, ESQS.
Attorneys for Defendant
CHU CHUNG FONG
40 Wall Street- 15th Floor
New York, NY 10005-2301
(212) 809-7600
File #: 05-00447-01(LLC/000206029CB

At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of December, 2011.

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

-----X

GWENDOLYN DUNN,

Plaintiff,

- against -

Index No. 13955/05

PUBLIC ADMINISTRATOR OF KINGS COUNTY
as the administrator of the estate of CHUNG FONG A/K/A
CHUNG FONG CHU ,

Defendants.

-----X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-2

Opposing Affidavits (Affirmations) _____

3

Reply Affidavits (Affirmations) _____

4

Upon the foregoing papers, plaintiff Gwendolyn Dunn, moves for an order: 1) pursuant to CPLR § 2221, granting leave to reargue and renew this Court's March 16, 2011 decision and order granting defendant Public Administrator's of Kings County, and the administrator of the estate of Chung Fong a/k/a Chung Fong Chu, motion for summary judgment motion on threshold grounds; 2) upon reargument and/or renewal, vacating the

March 16, 2011 order that granted defendant summary judgment and dismissed plaintiff's action; 3) marking the case active and; 4) restoring the case back to the trial calendar.

Plaintiff commenced the instant personal injury action on May 3, 2005 to recover damages for injuries allegedly sustained on May 18, 2002 as the result of a motor vehicle accident. By notice of motion filed March 12, 2010, defendant moved, for an order granting summary judgment in favor of defendant on the ground that plaintiff did not satisfy the "serious injury" threshold requirement of the New York Insurance Law.¹ By order dated March 16, 2011, this Court granted defendant's motion for summary judgment, dismissing the complaint. Plaintiff now moves for the relief requested herein.

The Parties' Contentions

In support of the instant motion, plaintiff first alleges that the Court failed to recognize that defendant did not meet its prima facie burden of proof showing that plaintiff did not sustain a serious injury. She argues that the defendants' doctors' failed to state the objective manner in which they came to their conclusions. In addition, she asserts that only one of the defendant's three examining physicians, Dr. Heiden, alleges that plaintiff's injuries are degenerative, thereby making defendant's medical evidence inconsistent and, thus, unworthy

¹ Insurance Law § 5102 (d) defines "serious injury" as " a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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 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."

of summary judgment. Plaintiff secondly alleges that, even assuming defendant met his initial burden, plaintiff's medical evidence is sufficient to raise a triable issue of fact.

In opposition, defendant maintains that he met his prima facia burden through the medical evidence he provided on the initial motion. He further argues that the reason Dr. Heiden is the only physician who details the degenerative nature of plaintiff's injuries is that as a radiologist he is uniquely qualified to do so.

Discussion

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the Court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (*see E.W. Howell Co., Inc. v S.A.F. La Sala Corp.*, 36 AD3d 653,654 [2007] [citing *Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2005]]). According to CPLR 2221(d), a motion for leave to reargue must also, be identified specifically as such and be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry (*see CPLR 2221[d]*).

Here, plaintiff specifically identified the instant motion as a motion for leave to reargue and moved in a timely manner (*see id.*). Based upon a review of the record submitted by the parties and in the exercise of its discretion, the court finds that it overlooked matters of fact or law in its March 16, 2011 order and hereby grants leave for reargument of the defendant's motion for summary judgment on threshold grounds (*see id.*).

Upon reargument, the Court modifies its prior order granting defendant's underlying motion for summary judgment on the grounds that defendant failed to satisfy his prima facie burden of showing that plaintiff did not sustain a serious injury as a result of the subject accident with respect to the categories of "permanent consequential limitation" and "significant limitation" of use (*see Neuburger v Sidoruk*, 60 AD3d 650, 652 [2009]). Although defendant's examining neurologist, Dr. Iqbal Merchant, conducted several objective tests such as the straight leg raising test, he failed to provide any range of motion quantifications and did not compare plaintiff's motion to normal function (*see Knokhinov v Murray*, 27 Misc3d 1211(A), 2010 NY Slip Op 50684 (U), *2 [2010] [observing that where plaintiff asserts a soft-tissue injury, range of motion testing has become the linchpin of "serious injury" and further explaining that the defendant who seeks to make a prima facie showing must provide numerical range of motion findings]; *see also Tariq v McLaurin*, 10 Misc3d 127(A), 2005 NY Slip Op 51894(U), *1-3 [2005]).

Absent the proper objective medical foundation, Dr. Heiden's opinion that the MRI findings of plaintiff's cervical and lumbosacral spine are degenerative is conclusory and speculative (*see McLaughlin v Rizzo*, 38 AD3d 856, 857 [2007]; *Cedillo v Rivera*, 39 AD3d 453, 454 [2007] [holding defendant failed to meet his prima facie burden on threshold grounds where affirmed medical report did not set forth the objective testing that was performed to reach the conclusion that plaintiff possessed no disability]; *Lyons v Subhan*, 33 Misc3d 1223(A), 2011 NY Slip Op 52089(U), *2 [2011] [holding that defendant failed to

meet his prima facie burden where defendant's examining doctor failed to compare his range of motion findings to what is normal and yet concluded that all cervical findings were degenerative]).

Further, defendant's examining orthopedist Dr. Paul Miller ("Dr. Miller"), found limitations of motions in plaintiff's right and left shoulder², but fails to address these losses of range of motion (*see Jean v New York City Transit Authority*, 85 AD3d 972, 974 [2011]). Moreover, while Dr. Miller sets forth range of motion findings for the cervical and lumbar spine, he fails to specify the objective measures he used to arrive at his conclusions (*see Hamilton v Rouse*, 46 AD3d 514, 517 [2007] [holding that the trial court should have granted defendant's application for judgment as a matter of law where plaintiff's medical expert failed to specify the objective means he used to ascertain plaintiff's cervical and lumbosacral range of motion]; *Myers v Edison*, 20 Misc3d 1120(A), 2008 NY Slip Op 51489(U), *2 [2008] [holding that defendants failed to satisfy their prima facie burden where examining physician compared range of motion findings to what is normal but did not "name or describe the objective measures used to arrive at his conclusions"]]).

However, with respect to plaintiff's "90/180 day" claim, the Court adheres to its original determination. Plaintiff's wage verification report which shows that she was absent from work for eights days following the subject accident and her deposition testimony in which she testified she missed work for about ten days are fatal to her "90/180 day" claim

² Specifically, the range of motion test of plaintiff's right and left shoulder revealed, among other things, right shoulder forward flexion of 160 degrees with

(see *Bamundo v Fiero*, 88 AD3d 831, 831-832 [2011]; see also *Hamilton v Rouse*, 46 AD3d at 516 [holding that no rational jury could have found in plaintiff's favor with respect to his "90/180 day" claim where plaintiff testified he missed one month of work following the accident, after which he returned to work on a part-time basis for a month, and thereafter resumed work full-time]).

Conclusion

Accordingly, it is

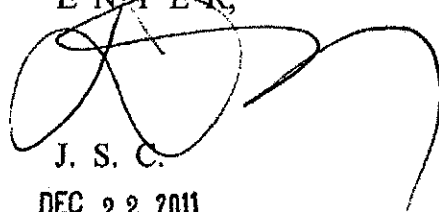
ORDERED that leave to reargue defendants' prior motion is granted; and it is further ORDERED that, upon reargument, the court modifies its original determination only to the extent of denying defendant's underlying motion with respect to plaintiff's "permanent consequential limitation of use" and "significant limitation of use" claims, and it is further

ORDERED that the case is restored to active status and the Court's trial calendar, and it is further

ORDERED that the parties are directed to appear in the Jury Conferencing Part at 9:30 a.m. on March 7 2012.

The foregoing constitutes the decision and order of the court.

MG EXT
MS# 5

ENTER,

J. S. C.

DEC 22 2011
HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT



FILED
MISSISSIPPI COUNTY CLERK
2012 JAN 26 AM 8:40

AFFIDAVIT OF SERVICE

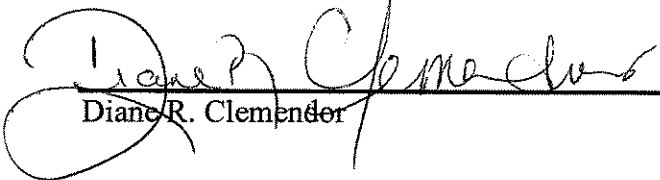
STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

I, Diane R. Clemendor, being duly sworn, deposes and says:

I am over 18 years of age, I am not a party to the action, and I reside in the Kings County in the State of New York.

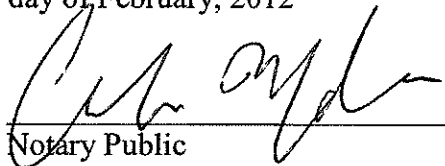
On, February 8, 2012, I served a true copy of the annexed, **Order with Notice of Entry**, by mailing the same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

CHEVEN, KEELY, HATZIS, ESQS.
Attorneys for Defendant
CHU CHUNG FONG
40 Wall Street- 15th Floor
New York, NY 10005-2301



Diane R. Clemendor

Sworn to before me this 8th
day of February, 2012



Notary Public

Christopher L. McFarlane
Notary Public, State of New York
No. 01MC6237941
Qualified in Kings County
Commission Expires: March 28, 2015

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-against-

Public Administrator of Kings County as the
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a/k/a CHUNG FONG CHU

Defendant.

ORDER WITH NOTICE OF ENTRY

The below signature attests to the following papers: ORDER WITH NOTICE OF ENTRY

By: 

Andra R. Roth

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New York, New York 10016
(212) 425-1020