Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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APOLONIA CASTILLO, Index No: 700183/13

Plaintiff, Motion
Dated: March 31, 2015

-against-

M# 2

MTA BUS COMPANY,

Defendant.

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The following papers numbered EF 45 - EF 104 read on this motion by defendant for summary judgment on the ground that plaintiff has failed to sustain a serious injury pursuant to Insurance Law § 5102(d) and on liability grounds.

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.....	EF 45-81
Affirmation in Opposition	EF 82-94
Replying Affirmations.....	EF 95-104

Upon the foregoing papers it is ordered that this motion by defendant for summary judgment is decided as follows:

Plaintiff commenced the instant action after she allegedly sustained serious injuries when she fell while she was a passenger on the defendant's bus on April 2, 2012 while the bus was traveling westbound on 57th Avenue between 97th Place and 98th Street in Queens County. Plaintiff contends that the bus driver was negligent because she pulled away from the bus stop before the plaintiff could safely cross from the passenger part of the bus and take a seat. Plaintiff states that she fell immediately after she paid her fare at the fare box. Defendant now moves for summary judgment on the ground that plaintiff has failed to sustain a serious injury pursuant to Insurance Law § 5102(d). In addition, defendant seeks summary judgment on the ground that the bus driver did not operate the bus in a negligent manner, and, thus, it cannot be held liable for the subject accident.

The court will first address the timeliness of defendant's motion for summary judgment. Pursuant to a stipulation so-

ordered by the Honorable Martin E. Ritholtz, dated September 22, 2014, motions for summary judgment were required to be returnable no later than November 25, 2014. The instant motion was made returnable on January 6, 2015. However, defendant's counsel states that the motion was originally returnable on November 25, 2014 as required by Justice Ritholtz's so-ordered stipulation. Counsel avers that she requested outside counsel to submit a courtesy copy of the motion on the return date since the motion was electronically filed. However, counsel explains that the outside counsel incorrectly diaried the matter, and as a result, the motion was marked off the court's calendar. Defendant submits the affirmation of Jerry Granata, an attorney with the law firm of Armienti, DeBellis, Guglielmo & Rhoden, L.L.P, who states that his office was asked by defense counsel to file a courtesy copy of the motion that was returnable on November 25, 2014. Mr. Granata avers that the date was incorrectly calendared by his office, and no one from his office appeared on the return date to submit the courtesy copy of the motion.

The court finds that in view of the circumstances presented, defendant's failure to submit the courtesy copy of the motion on the November 25, 2014 return date was the result of law office failure, which the court can accept as an excuse for the default. (CPLR 2005; *Swensen v MV Transp., Inc.*, 89 AD3d 924, 925 [2d Dept 2011].) Indeed, the movant has offered a "detailed and credible" explanation of its default. (*see Madonna Mgt. Servs., Inc. v Naghavi M.D. PLLC*, 123 AD3d 986, 987-988 [2d Dept 2014]; *Sarcona v J & J Air Container Sta., Inc.*, 111 AD3d 914, 915 [2d Dept 2013].) Thus, the court will entertain the motion by defendant for summary judgment.

The court will now address the branch of the motion by defendant for summary judgment on the ground that plaintiff has failed to sustain a serious injury pursuant to Insurance Law § 5102(d).

The issue of whether plaintiff has made a prima facie showing of serious injury is a matter of law, to be determined in the first instance by the court. (*Licari v Elliott*, 57 NY2d 230, 237 [1982]; *Charles v U.S. Fleet Leasing*, 140 AD2d 481, 481 [2d Dept 1988].) A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. (*see Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]; *Turchuk v Town of Wallkill*, 255 AD2d 576, 576 [2d Dept 1998].) With this established, the burden shifts to the plaintiff to come forward

with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact as to whether a serious injury was sustained within the meaning of the Insurance Law. (*see Gaddy v Eyler*, 79 NY2d 955, 957 [1992].) A plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings. (*see Carroll v Jennings*, 264 AD2d 494, 495 [2d Dept 1999]; *Kauderer v Penta*, 261 AD2d 365, 366 [2d Dept 1999].)

In the matter at hand, the defendant fails to make a prima facie case that the plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102(d). (*Toure v Avis Rent-A-Car Sys., Inc.*, 98 NY2d 345, 350 [2002].) Defendant submits, *inter alia*, the affirmed report of Dr. Thomas P. Nipper, who performed an independent orthopedic examination of the plaintiff on August 25, 2014. Dr. Nipper notes specific limitations in the range of motion of plaintiff's right shoulder. (*Farrah v Pinos*, 103 AD3d 831 [2d Dept 2013]; *Landman v Sarcona*, 63 AD3d 690, 690-691 [2d Dept 2009]; *Bagot v Singh*, 59 AD3d 368, 368 [2d Dept 2009]; *Hurtte v Budget Roadside Care*, 54 AD3d 362, 362 [2d Dept 2008].) Dr. Nipper's report fails to establish, prima facie, that these limitations were not caused by the subject accident. (*see Varghese v Ramcharitar*, 111 AD3d 819, 820 [2d Dept 2013].

Under these circumstances, it is not necessary to consider whether plaintiff's papers submitted in opposition to the defendant's motion are sufficient to raise a triable issue of fact on the issue of serious injury. (*Gaccione v Krebs*, 53 AD3d 524, 525 [2d Dept 2008]; *Coscia v 938 Trading Corp.*, 283 AD2d 538, 538 [2d Dept 2001].)

The court will next address the branch of the motion for summary judgment on liability grounds.

In the instant case, plaintiff alleges that she sustained serious injuries when the bus she was a passenger on pulled away from the bus stop before she was able to sit down, causing her to lose her balance and fall. In support of this branch of its motion for summary judgment, defendant asserts that the bus driver owed no duty to the plaintiff to wait for her to sit before accelerating. Defendant further argues that plaintiff offers no evidence that the take-off of the bus was sudden or violent and notes that plaintiff was unable to estimate the speed of the bus.

Defendant submits, *inter alia*, the affidavit of Laurette Clark, the operator of the subject bus, who avers that after the plaintiff boarded the bus, she watched in her rearview mirror as

the plaintiff sat behind her on the left side of the bus. Ms. Clark states that she then began to drive. According to Ms. Clark, she could not have taken off fast because buses are "governed", meaning that they take off gradually. She avers that as she accelerated from the bus stop, the bus was traveling less than five miles per hour. Ms. Clark states that she did not accelerate up to the speed limit because she was approaching a traffic light at the next intersection and was about to apply her brakes again.

In opposition, plaintiff contends that she fell immediately after paying at the fare box prior to her safely crossing over the standee line and into the passenger compartment of the bus. Plaintiff submits the deposition transcript of Ms. Clark, who testified that she is required to wait for passengers to find their seats before pulling away from the bus stop and must make sure that there are no passengers in front of the white standee line. Ms. Clark stated at her deposition that it would be dangerous to drive with a passenger in front of the white line.

At her deposition, plaintiff testified that she did not sit on the bus prior to her fall. She stated that she fell right from the place where she paid her fare. According to the plaintiff, after she put in her money in the fare box, the driver immediately started moving at a "fast pace." In her annexed affidavit, plaintiff also avers that the driver pulled away from the bus stop while the plaintiff was in front of the white line, and she had not yet entered the passenger part of the bus.

To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger as a result of the movement of the vehicle, the plaintiff must establish that the movement consisted of a jerk or a lurch that was unusual and violent, rather than merely one of the sort of "jerks and jolts commonly experienced in city bus travel." (*Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995].) This case, of course, is different in that it deals with a bus which allegedly accelerated quickly before the plaintiff could sit down. This case, thus, is governed by Section 392.62 of the Federal Motor Carrier Safety Regulations, which provide that "[n]o person shall drive a bus ... unless (a) all standees on the bus are rearward of the standee line..." (49 CFR 392.62[a].)

Defendant, seeking summary judgment, relies heavily on *McLeod v County of Westchester* (38 AD3d 624 [2d Dept 2007]), where the Appellate Division, Second Department, found that the operator of a bus was not required to wait until plaintiff found a seat before proceeding. However, there is no indication that

the bus driver in *McLeod* accelerated while the plaintiff was at the standee line, which is what plaintiff alleges here. Moreover, as noted above, the bus driver, Ms. Clark, testified that it would be dangerous for her to drive with passengers in front of the standee line.

Furthermore, there are issues of fact as to where plaintiff was at the time the bus accelerated. As noted, plaintiff asserts she was standing by the fare box in front of the standee line. Ms. Clark, however, testified at her deposition that she looked in her rearview mirror and saw that plaintiff was seated before she accelerated. In view of sharp conflict in the testimony, summary judgment is not warranted.

Accordingly, this motion by defendant for summary judgment is denied in its entirety.

Dated: June 18, 2015

CARMEN R. VELASQUEZ, J.S.C.