STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

JOHANNA B. MOTT

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 05-0659

GERARD BUCKLEY

Defendant.

Supreme Court Greene County All Purpose Term, September 7, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Defendant ("Mr. Buckley") brings this motion seeking summary judgment, pursuant to CPLR §3212. Plaintiff ("Ms. Mott") opposes the motion. Plaintiff brings a cross-motion for summary judgment on the issue of liability. Defendant opposes this cross-motion.

This action arises out of a motor vehicle accident involving the vehicle driven by Plaintiff Johanna B. Mott and the vehicle driven by Defendant Gerard Buckley. The accident

occurred on August 6, 2003 on State Route 32 in the Town of Catskill, Greene County. Plaintiff was allegedly traveling on State Route 32 at 55 mph, and the accident allegedly occurred when the Plaintiff stopped to make a left hand turn and was rear ended by Defendant's vehicle. Plaintiff was taken by ambulance to the emergency room at Columbia Memorial Hospital. Following the accident, Plaintiff underwent numerous medical evaluations as well as physical therapy.

Defendant brings this motion contending that Plaintiff did not sustain a "serious injury" as defined by Insurance Law §5102(d) in the motor vehicle accident that occurred on August 6, 2003. Defendant argues that Plaintiff's complaints are the result of pre-existing conditions, including chronic depression, anxiety and obesity, not the result of the motor vehicle accident. In addition, the Defendant argues that Plaintiff was able to return to both school and work almost immediately following the accident. Defendant supports his argument with affirmations of two physicians, Dr. Thomas Eagan and Dr. Christopher Calder as well as deposition testimony of the Plaintiff.

Plaintiff, in opposition, argues that she has suffered "a significant limitation of use of a body function or system," namely a "severe sprain/strain of thee cervical thoracic and lumbar spine with the tearing of the para spinal muscles [and] the bony insertions, facet joint capsules." Plaintiff supports her contentions with affirmations from three physicians, Dr. Clay J. Van Doren, Dr. Louis DiGiovanni, and Dr. Ralph Ortiz, and chiropractor, David Connell.

"Summary judgment is a drastic remedy and 'should not be granted where there is any doubt as to the existence of a triable issue.'" Napierski v. Finn 229 A.D.2d 869, 870 (3d Dept. 1996) (quoting Moskowitz v. Garlock, 23 A.D.2d 943, 944 (1965)). In deciding whether

summary judgment is warranted, the court's primary function is issue identification, not issue determination. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law by establishing the nonexistence of material issues of fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y. 2d 851, 853 (1985). The evidence must be construed in a light most favorable to the party opposing the motion. See Dykstra v. Winridge Condominium One, 175 A.D.2d 482, 483 (3d Dept. 1991). In order to defeat a motion for summary judgment, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. See Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

"The proponent of a motion for summary judgment [on a claim for serious injury] must establish, through the submission of competent medical evidence, that the plaintiff did not suffer a serious injury casually related to the accident." John v. Engel, 2 AD.3d 1027 (3d Dept. 2003). Once this initial showing is made, the burden shifts to the party opposing the motion for summary judgement to set forth "competent medical evidence based upon objective medical findings and diagnostic tests to support his claim . . . [because] subjective complaints of pain. . . absent other proof [are] insufficient to establish a 'serious injury.'" Tankersley v. Szesnat, 235 AD.2d 1010, 1012 (3d Dept. 1997)(citing Eisen v. Walter & Samuels, 215 AD.2d 149, 150).

"In order to establish a permanent consequential limitation or . . . 'a significant limitation of use,' the medical evidence submitted by plaintiff must contain objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present

limitations to the normal function, purpose and use of the affected body organ, member, function or system." Gehrer v. Eisner, 19 AD.3d 851 (3d Dept. 2005)(quoting John v. Engel, 2 AD.3d 1027, 1029 (3d Dept. 2003)). A "serious injury" or significant "limitation of use of a body function or system" means more than just a minor, mild, or slight limitation. Licari v. Elliott, 57 NY.3d 230, 236 (1982); See also Gaddy v. Eyler, 167 AD.2d 67 (3d Dept. 1991).

Although Defendant met its initial burden of a prima facie showing that the Plaintiff did not sustain a "serious injury" that meets the statutory threshold standard, Plaintiff set forth evidence in admissible form that raises triable issues of fact. Plaintiff, through medical affirmations, has brought forth evidence showing objective tests performed on Plaintiff and the results of those tests, including range of motion tests. The affirmations are not solely based on Plaintiff's subjective complaints, but on objective testing and observation by the physicians. In addition, the Third Department has found evidence sufficient to raise triable issue of fact where physician's opinions were supported by objective medical findings and diagnostic tests along with Plaintiff's statements regarding curtailment of activities. Chunn v. Carman, 8 AD.3d 745 (3d Dept. 2004). In the case at hand, Plaintiff has set forth evidence in the form of medical affirmations along with her own deposition testimony regarding curtailment of her everyday activities that is sufficient to raise triable issues of fact as to a "significant limitation of use of a body function or system." As Plaintiff's opposition papers specifically state that her claims are limited to the "significant limitation of use of a body function or system," this Court will dismiss all claims that Plaintiff's injuries reach the "permanent consequential limit" threshold and the "90/180" no-fault threshold sub-categories of Insurance Law §5102 (d).

Regarding the Plaintiff's cross-motion for summary judgment on issue of liability,

in a "rear-end collision with a stopped automobile creates a prima facie case of liability with respect to the operator of the moving vehicle and imposes upon him or her a duty of explanation." Jones v. Egan, 252 AD.2d 909 (3d Dept. 1998)(citing Masone v. Westchester County, 229 AD.2d 657 (3d Dept. 1996)). This inference of negligence can be overcome by a non-negligent explanation by the party opposing the motion. Id. In DeVito v. Silvernail, the Third Department held that the deposition testimony of the defendant that the plaintiff allegedly came to a sudden stop provided a sufficient non-negligent explanation to overcome the inference of negligence. DeVito v. Silvernail, 239 AD.2d 824, 825 (3d Dept. 1997). Here, the Plaintiff argues that the Defendant was following the Plaintiff too closely, the Defendant stated in his deposition testimony that Plaintiff came to a sudden stop. That the evidence must be construed in the light most favorable to the non-moving party, and where there are two plausible explanations, the evidence is sufficient to raise a triable issue of fact as to liability.

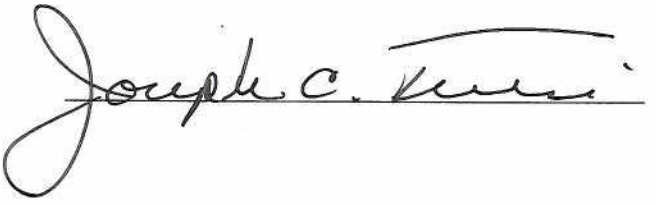
After full review of the record, this Court will deny the Defendant's motion for summary judgment, as the Plaintiff has set forth sufficient evidence to raise a triable issue of fact as to whether she has sustained a "serious injury" that meets the standard for "significant limitation of use" set forth in Insurance Law §5102 (d). However, this Court will dismiss all claims that Plaintiff's injuries reach the "permanent consequential limit" threshold and the "90/180" no-fault threshold sub-categories of Insurance Law §5102 (d). After full review of the record, this Court will also deny the Plaintiff's cross-motion for summary judgment on the issue of liability. Plaintiff has failed as a matter of law to set forth prima facie evidence that the Defendant was the sole cause of the motor vehicle accident.

All papers, including this Decision and Order, are being returned to the attorney

for the Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED

Dated: Albany, New York
October 17, 2007



PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment, dated July 16, 2007, including Exhibits 1-4 and Exhibits A-Q.
2. Affidavit in Support of Motion for Summary Judgment, dated July 16, 2007.
3. Memorandum of Law in Support of Defendant Gerard Buckley's Motion for Summary Judgment, dated July 16, 2007.
4. Affidavit of Thomas Stanford Eagan, M.D., dated July 12, 2007.
5. Affidavit of Christopher S. Calder, M.D., PhD, dated July 13, 2007.
6. Affirmation in Opposition to Motion for Summary Judgment, dated August 15, 2007.
7. Affirmation of Dr. Clay J. Van Doren, D.O., dated August 1, 2007.
8. Affidavit of Dr. Louis Di Giovanni, dated August 8, 2007.
9. Affirmation of David Connell, licensed chiropractor, dated August 13, 2007.
10. Affirmation of Dr. Ralph Ortiz, D.O., dated August 16, 2007.
11. Notice of Cross-Motion for Summary Judgment, dated August 14, 2007, including Exhibits A-E.
12. Attorney's Affidavit in Opposition to Cross-Motion, dated August 30, 2007.
13. Reply Memorandum of Law in Further Support of Defendant's Motion for Summary Judgment, dated September 6, 2007.
14. Attorney's Reply Affidavit, dated September 6, 2007.