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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

ANN RETMANSKI,

Plaintiff,

- against -

MICHAEL S. DELMONACO and LAWRENCE P. DELMONACO,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 3826/07

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The defense moves for summary judgment on the ground the plaintiff has not sustained a serious bodily injury as defined within the Insurance Law § 5102. The plaintiff opposes the motion. The defense replies to the plaintiff's opposition. The underlying personal injury action arises from a motor vehicle accident on February 22, 2006, at approximately 12:30 P.M., in the Town of Oyster Bay, Nassau County, State of New York. The plaintiff alleges driving a 2000 Nissan Maxima east on Underhill Avenue approaching its intersection with Queens Street. The plaintiff claims, at Queens Street, while intending to make a left turn, the vehicle was struck in the rear by the front

end of a Jeep Wrangler, driven by the defendant Lawrence P. Delmonaco, and owned by the defendant Michael S. Delmonaco. The plaintiff alleges sustaining serious bodily injuries as submitted by the plaintiff in the verified complaint, verified bill of particulars, various exhibits in opposition to this moving, including the affidavits of the plaintiff and the plaintiff's son dated September 26, 2008, and the deposition testimony dated October 16, 2007, by the defendant Lawrence P. Delmonaco. This Court has carefully reviewed all of the papers submitted with respect to this motion.

The defense attorney states, in a supporting affirmation dated June 16, 2008, the plaintiff appeared for independent medical examinations by Vartkes Khachadurian, M.D., an orthopedist, on February 13, 2007, and Matthew M. Chacko, M.D., on February 13, 2007. The defense attorney states the defendants now proffer the reports from those physicians, and the plaintiff's deposition testimony dated October 16, 2007, and asserts the physicians findings from objective medical testing establish a prima facie case for the defendants' entitlement to judgment as a matter of law, and dismissing the complaint.

The defense attorney points out Dr. Khachadurian diagnosed the plaintiff with cervical and lumbar sprain, only subjective complaints related to facial injuries, and with no clinical evidence of neuromotor deficits, herniated discs, radiculitis or radiculopathy, superimposed on degenerative spondylosis and disc disease. The defense attorney notes, while Dr. Khachadurian stated the subject accident is a cause of the plaintiff's injuries, this doctor identified the plaintiff had pre-existing conditions of extensive spondylosis,

degenerative joint disease of the cervical and lumbar spine, and degenerative disc disease. The defense attorney points to Dr. Khachadurian's finding of unrelated osteo-arthritis of the plaintiff's left hip of recent onset. The defense attorney reports Dr. Khachadurian concluded the plaintiff does not show any evidence of ongoing orthopedic disability from the subject accident, and the plaintiff is capable of performing usual work activities without restriction.

The defense attorney points out Dr. Chacko concluded the plaintiff suffered from cervical and lumbar spine sprains which resolved, and the plaintiff had no clinical findings of carpal tunnel syndrome. The defense attorney notes, with respect to a limitation of motion of the lumbar spine, Dr. Chacko dismissed this condition as a "subjective finding" where the plaintiff controlled the movements during the test. The defense attorney points to Dr. Chacko's addition that there were no objective neurological findings "suggesting any neurological sequelae attributable to the subject accident." The defense attorney reports Dr. Chacko closed by finding a causal relationship between the plaintiff's injuries, and the subject accident, but stated the plaintiff is fully capable of performing normal activities of daily living and working.

The plaintiff's attorney states, in an opposing affirmation dated September 27, 2008, the defense motion and supporting papers are insufficient to entitle the defendants to judgment as a matter of law. The plaintiff's attorney points to the plaintiff's affidavit dated September 26, 2008, with attached exhibits, including photographs of the plaintiff,

the plaintiff's vehicle, a letter dated September 17, 2008, from Laura A. Gulliksen, Clerk IV/Payroll Supervisor, Nassau County Probation Department; the affirmation dated September 25, 2008, by Dr. James Ligouti, D.O., the plaintiff's treating neurologist; the affirmation dated August 22, 2008, by Dr. A. Anand, M.D., a board certified radiologist, who took a lumbar CT scan of the plaintiff on April 13, 2006; the affidavit dated September 26, 2008, by Kristen M. Guleksen, MS, PT, a licensed New York State physical therapist, who certifies the plaintiff's physical therapy and physical therapy progress records; the affidavit dated September 26, 2008, by the plaintiff's son, Kenneth Retmanski; the deposition testimony dated October 16, 2007, by the defendant Lawrence P. Delmonaco; and the pleadings by the plaintiff.

The plaintiff's attorney states the defendant driver testified traveling at a speed of 40 miles per hour at the time of the impact between the vehicles. The plaintiff's attorney states that testimony, and the vehicle photograph show this accident was not minimal rather it involved a combination of speed and heavy impact to the rear of the plaintiff's vehicle resulting in the plaintiff sustaining serious bodily injuries. The plaintiff's attorney notes Dr. Khachadurian, who examined the plaintiff once almost two years after the accident, failed to make any mention of the 90/180 day category of serious injury, and asserts that lack is fatal to the defense motion as a matter of law. The plaintiff's attorney asserts Dr. Chacko, who also examined the plaintiff once almost two years after the accident, failed to make any mention of the 90/180 day category of serious injury, and

asserts that lack is fatal to the defense motion as a matter of law. The plaintiff's attorney points Dr. Chacko's finding of a causal relationship between the plaintiff's injuries and the accident, and states this physician does not address the extent to which the plaintiff was unable to perform usual and customary daily activities for the 90 days of the 180 days after the accident. The plaintiff's attorney avers there is no evidence submitted by the defendants to establish the plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing substantially all of the material acts which constituted the plaintiff's usual and customary activities for a period of not less than 90 days during the 180 day period immediately following the accident. The plaintiff's attorney maintains neither defense expert, in the independent medical examinations, opines with respect to the scar on the plaintiff's eyelid, as alleged in the plaintiff's verified bill of particulars, to be a significant disfigurement.

The plaintiff's attorney states Dr. Ligouri provides the requisite objective medical evidence of the plaintiff's disability and its casual relationship to the subject accident. The plaintiff's attorney points out Dr. Ligouri continuously treated the plaintiff commencing on March 13, 2006, two weeks after the accident, through September 2008. Dr. Ligouri performed a physical examination and range of motion testing at that March 13, 2006 examination, and the doctor's impression was the plaintiff suffered from head trauma with post concussion syndrome, headache syndrome, cervical radiculapathy, and

lumbar radiculapathy. Dr. Ligouri examined the plaintiff again on March 27, 2006, and based upon NVC testing of the upper extremities, the doctor concluded the examination revealed moderate carpel tunnel syndrome and mild left carpel tunnel syndrome, and on the right, a CT scan, revealed a possibility of disc herniation. Dr. Ligouri was not able to do an MRI nor EMG testing on the plaintiff because of a pacemaker and the plaintiff takes Coumadin, a medication, but the doctor prescribed physical therapy. Dr. Ligouri concludedes, as a result of the accident, the plaintiff sustained status post head trauma with post concussion headache syndrome, cervical derangement, carpel tunnel syndrome and lumbar radiculaphy secondary to possible disc herniation. Dr. Ligouri finds the plaintiff's prognosis is guarded, and the plaintiff has a permanent partial disability. The plaintiff's attorney points to the records from Precision Physical Therapy which demonstrate the plaintiff continues to suffer from limitations in the right hand. The plaintiff's attorney contends there is a triable issue of fact for a jury.

The defense attorney states, in a reply affirmation dated October 6, 2008, the defendants have met their burden of proving the plaintiff failed to sustain a threshold injury. The defense attorney, in detail, reiterates the defendants' assertions, and challenges the plaintiff's contentions. The defense attorney asserts the plaintiff's recitation of treatment has no evidentiary value. The defense attorney avers the plaintiff has not adequately explained the gaps in the plaintiff's treatment with Dr. Ligouri, and point outs some of those gaps, which occurred subsequent to the 90/180 statutory period,

extend up to almost seven months. The defense attorney contends the plaintiff has not demonstrated an issue of fact that the plaintiff sustained a serious injury as defined under Insurance Law § 5102 (d). The defense attorney argues the evidence fails to establish any injury allegedly caused by the accident, and maintains the injuries were mild, minor or slight limitation, so summary judgment should be granted in favor of the defendants.

Under CPLR 3212 (b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party ... [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 325; ***Andre v Pomeroy***, 35 NY2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelan v GTE Sylvania***, 182 AD2d 446). Here, in view of the applicable legal standards, plaintiffs' causes of action can be sustained. The complaint must not be dismissed. The court's role is issue finding rather than issue determination (***see, e.g., Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395; ***Gervasio v Di Napoli***, 134

AD2d 235, 236; ***Assing v United Rubber Supply Co.***, 126 AD2d 590). Nevertheless, " 'the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated' " (***Gervasio v Di Napoli, supra***, 134 AD2d, at 236, quoting ***Assing v United Rubber Supply Co., supra; see, Columbus Trust Co. v Campolo***, 110 AD2d 616, ***affd*** 66 NY2d 701). If the issue claimed to exist is not genuine and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v Pomeroy***, 35 NY2d, ***supra***, at 364; ***Assing v United Rubber Supply Co., supra***). Here, the defendants have not demonstrated that, on the facts, they are entitled to judgment as a matter of law under CPLR 3212 (b). The plaintiff has explained any gap in treatment. There is a triable issue of fact which requires resolution by the trier of fact.

Accordingly, the motion is denied.

So ordered.

Dated: **December 15, 2008**

ENTER:

J. S. C. HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION NON FINAL DISPOSITION XXX