S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

TASHI KIRBY,

Plaintiff,

- against -

CATHERINE WILLIAMS,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 3677/08

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 pursuant to CPLR 3212 for summary judgment on the ground the injuries allegedly sustained by the plaintiff in a March 15, 2006 automobile accident do not satisfy the Insurance Law § 5102 (d) threshold, so the plaintiff's claims should be dismissed. The plaintiff opposes this motion on the ground she sustained serious injury as defined by the Insurance Law §§ 5102 (d) and 5104 (a), to wit her cervical and lumbar regions resulting from the accident where the defendant operator impacted her car. This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion.

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." "The 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 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 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, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 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 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***).

The Court of Appeals has observed:

> The No-Fault Law provides a plan for compensating victims of automobile accidents for their economic losses without regard to fault or negligence. An injured party may bring a plenary action in tort, however, to recover for non-economic loss, pain and suffering, but must show that he or she has suffered a serious injury within the meaning of the No-Fault Law

Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295, 296-297, 727 N.Y.S.2d 378 [2001].

> Insurance Law § 5102 (d) provides:
>
> "Serious injury" means 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.

This State's highest Court holds:

> Hence, the word "significant " as used in the statute pertaining to "limitation of use of a body function or system" should be construed to mean something more than a minor limitation of use. We believe that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute

Licari v. Elliott, 57 N.Y.2d 230, 236, 455 N.Y.S.2d 570 (1982).

The ***Licari*** Court also stated: "It requires little discussion that plaintiff's subjective complaints of occasional, transitory headaches hardly fulfill the definition of serious injury...To hold that this type of ailment constitutes a serious injury would render the statute meaningless and frustrate the legislative intent in enacting no-fault legislation" " (***supra***, p. 238-239).

The Second Department reiterated that body of law when it stated:

> 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, Turchuk v Town of Wallkill***, 255 AD2d 576). 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 that a serious injury was sustained within the meaning of the Insurance Law (***see, Gaddy v Eyler***, 79 NY2d 955). The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (***see, Powell v Hurdle***, 214 AD2d 720; ***Giannakis v Paschilidou***, 212 AD2d 502). Further, this Court has consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (***see, Kauderer v Penta***, 261 AD2d 365; ***Carroll v Jennings, supra***). Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff (***see, Kauderer v Penta, supra***). In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained (***see, Smith v Askew***, 264 AD2d 834).

Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102 (d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. Although each case will stand or fall on its own facts, certain objective tests satisfy this standard

Grossman v. Wright, 268 A.D.2d 79, 83-84, 707 N.Y.S.2d 233 (2nd Dept., 2000).

The Second Department stated:

We hold, consistent with our prior rulings in ***Perez v. State of New York, supra and Zecca v. Riccardelli, supra*** that serious injury is quintessentially an issue of damages, not liability. In the event a plaintiff at a damages trial fails to sustain the burden of establishing serious injury, the plaintiff is not entitled to any recovery despite proof of common law liability

Van Nostrand v. Froehlich, 44 A.D.3d 54, 62, 844 N.Y.S.2d 293 [2nd Dept., 2007].

The Court of Appeals has also stated:

While a cessation of treatment is not dispositive-the law surely does not

> require a record of needless treatment in order to survive summary judgment-a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so

Pommells v. Perez, 4 N.Y.3d 566, 574, 830 N.E.2d 278 [2005].

Here, the plaintiff supplied no explanation whatever as to why she failed to pursue any treatment for her injuries for a few years nor did her doctors.

The medical records of the Emergency Department of North Shore University Hospital shows the plaintiff had an automobile accident on July 11, 2007, some 16 months after the subject March 15, 2006 motor vehicle accident. The subsequent accident consisted of the plaintiff's car rolling over, and the plaintiff allegedly sustaining neck and back injuries. X-rays were negative of the plaintiff which were taken after the March 15, 2006 motor vehicle accident. The defense expert orthopedist examined the plaintiff on March 26, 2009, and found full quantified range of motion of the cervical spine and lumbar spine with comparisons to normal range of motion, as well as negative cervical compression and straight leg raising tests. The defense expert diagnosed the plaintiff's cervical and lumbar sprains/strains as resolved. The defense expert opines there is no evidence of an orthopedic disability, and the plaintiff is able to perform all activities of daily living, as well as duties of her occupation without restrictions or limitations.

The plaintiff's treating physician completed health insurance forms for March 16, 2006 through June 20, 2006, and never stated the plaintiff was disabled nor unable to work in question 16 on the forms. The plaintiff testified at a February 10, 2009 deposition she

did not miss time from school, but only missed three to four days of part time work at Marshall's department store, and four days of part time work at Starbucks after the March 15, 2006 motor vehicle accident.

The plaintiff submits her December 15, 2009 affidavit with an October 2009 affidavit and an April 10, 2007 unsworn report by a radiologist, employed by Open MRI of Miami-Dade, Ltd., in Florida, who states he took an MRI of the plaintiff's lumbar spine on April 6, 2007, in Aventura, Florida, and that MRI is inscribed with the plaintiff's name, the date of the MRI, an identifying number, and the name of the facility. That radiologist stated he would testify to all matters relating to that MRI in the manner set forth in the October 2009 sworn statement.

The plaintiff also submits a November 4, 2009 affidavit by Raymond Cecora, a physical therapist and owner of Park Physical Therapy, 5500 Merrick Road, Massapequa, New York, who states the contents of physical therapy records dated March 18, 20, 22, 23, 27, 29, and 30, 2006, and April 5, 6, 13, and 20, 2006, and May 17, 2006, are true under penalties of perjury to the best of Cecora's knowledge and information, these papers bear the signatures of other physical therapists. The plaintiff also submits December 22 and 23, 2009 affidavits by a Florida chiropractor, who treated the plaintiff from February 15, 2007 through May 14, 2007, but the chiropractor fails to set forth any quantified loss of motion with comparisons to normal range of motion. The first time any measurements of motion were taken of the plaintiff was on September 29, 2009, after the plaintiff was involved in

the July 11, 2007 accident, so there is a lack of showing the March 15, 2006 was the proximate cause of the plaintiff's injuries. The plaintiff further submits the affirmation and report of her treating physician setting forth records from 2006 and 2007, but there is no recent examination of the plaintiff by this plaintiff expert, who fails to set forth any quantified loss of motion with comparisons to normal range of motion. The most recent examination of the plaintiff shows full range of lumbar flexion (80/80), a ten degree loss of lumbar extension (15/25), and a five degree loss of rotation (30/35), and none of those findings, nor the whole body disability of 11% are significant.

Here, the evidence submitted by the defendant in support of the motion is sufficient to establish a *prima facie* case within the meaning of Insurance Law § 5102 (d), to wit the plaintiff did not sustain a serious injury. The plaintiff's opposition is insufficient to raise a triable issue of fact.

Accordingly, the motion is granted.

So ordered.

Dated: **March 16, 2010**

ENTER:

J. S. C.

FINAL DISPOSITION XXX NON FINAL DISPOSITION