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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

DELPHIN JONES,

Plaintiff,

- against -

VELANA C. BRASWELL and NYRIE N. AUSTIN,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 6292/08

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2
Answering Affidavits 3
Replying Affidavits 4
Briefs: Plaintiff's / Petitioner's . . . . . _____
Defendant's / Respondent's . . . . . _____

The defendant Nyrie N. Austin moves for summary judgment against the plaintiff and the co co-defendant Velana C. Braswell to dismiss the complaint and cross claims. Austin claims no liability for the April 8, 2005 accident, or in the alternative the plaintiff failed to suffer or otherwise meet the no-fault serious injury requirement under Insurance Law § 5102 (d).

Austin's attorney states, in a September 28, 2009 affirmation, the admissible evidence establishes the accident happened when Braswell's vehicle struck Austin's vehicle, where the plaintiff was a passenger. Austin's attorney states Austin's vehicle was completely stopped in the northbound left turn lane of North Main Street, at the intersection of North Main Street and West Seaman Avenue, Freeport, New York, waiting to make a left turn while signaling a left turn, when Braswell failed to keep right and caused a head on collision. Austin's attorney points to deposition

testimony by all of the parties and a police report to show Austin was not a proximate cause of the accident, and Braswell never saw Austin's vehicle before the accident.

Austin's attorney addresses the verified bill of particulars alleging the plaintiff's injuries resulting from the accident, and states the injuries cannot be considered serious injury under Insurance Law § 5102 (d). Austin's attorney notes the verified bill of particulars makes no claim for past or future lost wages nor alleges the plaintiff cannot work. Austin's attorney comments the plaintiff testified basketball was the only activity he is prevented from participating, although he continues to play once a month.

Austin's attorney points out the April 8, 2009 affirmation by S. Farkas, M.D., an orthopedic surgeon, who performed an orthopedic examination of the plaintiff on that same day, opined the plaintiff presented with resolved cervical sprain, lumbar sprain, and right shoulder sprain. Dr. Farkas stated there was no clinical correlation to any alleged disc bulges nor herniations. Dr. Farkas found, having performed range of motion tests, no orthopedic impairment based on the physical examination, and the plaintiff was capable of performing all of the tasks of daily living, and maintaining full employment without restrictions.

Austin's attorney points to the unsworn June 17, 2005 MRI radiology report by Elizabeth P. Maltin, M.D. as the basis for the plaintiff's allegations with respect to the lumbar spine, and then the affirmation by Clifford Beinart, M.D., a board-certified radiologist, who reviewed the June 17, 2005 MRI. Austin's attorney notes Dr. Beinart initially mentions there are degenerating discs at L4-5 and L5-S1, and points out Dr. Beinart disagrees with Dr. Maltin, and concludes the degenerative and hypertrophic changes in L4-5 and L5-S1 are clearly of longstanding degenerative origin, no post traumatic changes are identified to indicate a correlation to the April 8, 2005 accident. Dr. Beinart opines there is no correlation between the findings on the June 17, 2005 MRI, and the April 8, 2005 accident.

Austin's attorney also points to the November 17, 2008 affirmation by Jacques Romano, M.D., who reviewed the June 17, 2005 MRI. Dr. Romano opines there are degenerative changes at L4-5 and L5-S1. Dr. Romano states there is no discal extrusion, and his findings are not suggestive of the sequella of acute trauma.

Braswell's attorney states, in a November 3, 2009 affirmation, there is no serious injury to the plaintiff as required by Insurance Law §§ 5102 (d) and 5104 (a). Braswell's attorney states Braswell adopts all of the fact and legal arguments made by Austin in motion sequence number one as to serious injury.

Braswell's attorney contends there are many issues of fact regarding liability, including Austin made a left turn in front of Braswell's vehicle; Austin failed to yield the right of way to Braswell; Austin violated Vehicle and Traffic Law §§ 1141 and 1163 (a), regarding a left turn and a turn at an intersection; and Austin failed to use reasonable care. Braswell's attorney points to the October 28, 2009 affidavit by Rahman Zellars, a nonparty witness. Zellars states he is Braswell's son, and he was a passenger in Braswell's vehicle at the time of the accident. Zellars states he observed Austin's vehicle make a left turn in front of Braswell's vehicle, and the collision happened. Zellars indicates his mother drove straight, but she did nothing to cause the accident, but rather Austin's made a left turn in the path of his mother's vehicle. Braswell's attorney asserts Austin was wholly responsible for causing the collision.

The plaintiff's attorney states, in a January 11, 2010 opposing affirmation, the motion and the cross motion are insufficient to warrant judgment as a matter of law. The plaintiff's attorney contends the defendants failed to make a *prima facie* showing the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). The plaintiff's attorney points to Dr. Farkas' affirmation, and states that report fails to sufficiently set forth whether any of the objective tests performed on the plaintiff were for the purpose of ruling out this claim. The plaintiff's attorney

notes the plaintiff testified he sustained injuries to his left arm from the April 8, 2005 accident, to wit the plaintiff identified his left shoulder down to his wrist, and still experiences numbness throughout his left arm even complaining about the condition during Dr. Farkas' examination. The plaintiff's attorney states, while Dr. Farkas notes in his report regarding the sensory examination that the plaintiff stated feeling more about the right than the left upper extremity circumferentially, Dr. Farkas failed to perform any range of motion testing on the left arm or any other objective medical testing nor opine as to whether the injury was casually related to the April 8, 2005 accident.

Austin's attorney states, in a February 1, 2010 reply affirmation to the opposition submitted by the plaintiff and Braswell. Austin's attorney reiterates Austin's contentions regarding liability and serious injury.

Austin's attorney points out Zellars was only 10 years on April 8, 2005, and notes there is no precise age at which an infant is competent to testify, but questions the competency of this youth where there was not preliminary examination to determine his competency, and adds unsworn testimony of an infant is inadmissible in a civil action. Austin's attorney remarks a preliminary examination regarding competency cannot be done by a notary public of the now 15 years old nonparty witness, whose October 28, 2009 affidavit alleges he was an eyewitness to the April 8, 2005 accident.

Austin's attorney states, while the plaintiff alleges jaw pain in the verified bill of particulars, the plaintiff's no-fault record indicates the plaintiff received no continuing treatment for this alleged condition. Austin's attorney asserts complaints of jaw pain is insufficient to establish the plaintiff suffered a serious injury within Insurance Law § 5102 (d). Austin's attorney avers the alleged arm injury is not even included in the verified bill of particulars, and the sole unsworn report by Mityaya Payackapan, M.D., an orthopedist, contained in the plaintiff's no-fault file, shows Dr. Payackapan saw the plaintiff once. Dr. Payackapan indicates the plaintiff suffered a previous left elbow fracture,

and failed to casually relate any symptomology to the April 8, 2005 accident. Dr. Payackapan found nothing of note with respect to an examination of the plaintiff's neck and left shoulder. Austin's attorney point out the no-fault file indicates the plaintiff's only treatment consisted of a handful of chiropractic visits, and the plaintiff's benefits were terminated due to the plaintiff's failure to appear for physical examinations scheduled by the no-fault insurance carrier.

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 articulated the serious injury standard when it stated: Plaintiff's proof that she suffered a soft tissue injury, described by her own expert as "mild," and which, at the time of trial, resulted in no restriction of plaintiff's mobility, is not a "serious injury" under the No-Fault Insurance Law. We reject the holding of the majority of the Third Department that under these circumstances, pain may form the basis of "serious injury". To so hold would undercut the policy behind the No-Fault insurance scheme to reduce the number of automobile personal injury accident cases litigated in the courts and frustrate the Legislature's attempt to put an objective verbal definition of serious injury (***Licari v. Elliott***, 57 N.Y.2d 230, 236, 239, 455 N.Y.S.2d 570, 441 N.E.2d 1088; ***see, Thrall v. City of Syracuse***, 96 A.D.2d 715, 464 N.Y.S.2d 1022, ***revd.*** on dissenting opn. below 60 N.Y.2d 950, 471 N.Y.S.2d 51, 459 N.E.2d 160, ***rearg. denied*** 61 N.Y.2d 905, 474 N.Y.S.2d 1027, 462 N.E.2d 1205). The subjective quality of plaintiff's transitory pain does not fall within the objective verbal definition of serious injury as contemplated by the No-Fault Insurance Law (***Licari v. Elliott***, 57 N.Y.2d, at 239, 455 N.Y.S.2d 570, 441 N.E.2d 1088, ***supra***)

Scheer v. Koubek, 70 N.Y.2d 678, 679, 512 N.E.2d 309 [1987].

The evidence submitted by both defendants here establishes *prima facie* the plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d) (***see Licari v. Elliott***, 57 N.Y.2d 230 [1982]). Once both defendants established a *prima facie* entitlement to judgment as matter of law by demonstrating the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), the burden of proof shifts to the plaintiff to come forward with sufficient admissible evidence to create an issue of fact to demonstrate a serious injury (***see Gaddy v Eyler***, 79 NY2d 955 [1992]). In opposition, the plaintiff's proffered evidence fails to demonstrate a "permanent consequential limitation of use of a body organ or member," or a "significant limitation of use of a body function or system." Also, the plaintiff fails to support sustaining a "permanent loss of use of a body organ, member, function or system" from pain of the injuries resulting from the April 8, 2005 accident, which the plaintiff claims is aggravated by certain activities. While there may be evidence of the plaintiff's subjective pain, there is no evidence backing up plaintiff's claim of permanency (***see, Gaddy v Eyler***, 79 NY2d, ***supra***). In addition, the plaintiff has not shown

serious injury under the statutory requirement of 90 days out of 180 days, that is, he was restricted from performing usual activities to a great extent rather than some slight curtailment"(***see Licari v Elliott,*** 57 N.Y.2d, ***supra***, at 236). Here, this plaintiff's usual activities were slightly impeded. The plaintiff testified basketball was the only activity he was allegedly prevented from doing, prior to the accident he played thrice a week. The plaintiff testified he presently plays once a month. Moreover, the plaintiff testified he was unemployed at the time of the April 8, 2005 accident, and in 2008 he took a manual labor job for eight months stacking shelves at Restaurant Depot. The plaintiff testified he left Restaurant Depot because he worked in a refrigerator, and he wanted to get a better job.

The Second Department holds "the subjective quality of the plaintiff's pain does not fall within the objective definition of serious injury as contemplated by the no-fault law (***see, Scheer v Koubek***, 70 NY2d 678, 679; ***Saladino v Meury***, 193 AD2d 727)" (***Iaria v. Romero***, 194 A.D.2d 769, 599 N.Y.S.2d 1011 [2nd Dept, 1993]). Here, the plaintiff's sprains and strains of the spine, and soft tissue injury causing shoulder and back pains do not amount to serious injury under the Insurance Law § 5102 without admissible medical evidence. Also, the plaintiff's claims based upon unspecified jaw pain, and arm numbness appear to be secondary to a previous left elbow fracture, and not the subject of the April 8, 2005 accident.

With respect to the defense cross claims on the issue of liability, there is a triable issue of fact with respect to the operation of the two vehicles. Moreover, the Court of Appeals holds:

> There is no precise age at which a child is deemed competent to testify under oath in a criminal proceeding. However, under CPL 60.20 (subd 2), a rebuttable presumption exists that an infant less than 12 years old is not competent to be sworn (***People v Klein***, 266 NY 188; Richardson, Evidence [10th ed], § 390). Moreover, the infant witness must not only demonstrate sufficient intelligence and capacity to justify the reception of his or her testimony, but it must also be clear that he knows, understands and appreciates the nature of an oath before the trial court may permit the reception of sworn testimony. The tests as to the infant's testimonial capacity and

> ability to understand the nature of an oath are necessarily individualistic in nature and are to be determined by "the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former." (***Wheeler v United States***, 159 US 523, 524)

People v. Nisoff, 36 N.Y.2d 560, 565-566, 369 N.Y.S.2d 686 [1975]; ***see also Rittenhouse v. Town of North Hempstead***, 11 A.D.2d 957, 205 N.Y.S.2d 564 [2nd Dept, 1960], where the child witness was almost four years old at the time of the accident, but nine years old when the infant testified). However, the issues of liability and infant competency are now moot since both defendants have shown evidence there is nothing to be resolved at the trial on the material issue of serious injury, and the plaintiff has not shown material facts sufficient to require a trial of any issue of fact.

Accordingly, both defense motions are granted to the extent of dismissing the complaint and any cross claims.

So ordered.

Dated: **April 12, 2010**

ENTER:

J. S. C.

FINAL DISPOSITION NON FINAL DISPOSITION XXX