Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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YEON OK PI and TAE YO KANG,

Plaintiffs, **Action No. 1**
-against- **Index No.: 18969/09**
Motion Date: 6/8/11
MINERVA CONFESSOR and HAK SOO PI **Motion Cal. No. 39**

Defendants,

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HAK SOO PI **Action No. 2**
Plaintiff, **Index No.: 18970/09**

-against-

MINERVA CONFESSOR,
Defendant.

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The following papers numbered 1 to 22 read on this motion by defendant **MINERVA CONFESSOR** for an order pursuant to CPLR 3212 granting summary judgment in her favor and dismissing all claims and complaints of the plaintiffs and co-defendant/plaintiff Hak Soo Pi and for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability and dismissing all claims and cross claims as against defendant Minerva Confessor and the cross-motion by defendant **HAK SOO PI** for an order pursuant to CPLR 3212 granting summary judgment in his favor and dismissing the Plaintiffs' complaints. In an Order of this Court, dated November 4, 2009, this Court consolidated Action Numbers 1 & 2 for joint discovery and joint trial. For purposes of disposition, the Court shall resolve these motions as if they have been made under their respective Index Numbers. The branch of the motion by defendant Confessor seeking dismissal of the complaint of plaintiffs Yeon Ok Pi and Tae Yo Kang is made under Index Number 18969/09. The branch of the motion by defendant Confessor seeking dismissal of the complaint of Hak Soo Pi is made under Index Number 18970/09. The Cross-motion by defendant/plaintiff Hak Soo Pi seeking dismissal of the complaint of plaintiffs Yeon Ok Pi and Tae Yo Kang is made under Index Number 18969/09.

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Upon foregoing papers it is ordered that the motion by defendant **MINERVA CONFESSOR** for an order pursuant to CPLR 3212 granting summary judgment in her favor and dismissing all claims and complaints of the plaintiffs and co-defendant Hak Soo Pi based upon their failure to meet the serious injury requirements of Insurance Law §5102(d) and for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability and dismissing all claims and cross claims as against defendant Minerva Confessor and the cross-motion by defendant **HAK SOO PI** for an order pursuant to CPLR 3212 granting summary judgment in his favor and dismissing the plaintiffs' complaints based upon their failure to comply with Insurance La w §§ 5102 and 5104 are denied for the following reasons:

According to the complaint, this action arises out of an accident that took place at or about the intersection of 67TH Avenue and 232ND Street, Queens County, New York, on November 16, 2007. At that time, plaintiffs in action Number 1, Yeon Ok Pi and Tae Yo Kang were passengers in the vehicle being driven by defendant in Action Number 1 and plaintiff in Action Number 2, Hak Soo Pi. This vehicle came into contact with the vehicle being operated and owned by defendant in both actions, Minerva Confessor. Plaintiffs brought these actions to recover for injuries suffered as a result of this accident.

The branch of the motion by defendant Minerva Confessor for summary judgment in her favor on the issue of liability is denied. She claims that there is no basis to impose liability upon her since the accident was caused solely by Hak Soo Pi's vehicle. She has submitted, inter alia, the deposition testimony of herself, Yeon Ok Pi, Tae Yo Kang, Hak Soo Pi, and an unsworn statement of Julio Rodriguez. This evidence suggests the vehicle being operated by defendant Hak Soo Pi crossed over a double yellow line and came into contact with Confessor's vehicle, which was stopped and waiting to make a left hand turn. According to defendant Confessor, this evidence establishes her entitlement to judgment in her favor on the issue of liability and the dismissal of the complaint as against her. She had the right to anticipate that defendant Hak Soo Pi would obey the vehicle and traffic law and stay within his traffic lane. Since Hak Soo Pi's violation resulted in the impact with Confessor's vehicle, Confessor cannot be held liable for the accident and the complaint must be dismissed as against her.

On a motion for summary judgment, the moving parties must establish their defenses sufficiently to warrant a court awarding judgment in their favor as a matter of law. Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988.) The opposing party must then produce sufficient

evidentiary proof in admissible form to raise a triable issue of fact warranting a trial. *Id*. It is the court's burden to determine whether a triable issue of fact exists. Barr v. County of Albany, 50 N.Y.2d 247(1981.)

Co-defendant Hak Soo Pi has opposed this motion and has referred to portions of his deposition testimony which indicates that Confessor's vehicle had moved into Pi's vehicle's path and struck his vehicle in the rear. This was done as the Pi vehicle was passing through the intersection.

The court finds that defendant Hak Soo Pi has submitted evidence that shows defendant Minerva failed to operate her vehicle in a reasonable manner and there is conflicting testimony regarding whether the plaintiffs' accident was caused by the actions of both defendant drivers. Consequently, it is not clear that defendant Minerva was free of any actionable negligence as a matter of law. As such, co-defendant Pi has raised an issue of fact concerning whether defendant Minerva's actions in operating the vehicle contributed to the accident; which requires resolution by a jury. See, Gonzalez v. County of Suffolk, 277 A.D.2d 350 *(*2d Dept 2000.) *Compare*, Brown v. City of New York, 237 A.D.2d 398 (2d Dept 1997.) Consequently, the branch of Minerva's motion seeking summary judgment on the issue of liability is denied.

The branch of Minerva's motion and the cross-motion seeking summary judgment based upon plaintiffs' failure to meet the serious injury requirements of Insurance Law §5102(d), is denied. In evaluating this motion, it is for the court in the first instance to determine whether plaintiff has established a prima facie case of sustaining a serious injury within the meaning of Insurance Law 5102 (d). *See*, Licari v Elliot, 57 NY2d 230,237 (1982); Armstrong v Wolfe, 133 AD2d 957,958 (3rd Dept. 1987.) The analysis of the meaning of serious injury has a long history beginning with Licari v Elliott, *supra*, and applying what could be discerned from the legislative intent, the Court of Appeals, analyzing the word "significant", wrote that "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, supra, at 236.) The Court of Appeals reiterated this analysis in Dufel v Green, 84 N.Y.2d 795 (1995), in which it wrote that the legislative intent of the "no-fault" legislation was to weed out frivolous claims and limit recovery to major or significant injuries.

To grant summary judgment it must clearly appear that no triable issue of fact is presented. Miceli v Purex Corp., 84 AD2d 562 (2d Dept. 1981.) Additionally, summary judgment should be granted in cases where the plaintiff's opposition is limited to "conclusory assertions tailored to meet statutory requirements" (Lopez v Senatore, 65 N.Y.2d 1017.) The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. Bronson v March, 127 AD2d 810 (2d Dept. 1987.)

In support of their motions, defendants have submitted, *inter alia*, plaintiffs' Bill of Particulars and deposition testimony and a affirmed reports of Dr. Miller, an orthopedist, Dr. Feuer, a neurologist, and Dr. Berkowitz, a radiologist. The Court finds that this evidence establishes that plaintiffs Yeon Ok Pi, Tae Yo Kang, and Hak Soo Pi have not suffered a serious injury within the meaning of Insurance Law § 5102. Consequently, the burden shifts to the plaintiffs to come forward with evidence to overcome the defendants' 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 N.Y.2d 955 [1992] ; Greggs v Kurlan, 290 AD2d 533 (2d Dept 2002.) Consequently, the plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see*, Powell v Hurdle, 214 A.D.2d 720 [2d Dept. 1995].) Further, courts have consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (*see*, Grossman v. Wright, 268 A.D.2d 79 (2d Dept 2000.) Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff. *Id*. 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. *Id*. 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. *Id.* This burden has been met by plaintiffs.

In opposition, plaintiffs have submitted affirmed reports of Dr. Khodadadi, a radiologist and an affirmation of Dr. Chang and medical reports he prepared. Dr. Khodadadi examined the MRI's of the plaintiffs and found they had suffered traumatic injuries, including disc herniations. The Doctor specifically refuted Dr. Berkowitz' findings that these images showed only degenerative changes that were not due to the subject accident. The Doctor also opined that these injuries were caused by the subject accident. Dr. Chang's affirmation and reports indicates he examined plaintiffs for the first time on or about November 29, 2007 and treated them for about ten months, when their no-fault benefits were stopped. At the first examination, Dr. Chang tested plaintiffs and found them to have specific restrictions of movement in their cervical and lumbar spines. He found that these restrictions corresponded to the injuries found in the MRI images. He prescribed treatments and plaintiffs appeared at his office over an extensive period of time to receive treatments. He examined plaintiffs again on February 18 & 21, 2011, and found continued limitations of movement in their spine. He found these limitations to be permanent and caused by the subject accident.

The court finds that plaintiffs' evidence is sufficient to raise a triable issue of fact that each plaintiff sustained a serious injury within the meaning of the Insurance Law. Dr. Chang

stated that he had measured the plaintiffs' range of motion through various tests that confirmed the findings of restrictions of movement. *See* Fabiano v Kirkorian, 306 AD2d 373(2d Dept 2003.) Moreover, the Doctor stated that plaintiffs had undergone various courses of medical treatment and physical therapy during a sufficient time period after the accident. *See generally*, Brown v Achy, 9 AD3d 30 (1st Dept 2004.) Dr. Chang's initial examination and findings were contemporaneous with the accident and he also found limitations at her recent examination of plaintiff. *Compare*, Iusmen v Konopka, 38 AD3d 308 (2d Dept 2007.) Additionally, any gap in treatment was sufficiently explained by plaintiffs having obtained treatment for about ten months after the accident, but stopped when their no-fault benefits were terminated and they could not afford to pay out of pocket. Delorbe v Perez, 59 AD3d 491 (2d Dept 2009.) Finally, plaintiffs have submitted an expert's opinion that refutes defendants expert's findings concerning the MRI images, (i.e. that the injuries were degenerative in nature) Francis v Christopher II, 302 AD2d 425 (2d Dept 2003.)

Based on the above, plaintiffs have raised issues of fact as to whether they sustained permanent and significant limitation of use of their body functions or systems within the meaning of N.Y. Insurance Law § 5102 (d). Accordingly, defendants are not entitled to summary judgment and their motions based on lack of serious injury are denied. Delorbe v Perez, 59 AD3d 491 (2d Dept 2009.) Cenatus v Rosen, 3 AD3d 546 (2d Dept 2004.)

In sum, the branch of the motion by defendant Confessor seeking dismissal of the complaint of plaintiffs Yeon Ok Pi and Tae Kang, under Index Number 18969/09, is denied. The branch of the motion made by defendant Confessor seeking dismissal of the complaint of Hak Soo Pi, made under Index Number 18970/09, is denied. The Cross-motion by defendant/plaintiff Hak Soo Pi seeking dismissal of the complaint of plaintiffs Yeon Ok Pi and Tae Yo Kang, made under Index Number 18969/09, is denied.

Dated: June 14, 2011

ORIN R. KITZES, J.S.C.