SHORT FORM ORDER

INDEX # 11837-09
RETURN DATE: **3-24-11**
MOT. SEQ. # **002**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

----------x
MALISA TORRES,

Plaintiff,

-against-

AVATAR MOVING SYSTEMS, INC., and RONALD C. MCKINNEY, JR.,

Defendants.

----------x

CALENDAR DATE: August 17, 2011
MNEMONIC: MD

PLTF'S/PET'S ATTORNEY:
Law Offices of Mark J. Fox
Mark J. Fox, Esq.
111 East 35th Street
New York, New York 10016

DEFT'S/RESP ATTORNEY:
Molon Spitz & DeSantis, PC
Mark S. Grodberg, Esq.
1430 Broadway
New York, New York 10018

Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-16; Notice of Cross-Motion and supporting papers ____; Answering Affidavits and supporting papers 17-27; Replying Affidavits and supporting papers 28-30; Other ____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendants, Avatar Moving Systems, Inc., and Ronald C. McKinney, Jr., for summary judgment and dismissal of plaintiff, Malisa Torres' complaint pursuant to CPLR §3212 and Insurance Law §5102 and §5104 because the plaintiff has not sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d) is denied in its entirety.

The plaintiff, a Connecticut resident now known as Malisa Blasini, instituted this action seeking damages for personal injuries allegedly sustained in a motor vehicle accident with a tractor trailer truck owned and operated by the defendants occurring on June 25, 2008 at approximately 11:00 am on the Cross Bronx Expressway at or near the vicinity of Third Avenue in the Bronx, in the City and State of New York. The plaintiff was traveling eastbound on the Cross Bronx Expressway in her 2006 Nissan Sentra in the center lane when the tractor trailer owned by defendant, Avatar Moving Systems, Inc., and being operated by co-defendant, Ronald C. McKinney, Jr., also traveling eastbound is alleged by plaintiff to have attempted to change lanes from the left lane into the plaintiff's lane striking her vehicle twice on the driver's side. The plaintiff describes the Cross Bronx Expressway that day as congested but with traffic moving and that her motor vehicle was alongside the tractor trailer when it attempted to move from the left lane into her vehicle's lane. The plaintiff thereafter instituted the present lawsuit.

The defendants' now move for summary judgment pursuant to CPLR §3212 dismissing the plaintiff's complaint because the plaintiff has not sustained a "serious physical injury" as that term is defined in Insurance Law §5102(d). The plaintiff opposes the defendants' motion. For the reasons stated herein, the defendants' motion is denied in its entirety.

AK

The Court's function on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. ***Elzer v. Nassau County***, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); ***Steven v. Parker***, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); ***Gaeta v. New York News, Inc.***, 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the Court of Appeals noted in ***Sillman v. Twentieth Century Fox***, 3 NY2d 395, 404 (1957):

> "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***DiMenna & Sons v. City of New York,*** 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues ***(Braun v. Carey***, 280 App. Div. 1019), or where the issue is `arguable' (***Barnett v. Jacobs***, 255 NY 520, 522); `issue finding, rather than issue determination is the key to the procedure' (***Esteve v. Avad***, 271 App. Div. 725, 727)."

Although the question of the existence of a "serious injury" is often left to the jury, where properly raised, the issue of whether a plaintiff is barred from recovery in a judicial forum for want of a "serious injury" is, in the first instance, for the Court's determination. ***Zoldas v. Louis Cab Corp.***, 108 AD2d 378, 489 NYS2d 468 (1st Dept. 1985); ***Dwyer v. Tracy***, 105 AD2d 476, 480 NYS2d 781 (3rd Dept. 1984). If it can be said, as a matter of law, that plaintiff suffered no serious injury within the meaning of the Insurance Law, then plaintiff has no claim to assert and there is nothing for the jury to decide. ***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 (1982).

Insurance Law §5104 provides that an individual injured in an automobile accident may bring a negligence cause of action only upon a showing that the individual has incurred a "serious injury" within the meaning of the no-fault law. Insurance Law §5102(d) defines "serious injury" as a personal injury which results in death; dismember-ment, significant disfigurement and 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.

The term "significant," as it appears in Insurance Law §5102, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment" (***Licari v Elliot***, *supra).*

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, *supra)*. The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979], ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal her proof in order to establish that the assertions in her pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

A defendant can establish that a 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 concluded that no objective medical findings support the plaintiff's claim. ***Turchuk v. Town of Walkill***, 55 AD2d 576, 681 NYS2d 72 (2nd Dept. 1998). With this established, the burden shifts to the plaintiff to come forward with admissible 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. ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 (1992). In this situation, the plaintiff must present objective medical evidence of the injury based upon a recent examination of the plaintiff. ***Grossman v. Wright***, 268 AD2d 79, 707 NYS2d 233 (2nd Dept. 2000).

On a motion for summary judgment to dismiss a complaint for failure to state a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***,182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party. (***Cammarere v Villanova***,166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

In order to recover under the "permanent loss of use" category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be

a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

Here in the case at bar, the defendants suggest that the reports and findings of the plaintiff's chiropractor, Jonathan Kazdan DC, her neurologist, Peter C. Kwan MD, and her radiologist, Jack Lyons MD, have not established the plaintiff's prima facie case of a serious physical injury. This Court finds otherwise. While the defendants claim that their examining neurologist, Howard B. Reiser MD, found no evidence of an ongoing neurological disorder causally related to the accident and that William A. Healy MD (hereinafter Healy), the defendants' examining expert orthopaedist, also concluded that the plaintiff had degenerative changes in her cervical spine not causally related to the accident, neither of the defendants' experts addressed her claim of a loss of work from November 2008 through May 2009. Healy noted in his report that "the patient may have sustained a cervical and lumbar strain that should have gone on to a full and maximal resolution". The plaintiff in her bill of particulars noted she was unable to work at her job at Jacobi Hospital in the Bronx from November 14, 2008 until May 4, 2009 as a result of this accident.

Even were the Court to find that the defendants met their prima facie burden to establish the plaintiff did not sustain a serious physical injury, the evidence proffered by the plaintiff's experts showing herniation and disc bulges to the C5-C6, C6-C7, and L4-L5 with radiculpathy and muscle spasms with the straightening of the cervical lordosis, along with persistent neck and low back pain associated with the accident is sufficient to establish that there are divergent medical opinions from both sides on the question of whether these injuries are causally related to the accident as the plaintiff's experts claims, or are degenerative changes based on life style as the defendants' experts claim.

Under the facts and circumstances of the instant case, considered in a light most favorable to the plaintiff, the Court finds that the plaintiff has provided sufficient medical evidence to raise a factual issue which requires resolution by a jury. It is well settled that pain can form the basis of a serious injury. ***Mooney v. Ovitt***, 100 AD2d 702, 474 NYS2d 618 (3rd Dept. 1984). Although the defendants submit expert medical proof to the contrary stating that nothing significant or consequential or permanent was noted and that the plaintiff sustained cervical and lumbarsacral spine sprains now resolved, the Court views the discrepancies between the medical reports and affidavits submitted on behalf of the parties to involve issues of credibility for resolution by the jury. ***Moreno v. Chemtob***, 271 AD2d 585, 706 NYS2d 150 (2nd Dept. 2000); ***Vasilatos v. Chatertonon***, 135 AD2d 1073, 523 NYS2d 211 (3rd Dept. 1987). Also, the Court notes that in the report of his examination of the plaintiff, Charles Raftery MD, of the Connecticut Spine and Disc Institute, stated in conclusory fashion that there was no abnormal motion, but also indicated that "this is a very complicated situation" and that her condition was not "amenable to my surgical abilities." There are serious, persistent and contrary views and medical evidence of the plaintiff's physical condition and whether she sustained a serious physical injury in the accident of June 25, 2008. These issues of fact and contrary opinions as to her medical condition preclude summary disposition as a matter of law.

Accordingly, the defendants' motion for summary judgment and dismissal of the plaintiff's action pursuant to CPLR §3212 because the plaintiff has failed to reach the threshold of a serious physical injury as defined in Insurance Law §5104 is denied.

The foregoing constitutes the decision of the Court.

Dated: November 16, 2011

J.S.C.