SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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LARRAINE WADE,

Plaintiff,

-against-

JUNE MIODOWNIK, as Executrix of the Estate of SAUL MIODOWNIK,

Defendant.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 9128/2009
Motion Seq. No.: 01

AMENDED
DECISION AND ORDER

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The defendant June Miodownik, as Executrix of the Estate of Saul Miodownik, moves by Notice of Motion for an an order pursuant to CPLR §3212 granting her summary judgment dismissing plaintiff's complaint on the ground that the plaintiff has failed to sustain a serious injury pursuant to Insurance Law § 5102(d). The plaintiff opposes the defendant's application.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a car accident which occurred at the intersection of Ocean Avenue and Nassau Road in West Hempstead, New York on July 4, 2008. There is no dispute that the plaintiff was stopped at a red light when her vehicle was struck in the rear by the vehicle operated by Saul Miodownik. Subsequent, to the accident, Saul Miodownik passed away and June Miodownik was appointed as the Executrix of his Estate. The plaintiff claims that she was "pitched forward as a result of the impact and [I] felt [my] chest hit the steering wheel" (Plaintiff's Affidavit, ¶2). Both parties drove their vehicles away from the scene of the accident. The plaintiff went to the Emergency Room at North Shore University in Manhasset where she was prescribed pain medication and

muscle relaxants and advised to see an orthopedic surgeon. Shortly after the accident, the plaintiff began treating with Dr. Jay Eneman for pain she experienced in her neck, shoulder, back and legs as a result of the accident. Dr. Eneman prescribed a soft neck collar, pain medication and physical therapy. The plaintiff treated with Dr. Eneman every three weeks and proceeded in a course of physical therapy at the Bridge Rehabilitation and Musculoskeletal Care. The plaintiff also sought chiropractic treatment from Dr. Leo Beloyianis. The plaintiff continued to treat with Dr. Beloyianis and Dr. Eneman until her no-fault benefits expired. The plaintiff claims that as a result of the accident she has difficulty performing everyday activities and is unable to bike ride and bowl as she did prior to the accident. She also complains that she is not able to ride a long distance in cars and is required to use a chair brace at work. The plaintiff further claims that as a result of the pain from the accident she is unable to sleep soundly.

In her Verified Bill of Particulars, Wade claims that she sustained the following personal injuries in the accident, all of which she asserts to be "serious injuries" within the meaning of Insurance Law §5102(d):

- Internal derangement of the cervical spine and/or pejoration thereof;
-Acute cervical radiculopathy
-Impingement syndrome of the right shoulder and/or pejoration thereof;
-Internal derangement of the right shoulder and/or pejoration thereof;
-Internal derangement of the lumbosacral spine and/or pejoration thereof;
-Right shoulder contusion
-Acute lumbosacral sprain
-Lumbar radiculopathy to the right
-Internal derangement of the right foot;
-Loss of sleep

The plaintiff testified at her deposition that she missed two weeks of work. She further claims that she is now restricted from many movements, lifting of things and her lifestyle has

definitely changed.

In support of her application for summary judgment, the defendant submitted the affirmed report of Dr. Arnold Illman, who conducted an independent orthopedic examination of Wade on March 13, 2010. Dr. Illman conducted range of motion testing on the plaintiff and determined that the plaintiff had resolved cervical, lumbosacral and right shoulder sprains. Dr. Illman further affirmed that there is no objective evidence of disability.

The defendant also submitted the affirmed report of Dr. Lawrence Robinson who performed an independent neurological examination of Wade on March 30, 2010. Dr. Robinson performed quantified range-of-motion testing on Wade's cervical spine and lumbar spine and concluded that Wade had normal ranges of motion of her cervical and lumbar spine. Dr. Robinson performed other clinical tests, which showed no motor or sensory deficits; and based on his clinical findings, concluded that Wade has no disability as a result of the accident. As a proponent of the summary judgment motion, the movant had the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories. *(See Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. (*Browdame v Candura*, 25 AD3d 747, 748 [2d Dept 2006]).

The defendant established her *prima facie* entitlement to judgment as a matter of law by submitting, *inter alia*, the affirmed medical report of Dr. Arnold M. Illman, an orthopedist. The

doctor found no significant limitations in the ranges of motion with respect to any of plaintiff's claimed injuries, and no other serious injury within the meaning of Insurance Law § 5102(d) causally related to the collision (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyler,* 79 NY2d 955, 956-957 [1992]).

The burden now shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious. *Perl v Meher,* 18 NY3d 208 [2011].

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law §5102(d). *See Toure v Avis Rent A Car Sys., Inc., supra; Scheer v Koubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth,* 18 AD3d 278, 279 [1st Dept 2005].

Plaintiff must come forth with objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 AD3d 978 [2d Dept 2010]; *Cornelius v Cintas Corp.* 50 AD3d 1085 [2d Dept 2008]; *Sharma v Diaz,* 48 AD3d 442 [2d Dept 2007]; *Amato v Fast Repair, Inc.*, 42 AD3d 447 [2d Dept 2007]) and upon medical proof contemporaneous with the subject accident. *(Perl v Meher, supra*; *Ferraro v Ridge Car Service*, 49 AD3d 498 [2d Dept 2008]; *Manning v Tejeda*, 38 AD3d 622 [2d Dept 2007]; *Zinger v Zylberberg,* 35 AD3d 851 [2d Dept 2006]).

In opposition to the motion, plaintiff submits an affirmed medical report of Leo Beloyionis, dated November 19, 2009 and Dr. Jay Eneman dated December 5, 2011. Dr. Eneman

first treated the plaintiff on July 8, 2008. In his report, Dr. Eneman states that "the patient was seen on September 20, 2011 at which time she continued to experience neck and shoulder discomfort as well as lower back pain. On objective physical examination of her range of motion using a goniometer, cervical flexion was limited to 25 degrees (50 degrees is normal, therefore a 50 % of limitation); extension 5 (60 is normal and therefore a 92% limitation); rotation was limited to 50% right and left with moderate pain radiating into the trapezius musculature (80 is normal and therefore a 35% limitation of range of motion); lateral flexion of the neck was limited to less than 10 degrees (40 is normal and therefore there was a 75% limitation of range of motion. According to Dr. Eneman, an examination of Ms. Wade's lumbar spine revealed diffuse tenderness throughout the entire lumbar region. The examination of Ms. Wade's left shoulder revealed increasing discomfort at the extremes of movement on abduction, forward flexion, adduction and abduction. He further opined that Ms. Wade has sustained a permanent and significant neck injury with cervical radiculopathy, low back and right shoulder injuries. He also determined that Ms. Wade may need surgery in the future.

The defendant argues that the report of Dr. Eneman should not be admitted based on the almost two year gap between the plaintiff's last visit and the underlying examination for the report submitted in the within motion. The Court rejects the defendant's argument and accepts Dr. Eneman's report. The Court finds that the plaintiff's gap in treatment of almost two years does not require the granting of defendant's motion for summary judgment. "There was evidence regarding the nature of her treatment for more than six months after the accident and plaintiff explained that she had to stop treatment at that point because her no-fault insurance ran out and she could not afford to pay for it herself" (see *Black v Robinson,* 305 AD2d 438 [2d Dept 2003]).

The affidavits submitted by the parties are in conflict with each other with regard to whether the injuries complained of by the plaintiff are permanent in nature and raise issues of fact for the trial court to decide. "It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits. *Millerton Agway Cooperative v Briarcliff Farms Inc.*, 17 NY 2d 57 (1966); *Sillman v 20th Century-Fox Film Corp.*, 3 NY 2d 395 (1957); *Epstein v Scally*, 99 AD 2d 713 (1st Dept 1984). Summary Judgment is "issue finding" not "issue determination." Sillman *supra*; Epstein *supra*. It is improper for the motion court to resolve material issues of fact which must be left to the trial court to resolve. *Bruneth v Musallam*, 11 AD 3d 280 (1st Dept 2004). As such, the defendant's motion for Summary Judgment is ***denied***.

ORDERED, that the parties are directed to appear on June 11, 2012 at 9:30 a.m. in Central Jury for trial.

This constitutes the Decision and Order of the Court.

DATED: April 23, 2012
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

F:\DECISION - SERIOUS INJURY\Wade v. Miodownik.wpd