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SHORT FORM ORDER

Index No.: 30450-02
Ret. Date: 3-17-04
Mot. Seq. #001

SUPREME COURT - STATE OF NEW YORK
IAS PART XXIV, SUFFOLK COUNTY

PRESENT:
Hon. **PETER FOX COHALAN**

CALENDAR DATE: September 15, 2004
MNEMONIC: MD

MANDY ZENONOS and DINO ZENONOS,

Plaintiffs,

-against-

THOMASINA MARCHETTA,

Defendant.

PLTF'S/PET'S ATTY:

MICHAEL S. LANGELLA, P.C.
2459 Ocean Ave.
Ronkonkoma, NY 11779

DEFT'S/RESP'S ATTY:

ROBERT P. TUSA, ESQ.
898 Veterans Mem. Highway
Hauppauge, NY 11788

Upon the following papers numbered 1 to 26 read on this motion for summary judgment
Notice of Motion/Order to Show Cause and supporting papers 1-14; Notice of Cross-Motion and supporting papers ____; Answering Affidavits and supporting papers 15-22 Replying Affidavits and supporting papers 23-26; Other ____; (and after hearing counsel in support of and opposed to the motion) it is,

ORDERED that this motion by the defendant, Thomasina Marchetta, for summary judgment and dismissal of plaintiffs' complaint pursuant to CPLR §3212 and Insurance Law §5102 and 5104 on the ground that the plaintiff has not sustained a "serious physical injury" as such term is defined in Insurance Law §5102(d) is hereby denied in its entirety.

Plaintiffs instituted this action seeking damages for personal injuries allegedly sustained in a motor vehicle accident occurring on September 15, 2001 at the intersection of Neighborhood Road and Daisy Drive in Mastic Beach, Suffolk County on Long Island, New York. Plaintiff Mandy Zenonos claims that she was proceeding northbound in her motor vehicle on Daisy Drive at approximately 9:15 a.m. and was in the intersection when her vehicle struck the defendant's vehicle traveling eastbound on Neighborhood Road. Plaintiff was removed from the scene by ambulance and treated at Brookhaven Hospital. Plaintiff claims to have sustained a herniated disc of the cervical spine at C4-C5 as a result of this accident. This lawsuit thereafter ensued.

Defendant now moves for summary judgment pursuant to CPLR §3212 dismissing plaintiff's complaint on the grounds that the plaintiff

Mandy Zenonos has not sustained a "serious physical injury" as that term is defined in Insurance Law §5102(d). Plaintiffs oppose the motion.

For the reasons set forth herein, defendant's motion for summary judgment and dismissal of plaintiffs' complaint is denied in its entirety.

The function of the court 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 New York 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).

Section 5104 of the Insurance Law 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; dismemberment, 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.

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 defendant's 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).

Furthermore, the New York Court of Appeals has recently stated in an opinion issued on July 9, 2002 in ***Toure v. Avis Rent A Car***, 98 NY2d 345, 746 NYS2d 865 (2002) that a sufficiently described opinion by a doctor on the "qualitative nature of the plaintiff's limitations based upon the normal function, purpose and use" of that body part is sufficient even without specific degrees of limitation or an arbitrary cutoff of degree. Unless the alleged limitations are as a matter of law so "minor, mild or slight" as to be considered insignificant, the defendant's motion for summary judgment, considered in a light most favorable to plaintiff, must be denied. ***Toure v. Avis Rent A Car***, supra. Here, in the case at bar, the plaintiffs in opposition to the defendant' motion submit an affirmed seven (7) page report from Christopher T. Foglia, DC, a chiropractor, who treated the plaintiff and reviewed the reports of Diane Moriarty, M.D. and her MRI report with a diagnosis of a herniated disc at the C4-C5 level with mild deformity of the thecal sac. In addition to the objective evidence submitted by plaintiff of a disc herniation, Dr. Foglia noted that the plaintiff had

specific range of motion limitations plus objective range of motion tests which he conducted and plaintiff's variance from the norm. These variances ranged from a loss of 100% in lateral bending to 60% in flexion and extension. Finally, Dr. Foglia referred the plaintiff for neuroselective transcutaneously applied electrical stimulation which objective testing found some sensory dysfunction and nerve root dysfunction in Andre Spindler, M.D.'s report dated September 26, 2001 and a musculoskeletal ultrasound by Joseph R. Carcione, Jr., M.D. who noted in his report dated September 24, 2001 certain calcific and/or arthritic changes which Dr. Foglia suggests indicates "fibrous capsulitis of the cervical facet joint at C4-C5" and would account for the restricted ranges of motion and pain experienced by the plaintiff.

While defendants' medical authorities claim no significant limitation or use of a body member, plaintiffs' submitted medical authority, in sworn affidavits, note that plaintiff, Mandy Zenonos, has a significant limitation of movement and use of the cervical regions of the neck of 60% flexion and 60% extension and provides documented ranges of motion and rotation of 100% in some areas which are restricted or limited by pain and a medically determined impairment from the date of the accident to the present.

Generally a soft tissue injury with cervical and low back sprain does not meet the threshold for serious injury (***DeFelippo v. White***, 101 AD2d 801, 475 NYS2d 141). These were the types of injuries which the legislature hoped would no longer burden the court system under the no-fault scheme (***Scheer v. Koubek***, 70 NYS2d 678, 518 NYS2d 788). Neither are subjective complaints of transitory pain due to cervical and lumbar sprains sufficient (***Georgia v. Ramautar***, 180 AD2d 713, 579 NYS2d 743). However, the Second Department, Appellate Division has consistently held that where there is objective proof of the cervical and lumbosacral pain by way of an MRI or x-ray showing a physical injury (***Jackson v. United Parcel Service***, 204 AD2d 605, 612 NYS2d 186; ***Flanagan v Hoeg***, 212 AD2d 756, 624 NYS2d 853; or by a chiropractor's report or affidavit setting forth the degree of more than 10% limitation of movement (***Rut v. Grigonis***, 214 AD2d 721, 625 NYS2d 633; ***Carucci v. Tzimopoulos***, 1997 WL 214768; ***Steuer v. Didonna***, 650 NYS2d 298; ***Kraemer v. Hening***, 655 NYS2d 96), then the plaintiff has either met her prima facie burden or raised a triable issue of fact warranting a denial of a summary judgment motion on the issue of threshold.

Although a minor limitation of movement is not consistent with the threshold (***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990), the Second Department has held that a 10% restriction or more in the movement of the lumbar spine is sufficient to establish a significant permanent

limitation of a bodily function. (***Schwartz v. New York City Housing***, 646 NYS2d 30). See, ***Lazarre v. Kopczynski***, 160 AD2d 772, 553 NYS2d 488 (2nd Dept. 1990); ***Parker v. Smith***, 242 AD2d 374, 664 NYS2d 374 (2nd Dept. 1997).

"The limitation or use of a body member or organ must be permanent and consequential but the limitation need not be total." ***Savage v. Delacruz***, 200 AD2d 707, 474 NYS2d 850 (1984). A `serious injury' definition should be construed to mean that a person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment. ***Sole v. Kurnik***, 119 AD2d 974, 500 NYS2d 872 (4th Dept. 1986)

While permanent loss does not necessitate proof of a total loss of the "organ, member, function or system", it must establish operating in some limited way or only with pain. ***Dwyer v. Tracey***, 105 AD2d 4767, 480 NYS2d 781 (3rd Dept. 1984). "It is well settled that pain can form the basis of a serious injury." ***Ottavio v. Moore***, 141 AD2d 806, 529 NYS2d 876 (2nd Dept. 1978), appeal denied 73 NY2d 704, 537 NYS2d 492 (1989). See also, ***Butchino v. Bush***, 109 AD2d 1001, 486 NYS2d 478 (3rd Dept. 1985). Indeed, plaintiff's treating physician Dr. Foglia duly noted specific degrees of range of motion and plaintiff's differential from the normal ranges of movement evidencing a significant limitation of motion or motion with pain by plaintiff and opined that these restrictions in movement were casually related to the accident. Finally, plaintiffs point out that the defendant's own examining orthopedist, Stuart Kandel , M.D., noted what would appear to be some restriction of movement with plaintiff's subjective complaints of pain since she was unable to bring her chin down to her chest but notes that his examination fails to reveal "any significant objective abnormal findings."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc. v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974). Questions of credibility between experts on behalf of plaintiff and defendant are for the jury and not the court to determine.

Under the facts and circumstances of the instant case, considered in a light most favorable to the plaintiffs, the Court finds that the plaintiff, Mandy Zenonos, 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 defendant submits expert medical proof to the contrary, 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***, AD2d , 706 NYS2d 150 (2nd Dept. 2000); ***Vasilatos v. Chatertonon,*** 135 AD2d 1073, 523 NYS2d 211 (3rd Dept. 1987).

Accordingly, the defendant's motion for summary judgment and dismissal of plaintiffs' action pursuant to CPLR §3212 on the ground that the plaintiff, Mandy Zenonos, has failed to reach the threshold of a serious physical injury as defined in Insurance Law §5104 is hereby denied.

The foregoing constitutes the decision of this Court.

Date: NOV 17 2004

J.S.C.