

SHORT FORM ORDER

Motion Sequence #1

SUPREME COURT-STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS

Justice.

**TRIAL/IAS, PART 11
NASSAU COUNTY**

TARA ROBINSON,

Plaintiff,

-against-

INDEX NO. 35331/96

MOTION DATE 3/07/00

RICKY D. BOONE, WALIQUE R. ROBERTSON, HAROLD
MOORE and GILBERT H. EVANS,

Defendants.

The following papers read on this motion:

Notice of Motion	1
Cross-Motion	2
Affirmation in Opposition	3
Replying Affidavits	4

Motion by defendants Ricky D. Boone and Walique R. Robertson, and cross-motion by defendants Harold Moore and Gilbert H. Evans for an order pursuant to CPLR 3212 awarding summary judgment on the grounds that plaintiff has not suffered a serious injury as defined by Insurance Law § 5102(d) are denied.

This action arises out of an accident which occurred on December 8, 1995 at the intersection of Pennsylvania Avenue and West Roosevelt Avenue in Roosevelt, New York. Two cars driven by defendants Robertson and Evans respectively collided in the intersection. The impact caused them to strike plaintiff's vehicle, which was stopped at the corner. Plaintiff brought this action seeking to recover damages for serious injury.

Defendants seek summary judgment alleging that plaintiff did not suffer serious injury as defined by Insurance Law § 5102(d). In support they offer the affirmations of Isaac Cohen, M.D., an orthopaedic surgeon, dated May 11, 1999, and Frederick S. Mortati, M.D., a neurologist, who examined plaintiff on July 22, 1999. Dr. Cohen reports that plaintiff complains of pain into the neck, lower back and thoracic spine area. His physical examination resulted in normal findings, with no neurotrophic changes, no evidence of motor weakness and no evidence of sensorial deficit. He stated "At the time of this examination, patient does not have any evidence of residual disability or permanency related to this accident. She has a completely normal physical examination without any evidence of sequela or permanency. It is my opinion patient recovered completely and does not require any form of active medical treatment." He concludes, "[n]o

evidence of residual disability or permanency is noted.”

The undated affirmation of Dr. Mortati details plaintiff's history and indicates that she underwent X-rays, an MRI, and a needle EMG. She was sent for physical therapy to Mr. Moses for about a month, and saw Dr. Butani who did the needle EMG and recommended follow up care with Dr. Joseph. Plaintiff also saw Dr. William Conway, her family physician, who recommended that she see a chiropractor. Plaintiff saw the chiropractor only once however, as her insurance did not provide coverage for those treatments. Plaintiff complained to Dr. Mortati of “discomfort” on the left side of her neck and upper back, and used Advil for relief. Dr. Mortati's impression reveals a normal neurological examination. He states that plaintiff's left cervical and left scapular discomfort are not “neurologically mediated.” He suggests independent orthopedic evaluation.

In response to the defendants' motion and cross-motion plaintiff avers that defendants' experts cannot speak to her claim of serious injury based upon her claim of a “medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for a period of not less than 90 days during the 180-day period immediately following the accident” (Insurance Law § 5102(d)), as they did not examine her until 1999. Plaintiff offers her deposition testimony, where she testified that she was out of work for a period of eight weeks following the accident. She returned to work on a part time basis thereafter for a period of four weeks, because she was undergoing physical therapy.

Plaintiff also submits the affirmation of Rudolph Joseph, M.D. who offers an opinion of permanent injury. The affirmation, dated March 20, 2000, states that Dr. Joseph first met with Tara Robinson on December 8, 1995. She advised that she had been in a car accident and was suffering neck and back pain. He conducted an examination and various tests which are documented in a report dated April 26, 1996. The 1996 report details Dr. Joseph's examination and test results and a diagnosis of sprain contusion of the neck with restricted range of motion to about 75 degrees; sprain contusion of the upper back with muscle spasm and considerable restricted mobility; sprain contusion of the lower back with poor mobility and straight leg raises positive at 55 degrees on the right and 65 degrees on the left. X-rays revealed a straightening of the lordotic curve which is indicative of muscle spasm. Plaintiff was referred for physiotherapy and rehabilitative exercises. She was also treated with nerve blocks for pain and spasm. As of April 1996 plaintiff was still in physical therapy, and there was a “restricted mobility of the cervical spine of 15 degrees and the lumbar spine to 20 degrees.” She was instructed in further care at home consisting of hot showers, soaks and analgesics.

As noted, Dr. Joseph re-evaluated plaintiff on March 6, 2000 and stated “A physical examination ... revealed the following: - Pain in the mid to low back; and - Restricted range of motion of the lumbosacral spine of 20 degrees.” He opined that plaintiff has sustained a “15% disability with regard to her lumbosacral spine” as a result of the accident. He further states that, based upon the fact that plaintiff still suffers from her accident related disabilities four years after

the accident, the injuries “can be considered to be permanent in nature”.

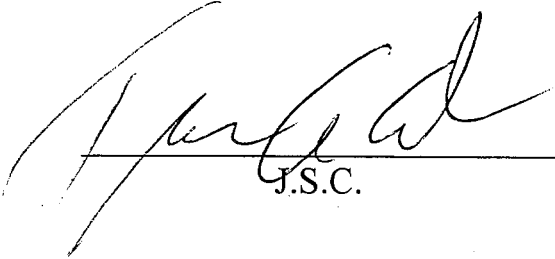
Plaintiff has offered sufficient evidence to raise an issue of fact with respect to serious injury. Plaintiff may demonstrate a serious injury if she establishes that: “(a) there was a medically determined injury, (b) the impairment prevented the injured person from performing substantially all of the material acts of the person's customary daily activities, and (c) the incapacity lasted for at least 90 out of the first 180 days immediately following the injury” (**D'Avolio v. Dictaphone Corp.**, 822 F.2d 5,6 [CCA2d]). By showing that she was unable to work at all for a period of four weeks, under doctor's orders, and that she was only able to return to work part time due to the necessity of further therapy plaintiff has adequately demonstrated a factual issue concerning serious injury (see, **Sole v. Kurnik** 119 AD2d 974; cf. **DeFillipo v. White**, 101 AD2d 801).

Even if plaintiff were not able to establish the ninety out of one-hundred eighty day category of serious injury, she has adequately established a factual question regarding significant impairment and permanent injury. A very recent Second Department decision clarifies “the type and quality of evidence that a plaintiff must submit in order to establish that ... she has suffered a serious injury” (**Grossman v. Wright**, ___ AD2d ___, 2000 WL 563150 [N.Y.A.D. 2 Dept. May 8, 2000]). Once the defendant has met his or her burden of proof, the burden shifts to the plaintiff as follows:

The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient * * * Further, this court has consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings * * * Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff * * * 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 * * * 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. Although each case will stand or fall on its own facts, certain objective tests satisfy this standard. Physical examinations personally conducted by the person making the affidavit or affirmation are sufficient * * * However, an affidavit or affirmation simply setting forth the observations of the affiant are not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination * * *

(**Grossman v. Wright**, ___ AD2d ___ 2000 WL 563150 [N.Y.A.D. 2 Dept.] citations omitted). Here plaintiff has submitted a report by her physician with a updated affirmation. The plaintiff's cessation of professional treatment after the 1996 visit to her physician is sufficiently explained by the non coverage of chiropractic treatment by plaintiff's insurance, as well as her physician's advice for at home treatment with heat and analgesics after a period of treatment. Although Dr. Joseph's latest affirmation is not explicit with respect to his methodology, his earlier report evidences his methods of examination and measurement. He notes "straight leg raising" tests as the basis for his finding of restricted motion. Accordingly, his affirmation is not one which appears to be tailored to meet statutory criteria, and his records as a whole meet the standards set forth in **Grossman**, supra. Accordingly, the motions for summary judgment are denied, as a factual issue concerning serious injury has been demonstrated.

DATED 5-18-00



J.S.C.