SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT:

HON. IRA B. WARSHAWSKY

Justice.

TRIAL/IAS PART 25

JULIANNA DETTO, FRANK DETTO and PAULINE DETTO,

Plaintiffs,

NASSAU COUNTY
INDEX NO. 019308/98
MOTION DATE: 8/17/00
MOTION SEQUENCE 001,002, and 003

-against-

KIMBERLY ROTHFELD, LESLEY ROTHFELD and JON ROTHFELD,

Defendants.

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Notice of Cross Motion	XX
Answering Affidavits	
Replying Affidavits	XXX
Memoranda of Law: Plaintiff's/Petitioner's	X
Defendant's/Respondent's	

This motion by defendant, Lesley Rothfeld, for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims asserted against her, and the cross-motion by defendants, Kimberly Rothfeld and Jon Rothfeld, for summary judgment pursuant to CPLR 3212 on the grounds that plaintiffs did not sustain a serious injury as defined by section 5102 (d) of the Insurance Law, and the cross-motion by plaintiffs for an order granting summary judgment on the issue of liability is determined as follows.

Plaintiffs commenced this action to recover damages for injuries they alleged they

sustained as a result of a three car accident which occurred on July 17, 1997. Plaintiff, Julianna Detto, with co-plaintiff, Gigliotti, as a passenger in the front seat, was stopped at a red traffic light when the collision occurred. Defendant, Lesley Rothfeld, was operating a motor vehicle directly behind the Detto vehicle. She testified at a deposition that she had her foot on the brake when the accident occurred, but that she does not recall whether she was stopped or not. Defendant, Kimberly Rothfeld, is the daughter of Lesley Rothfeld.; she was following her mother in a vehicle owned by her father, Jon Rothfeld. She testified at her deposition that a bumble bee flew into her car and in the process of trying to get the bee out of the car she failed to notice that her mother's car had slowed or stopped. She hit her mother's car in the rear and the impact caused her mother's car to hit the rear end of the Detto vehicle. There is evidence in the record that the Detto vehicle was then propelled into the vehicle ahead of it.

A rear end collision is prima facie evidence of negligence. Mascitti v Greene, 250 A.D. 2d 821 (2d Dept 1998). There is a duty of explanation imposed upon the driver of the rearmost vehicle to "excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement or any other reasonable cause." Power v Hupart, 260 A.D. 2d 458 (2d Dept 1999). A review of the case law shows that a sudden stop by the preceding vehicle can constitute a non-negligent excuse for the rearmost vehicle, not withstanding that that vehicle remains under a duty to maintain a safe distance between his or her car and the preceding vehicle. Lopez v Minot, 258 A.D. 2d 564 (2d Dept 1999). A rear end collision with a car that is stopping, braking or stopped, however, normally results in a finding of negligence as a matter of law against the rearmost driver on the basis of that driver's duty to maintain a safe distance between the two vehicles. Barba v Best Security Corporation, 652 N.Y.S.2d 71 (2d Dept 1997). Each case turns on the particular facts.

In this case, defendant, Kimberly Rothfeld, has not come forward with a non-negligent excuse for hitting the car ahead of her and causing it to come into contact with the Detto vehicle. There is no evidence of negligence on the part of Lesley Rothfeld and her explanation that she was operating her vehicle with her foot on the brake as she

approached the traffic control device which she observed to be red, and that she was aware that there was a stopped vehicle ahead of her is sufficient to rebut the inference of negligence arising out of her collision with the car ahead of her. Although she was unable at her deposition to answer several questions for lack of recall, the details that are the subject of those questions are not dispositive to the issue of her reason for hitting the car ahead of her. She has succeeded in her duty of giving a non-negligent reason for the accident, Carter v Castle Contracting Co., 26 A.D. 2d 83 (2d Dept 1996); her car was hit in the rear and pushed her car into the car ahead of her, just as that car (the Detto car) hit the car ahead of it without any negligence.

The proof in the record before me is uncontested that defendant Kimberly Rothfeld's attention was focused on a bee and that she failed to keep a look out ahead of her for what could be seen. Under these facts, no reasonable view of the evidence could lead to any other conclusion but that her absorption with the bee was a failure to drive carefully and was the legal cause of the accident. Accordingly, plaintiff's motion for summary judgment on the issue of liability against defendant, Kimberly Rothfeld, is granted. However, on the same reasoning that defendant, Lesley Rothfeld, is granted summary judgment, plaintiff's motion for summary judgment is denied as to her. There is simply no evidence in the record that could lead the trier of fact to decide that Lesley Rothfeld was negligent in the operation of her motor vehicle.

Turning to defendant Kimberly Rothfeld's application for summary judgment on the grounds that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102, the sufficiency of the showing is a threshold question of law appropriate for the court to decide on summary judgment. The burden is upon movant to show by competent proof that plaintiffs neither suffered, inter alia, a permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member, or a 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.

In plaintiff Detto's Bill of Particulars it is asserted that she suffered a cervical disc protrusion at C5-6 and C6-7, cervical sprain and radiculopathy, pain and tenderness of the posterior cervical muscles, spasm, lumbosacral disc protrusion at L5-S1, lumbosacral sprain with spasm, and cubital tunnel syndrome of the right ulnar nerve.

The injuries allegedly suffered by Pauline Gigliotti, as set forth in her Bill of Particulars, are cervical sprain and radiculopathy, pain and tenderness of the posterior cervical muscles, spasm, lumbosacral sprain and spasm.

Both parties claim an undifferentiated category of "serious injury" of the types set forth above.

Plaintiff, Detto, was examined by John C. Killian M.D., an orthopedic specialist, on October 25, 1999. His report includes a comprehensive recital of her medical treatment, post accident, and recites her current complaints of neck pain and sporadic, recurrent low back pain. He opines on the basis of his examination and the medical records submitted for his review that she sustained a cervical and lumbar sprain as a result of the accident and that although she had subjective complaints of pain there were no objective findings of restricted motion or muscle spasm in their support. He opines that the small central disc protrusions reveal on an MRI are "common incidental findings which are of questionable clinical significance." In sum he found she had recovered completely from the initial strain and sprain.

Plaintiff, Detto, was examined by Ellen J. Braunstein, M.D., a neurologist, and in a report dated January 3, 2000 she reported a normal neurological examination.

Plaintiff, Gigliotti, was also examined by Dr. Killian on October 25, 1999. After his examination of her and review of her medical records he reported that she had not suffered a serious injury, but had sustained cervical and lumbar strain and sprain, and had recovered completely from those soft tissue injuries. Her complaints of tenderness in the cervical and lumbar spine and of pain at certain extremes of lumbar and cervical motion

were found consistent with age related degenerative disease but without objective evidence to establish a causal connection with the July 17, 1997 accident.

Plaintiff, Gigliotti, was also examined by Burton S. Diamond, M.D., on October 25, 1999. He found her to be neurologically normal without evidence of cervical or lumbar radiculopathy and with no neurological disability for her day to day activities.

A review of the medical evidence submitted by defendants and the plaintiffs' Bill of Particulars together with the expert opinions of defendant's doctors discloses that plaintiff did not suffer a permanent loss of use of a body organ, member, function or system, or a permanent consequential limitation of use of body organ or member, or a significant limitation of use of body function of system. The burden, therefore, shifts to plaintiff to rebut the proofs submitted by defendants and to raise a triable issue of fact. Licari v Elliot, 56 N. Y. 2d 230, 235 (1982).

As a threshold concern, it still remains unclear as to which category of "serious injury" plaintiff, Julianna Detto, seeks to establish at trial. She was 34 at the time of the accident, married, and had one young child. She worked as a bookkeeper approximately 35 hours a week doing medical billing for one firm, and had an additional part time job with Key Foods each week. She did not return to her primary work after the accident until November 3, 1997, but then she worked at least 40 hours a week to "catch up" on work that had accumulated in her absence. She returned to her job with Key Food on October 17, 1997, which, curiously, is ninety days after the accident. There is a note from her treating doctor, Barry Jupiter, M. D., dated July 25, 1997, advising that she may not return to work. However, it does not state the injury that causes her to remain absent from work, and pursuant to section 5102 (d) of the Insurance Law, a serious injury is 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 eight days immediately following the occurrence of the injury or impairment." It is speculation to conclude from the information before me that plaintiff Detto's cervical/lumbar

sprain prevented her from working, at all, for three months as a bookkeeper, especially, in light of the fact that she was diagnosed with cubital tunnel syndrome which has not been causally related to the underlying accident, and in light of the fact that her no-fault benefits were denied as a result of an examination conducted on December 17, 1997. See Exhibit 5.

The only evidence plaintiff, Detto, submits which is in admissible form is an affidavit of Barry Jupiter, M.D., dated June 9, 2000, after he examined her on May 12, 2000. Dr. Jupiter is an orthopedist who treated plaintiff, Detto, from July 21, 1997 to November 10, 1997. His report does not establish a permanent injury or a significant limitation of use of a body function or system. He renders the opinion that he "expects a significant permanent partial disability here." He refers to his previous diagnosis of her injuries of sprain, cervical lordosis and spasm, radiculopathy, tenderness, pain, restriction, and refers to an unsworn, or affirmed, and, hence, inadmissable MRI to support a diagnosis of disc protrusion. The report does not establish serious injury as there is no evidence of objective testing, Graves v Liu, 710 N.Y.S. 2d 113, 114 (2d Dept 2000), and there is no evidence of injury causally related to the underlying accident other than the original soft tissue injury. Villalta v Schechter, 710 N.Y.S.2d 87, 88 (2d Dept 2000). Finally, Dr. Jupiter's conclusion of "permanence" and "limitation" is so vague and conclusory that is seems tailored to fit the needs of plaintiff, Detto, to establish serious injury.

Defendant, Pauline Gigliotti, relies upon that provision of section 5102 (d) of the Insurance Law that defines serious injury as 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 eight days immediately following the occurrence of the injury or impairment."

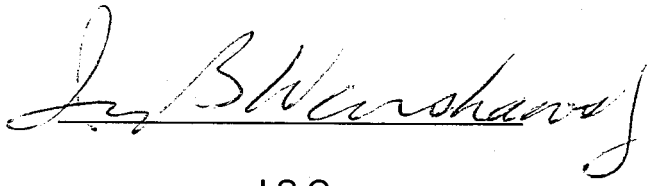
She testified in her deposition that she is a homemaker and that she was unable to keep house as she formerly did. The proof submitted in support of this claim is insufficient. There is no affirmation by a doctor establishing a medically determined injury that

prevented her from keeping house as she formerly did for 90 of the 180 days following the accident. Kaplan v Gak, 259 A. D. 2d 736 (2d Dept 1999). To the extent that she relies upon the records of Dr. Jupiter and her injuries of sprain the proof is further deficient for she stopped physical therapy and other related treatment on September 25, 1997 and had surgery for an unrelated ailment (a carotid artery) so that her alleged incapacity resulting from the underlying accident can only be viewed as lasting for two months instead of ninety days. Finally, there is authority that the mere cessation of household duties is insufficient to establish a threshold injury. Graves v Liu, supra at 114, citing to Nunez v Dabrowski, 185 A.D. 2d 269.

Accordingly, the evidence presented on the motion establishes that plaintiffs did not suffer or sustain a serious injury in the accident that occurred on July 17, 1997 and notwithstanding that there is no issue of fact as to defendant Kimberly Rothfeld's and Jon Rothfeld's negligence in causing the accident the complaint must be dismissed and it is,

SO ORDERED.

Dated: September 14, 2000



J.S.C.

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