SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

MARIA A. HENRIQUEZ, individually and as Parents and Natural Guardian of MARIA GUEVARA, an infant over the age of 14 years, and JOSE T. GUEVARA,

Plaintiff(s),

SUBMISSION DATE: 02/06/04
INDEX No.: 2765/02

-against-

JEAN MORIN and DIANE M. MORIN,

MOTION SEQUENCE #2, 3, 4, 5

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, Defendants Jean Morin and Diane Morin's motion for an order granting summary judgment dismissing the action pursuant to CPLR § 3212 and Insurance Law § 5102 is denied. Plaintiff's cross motion for an order granting summary judgment dismissing the defendant's counterclaim based on liability and dismissing the counterclaim pursuant to Insurance Law § 5102 is denied. Additionally, Plaintiff's motion for an order granting summary judgment on the issue of liability is denied. Finally, defendants' cross motion for an order granting defendant leave to amend the answer to include an alternative liability counterclaim against the plaintiff Jose Guevara is granted.

The instant action stems from a motor vehicle accident that occurred on May 19, 2001 at the intersection of Westbury Boulevard and Lindbergh Street. It is alleged by plaintiff that at the time of the accident, Maria Henriquez was operating a vehicle in which plaintiff Maria Guevara was a passenger. Plaintiff claims that defendant failed to abide by a stop sign at said location, thereby causing the accident. Plaintiff was transporting building materials atop of her vehicle. Defendants vehicle struck the

passenger side of plaintiffs' vehicle. Defendants claim that plaintiff Jose Guevara was actually the driver at the time of the accident. Following the accident, plaintiffs Henriquez and Guevara were treated at Winthrop University Hospital for various complaints including neck and back pain. Subsequently, both plaintiffs treated with Alliance Medical Center, a chiropractor and various physicians. Plaintiffs Henriquez and Guevara claim to have sustained injuries that meet the threshold requirements of Insurance Law § 5102 in that both have a significant limitation of use of a body function, a permanent loss of use of a body function and that they both were unable to perform substantially all of their activities for more than ninety (90) days following the one-hundred and eighty (180) days after the accident. Defendants claim that neither plaintiffs injuries meet the requirements of Insurance Law § 5102.

The trial court has the ability to issue summary judgment where there are no triable issues of fact with regard to questions of serious injury. Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361(1974). The goal of summary judgment is to issue find, rather than to issue determine. Hantz v. Fleischman, 155 A.D.2d 415 (2d Dep't 1989). In a motion for summary judgment, defendant has the initial burden of proving a serious injury was not sustained by the plaintiff. Gaddy v. Eyler, 79 N.Y.2d 955 (1992). Insurance Law § 5102 (d) states:

> 'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, a significant limitation of use of 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's contention that the plaintiff's injury do not constitute a serious injury pursuant to the Insurance Law is to be submitted to a jury when plaintiff submits affidavits from medical

professionals that present a triable issue as to the seriousness of the injury. Whiteford v. Smith, 168 A.D.2d 885 (3d Dep't 1990). In the present case, Defendant has submitted letters sworn to by Steven Ender, D.O., a neurologist, Leon Sultan, M.D. and Dr. Steven Medelsohn, M.D., a radiologist, stating that both plaintiffs do not suffer from any neurological or orthopedic ailment and that the exams were normal. Plaintiffs, in an effort to rebut the above findings, have submitted affidavits from Dr. Joseph Gregporace, D.O., a physiatrist and Robert Diamond, M.D., a radiologist, attesting that the injuries sustained by the plaintiffs are permanent in nature and fall within the realm of a serious physical injury as defined in Insurance Law § 5102 and are permanent in nature. Plaintiffs' physicians state that they based this determination on objective tests and reviewing MRI examinations. See, Toure v. Avis Rent-a-Car, 98 N.Y.2d 345 (2002). Issues of credibility should not be decided on a motion for summary judgment. Anash v. Pollack 181 A.D.2d 537 (1st Dep't 1992). However, the court finds that plaintiff has not rebutted defendants *prima facie* case that the plaintiff sustained a permanent loss of use of a body organ, system, function or member or a permanent consequential limitation of use of a body organ or member. The Court of Appeals decision in Oberly v. Bangs Ambulance, 96 N.Y.2d 295 (2001) held that a permanent loss under the Insurance Law must be a total loss of use. Plaintiffs' doctor has attested that both plaintiffs have sustained a significant limitation of use to their back, accordingly they did not suffer from a total loss of use of their back. Additionally, the plaintiffs are claiming a spinal injury, therefore they have not sustained an injury to a member or organ. Additionally, plaintiffs Henriquez and Guevara have presented sufficient evidence to overcome and to substantiate that the injuries sustained caused a disability that prevented them from performing all or most of the material acts that made up their usual or customary activities for at least ninety (90) out of one-hundred and eighty (180) days immediately following the accident. Sigona v. New York City Transit Authority, 255 A.D.2d 231, 659 N.Y.S.2d 254 (1st Dep't 1997). Specifically, Henriquez missed three months of work following the accident and Guevara was unable to sit for classes and could not attend gym classes for several months following the accident.

Based on the above, the court finds that there are issues of fact as to whether plaintiffs have sustained injuries that are a significant limitation of use of a body function and that they both were unable to perform substantially all of their activities for

more than ninety (90) days following the one-hundred and eighty (180) days after the accident.

As to the issue of liability for the accident, the court finds that issues of fact exist that must be submitted to a jury. Here, there are questions of fact as to who the driver of the plaintiff's vehicle was at the time of the accident, as well as the happening of the accident. "It is well settled that negligence cases do not generally lend themselves to resolution by summary judgment and determinations as to credibility should be left for trial." Greenberg v. Green, 197 A.D.2d 502, 604 N.Y.S.2d 743 (2d Dep't 1993); Ugarriza v. Schmieder, 46 N.Y.2d 471, 414 N.Y.S.2d 304 (1979). Accordingly, the motions for summary judgment are denied.

CPLR § 3025(b) provides that leave to amend pleadings shall be "liberally granted absent prejudice or surprise resulting directly from the delay unless the amendment is palpably insufficient or clearly without merit." Boesch v. Nishball, 283 A.D.2d 534, 725 N.Y.S.2d 851 (2d Dep't 2001). In the instant matter, defendant has set forth sufficient proof that the proposed amendment is permissible. The court finds that plaintiffs will not be prejudiced or subject to unfair surprise based on the proposed counterclaim. Accordingly, defendant is hereby granted leave to amend the answer to assert the new counterclaim.

This decision constitutes the order of the court.

Dated: MAR 0 2 2004

J.S.C.

HON. KENNETH A. DAVIS

ENTERED

MAR 0 5 2004

NASSAU COUNTY
COUNTY CLERK'S OFFICE