

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

NIPAPORN NEENAN and MICHAEL J. NEENAN,

Plaintiffs,

SUBMISSION DATE: 08/16/04
INDEX No.: 891/03

-against-

METRO SNAX, INC. and HARVEY L. WIENER,

MOTION SEQUENCE #1

Defendants.

The following papers read on this motion:

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

Upon the foregoing papers, defendant's motion for an order awarding summary judgment dismissing the action based upon plaintiff's failure to meet the serious injury threshold as set forth in Insurance Law § 5102 is decided as follows.

The instant action stems from a motor vehicle accident that occurred on August 14, 2002 at the intersection of Woodbury Road and Piquets Lane in Woodbury, New York. Plaintiff was the driver of an automobile that was involved in this left turn accident with defendant Harvey Wiener. Plaintiff claims to have sustained injuries to her back and leg. The action was commenced by the filing of a summons and complaint on or about January 17, 2003. Issue was joined by the service of an answer on or about February 21, 2003.

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 Dept. 1989). In a motion for

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summary judgment, defendant has the initial burden of a serious injury was not incurred by the plaintiff. Gaddy v. Eyler, 79 N.Y.2d 955 (1992). A defendant's contention that the plaintiff's injury do not constitute a serious injury pursuant to the Insurance Law is a triable issue 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 Dept. 1990). In the present case, defendant has submitted letters sworn to by Dr. John Killian, M.D., an orthopedist and Dr. Peter Ross, M.D., a radiologist, stating that the plaintiff did not sustain a serious injury as specified in the statute. Additionally, both doctors state that the injuries are not related to the subject accident with the exception of the knee injury in which Dr. Ross states he cannot exclude the accident as a cause. Plaintiff has submitted affirmations and affidavits from Brian Moynihan, M.D. a physician, Charles Aronica, D.C., a chiropractor, Jonathan Ticker, an orthopedist, Neil Smith, an orthopedist, Kornelia Teslic, M.D., a radiologist, David Rabinovici, M.D., a neurologist, Mitchel Goldstein, M.D., an orthopedist, Robert Waxman M.D., a radiologist and Sebastian Lattuga M.D., an orthopedist who attest to the treatment rendered to plaintiff and diagnoses made regarding plaintiff's condition. Additionally, Dr. Aronica states that the injuries sustained by the plaintiff 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. Plaintiff's physicians state that they based this determination on objective tests and reviewing MRI and X-ray 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 Dept. 1992). The court finds that there are issues of fact that preclude the granting of summary judgment.

However, plaintiff has not set forth any evidence to sustain a cause of action based on a medically determined injury or impairment of a non-permanent nature which prevents her from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment. Sigona v. New York City Transit Authority, 255 A.D.2d 231 (1st Dept 1997).

Accordingly, defendant's motion is granted only to the ninety

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(90) out of one hundred eighty (180) day requirement of Insurance Law § 5102 and denied to all remaining issues. This matter shall proceed to trial on October 12, 2004.

This decision constitutes the order of the court.

Dated: SEP 29 2004



HON. KENNETH A. DAVIS

J.S.C.

ENTERED

OCT 01 2004

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**