

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
DAWN RIZZI,

Plaintiffs.

Index No. 15860/01
Sequence #001, 002
Part 43

- against -

PETER J. FOTI and ERIK S. LEMISH,

9/19/2002

Defendants

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Upon the foregoing papers, plaintiff's motion for summary judgment on the issue of liability pursuant to CPLR §3212 against defendants is granted (*Siegel v. Terrusa*, 222 AD2d 428).

Defendants' cross-motion for an order pursuant to CPLR §3212 granting summary judgment in their favor and dismissing the summons and complaint of plaintiff upon the grounds that as a matter of law plaintiff has not suffered a serious injury as defined by *Insurance Law §5102(2)* is denied.

This case involves a motor vehicle accident that occurred on August 11, 2001 resulting in plaintiff's claim of permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system. In her opposition, plaintiff provides some probative evidence of permanent and/or significant limitation which raises an issue of material fact.

Movants have sustained their initial burden of submitting evidentiary proof in admissible form to warrant the objective findings that plaintiff has not suffered a serious injury including the affirmed report of Dr. John Killian who conducted an examination of plaintiff on July 25, 2002 and concluded that there were no positive

objective physical findings that plaintiff sustained any serious or permanent injuries as a result of the accident (see *Grossman v. Wright*, 268 AD2d 79 [2<sup>nd</sup> Dept. 2000]; *Guzman v. Paul Michael Management*, 266 AD2d 508 [2<sup>nd</sup> Dept. 1999]).

Further, Dr. Killian referred to a report of plaintiff's own orthopedic surgeon who reviewed an MRI of the spine and determine that, although the MRI reported to show disc bulges at C3-4 and C6-7, his examination revealed no clinical correlation with the MRI (see, *Torres v. Micheletti*, 208 AD2d 518).

The burden then shifted to plaintiff to come forward with some admissible evidence of serious injury within the meaning of the No-Fault Law in order to survive the motion (*Gaddy v. Eyler*, 79 NY2d 955). This she has been able to do.

Plaintiff's opposition contains an unaffirmed report from Dr. Philip Rafiy which the Court may not consider (*Perovich v. Liotta*, 273 AD2d 367). However, plaintiff also submits objective medical proof in admissible form consisting of a MRI report describing focal disc bulges at C3-4 and C6-7 and disc herniations at L3-4, L4-5 and L5-S1 (cf. *Bucci v. Kempinski*, 273 AD2d 333). While the MRI physician did not address the issue of causation of the spinal abnormalities, Dr. Poonam Dulai, after examining plaintiff and reviewing the affirmed MRI report, opined that plaintiff's symptoms were causally related to the August 11, 2001 accident.

Plaintiff's primary expert, her chiropractor Shari Jacobs, stated that her suspicions of disc pathology were confirmed by the objective proof contained in the MRI. Ms. Jacobs noted that plaintiff sustained 25% loss of overall normal range of cervical motion and 50% loss of overall range of lumbar motion - considered a "substantial" limitation of the use of the spine. Ms. Jacobs concluded plaintiff will continue to suffer from "a permanent consequential limitation in the use of her cervical and lumbar spine" as a result of the accident.

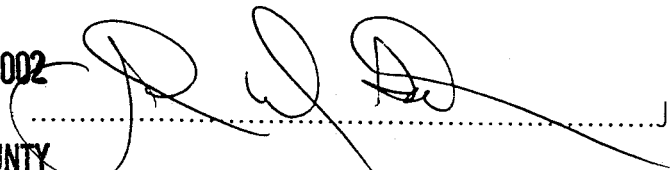
The Chiropractor's opinion was sufficient to raise an issue of fact as it was based on various range of motion studies specifying degrees of limitation as well as other enumerated objective tests (*Toure v. Avis Rent-A- Car Systems, Inc.*, 98 NY2d 345).

Due to the conflicting affirmations submitted on this motion, the Court recognizes that it cannot resolve the material factual questions regarding the extent of plaintiff's injuries. Accordingly, ~~defendant's~~ motion is denied.

**ENTERED**

OCT 22 2002

Dated: October 7, 2002



J.S.C.

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COUNTY CLERK'S OFFICE**