SHORT FORM ORDER

SCAN

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present: HON. ZELDA JONAS
Justice

TRIAL/IAS PART 25

OPHELIA RAMOS and CARMINE CESARANO,

Plaintiffs,

Index No. 14615/01

- against -

Sequence No. 3 & 4
Motion Date: March 4, 2003

THE INCORPORATED VILLAGE OF FREEPORT and MICHAEL WILLIAMS,

Defendants.

The following papers read on this motion:

Amended Notice of Motion 1
Affirmation in Opposition 2
Supplemental Affirmation in Opposition 3
Re-Notice of Motion 4
Affirmation in Opposition 5
Affirmation in Reply 6

Motion pursuant to CPLR 3212 by the plaintiffs, Ophelia Ramos and Carmine Cesarano, for summary judgment on the issue of liability.

Motion pursuant to CPLR 3212 by the defendants, The Incorporated Village of Freeport and Michael Williams, for an order dismissing the plaintiffs' complaint on the ground that the plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102[d].

On March 24, 2001 the plaintiff, Ophelia Ramos, brought her car to a full stop at a red light controlling the intersection of Merrick Road and Liberty Avenue in Freeport,

New York (Ramos Dep., 31, 39; Cesarano Dep., 18; Williams Dep., 12, 21, 39; Ramos BOP, ¶ 2).

While the Ramos vehicle was stopped at the light, a Freeport police car operated by Freeport Police Officer Michael Williams, collided into the rear of Ramos's car.

Ramos was transported by ambulance to a nearby hospital where she was examined and released that day (Ramos Dep., 46-48).

Cesarano, who did not complain of pain at the scene, was not transported to the hospital (Cesarano Dep., 26-27), although he did seek treatment from his private physician the next day (Cesarano Dep., 31).

Ramos and Cesarano testified in their respective depositions that they each missed one week of work after the accident occurred (Ramos Dep., 9; Cesarano Dep., 8; Ramos Amended BOP, ¶ 9 [c]; Cesarano BOP, ¶ 10[a]).

The record reveals that Ramos had been involved in two prior automobile accidents, which took place in 1986 and 2000, and that she had commenced lawsuits in connection with both incidents (Ramos Dep., 15-16).

The plaintiffs subsequently instituted separate personal injury actions which were consolidated by the Court (Defs' Exh., "B"). The plaintiffs – who make no claim for property damage sustained – both allege that they sustained serious injuries within the meaning of Insurance Law § 5102[d] (Defs' Mot., Exh.,"A" Ramos Cmplt.,¶ 26; Cesarano Cmplt.,¶ 28).

The defendants, Incorporated Village of Freeport and Michael Williams, move for summary judgment dismissing the complaint, arguing that neither Ramos nor Cesarano sustained a serious injury pursuant to Insurance Law § 5102[d].

The plaintiffs move for partial summary judgment on the issue of liability with respect to the occurrence of the accident. The defendants' motion is granted.

The defendants have demonstrated their *prima facie* entitlement to judgment with respect to the claim that the plaintiffs did not sustain serious injuries within the meaning of Insurance Law § 5102[d] (*e.g.*, *Herrin v. Airborne Freight Corp.*, 753 N.Y.S.2d 140

[2nd Dept. 2003]; *Matonti v. Tierno*, 753 N.Y.S.2d 379 [2nd Dept. 2003]; *Espinal v. Galicia*, 290 A.D.2d 528 [2nd Dept. 2002]).

More particularly, the defendants have submitted the affirmed reports of their examining neurologist and orthopedist, who concluded upon examining and testing both plaintiffs, that neither exhibited any positive, objectively verifiable physical limitations or medical sequellae attributable to the underlying accident.

The burden therefore shifted to the plaintiffs to come forward with admissible proof that they sustained a serious injury (*see*, *Gaddy v. Eyler*, 79 N.Y.2d 955; *Licari v. Elliott*, 57 N.Y.2d 230, 237). The plaintiffs have failed to do so (*Martinez v. Bernal*, ___A.D.2d___ [2nd Dept. 2003]; *Toto v. Ford*, 208 A.D.2d 712 [2nd Dept. 1994]).

Although the medical submissions produced in opposition to the motion mention various deficits and purported range of motion restrictions, a review of the record establishes that these findings are predicated upon the plaintiffs' own subjective complaints of pain (*see, Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 357-358; *see also*, *Taylor v. Jerusalem Air, Inc.*, 280 A.D.2d 466 [2nd Dept. 2001]; *Tabacco v. Kasten*, 229 A.D.2d 526 [2nd Dept. 1996]; *Barrett v. Howland*, 202 A.D.2d 383 [2nd Dept. 1994]).

It is settled that "objective proof of a plaintiff's injury [is required] in order to satisfy the statutory serious injury threshold" (*Toure v. Avis Rent A Car Systems, Inc., supra*, at 350). Moreover, "[m]ere subjective complaints of pain alone, as well as medical opinions clearly based upon such complaints, are insufficient to raise a triable issue of fact" (*Barrett v. Howland, supra*, at 384; *see also*, *Nager v. Ghatan*, ___A.D.2d___ [2nd Dept. 2003]; *Scudera v. Mahbubur*, 299 A.D.2d 535, 536 [2nd Dept. 2002]; *Coloquhoun v. 5 Towns Ambulette, Inc.*, 280 A.D.2d 512 [2nd Dept. 1994]; *Carroll v. Jennings*, 264 A.D.2d 494, 495 [2nd Dept. 1999]; *see also*, *Scheer v. Koubek*, 70 N.Y.2d 678, 679).

Further, while the plaintiffs' examining doctors make passing reference to certain radiological and imaging tests, their reports fail to adequately connect or casually link

the range of motion limitations and other injuries they diagnosed to the findings produced by these studies.

Moreover, and as to Ramos, who was involved in two prior accidents, the expert opinions submitted fail to refer to, or account for, the possible existence of pre-existing injuries allegedly sustained in connection with these accidents, including the 2000 accident – for which Ramos was still receiving treatment immediately before the instant accident occurred (Ramos Dep., 21) (*e.g.*, *Omar v. Goodman*, 295 A.D.2d 413, 414 [2nd Dept. 2002] *cf.*, *Pajda v. Pedone*, ___A.D.2d___ [2nd Dept. 2003]).

Lastly, the plaintiffs have failed to establish a medically-determined injury or impairment of a non-permanent nature which prevented them from performing all of the material acts which constituted their unusual and customary daily activities for a period of not less than 90 days during the 180-day period immediately following the accident (*DeJesus v. Grazadrei*, 755 N.Y.S.2d 302 [2nd Dept. 2003]).

Although the plaintiffs' doctors assert, *inter alia*, that the injuries diagnosed would "certainly interfere" with the daily activities of the plaintiffs – who each missed only one week of work – (*cf., Lee v. Rosio*, 257 A.D.2d 561, 562 [2nd Dept. 1999]), in the absence of properly articulated, objective evidence of a medically determined injury, neither these assertions – nor those contained in the plaintiffs' affidavits – are sufficient to raise a triable issue of fact (*e.g., Rodney v. Solntseu*, 754 N.Y.S.2d 911 [2nd Dept. 2003]; *Collazo v. Jun Yong Kim*, 288 A.D.2d 173 [2nd Dept. 2001]; *Delgado v. Hakim*, 287 A.D.2d 592, 593 [2nd Dept. 2001]; *Rosenbaum v. City of New York*, 282 A.D.2d 514, 515 [2nd Dept. 2001]; *Harney v. Tombstone Pizza Corp.*, 279 A.D.2d 609, 610 [2nd Dept. 2001]; *Lopez v. Zangrillo*, 251 A.D.2d 382, 383 [2nd Dept. 1998]). The Court notes in this respect that the record contains a letter authored by Ramos's treating orthopedist, dated approximately one week after the accident occurred, which advises that, "Ophelia Ramos * * * is medically cleared to return to work without restrictions as a school bus driver * * *."

In light of the Court's determination with respect to the issue of whether the plaintiffs sustained a serious injury, the plaintiffs' motion relating to question of fault in the occurrence of the accident is academic (*cf.*, *Pajda v. Pedone, supra; McCauley v. Ross*, 298 A.D.2d 506 [2nd Dept. 2002]).

Accordingly, the defendants' motion to dismiss is granted, and the plaintiffs' complaint is dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: 5/19/03

J.S.C.