

SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

MARIA ROMERO and NORA MIRANDA.

Plaintiffs.

- against -

Sequence No.: 002
Index No.: 007889/04
XXX

VINCENT A. CERELLI.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendant's motion for summary judgment is hereby granted.

Plaintiffs both allegedly suffered personal injuries as a result of an automobile accident in which the car in which they were driving was hit by an automobile owned and operated by defendant Vincent A. Cerelli on November 22, 2002.

Plaintiff Marie Romero claims to have suffered the following injuries:

“Subligamentous posterior disc herniations at C4-C5 and C5-C6 impinging on the anterior thecal sac; loss of normal cervical lordosis; posterior disc bulges at L4-L5 and L5-S1 impinging on the anterior thecal sac; thoracic pain syndrome; lumbosacral sprain; lumbosacral strain; cervical strain; cervical sprain; traumatic cervical spine syndrome; traumatic lumbosacral spine syndrome; hyperesthesia in the S1; multiple subluxations present in the cervical and lumbar spine; multiple subluxation present in the thoracic spine; cervicalgia; myofascial pain syndrome; low back syndrome; vertebral fixation; lumbago; muscle spasm; myalgia; lumbar derangement; dizziness and blurred vision; post-traumatic syndrome and headaches.”

Plaintiff Nora Miranda claims to have suffered the following injuries:

“Posterior disc herniation at C5-C6; posterior disc bulges at L2-L3, L3-L4 and L5-S1 impinging on the anterior thecal sac; thoracic pain syndrome; lumbrosacral sprain; lumbrosacral strain; cervical sprain; cervical strain; C6 radiculopathy with continued numbness and pain on the left arm; traumatic cervical spine syndrome; traumatic lumbosacral spine syndrome; multiple subluxations present in the cervical and lumbar spine; multiple subluxation present in the thoracic spine; cervicgia; myofascial pain syndrome of bilateral shoulders; myofascial pain syndrome of the left hip; low back syndrome; vertebral fixation; muscle spasm; myalgia; lumbar derangement; left sided headaches.”

Defendant moves for summary judgment to dismiss the complaint on the basis that neither plaintiff sustained serious injuries as defined by Insurance Law §5102(d).

In order to succeed on a motion for summary judgment, the defendant must demonstrate that there are no issues of fact by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In opposing a motion for summary judgment, plaintiffs must demonstrate a genuine issue of material fact through admissible evidence. Zuckerman v. City of New York, supra. Plaintiffs must prove they sustained serious injuries as defined by Insurance Law §5102(d).

Insurance Law §5104(a) provides “[n]otwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.”

Insurance Law §5102(d) defines a “serious injury” as:

“... a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function, or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent 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.”

The court shall consider defendant’s motion as it pertains to each plaintiff separately.

Defendant’s Motion against Plaintiff Maria Romero

In support of his motion as it pertains to defendant Romero, defendant annexes the medical affirmations of Harold A. Kozinn, M.D., an orthopedist; Maria Audra DeJesus, M.D., a neurologist; and Melissa Sapan Cohn, M.D., a radiologist.

Dr. Kozinn affirms that he performed an orthopedic examination on plaintiff Romero on February 23, 2006 and sets forth the objective tests administered on this plaintiff as well as the results and comparable norms. Dr. Kozinn concludes:

“I feel that the patient has reached MMI. I find no positive physical findings. The injuries sustained can be related to the motor vehicle accident that the patient was involved in. She has no restrictions or disabilities.”

Dr. DeJesus affirms that she performed a neurologic examination of plaintiff Romero on February 22, 2006 and also sets forth the objective tests administered on this plaintiff, the results and comparable norms. Dr. DeJesus concludes:

“Status post cervical and lumbar spine strain/sprain, resolved; normal neurologic examination.

After performing a thorough neurologic examination, and taking into consideration the history the claimant provided, it is my opinion, with a reasonable degree of medical certainty that Ms. Romero has recovered from any injury to the cervical or lumbar spine that she may have sustained.”

Dr. Cohn performed radiology reviews of magnetic resonance imaging (hereinafter MRI) tests of both the cervical and lumbar spines on November 14, 2006. Dr. Cohn concludes that the MRI examinations of the cervical spine and the lumbar spine reveal “mild” or “minimal” degenerative changes and further states “there is no evidence of trauma-related injury”.

The court has some concern on this issue. This court questions whether a radiologist can report on the causation of an injury from only reading MRI films. If the issue is whether this event caused plaintiff to suffer a serious injury, the fact that she may have had a pre-existing condition should not preclude her claim. It has been held that where an accident caused a pre-existing condition to be symptomatic that an issue of fact exists. See, e.g., Schaming v. Saunders Construction Carriers, 172 A.D.2d 957 (3rd Dep’t 1991). This raises the issue of whether it is possible for a radiologist to determine from an MRI whether the patient’s pain is related to the pre-existing condition or is an exacerbation of the pre-existing injury caused by the accident. Based on this concern, the court finds it difficult to rely on a radiologist’s report to satisfy defendants’ burden of making a *prima facie* showing.

Where, as here, defendant has demonstrated *prima facie* entitlement to summary judgment through objective medical evidence, in this case Drs. Kozinn’s and DeJesus’ affirmations, the burden shifts to plaintiff Romero to demonstrate triable issues of fact as to whether this plaintiff suffered serious injuries through objective medical evidence. Oguendo v. New York City Transit Authority, 246 A.D.2d 635 (2nd Dep’t 1998).

In opposition plaintiff Romero relies upon the affidavit of Wayne P. Wagner, a chiropractor. Romero, however, fails to explain the approximately three year gap in treatment. See, Crespo v. Kramer, 295 A.D.2d 467 (2nd Dep't 2002); Ersop v. Variano, 307 A.D.2d 951 (2nd Dep't 2003).

The court therefore concludes that plaintiff Romero has failed to demonstrate a triable issue of fact which precludes summary judgment as against her through objective medical evidence.

Defendant's Motion as Against Defendant Nora Miranda

In support of his motion as asserted against plaintiff Miranda, defendant again relies upon the affirmations of Drs. Kozinn, DeJesus and Cohn.

Dr. Kozinn affirms that he performed an orthopedic examination of plaintiff Miranda on February 23, 2006 and again sets forth the objective tests administered on this plaintiff as well as the results and comparable norms. Dr. Kozinn concludes:

“Cervial sprain, resolved; lumbosacral sprain, resolved.

I feel that both injuries have reached maximum medical improvement. I see no further indication for therapy, and there are no positive physical findings. The patient has made a complete recovery. She has no restrictions or disability.

Dr. DeJesus affirms that she performed a neurologic examination of this plaintiff on February 22, 2006 and also sets forth the objective tests administered on this plaintiff, their results and comparable norms. Dr. DeJesus concludes:

“After performing a thorough neurologic examination, and taking into consideration the history the claimant provided, it is my opinion, with a reasonable degree of medical certainty that Ms. Miranda has recovered from any injury to the cervical or lumbar spine that she may have sustained.

Ms. Miranda is not impaired at this time from a neurologic point of view. The claimant is currently working and can continue to work and perform all activities of daily living. There is no permanency or residuals.”

Dr. Cohn affirms that her review of Ms. Miranda's MRI results in a conclusion, that like that reached for Ms. Romero, finds that plaintiff Miranda's conditions were not traumatically caused and are degenerative in nature. For the same reason sets forth above, the court finds Dr. Cohn's affirmation as applied to plaintiff Miranda to be unavailing. See, Schaming, supra.

Where, as here, defendant has demonstrated *prima facie* entitlement to summary judgment through objective medical evidence, again in this case Drs. Kozinn's and DeJesus' affirmations, the burden shifts to plaintiff Miranda to demonstrate triable issues of fact as to

whether this plaintiff suffered serious injuries through objective medical evidence. Oguendo v. New York City Transit Authority, supra.

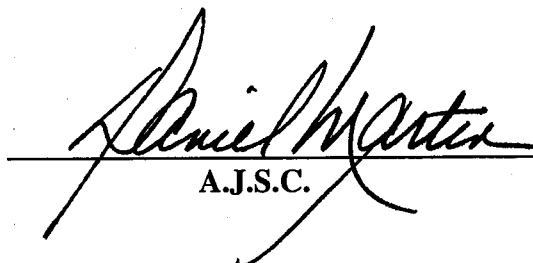
In opposition to this branch of the motion, plaintiff again relies upon Dr. Wagner's affidavit. Once again, plaintiff fails to explain the three year gap in treatment. See, Crespo, supra; Ersop, supra.

The court concludes that plaintiff Miranda has also failed to meet her burden of demonstrating an issue of fact which precludes summary judgment.

Based upon the foregoing, defendant's motion is granted and the complaint is dismissed in its entirety.

So Ordered.

Dated: May 1, 2007


A.J.S.C.

ENTERED

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MOHAWK COUNTY
COUNTY CLERK'S OFFICE