

SHORT FORM ORDER

SUPREME COURT- STATE OF NEW YORK

Present: HON. JAMES P. McCORMACK, Acting Justice of the Supreme Court

TRIAL/IAS, PART 51
NASSAU COUNTY

ELIZABETH MOLINA GAY AND COREY GAY,

Plaintiff,

-against-

TRACY MONTOYA AND JOSE R. MONTOYA,

Defendants.

Index No.: 004930/05
Motion Seq. No.: 001
Submission Date: 6/22/07

The following papers read on this motion:

Notice of Motion/Memorandum of Law.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Motion by defendants Tracy and Jose Montoya for an order pursuant to CPLR §§ 3211(a)(2), 3211(a)(7) and 3212 granting summary judgement on the grounds that plaintiff did not sustain a “serious injury” within the meaning of Insurance Law §§ 5102 and 5104 and cannot make out a prima facie case, is denied to the extent hereinafter provided.

This action is brought by plaintiffs Elizabeth Molina Gay to recover money damages for what are alleged to be serious physical injuries sustained by her in an automobile accident which took place on September 7, 2003 at the intersection of North

Main Street and Broadway, Freeport, New York when the automobile he was driving was struck by a vehicle operated by defendant Tracy Montoya and owned by Jose Montoya. The plaintiff's Bill of Particulars alleges, amongst other items, that she sustained a L5-S1 posterior lumbar disc herniation, C5/6 posterior cervical disc bulge, left C6 cervical radiculopathy, bilateral L5 lumbar radiculopathy left brachial plexus neuroalgia and bilateral occipital nerve neuralgia requiring cervical epidural steroid installation and bilateral occipital nerve block. (Defendant's Notice of Motion Exhibit "B").

Insurance Law 5102(d) defines "serious injury" as a personal injury which results in among other things "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 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."

With regard to the statutory categories of "permanent consequential limitation" and "significant limitations of use", the Court of Appeals has stated that whether a limitation of use or function is "consequential" or "significant" relates to "medical significance" and involves a "comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part"

(*Toure v. Avis Rent A Car Systems*, 98 NY 2d 345, 353[2002]) Additionally, the doctor's opinion as to the medical significance of the injury must be supported by objective medical evidence, such as an MRI or CT scan, or the observation of muscle spasms during the physical examination. *Id.*

On a motion for summary judgement, it is defendant's burden to present a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) as a matter of law (*Schultz v. Von Voight*, 86 NY 2d 865[1995]). If defendant makes that showing the burden shifts to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that he/she sustained a serious injury under the No-Fault Law (*Gaddy v. Eycler*, 79 NY 2d 955[1992]). Thus, the question of whether plaintiff suffered a serious injury is not always a question of fact which requires a jury trial (*Licari v. Elliot*, 57 NY 2d 230, 237[1982]). However, where plaintiff submits objective evidence as to "the extent of the limitation of movement," a factual issue will be presented (*Id.* at 238-239).

In support of their motion for summary judgement dismissing the complaint, defendants submit an affirmed report of one physician Edward M. Weiland, M.D., a neurologist, who examined plaintiff on February 20, 2007 as part of an independent medical evaluation. Dr. Weiland noted cognitive functions were intact with no signs of raised intra cranial pressure, corneal reflex was intact and extra ocular movements were full, pupils were equal and reactive, the headtilt maneuver failed to identify evidence of

nystagmus. There was a full range of motion of the neck, shoulders extremities, as well as the lower torso. No vertebral body percussion tenderness or paraspinal muscle spasm was appreciated. There was no sciatic notch tenderness and no clinical signs of any compressive neuropathy were noted in either upper or lower extremities. The segmental motor evaluation revealed full power in both proximal and distal muscle groups of the upper and lower extremities. Gait and coordination skills were within normal limits and no evidence of a foot drop or hip tilt.

The conclusion reached by Dr. Weiland after his exam was that plaintiff was not suffering from any lateralizing neurological deficits. He found no primary neurological disability and no findings of any neurological residual or permanency based upon the physical examination. Defendants have submitted no orthopedist's opinion or MRI review.

The defendant has established, through the affirmed report of Dr. Weiland, a prima facie case that plaintiff's injuries were not serious within the meaning of Insurance Law § 5102. (*Chatah v. Iglesias*, 5 AD 3d 160; *Ziegler v. Ramadhan*, 5 AD 3d 1080).

Accordingly, the burden now shifts to the plaintiff to demonstrate a serious injury.

(*Attanasio v. Lashley*, 636 NYS 2d 834)

In opposition to the motion, plaintiff has submitted the affirmed reports of Dr. Joseph Gregorace, her treating physiatrist, and Dr. Robert Diamond, a radiologist who conducted an M.R.I. of plaintiff's lumbar spine and an MRI of plaintiff's cervical spine.

The M.R.I of the cervical spine. taken by Dr. Diamond on November 12, 2003, approximately two-months post accident, showed straightening of the cervical curvature compatible with reflex muscle spasm. C5/6 posterior subligamentous disc bulge, and findings compatible with posterosuperior nasopharyngeal adenoidal hyperplasia. The MRI of the lumbar spine taken by Dr. Diamond on November 12, 2003, revealed L5/S1 posterocentral disc herniation (Plaintiff's Exhibit B).

Dr. Joseph Gregorace had last examined plaintiff on April 20, 2007. At that exam, plaintiff complained of occasional cervical and lumbar pain. The physical exam revealed low cervical spine tenderness with low lumbar spine spasms. Additionally, cervical and lumbar spine range of motion was diminished in various planes. He noted Ms. Molina-Gay participated in a program of physical therapy on a consistent and long-term basis with different modalities and restrictions of her activities yet she continues to demonstrate signs of residual inflammatory pathology to the muscles and supportive structures of the neck and back. Dr. Gregorace indicated that the MRI findings were consistent with Molina-Gay's subjective complaints and his clinical impression of the patient. He also pointed out that electro diagnostic testing of her upper and lower extremities revealed nerve damage in the form of a left C-6 radiculopathy and bilateral L5 radiculopathies. In conclusion, Dr. Gregorace opined that plaintiff had a "permanent partial disability including a lumbar disc herniation at L5/S1 as well as a cervical bulge at C5/6 which has a tendency to result in chronic pain with progressive remission and exacerbation during

overuse". He further indicated that the ongoing radicular symptomatology was confirmed by the results of the EMG/NCV studies. He concluded the permanent disability limited plaintiff in her capabilities and limitations of her activities indefinitely and will increase as she ages and the development of arthritis to the affected area is likely. (Dr. Gregorace Aff. ¶¶ 7-16)

Plaintiff also submitted her own affidavit explaining that she was advised by Dr. Gregorace in April 2004 that continued physical therapy would not be beneficial and she was discharged from further care. She had also been referred to Alexander Nash, M.D., an anesthesiologist who specialized in pain management. He recommended the plaintiff undergo a cervical epidural steroid injection to alleviate pain. That procedure was performed on January 12, 2004 and immediately following the procedure Molina-Gay indicated she experienced a reduction in cervical pain. The doctor recommended a series of injections, however the plaintiff's no-fault benefits were terminated and she did not have health insurance to cover the additional procedures. (Molina-Gay Aff. ¶¶)

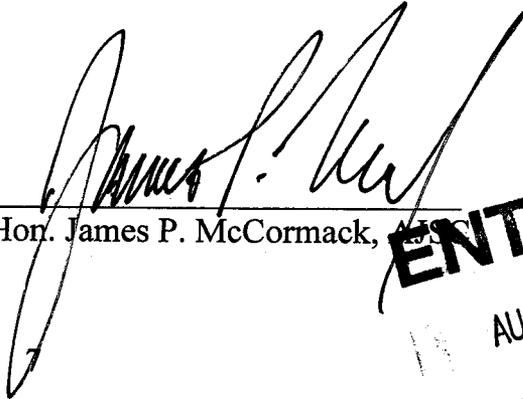
Dr. Gregorace's findings contained in his affirmed report as well as those of radiologist, Dr. Diamond, lead this court to conclude that the plaintiff has met her burden of presenting sufficient evidence in admissible form as to present a triable issue of fact as to the serious nature of her injuries. The plaintiff herein has submitted objective medical evidence of a herniated disc(s) together with objective tests showing a decreased range of motion in the cervical and lumbar spine of a sufficient quality as to preclude summary

judgement. (*Toure v. Avis Rent A Car Systems, supra; Ejzerman v. Cruz, 309 AD 2d 893; Salomon v. Hadco, 1 AD 3d 426; Espinoza v. Dinicola, 8 AD 3d 225*). The court is also satisfied that plaintiff's affidavit that she could not afford to pay for additional cervical epidural steroid injections once the no-fault benefits had been terminated and that Molina-Gay was advised by Dr. Gregorace that further physical therapy treatment would not improve her condition. These statements present a reasonable explanation for the cessation of physical therapy treatment. (*Pommells v. Perez, 4 NY 3d 566*) It does appear the plaintiff has continued to see her primary care physician who has prescribed pain medications for her continuing pain, including Vicodin. Specifically, this court concludes that plaintiff has presented sufficient evidence as to two of the No-Fault thresholds: 1) permanent consequential limitation of use of a body organ or member, and 2) significant limitation of use of a body function or system.

Accordingly, the defendant's motion is denied in all respects.

This decision constitutes the order of this Court.

Dated: August 13, 2007



Hon. James P. McCormack, J.S.C.

ENTERED
AUG 23 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE