

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 15

KAREN J. MARTIN,

Plaintiff,

INDEX NO. 13489/04

X X X

-against-

MOTION DATE: 10/31/06

SEQUENCE NO. 0013

MARIA N. FRENCH and TINA HEDSTROM,

Defendants.

-----X

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| Notice of Motion, Affs. & Exs..... | <u>1</u> |
| Affirmation In Opposition & Exs..... | <u>2</u> |
| Reply Affirmation & Exs..... | <u>3</u> |

Upon the foregoing papers, it is ordered that the motion by the defendants for an order granting summary judgment dismissing the Complaint on the ground that the plaintiff did not sustain a serious injury (Insurance Law §5102(d)) is granted.

This is an action to recover damages for the personal injuries sustained by the plaintiff as a result of a two-car accident accident which occurred at on Froehlich Farm Boulevard, Woodbury, N.Y. on June 21, 2002. Plaintiff was the owner and operator of a car. The other car was owned by defendant Maria French and operated by Tina Hedstrom.

Plaintiff's injuries include "acute cervical whiplash syndrome", cervical and lumbar pain and restricted motion. Plaintiff was not hospitalized or confined to bed or home and is claiming a permanent partial disability.

In support of this application, defendants submit the sworn report of orthopedist, Frank Hudak. Plaintiff was examined by Dr. Hudak on March 20, 2006 and after reviewing her medical records along with the exam concluded that she suffers from post-sprain of the cervical and lumbosacral spine, no disability, treatment or permanency.

Defendants have also submitted plaintiff's sworn testimony that she did not seek treatment for the lower back until 3 months after the accident and she said an MRI revealed arthritis in her neck. Defendants also submitted the unsworn report of plaintiff's physician, Dr. James Gurtowski, dated two years before the accident showing plaintiff's tennis elbow, hand numbness, possible carpal tunnel syndrome, cervical radiculopathy and a fracture of the wrist on November 30, 2001.

In opposition plaintiff explains by her sworn testimony that she sought medical care about 1 year after the accident and until May, 2005 was receiving chiropractic treatments several times per week. She avers to current chiropractic treatment by Dr. S. Cavagnuolo. She also refers to a sworn report of a June 2006 exam by Dr. Oliverio who ordered an MRI and concluded herniations in plaintiff's neck.

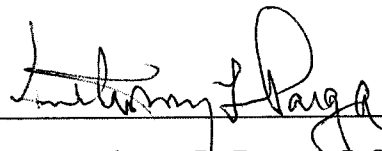
Dr. Datikashvili's sworn statement contains a conclusion of acute cervical whiplash syndrome based on objective tests with quantitative results. However, the report is based on examinations and treatments in 2002 and are not dispositive as to plaintiff's current condition.

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

As recently reaffirmed by the Court of Appeals, in the context of soft-tissue injuries, involving complaints of pain which are difficult to observe or quantify, what constitutes a "serious injury" is vexing. The Court of Appeals concluded, however, that even where there is objective medical proof of injury, where additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a gap in treatment, an intervening medical problem or pre-existing condition, summary dismissal of a complaint may be appropriate (*Pommells v. Perez, et al.* 4 NY3d 566 (2005)).

Dated: December 28, 2006.



Anthony L. Parga, J. S. C.

ENTERED

JAN 04 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE