SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MICHAEL TAYLOR AND DONNA SPEED,

Plaintiffs,

-against-

DOROTHY TAYLOR, RICHARD WILLIAMSON and CRAIG GOODMAN

Defendants.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 20138/08
Motion Seq. Nos.: 03, 04 & 05

DECISION AND ORDER

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The motions by defendant Craig Goodman ("Goodman") and Dorothy Taylor ("Ms. Taylor") and Richard Williamson ("Williamson") each seeking summary judgment on the grounds that the plaintiffs Michael Taylor ("Taylor") and Donna Speed ("Ms. Speed") did not sustain serious injuries as defined under Insurance Law §5102(d) are **granted** for the reasons set forth herein. The motion by Taylor and Ms. Speed to vacate the plaintiffs' Note of Issue and Statement of Readiness is decided as hereinafter indicated.

Plaintiffs commenced this action for personal injuries as a result of a motor vehicle collision that occurred at 9:00 - 9:30 P.M. on September 12, 2008 on Park Avenue at or near the intersection with Broadway in Huntington, N.Y. Ms. Speed and Mr. Taylor were passengers in a vehicle owned by

Ms. Taylor and operated by Williamson. Goodman was operating the second vehicle involved in the collision. Both plaintiffs allege they sustained serious injuries. Defendants allege they, the plaintiffs, did not.

The deposition of Ms. Speed is set forth as Exhibit C (annexed to Goodman's motion; the following pages refer to that exhibit). Ms. Speed worked for Best Care as a patient care assistant (pgs. 11-12); Ms. Speed worked with or cared for Taylor for one week after the September 12, 2008 collision (p. 14); a week after the collision, Ms. Speed stopped working with Taylor since it, Best Care, did not assign her to his case (p. 15); Ms. Speed was taken to the hospital (p. 42, 44); Ms. Speed stated she was in the E.R. at 3:00 p.m. and left at 3:00 a.m. (p. 45); she saw Dr. Mendoza, a chiropractor, within a week of the incident (p. 47); in the beginning of treatment, Ms. Speed saw Dr. Mendoza everyday, then three times a week, then two times a week (p. 48); as of the date of the deposition (August 3, 2009), Ms. Speed states she still sees Dr. Mendoza (p. 48). Ms. Speed (as of August 2009) was getting unemployment insurance as of July 2009 (p. 66); Ms. Speed stopped going to Dr. Mendoza because Dr. Mendoza referred Ms. Speed to Dr. Liguori for pain (pgs. 49, 65); Ms. Speed was never confined to her bed due to the collision of September 12, 2008 (pgs. 72, 73); Ms. Speed asked Dr. Mendoza if she, Ms. Speed, could return to work but Dr. Mendoza stated she, Ms. Speed, was not able to go back to work (p. 76).

As to plaintiff Taylor, (his deposition is set forth as Exhibit D annexed to Goodman's motion; the following pages refer to that Exhibit) due to the collision, Taylor lost consciousness and woke up in an ambulance (p. 38); he was taken to a hospital for a short (two to five hours) stay (pgs. 41, 42); the hospital staff saw "nothing" in the CAT scan or MRI done on Taylor (p. 46); Taylor stopped going to Dr. Mendoza, a chiropractor, because he . . . "could not take it any longer" (p. 49); Taylor saw Dr.

Liguori once (p. 53); Taylor states he, post collision, can no longer write; while no doctor told Taylor so, Taylor contends it is due to the collision (p. 61); and Taylor, by his own conjecture, states he is having trouble eating post collision (p. 64).

As to Ms. Speed, defendants offer the sworn reports of Dr. Alan Zimmerman, an orthopedist (Dr. Zimmerman's report is dated September 30, 2009 and it is annexed to the Goodman motion as Exhibit E). Dr. Zimmerman found Ms. Speed's cervical and lumbar sprains, her left shoulder sprain and her right knee sprain were all resolved. Dr. Zimmerman found she had no disability, no further treatment was necessary, and Ms. Speed could pursue gainful employment.

Defendants offer the sworn report of Dr. Kuldip K. Sachdev, a neurologist (Dr. Sachdev's report is dated October 8, 2009 and is annexed to the Goodman motion as Exhibit F). Dr. Sachdev found Ms. Speed managed her headaches by taking generic ibuprofen and Motrin. Dr. Sachdev found Ms. Speed's cervical and lumbar strains and sprains resolved. He found no need for her to pursue causally-related treatment. Dr. Sachdev found Ms. Speed had no neurological disability. He found she was able to work, and she could pursue the activities for normal living.

Defendants also offer the sworn report of Dr. Paul Miller, an orthopedist (the report is dated November 16, 2009 and is annexed to the motion of Ms. Taylor and Williamson as Exhibit E). Dr. Miller found no evidence of a causally related disability. Dr. Miller also concluded that Ms. Speed could carry out the activities of daily living without restrictions, and she was capable of working.

As to Taylor, the defendants offer the sworn report of Dr. Zimmerman (the report on Taylor is dated September 30, 2009 and is annexed to the Goodman motion as Exhibit G). While Dr. Zimmerman noted Taylor was suffering from multiple sclerosis, Dr. Zimmerman found he had no causally-related disability due to the September 12, 2008 accident. Dr. Zimmerman did note from his

findings that as to Taylor's cervical and lumbar spines, there was evidence of a degenerative condition that pre-existed the collision and was not causally related to the September 12, 2008 collision.

The report of Dr. Sachdev on Taylor (dated October 10, 2009 and annexed to the Goodman motion as Exhibit H). Dr. Sachdev noted Taylor's cervical and lumbar spine sprains are resolved as are Taylor's posttraumatic headaches. Dr. Sachdev found there was no need for any causally-related treatment or follow up due to any injuries sustained on September 12, 2008.

Defendants also offer the sworn report of Dr. Iqbal Merchant, a neurologist (the report is dated January 10, 2010 and it is annexed as Exhibit D defendant to the Taylor/Williamson motion). Dr. Merchant found any injuries Taylor sustained as a result of the September 12, 2008 collision were resolved and Taylor could carry out his daily living as before the collision.

In a serious injury matter, when a defendant seeks summary judgment on the issue that the plaintiff did not sustain a serious injury, the burden is placed on the defendant to prove through admissible evidence that the plaintiff failed to meet the statutory threshold of "serious injury" (*Gaddy v Eyler*, 79 NY2d 955 [1992]; *Lagois v Public Administrator of Suffolk County*, 303 AD2d 644 [2d Dept 2003]).

A defendant moving for summary judgment on the grounds that the plaintiff did not sustain a "serious injury" under Insurance Law §5102(d) must meet the initial burden of establishing *prima facie* entitlement to judgment (*Matthew v Cupie Transportation Corp.*, 302 AD2d 566 [2d Dept 2003]). In an automobile negligence case, it is only after a defendant has made a *prima facie* showing of entitlement to summary judgment that it becomes incumbent on the plaintiff to present competent medical evidence to support plaintiffs' claim or serious injury (*Franchini v Palmieri*, 307 AD2d 1056 [3d Dept 2003]).

A defendant in an automobile negligence/serious injury case can establish his or her entitlement

to judgment by a physician's report, from the qualitative assessment therein, that the plaintiff has not sustained a serious injury (*Toure v Avis Rent A Car System, Inc.*, 98 NY2d 345, 350 [2002]; *Gonzales v Fiallo*, 47 AD3d 706 [2d Dept 2008]).

Examining the reports of defendants' physicians, there are enough tests set forth therein to provide an objective basis so that their respective qualitative assessments of plaintiffs could readily be challenged by any of plaintiffs' expert(s) during cross examination at trial as well as to provide enough to be evaluated by the trier of fact (*Toure v Avis Rent A Car Systems, Inc., supra; Gonzales v Fiallo, supra*).

Thus, as noted, defendants' submission of relevant portions of plaintiffs' deposition (*Jackson v Colvert* [2d Dept 2005], 24 AD3d 420; *Batista v Olivo*, 17 AD3d 494 [2d Dept 2005]) and affirmations of defendants' physicians are sufficient to make a *prima facie* showing that the plaintiffs did not sustain serious injuries within the meaning of Insurance Law § 5102(d) (*Paul v Trerotola*, 11 AD3d 441 [2d Dept 2004]). The plaintiffs are now required to come forward with viable, valid objective evidence to verify their complaints of pain and limitation of motion (*Farozes v Kamran*, 22 AD3d 458 [2d Dept 2005]). Here, plaintiffs have not met their burden.

Plaintiffs have offered the sworn reports of Dr. Richard L. Parker (dated April 27, 2010 and annexed as Exhibit B to plaintiffs' affirmation in opposition–for Ms. Speed) and the post sworn reports of Dr. Walter E. Mendoza, a chiropractor (see Exhibit I dated October 25, 2008, annexed to plaintiffs' affirmation in opposition as Exhibit C–for Ms. Speed and one dated October 30, 2008 annexed to plaintiffs' affirmation for Taylor) and Dr. James M. Liguori (see Exhibit H annexed to plaintiffs' affirmation in opposition dated April 30, 2010 and May 28, 2010 and annexed to plaintiffs affirmation in opposition as Exhibit defendant for Ms. Speed and Exhibit H for Taylor). All these reports suffer

from a gap in treatment issue.

For Ms. Speed (Exhibit B), Dr. Parker's reports run from December 3, 2008 with the next (post summary judgment motion) on April 27, 2010. For Dr. Mendoza, Ms. Speed's documented examination was October 25, 2008 with the next, post summary judgment motion, dated May 15, 2010 (Exhibit C). For Dr. Mendoza's records of Taylor, the full report was for October 30, 2008 (Dr. Mendoza contends Taylor received "care" until February 13, 2009). For Dr. Liguori's reports of Ms. Speed, the gap is March 12, 2009 until April 30, 2010 (post motion). Dr. Liguori's reports on Taylor are dated February 18, 2009 and May 28, 2010 (post motion).

Both Dr. Mendoza (for both Ms. Speed and Taylor, see Exhibit I annexed to plaintiffs' affirmation in opposition) and Dr. Liguori (see Exhibit H for both Speed and Taylor) offer explanation for the gap in treatment.

In *Pommells v Perez*, 4 NY3d 566 [2005], the Court of Appeals held that a gap in treatment would interrupt the chain of causation between the collision and the alleged injury.

While a cessation of treatment is not totally dispositive since it is not required that the plaintiff continue needless treatment in order to survive a summary judgment motion, the Court of Appeals has recently stated that a plaintiff who terminates therapeutic measures following the accident while claiming serious injury must offer some reasonable explanation for having done so (see, *Pommells v Perez, supra*; *see also Mohamed v Siffrain*, 19 AD3d 561 [2d Dept 2005]).

Courts that have applied *Pommells v Perez, supra*, have consistently held that to be reasonable, the explanation must be concrete and substantiated by the record. The same exacting scrutiny should be applied to plaintiffs' explanation that the gap or cessation of treatment occurred when no-fault benefits stopped.

Dr. Mendoza stated Ms. Speed's treatment had reached maximum benefits and Ms. Speed was to return only for symptomatic relief and/or as she (Ms. Speed) saw fit. Dr. Mendoza contends Ms. Speed's last visit on August 5, 2009 was for spinal manipulation. However, in his last full report of October 25, 2008 (pre-summary judgment motion), he recommended continued physiotherapeutic and rehab care so she, Ms. Speed, could make further gains.

As noted in her deposition, Ms. Speed stopped going to Dr. Mendoza due to the fact that Dr. Mendoza referred Ms. Speed to Dr. Liguori (see Exhibit C, pgs. 49, 65 annexed to Goodman's motion). There is no mention in Ms. Speed's deposition (dated August 3, 2009) of the cessation of no-fault payments. Taylor, as noted in his August 12, 2009 deposition (see Exhibit D, pg. 49 annexed to Goodman motion) that he, Taylor, stopped going to see Dr. Mendoza because he, Taylor ". . . could not take it any longer." Again, there is no comment as to "maximum benefits reached, etc." by Taylor. Thus, as to Ms. Speed and Taylor, Dr. Mendoza's statement is tailored to "hurdle" or avoid the "gap issue" (*see Cornelius v Cintas Corp.*, 50 AD3d 1085 [2d Dept 2008]).

As to Ms. Speed's explanation for the "gap," that the no-fault payments ended, no substantiation of this explanation has been set forth such as a letter from the insurance carrier as to why and when the coverage was discontinued. It is also unclear whether Ms. Speed explored or utilized other insurance. Whether Dr. Roth offered some reduced rate program Ms. Speed could use and afford? Also, there is no substantiation of the plaintiff's financial condition that would clarify her position and present a concrete reasonable explanation for the *Pommells v Perez, supra*, gap.

Any subjective complaints of pain and limitation of motion by plaintiff must be substantiated by valid certified objective medical findings based on a recent examination of the plaintiff for the purpose of the application of the no-fault tort threshold (*Young v Russell*, 19 AD3d 688[2d Dept 2005]). Thus,

subjective complaints of lack of income to be able to afford continued, needed physical therapy should be backed up by objective findings, not the conclusory and merely stated phrase–"I don't have the funds."

A plaintiff should be required to submit appropriate evidence as to why he or she ended physical therapy some time ago.

Clearly, the explanation of the plaintiff for the lapse in time is unsupported by the record (*Pommells v Perez, supra*).

For Taylor, Dr. Parker's only report is dated May 20, 2010 (Exhibit F). Dr. Parker does not cite competent medical evidence of a significant limitation in the cervical or lumbar spine contemporaneous with the subject collision (*see Caraballo v Kim*, 63 AD3d 976 [2d Dept 2009]). Nor does Dr. Parker offer a "normal" range for Taylor in the May 20, 2010 exam (*Berson v Rosada Cab Corp.*, 62 AD3d 636 [2d Dept 2009]).

Plaintiffs have offered the MRIs of Ms. Speed (see Exhibit A annexed to plaintiffs' affirmation in opposition) and Taylor (see Exhibit E annexed to plaintiffs' affirmation in opposition). These reports do not causally relate the issue of the plaintiffs' condition to the September 12, 2008 collision (*see Garcia v Lopez*, 59 AD3d 593 [2d Dept 2009]; *Bosnajian v Wang*, 12 AD3d 471 [2d Dept 2004]).

Plaintiffs must set forth competent medical evidence to establish that they sustained a medically determined injury or impairment of a nonpermanent nature which prevented them from performing substantially all of the material acts which constituted their usual and customary daily activities for 90 of the 180 days following the subject collision (*Ly v Holloway*, 60 AD3d 1006 [2d Dept 2009]; *Rabolt v Park*, 50 AD3d 995 [2d Dept 2008]).

Here, the plaintiffs offer no viable medical evidence on the 90/180 day issue. Clearly, the

plaintiffs' depositions do not support a 90/180 day issue in plaintiffs' favor. Even if the deposition did so, the deposition testimony does not indicate "competent medical evidence" that they were unable to perform substantially all of their daily activities for 90 out of 180 days after the September 12, 2008 collision.

The affidavit of Ms. Speed (see Exhibit J to plaintiffs' affirmation in opposition) is insufficient to raise triable issues of fact as to whether she sustained a "serious injury" (*see Niles v Lam Pakie Ho*, 61 AD3d 657 [2d Dept 2009]; *Contave v Gelle*, 60 AD3d 988 [2d Dept 2009]).

As to the motion by Ms. Taylor and Williamson to strike the plaintiffs' Note of Issue and Statement of Readiness due to plaintiffs' alleged failure to provide certain items of discovery (see ¶ 5 annexed to the Taylor/Williamson motion dated June 2, 2010), it is denied as moot since the action against defendants herein is deemed over per the court's determination on the summary judgment motion, *supra*.

This constitutes the Decision and Order of the Court.

DATED: August 11, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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