

SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

DONNA TISO,

Plaintiff,

TRIAL/IAS PART 9
NASSAU COUNTY

- against -

INDEX NO. 19921/10

MICHELLE SASSO and DANIEL SASSO,

Defendants.

MOTION SUBMISSION
DATE: 3/27/12

MICHELLE SASSO and DANIEL SASSO,

Third-Party Plaintiffs,

MOTION SEQUENCE
NOS. 1, 2, 3, 4, 5

- against -

JOSEPH TISO,

Third-Party Defendant.

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>X</u>
Notice of Cross-Motion and Affidavits.....	<u>X</u>
Affirmations in Opposition.....	<u>X</u>
Reply Affirmations.....	<u>X</u>

Relief Requested

The plaintiff, Donna Tiso, moves for an order pursuant to CPLR §3212 granting plaintiff summary judgment on the issue of liability in favor of the plaintiff as and against the defendants/third-party plaintiffs, Michelle Sasso and Daniel Sasso, (hereinafter referred to as "Sasso"). Sasso moves for an order pursuant to CPLR §3212 granting defendant summary judgment dismissing plaintiff's complaint and all counterclaims and/or cross-claims on the ground that the plaintiff did not suffer a serious injury as required pursuant to Insurance Law §5102(d). The third-party defendant, Joseph Tiso, cross-moves for an order pursuant to CPLR §3212 granting the third-party defendant summary judgment on the ground that the plaintiff did not suffer a serious injury as required pursuant to Insurance Law §5102(d). The third-party defendant also moves for summary

judgment on the ground that he bears no liability for the subject accident. Finally, the plaintiff cross-moves for an order pursuant to CPLR §3212 for summary judgment on the ground that plaintiff meets the issue of serious injury under Insurance Law §5102(d). The parties submit respective opposition and reply affirmations.

Background

The plaintiff initiated this action to recover for personal injuries sustained on August 17, 2009 at or near the intersection of East Street and Keller Avenue, Elmont, New York. Plaintiff was a passenger in the vehicle operated by the third-party defendant. Plaintiff's vehicle came into contact with the Sasso vehicle.

The Threshold Motions

Sasso moves, pursuant to CPLR §3212 for an order granting summary judgment in their favor and dismissing the plaintiff's complaint on the grounds that the plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d), and thus, plaintiff's claim for non-economic loss is barred by §5104(a) of the New York Insurance Law. The third-party defendant also cross-moves for summary judgment on the same grounds and repeats and reiterates Sasso's arguments. Plaintiff submits opposition, and cross-moves for summary judgment pursuant to CPLR §3212 for an order granting plaintiff summary judgment on the grounds that plaintiff did meet the serious injury threshold pursuant to Insurance Law §5104(d). The defendants and the third-party defendants submit opposition to the plaintiff's motion, and reply affirmations. The plaintiff submits a reply affirmation.

As already provided, plaintiff commenced an action to recover for personal injuries sustained as a result of an automobile accident which occurred on August 17, 2009. The plaintiff alleges injuries including restriction of motion of lumbar and lumbosacral spine, restriction of motion of cervical spine, restriction of motion of right knee, and left knee, cervical and lumbosacral radiculopathy and internal derangement of the left and right knee.

Sasso submits an affirmed medical examination report of Dr. Michael Katz, M.D., an orthopedist. Dr. Katz conducted a physical examination of the plaintiff on December 16, 2011. Dr. Katz concluded that his physical examination of the plaintiff reveals no objective clinical signs of ongoing disability or functional impairment regarding the subject accident. Dr. Katz found plaintiff's cervical strain with radiculitis, lumbosacral spine and sacroiliac joint strain, and bilateral knee contusion are resolved.

Sasso also submits the affirmed report of Dr. Erik J. Entin, M.D., neurologist who examined the plaintiff on December 20, 2011. Dr. Entin opines that plaintiff demonstrates an entirely normal neurological examination and has no history of, or any objective evidence of, neurological deficit or disability referable to the subject accident.

The plaintiff submits the affirmed report of Dr. Joseph Gregorace, D.O., who examined the plaintiff on January 20, 2012. Dr. Gregorace found limitations in plaintiff's cervical range of motion and recommends that she continue with her home exercise program for her persistent and chronic disco genic neck pain associated with her cervical spine disc herniation at the C6/7 level. Dr. Gregorace opines that plaintiff has sustained a significant limitation of use and permanent injury to her cervical spine casually related to her accident of August 17, 2009.

"Serious Injury" is defined in Insurance Law §5102(d) as:

"...[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of 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 or a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than ninety day during the one hundred eighty days immediately following the occurrence of the injury or impairment."

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of the Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v. Wright*, 268 AD2d 79). The courts have consistently held a "plaintiff's subjective claim of pain and limitation of motion must be supported by verified objective medical findings". (*Grossman v. Wright*, 268 AD2d 79, *Kauderer v. Penta*, 261 AD2d 365). The threshold question in determining a summary judgment motion on the issue of serious injury focuses on the sufficiency of the moving papers. Once the defendants submit evidence establishing that the plaintiffs did not suffer a serious injury within the meaning of Insurance Law §5102(d), the burden shifts to the plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact. (*Gaddy v. Eyler*, 582 NYS2d 990). The proof shall be viewed in a light most favorable to the non-moving party. (*Cammarer v. Villanova*, 562 NYS2d 808).

When a claim is raised under the "permanent consequential limitation of use of a body organ or member", or "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," in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. (*Toure v. Avis Rent A Car Systems, Inc.*, 746 NYS2d 865). An expert's qualitative assessment of a plaintiff's condition is also probative provided that the evaluation has an objective basis, and the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id.*)

Here, while defendants have met their initial burden of establishing that the plaintiff has not sustained a serious injury, the plaintiff, in its opposition, and by way of cross-motion, has submitted admissible evidence indicating the plaintiff sustained objectively-measured, causally related specifically-quantified limitations of motion in her cervical spine. (*Molina v. Choi*, 298 AD2d 508). An expert's designation of a numeric percentage or a plaintiff's loss of motion can be used to substantiate a claim of serious injury. Here, as in *Toure v. Avis*, 98 NY2d 345, we cannot say that the plaintiff's claimed limitations are so 'minor, mild or slight' as to be considered insignificant.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sullivan v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627). The role of the court is to determine if bona fide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665). In reviewing a motion for summary judgment, the court evaluates the evidence in the most favorable light to the party opposing the motion. (*Sullivan v. Twentieth Century Fox Film Corp.*, *supra*).

While the defendants have met their initial burden of establishing that the plaintiff has not sustained a serious injury as set forth in the insurance law, the plaintiff has submitted competent objective evidence for the purposes of overcoming the defendant's submission that there are no triable issues of fact in this case. As issues of fact exist concerning plaintiff's serious injury, the defendants' motions for summary judgment, and the plaintiff's motion for summary judgment, on the issue of threshold, are hereby denied.

The Liability Motions

The plaintiff and the third-party defendant move separately for summary judgment on the ground of liability. The plaintiff claims that she sustained personal injuries as a passenger in the vehicle operated by the third-party defendant, which was struck by the Sasso vehicle. The third-party defendant argues that Sasso, who traveled on Keller Avenue, and had a stop sign in Sasso's direction of travel, failed to yield the right of way when moving across the intersection, causing the Sasso vehicle to come into contact with the vehicle operated by the third-party defendant. The third-party defendant submits that [a]lmost all of Sasso's front bumper struck the right side of [his] vehicle".

Sasso argues that Sasso stopped for the stop sign for about ten seconds, looked back and forth a couple of times, viewed no traffic before proceeding into the intersection, and further, rolled forward to view around a bush at or near the corner. Sasso argues that the third-party defendant was traveling at a high rate of speed and flew against her bumper, and provides that neither the Sasso operator, or the operator of plaintiff's vehicle, saw the other vehicle prior to the happening of the accident.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sullivan v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an

issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bona fide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665). In reviewing a motion for summary judgment, the court evaluates the evidence in the most favorable light to the party opposing the motion. (*Sullivan v. Twentieth Century Fox Film Corp.*, *supra*).

Here, triable issues of fact exist to warrant the denial of summary judgment on liability with respect to the third-party defendant's motion. A driver who has the right-of-way still has a duty to use reasonable care when entering an intersection, as the driver has a duty to use reasonable care to avoid a collision. (*Mateiasevici v. Daccardo*, 34 AD3d 641).

With respect to plaintiff, passenger, no issues of fact exist to warrant the denial of plaintiff's motion for summary judgment on the issue of liability. Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted, and the third-party defendant's motion for summary judgment on the issue of liability is denied.

Conclusion

It is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted, and it is hereby further

ORDERED that Sasso's motion for summary judgment on the grounds that the plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d) is denied, and it is hereby further

ORDERED that the third-party defendant's cross-motion for summary judgment on the grounds that the plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d) is denied, and it is hereby further

ORDERED that the third-party defendant's cross-motion for summary judgment on the issue of liability is denied, and it is hereby further

ORDERED that the plaintiff's cross-motion for summary judgment on the grounds that plaintiff did suffer a "serious injury" as defined by Insurance Law §5102(d) is denied.

ENTERED
J.S.C.

Dated: April 24, 2012

cc: Manoussos & Messer, PLLC

Hammill, O'Brien, Croutier, Dempsey Pender & Koehler, P.C.

Martyn, Toher & Martyn

ENTERED
MAR 01 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE