Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE THOMAS V. POLIZZI** **IAS PART 14**
Justice

STEPHANIE DAVIS,	Index No. 3800/03
Plaintiff	Motion Date February 22, 2005
-against-	
GARY LOGAN BOWMAN and RIDE FOUOU, INC.,	Motion Cal. No. 11
Defendants	

GARY LOGAN BOWMAN and RIDE FOURU, INC.,
Third-Party Plaintiffs

-against-

JERRY DAVIS,
Third-Party Defendant

The following papers numbered 1 to 19 read on this motion by defendants and cross motion by third-party defendant for summary judgment dismissing plaintiff's complaint alleging plaintiff did not sustain a serious injury as required by Insurance Law § 5102(d); cross motion by plaintiff to strike defendants' answer for failure to submit to depositions.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1-5
Cross Motions-Answering Affidavits.....	6-17
Reply Affidavits.....	18-19

Upon the foregoing papers it is ordered that the motion and cross motion are disposed of as follows:

1. Defendants' motion and third-party defendant's cross motion to dismiss are denied.

Plaintiff alleges she sustained injuries, as a result of an automobile accident which occurred on August 9, 2001 on the Rockaway Freeway at or near the intersection with Beach 35th Street, Queens County, New York. She was taken from the scene, by ambulance, to St. John's Episcopal Hospital emergency room, examined and released.

The following day she went to her personal doctor's office who after examining her, referred her to Rockaway Rehabilitation, Dr. Christopher Green, and began a course of treatment. Her complaints were of pain to her right shoulder, lower back and neck. She was referred to Rockaway Open MRI and Diagnostic Imaging, Dr. Alan Greenfield, a board certified radiologist, for MRI imaging of her lumbar spine (October 6, 2001), cervical spine (October 15, 2001) and thoracic spine (October 17, 2001). The significant findings were: disc herniation at L5-S1; disc herniations at C3-C4 and C4-C5 and diminished disc heights T7 through T12.

She continued her course of physical therapy treatment which included evaluations by Dr. John J. McGee, an osteopath, on August 13, 2001, by an associate of Dr. McGee, Dr. Andrew Susi, on April 15, 2002 and once again by Dr. McGee on December 21, 2004. Dr. McGee's findings on December 21, 2004 were memorialized in a written affidavit dated January 25, 2005. His examination revealed a diminished range of flexion and extension of the cervical spine as well as diminished left and right rotation. In addition there was a diminished range of flexion and extension of the lumbar spine as well as limited range of right and left rotation and left and right lateral flexion. His examination of her right shoulder revealed a diminished range of flexion, abduction, external and internal rotation limitation as well as a diminished range of extension. Each restriction was measured by the degree of limitation.

The defendants' examining physician, Dr. Burton Diamond, a board certified neurologist, clearly not an independent medical physician, examined plaintiff on September 14, 2004. After conducting various objective tests Dr. Diamond concluded that plaintiff was a normal, healthy young woman free of any evidence of neurological disability "for her activities or occupation" and rendered a neurologically excellent prognosis. He further stated that there was no need for follow-up treatment or testing and that plaintiff can resume her "normal activities of daily living without restriction".

The defendants contend that the "three year gap" in treatment between the conclusion of treatment and Dr. McGee's December 2004 serious injury; that the physical examination of December 21, 2004 was conducted to oppose this motion. The reply affirmation goes on to state:

> "In December 2004, Plaintiff's Dr. McGee was not treating Plaintiff. He was being paid to conduct one examination and provide a sworn medical report that supported Plaintiff's argument of a serious injury. Thus, the January 25, 2005 Affidavit issued by Dr. McGee was based on different motivation, had different goals..." (sic)

Obviously, this argument is not applicable to Dr. Diamond's negative report which was based upon one examination which in all likelihood took less than 30 minutes. The fact that Dr. Diamond, a non-treating physician, was retained by the defendants to conduct this single examination, was paid by the defendants and would be a witness for the defendants should the action proceed to trial has no bearing on the motivation or goal for his report.

Clearly, it is possible, and indeed probable, that the reason no further medical treatment was sought during the "gap of three years" was because plaintiff had achieved maximum recovery and further treatment would not serve any purpose other than to give an additional source of income to a physician. Plaintiff was compelled to see Dr. McGee in December 2004 because she had to oppose the motion to dismiss. She incurred this unwarranted expense even though further treatment may not have been required or necessitated. The issue of whether plaintiff achieved maximum recovery or is indicative of her not sustaining a serious injury is a question of fact to be determined by the trier of the facts.

Once again, the statute and case law have created a battle of experts and this court, in its finite wisdom, cannot, as a matter of law, determine the credibility of the medical professionals based upon their affirmations and affidavits. Our courts are being inundated with motions for summary judgment predicated upon Insurance Law § 5102(d). The time has long passed for the judicial system to take definitive action to rectify this problem. In other than the most obvious "non serious injury" scenario, the issue should be presented to the jury to determine the seriousness of any injury. Subject the medical professionals to the usual vigorous cross-examination of opposing counsel and let the jury decide the threshold issue of whether a plaintiff has suffered a "serious injury".

Inasmuch as the medical affirmations submitted herein create a triable issue of fact on whether the plaintiff sustained a serious injury, the defendants' motion and third-party defendant's cross motion are denied.

2. Plaintiff's cross motion to strike defendants' answer is

granted only to the extent that defendants shall be precluded from giving any evidence at the trial of this action unless the defendant driver, Gary Logan Bowman, is produced for depositions prior to 60 days before trial.

DATED: June 16, 2005

Thomas V. Polizzi, J.S.C.