

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

EVELYN CARDONA CRUZ, :  
Plaintiff, :  
 :  
v. : CA 05-336 S  
 :  
BLOCK ISLAND PARASAIL, INC., :  
Defendant. :

**REPORT AND RECOMMENDATION**

David L. Martin, United States Magistrate Judge

Before the court is Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b)(1) (Document ("Doc.") #4) ("Motion to Dismiss" or "Motion"). Defendant Block Island Parasail, Inc. ("Defendant"), contends that this court lacks subject matter jurisdiction because Plaintiff's claim allegedly does not meet the monetary minimum required for federal court diversity jurisdiction. See Motion at 1. The Motion has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons stated herein, I recommend that the Motion to Dismiss be denied.

**Facts and Travel**

The Complaint (Doc. #1) alleges that Plaintiff Evelyn Cardona Cruz ("Plaintiff"), a resident of Connecticut, was injured while a passenger aboard a banana boat owned by Defendant, a Rhode Island corporation. See Complaint ¶¶ 1-2, 4, 10, 14. The banana boat was being towed in Rhode Island Sound by a motor vessel which was also owned by Defendant. See id. ¶¶ 5-6. Plaintiff alleges that she was injured as a result of the failure of Defendant's employee or agent to exercise ordinary care in the operation of the motor vessel. See id. ¶ 13. She demands judgment against Defendant in the amount of

\$1,000,000.00. See Complaint, Prayer for Relief.

Defendant filed the instant Motion to Dismiss on September 8, 2005. See Docket. Plaintiff's Opposition to Defendant's Motion to Dismiss (Doc. #7) was filed on September 21, 2005. See id. The court conducted a hearing on the Motion on October 21, 2005, and thereafter took the matter under advisement.

#### Law

28 U.S.C. § 1332(a) provides, in relevant part, that:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

....

28 U.S.C. § 1332(a).

The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938)(footnotes omitted).

"Under St. Paul, a plaintiff's allegations of damages that meet the amount-in-controversy requirement suffices unless questioned by the opposing party or the court." Spielman v. Genzyme Corp., 251 F.3d 1, 5 (1<sup>st</sup> Cir. 2001). Once a defendant questions jurisdiction by challenging the amount of damages alleged in the complaint, the burden shifts to the plaintiff to show that it is not a legal certainty that the claims do not involve the requisite amount. Id. at 4; Barrett v. Lombardi, 239 F.3d 23, 30-31 (1<sup>st</sup> Cir. 2001). "A party may meet this burden by amending the pleadings or by submitting affidavits." Dep't of Recreation & Sports v. World Boxing Ass'n, 942 F.2d 84, 88 (1<sup>st</sup> Cir. 1991).

Rosario Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 128 (1<sup>st</sup> Cir. 2004)(footnote omitted), rev'd on other grounds sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S.Ct. 2611 (2005).

On matters involving an issue of credibility, the plaintiff is to be given the benefit of the doubt. See Duchesne v. American Airlines, Inc., 758 F.2d 27, 28 (1<sup>st</sup> Cir. 1985). "Provided a plaintiff's claims are 'colorable,' the court's inquiry does not focus on their probable success but rather on 'whether to anyone familiar with the applicable law [the] claim could objectively have been viewed as worth' the jurisdictional minimum." Evans v. Yum Brands, Inc., 326 F.Supp.2d 214, 221 (D.N.H. 2004)(quoting Jimenez Puig v. Avis Rent-A-Car Sys., 574 F.2d 37, 40 (1<sup>st</sup> Cir. 1978))(alteration in original).

#### **Discussion**

By filing the Motion to Dismiss, Defendant has challenged the amount of damages alleged in the Complaint, thereby shifting to Plaintiff the burden of showing that it is not a legal certainty that her claim does not involve damages greater than \$75,000.00. See Spielman v. Genzyme Corp., 251 F.3d at 5. Plaintiff has responded to this challenge by submitting an affidavit, see Affidavit of Evelyn Cardona Cruz (Doc. #9) ("Aff."), a report from her surgeon, Dr. Paul B. Murray, dated October 21, 2003 ("Report of 10/21/03"), and a color photograph which shows the surgical scar on Plaintiff's left knee.<sup>1</sup> See

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<sup>1</sup> Counsel for Defendant agreed at the October 21, 2005, hearing that for the purpose of deciding the instant Motion the court could consider the report from Dr. Murray and the photograph. "While the court generally may not consider materials outside the pleadings on a Rule 12(b)(6) motion, it may consider such materials on a Rule 12(b)(1) motion." Gonzalez v. United States, 284 F.3d 281, 288 (1<sup>st</sup> Cir. 2002); see also Dynamic Image Techs., Inc. v. United States, 221 F.3d 34, 37 (1<sup>st</sup> Cir. 2000).

D'Amato v. Rhode Island Hosp. Trust Nat'l Bank, 772 F.Supp. 1322, 1324 (D.R.I. 1991)(noting that when jurisdictional facts are challenged Plaintiff must support them by competent proof).

According to her affidavit, Plaintiff injured her left knee on August 10, 2002, when she was thrown off Defendant's banana boat. Aff. at 1. She experienced immediate pain and swelling. Id. Plaintiff was unable to walk well and could not fully bend or straighten her leg. Id. She sought treatment at the Block Island Medical Center and was given crutches. Id. After returning home, Plaintiff saw her family doctor. Id. He arranged for Plaintiff to have an MRI on August 15, 2002. Id. The MRI confirmed that Plaintiff had suffered a torn anterior cruciate ligament ("ACL") in her left knee. Id. Plaintiff was referred to an orthopedic surgeon, Dr. Murray, and saw him on August 23, 2002. Id. Dr. Murray advised Plaintiff that she needed an ACL reconstruction, but that she would have to have some physical therapy before he could perform the surgery. Id. Plaintiff commenced physical therapy at the Rehabilitation Hospital of Connecticut, id., and on September 17, 2002, Dr. Murray performed the surgery, id. at 2.

Plaintiff continued to use crutches for approximately three or four weeks after her surgery. Id. at 2. Thus, she used crutches for a total of approximately seven or eight weeks (from August 10<sup>th</sup> to early or mid October). Id. at 1-2. Plaintiff limped "pretty badly," id. at 2, for about five weeks after she ceased using crutches, see id. Thereafter, Plaintiff was able to walk normally, although for about six months after the surgery it was "very painful," id., for her to go up or down stairs, id. As of September 14, 2005, the date of her affidavit, Plaintiff had no problem going up stairs, but sometimes still experienced pain going down stairs. Id.

Prior to the accident, Plaintiff participated in volleyball

and bowling leagues, and she was a casual jogger and occasional basketball player. Aff. at 2. Because of her injury, Plaintiff stopped all of these activities. Id. As of September 14, 2005, she had not resumed any of them. Id.

Plaintiff has a surgical scar on her left knee which she describes as "very noticeable," id., and which bothers her "a lot," id. Although the scar "has faded some," id., earlier, when it was more prominent, Plaintiff noticed people staring at it and this upset her, id.

Plaintiff further attests that:

I still have pain and some other problems in my knee. I cannot kneel down on bare floor unless I put a pillow or some type of cushion on the floor. It hurts my knee too much to simply kneel down on a hard surface. I have not been able to play with my children as I would have liked. I have a 9 year old daughter and a 10 month old son. When I was pregnant with my son, I found it very difficult to bear weight on my left leg. Today, I make sure to carry my son on my right side because I still feel uncomfortable putting his weight on my left side. My husband and I wanted to have a third child but due to the circumstances and with me feeling so scared that my knee would give way and jeopardize my pregnancy we've decided not to have another child for the time being, which makes us very sad and at points has gotten us into arguments. It also makes me very uncomfortable when my daughter continues to ask me when we are going to try and give her a little sister and I really can't give her a response.

Currently, I still have pain and some stiffness in the afternoons and evenings. My knee is generally OK in the mornings, but, as the day goes on, it gets tired and painful. I still feel a popping sensation in my knee up to a couple times a day. I have had that problem all throughout my recovery. When this happens, it is very uncomfortable, and I feel like my knee is going to give way. It is also uncomfortable and painful if I were to get hit right on the kneecap. As recently as February, 2005, two and a half years after the surgery, the door of my truck accidentally hit my left knee right on the scar, and I actually cried from the pain.

Aff. at 3.

As a result of the injury and subsequent surgery, Plaintiff was unable to work for approximately five to six weeks. Id. She claims lost earnings of \$3,384.72. Id. She incurred medical bills of \$11,120.22. Id. Although more than three years have elapsed since the accident, Plaintiff states that "I still have not fully recovered. I do not like the fact that, 3 years after the accident, I still look down and have to see the big scar on my left knee. I am upset that I am not able to play with my children as I would like." Aff. at 3.

The Report of 10/21/03 from Dr. Murray reflects that "[o]verall the patient is doing well with her left knee and reports mild discomfort anteriorly about her knee while going up and down stairs."<sup>2</sup> Report of 10/21/03 at 1. Dr. Murray opined that Plaintiff had reached maximum medical improvement, and he "assign[ed] her a permanent partial disability rating of 10 percent towards her left knee." Id. at 2.

Plaintiff's scar, as shown in the color photograph, runs vertically from approximately two or three inches beneath Plaintiff's left kneecap to approximately the middle of the kneecap. It appears to be approximately five inches long and three-quarters of an inch wide. The scar is a different hue of pink and different in texture than the surrounding skin.

After considering the contents of Plaintiff's affidavit, the

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<sup>2</sup> The report also reflects that "[w]hen the patient is involved [in] running type activities she notes mild discomfort anteriorly about her knee." Report of 10/21/03 at 1. This statement could be viewed as casting doubt on Plaintiff's claim that she did not resume volleyball, jogging, or basketball activities for more than three years after the accident because of pain in her left knee. See Aff. at 2. However, in determining whether the amount in controversy exceeds \$75,000.00, Plaintiff must be "giv[en] ... the benefit of the doubt on all matters where there is an issue of credibility." Duchesne v. American Airlines, Inc., 758 F.2d 27, 28 (1<sup>st</sup> Cir. 1985).

Report of 10/21/03, and the color photograph, the court concludes that Plaintiff has met her burden. The court reaches this conclusion for the following reasons.

At the time of the accident, Plaintiff was only twenty-four years of age. Aff. at 1. She suffered a permanent injury, namely a 10% loss of the use of her left knee. See Rosario Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 129 (1<sup>st</sup> Cir. 2004) (“‘[T]he presence of medical evidence showing that a plaintiff is suffering from a continuing or permanent physical impairment [is] an important indicator’ in determining whether the plaintiff meets the amount-in-controversy requirement.”) (quoting Rosenboro v. Kim, 994 F.2d 13, 18-19 (D.C. Cir. 1993)) (alterations in original), rev’d on other grounds sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S.Ct. 2611 (2005); Id. (finding jurisdictional amount satisfied where nine year old girl suffered a 3% partial permanent impairment of the functioning of her hand); Lee v. Kisen, 475 F.2d 1251, 1253 (5<sup>th</sup> Cir. 1973)(stating that the possibility of residual disability was “key” to its finding that plaintiff satisfied jurisdictional amount even though he had shown only nine weeks of lost wages and minimal medical expenses); Kry v. Poleschuk, 892 F.Supp. 574, 576-77 (S.D.N.Y. 1995)(finding jurisdictional amount satisfied where plaintiff suffered a 10% loss of neck function). Plaintiff’s affidavit details how this loss of use has affected her life and impacted her family. Aff. at 2-3. The knee continues to be sensitive, and she suffers pain if she kneels on the bare floor or hits her knee on an object. Id.; cf. Lee v. Kisen, 475 F.2d at 1252-53 (disagreeing that it was a legal certainty that a reasonable jury could not have found the pain and suffering in plaintiff’s claimed residual disability to be in an amount sufficient to invoke federal jurisdiction where plaintiff testified that his hand hurt every time he struck or

strained his fingers and that this condition had continued for the two-year period prior to trial).

At the hearing, Defendant's counsel indicated that Plaintiff's present life expectancy is approximately an additional fifty years. The court agrees, and this circumstance significantly increases the value of Plaintiff's permanent injuries. For example, if her permanent injuries are assigned a value of only \$1,500.00 per year (an amount which seems within the possible range), multiplying that figure by fifty years would yield \$75,000.00. While this sum would have to be discounted to its present value, Plaintiff would be well on her way towards meeting the jurisdictional amount. Her lost earnings of \$3,384.72 and medical bills of \$11,120.22 would bring her even closer.

What ultimately causes the court to conclude that it is not a legal certainty that Plaintiff's claim does not exceed \$75,000.00 is the possibility that a jury may find that Plaintiff's scar is worth a substantial amount (which when added to her other compensable claims would exceed the \$75,000.00 threshold). While admittedly unlikely, it is conceivable to this court that a jury could value Plaintiff's scar as high as \$20,000.00. Cf. Duchesne v. American Airlines, Inc., 758 F.2d 27, 29 (1<sup>st</sup> Cir. 1985) ("while it seems unlikely that [plaintiff] will recover so much, we cannot say that it is legally certain"). Plaintiff is a young woman, and her self-consciousness about the scar is understandable. Even if she wears a knee-length skirt, the scar will be partially visible when she is standing and fully visible when seated. If she wears shorts, the scar will be fully visible regardless of whether she is sitting or standing. This circumstance significantly increases the compensable value of the scar. Cf. Chavez v. United States, 192 F.Supp. 263, 273 (D. Mont. 1961) (noting that scars on arms, neck, shoulders, or lower

extremities which are visible at all times are treated differently than scars which are only visible when plaintiff is in swimming attire).

### **Conclusion**

For the reasons stated above, I recommend that Defendant's Motion to Dismiss be denied because it is not a legal certainty that Plaintiff's claim for damages does not exceed \$75,000.00. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1<sup>st</sup> Cir. 1980).

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DAVID L. MARTIN  
United States Magistrate Judge  
March 13, 2006