Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Submitted - October 15, 2008

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
DANIEL D. ANGIOLILLO
WILLIAM E. McCARTHY
CHERYL E. CHAMBERS, JJ.

2007-07920 DECISION & ORDER

Dianne L. Besso, appellant, v Vincent J. DeMaggio, respondent.

(Index No. 25585/04)

Maffei & Condon, LLP, Sayville, N.Y. (Bassett & Bassett, P.C. [Kerry S. Bassett], of counsel), for appellant.

Richard T. Lau, Jericho, N.Y. (Joseph G. Gallo of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Doyle, J.), dated July 17, 2007, which granted the defendant's motion for summary judgment dismissing the complaint on the ground that she did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is affirmed, with costs.

The defendant established his prima facie entitlement to judgment as a matter of law by showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.,* 98 NY2d 345; *Gaddy v Eyler,* 79 NY2d 955, 956-957). In opposition, the plaintiff failed to raise a triable issue of fact. The affirmed medical report of the plaintiff's treating physician is without probative value as his conclusions rely upon the unsworn reports of others (*see Matra v Raza,* 53 AD3d 570; *Malave v Basikov,* 45 AD3d 539, 540; *Verette v Zia,* 44 AD3d 747; *Furrs v Griffith,* 43 AD3d 389, 390; *see also Friedman v U-Haul Truck Rental,* 216 AD2d 266, 267). Moreover, the physician's conclusions

contained within his report that the injuries noted by him in the plaintiff's cervical and lumbar spine were the result of the subject accident were clearly speculative. In this regard, he failed to adequately address in his report the fact that the plaintiff had significant injuries to her neck and back prior to the subject accident (*see Seck v Minigreen Hacking Corp.,* 53 AD3d 608, 609; *McNeil v Dixon,* 9 AD3d 481). Furthermore, neither the plaintiff nor her treating physician explained the gap between when she stopped treatment in May 2005 and her most recent examination in March 2007 (*see Pommells v Perez,* 4 NY3d 566; *Sealy v Riteway-1, Inc.,* 54 AD3d 1018; *Cornelius v Cintas Corp.,* 50 AD3d 1085).

RIVERA, J.P., FLORIO, ANGIOLILLO, McCARTHY and CHAMBERS, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court