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

D21373
G/kmg

_____AD3d_____ Submitted - November 12, 2008

STEVEN W. FISHER, J.P.
ROBERT A. LIFSON
JOSEPH COVELLO
RUTH C. BALKIN
ARIEL E. BELEN, JJ.

2007-08851 DECISION & ORDER

Latrecia Shaw, appellant,
v Umar Jalloh, et al., respondents.

(Index No. 10048/06)

Daniel P. Buttafuoco & Associates, PLLC, Woodbury, N.Y. (Ellen Buchholz of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York, N.Y. (Stacy R. Seldin of counsel), for respondent Umar Jalloh.

Buratti, Kaplan, McCarthy & McCarthy, East Elmhurst, N.Y. (James P. McCarthy of counsel), for respondent Floria Graham.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Grays, J.), entered August 30, 2007, which granted the defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

ORDERED that the order is reversed, on the law, with one bill of costs, and the defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against each of them are denied.

The Supreme Court erred in granting the defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against each of them since they each failed to

satisfy their prima facie burden of 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 support of their motions, the defendants relied on the same submissions. The defendants' motion papers never adequately addressed the plaintiff's claim, clearly set forth in her bill of particulars, that she sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see Alexandre v Dweck*, 44 AD3d 597; *DeVille v Barry*, 41 AD3d 763; *Sayers v Hot*, 23 AD3d 453). The subject accident happened on November 16, 2005, and the plaintiff alleged that she missed four months of work as a result thereof. The defendants' physicians conducted their examinations of the plaintiff one year after the subject accident. Neither expert related his findings to this category of serious injury for the period of time immediately following the accident, and both noted in their respective reports that the plaintiff was out of work for more than four months as a result of the subject accident.

Since the defendants each failed to satisfy their prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiff were sufficient to raise a triable issue of fact (*see Alexandre v Dweck*, 44 AD3d 597; *DeVille v Barry*, 41 AD3d 763; *Sayers v Hot*, 23 AD3d 453).

FISHER, J.P., LIFSON, COVELLO, BALKIN and BELEN, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court