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

D22801
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_____AD3d_____ Submitted - February 4, 2009

WILLIAM F. MASTRO, J.P.
STEVEN W. FISHER
ANITA R. FLORIO
RANDALL T. ENG, JJ.

2008-01302 DECISION & ORDER

Dorothy McCarthy, appellant, v Melissa Gagne, et al., respondents.

(Index No. 404/06)

Brody, O'Connor & O'Connor, Northport, N.Y. (Thomas M. O'Connor and Patricia A. O'Connor of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains, N.Y. (Glen Feinberg of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Kramer, J.), entered November 27, 2007, which granted the defendants' 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 reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is denied.

Contrary to the Supreme Court's determination, the defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Toure v Avis Rent A Car Sys.,* 98 NY22d 345; *Gaddy v Eyler,* 79 NY2d 955, 956-957). In support of their motion for summary judgment, the defendants relied on, among other documents, the affirmed medical reports of Dr. Robert Zaretsky, Dr. Alan Zimmerman, and Dr. Philip G. Taylor. In his report, Dr. Zaretsky, an orthopedic surgeon who examined the plaintiff on October 10, 2005, provided range-of-motion findings with respect to the plaintiff's left

shoulder, yet he failed to compare all of those findings to what is normal (*see Banguela v Babbo,* 51 AD3d 833; *Page v Belmonte,* 45 AD3d 825; *Malave v Basikov,* 45 AD3d 539; *Fleury v Benitez,* 44 AD3d 996; *Nociforo v Penna,* 42 AD3d 514). The same deficiencies are found in the reports of Dr. Zimmerman and Dr. Taylor. Dr. Zimmerman, an orthopedic surgeon who evaluated the plaintiff on December 6, 2005, noted in his report range-of-motion findings with respect to the plaintiff's cervical spine, yet he failed to compare those findings to what is normal. Dr. Taylor, the defendants' examining orthopedic surgeon, set forth in his report range-of-motion findings with respect to, inter alia, the plaintiff's cervical spine, however he failed to compare those findings to what is normal.

Since the defendants failed to meet their initial prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Banguela v Babbo,* 51 AD3d 833; *Coscia v 938 Trading Corp.,* 283 AD2d 538).

MASTRO, J.P., FISHER, FLORIO and ENG, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court