

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

D26715
O/ct

_____AD3d_____

Submitted - March 3, 2010

MARK C. DILLON, J.P.
HOWARD MILLER
RUTH C. BALKIN
JOHN M. LEVENTHAL
LEONARD B. AUSTIN, JJ.

2009-02236

DECISION & ORDER

Stefanie Varveris, appellant, v Andrea Franco,
respondent.

(Index No. 15397/06)

Sacco & Fillas, LLP, Whitestone, N.Y. (Lamont K. Rodgers of counsel), for appellant.

Richard T. Lau, Jericho, N.Y. (Marcella Gerbasi Crewe of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Taylor, J.), dated January 8, 2009, which granted the defendant's motion for summary judgment dismissing the complaint 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 affirmed, with costs.

The defendant established her prima facie burden of demonstrating 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 Avid Rent-A-Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955, 956-57). In opposition, the plaintiff failed to raise a triable issue of fact.

Many of the medical reports submitted by the plaintiff were inadmissible, as they were unaffirmed and/or unsworn (*see Grasso v Angerami*, 79 NY2d 813; *Maffei v Santiago*, 63 AD3d

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1011; *Niles v Lam Pakie Ho*, 61 AD3d 657), or they relied upon unaffirmed and/or unsworn reports of others (see *Gastaldi v Chen*, 56 AD3d 420; *Williams v Clark*, 54 AD3d 942; *Zarate v McDonald*, 31 AD3d 632).

The submissions of Dr. Fokion Avgerinos, while admissible, relied upon the plaintiff's subjective representation that her neck and back injuries from a 2004 accident were asymptomatic at the time of the instant accident, rendering his opinions of cervical and lumbar limitations speculative (see *Penaloza v Chavez*, 48 AD3d 654; *Vidor v Davila*, 37 AD3d 826). Further, Dr. Avgerinos's findings of limited flexion of the plaintiff's right knee indicated, at best, an insignificant limitation (see *Acosta v Alexandre*, 70 AD3d 735; *Cabri v Park*, 260 AD2d 525). The report of Dr. Thomas Scilaris was speculative, as it failed to address the plaintiff's 2004 accident (see *Joseph v A and H Livery*, 58 AD3d 688; *Penaloza v Chavez*, 48 AD3d at 654). Moreover, that report contained no objective evidence regarding limitations to the plaintiff's right knee and right shoulder (see *LaMarre v Michelle Taxi, Inc.*, 60 AD3d 911; *Sapienza v Ruggiero*, 57 AD3d 643).

The plaintiff also failed to submit competent medical evidence that her injuries rendered her unable to perform substantially all of her usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the accident (see *Rabolt v Park*, 50 AD3d 995; *Roman v Fast Lane Car Serv., Inc.*, 46 AD3d 535).

The plaintiff's remaining contentions are without merit.

DILLON, J.P., MILLER, BALKIN, LEVENTHAL and AUSTIN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court