

**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**

**PART 17**

**Justice**

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**WILLIAM BISHOP and INEZ BISHOP,**

**Plaintiff,**

**-against-**

**Index No.: 3557/06**

**Motion Date: 2/20/08**

**Calendar Number: 3**

**MELLOW CAB CORP., FRANCISCO LACAYO,  
CAMILLA CROSLEY, and LEIGHTON E. CROSLEY,  
Defendants.**

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The following papers numbered 1 to 7 read on this motion by defendants Mellow Cab Corp. (hereinafter “Mellow”) and Francisco Lacayo for an order granting summary judgment in their favor and dismissing the complaint as against them on the grounds that plaintiff William Bishop has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that the motion by defendants Mellow and Lacayo for an order dismissing the complaint and directing that summary judgment be entered pursuant to CPLR 3212 in their favor and against plaintiff William Bishop on the ground that the injuries sustained by plaintiff William Bishop do not meet the requisite definition of “serious injury” as set forth in Article 51 of the Insurance Law, is denied, for the following reasons:

The action arises out of an accident that occurred on May 31, 2005, on the Triborough Bridge main span at or near its intersection with 31<sup>st</sup> Street and Hoyt Avenue, Queens County, New York. Thereafter, plaintiffs commenced the instant action to recover for personal injuries sustained.

Initially, defendants Mellow and Lacayo seek to have this court decide this motion even though 120 days have elapsed since the filing of the note of issue. Plaintiffs filed the Note of Issue on June 29, 2007 and on or about November 2, 2007, defendants Mellow and Lacayo filed this motion with the County Clerk of Queens County and on or about December 20, 2007, served this motion on plaintiff William Bishop. As such, this motion was filed more than 120 days from the filing of the note of issue. In the case of Brill v. City of New York, 2 NY3d 648 (2004), the court noted that CPLR 3212(a) requires a showing of good cause for failing to file a

motion for summary judgment within 120 days of the filing of the note of issue. The court specifically ruled that “good cause” requires a satisfactory explanation for the untimeliness and a late motion cannot be heard if such excuse is not offered, even if it is meritorious. Here, defendants have not offered any excuse for the late filing of this motion. Accordingly, this court does not find a “good cause” for the late filing of this motion and regardless of its merit or lack of prejudice to the plaintiff, the motion is denied as untimely. Dettmann v Page, 18 AD2d 422 (2d Dept 2005.) *See*, Brill v City of New York, 2 NY3d 648 (2004.)

In any event, if this court were to consider the motion, it would be denied. In considering this motion, the Court must first determine whether plaintiff has established a prima facie case of sustaining a serious injury within the meaning of Insurance Law 5102 (d). *See*, Licari v Elliot, 57 NY2d 230,237 (1982); Armstrong v Wolfe, 133 AD2d 957,958 (3<sup>rd</sup> Dept. 1987.) To grant summary judgment it must clearly appear that no triable issue of fact is presented. Miceli v Purex Corp., 84 AD2d 562 (2d Dept. 1981.) The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. Bronson v March, 127 AD2d 810 (2d Dept. 1987.)

Regarding the defendants’ motion, thy submit, *inter alia*, plaintiff’s bill of particulars, an affirmed report of Dr. Mesh, a neurologist, who examined plaintiff on April 18, 2007, at defendant’s request; and an affirmed report of Dr. Rothpearl, a radiologist.

Initially, the court notes that Doctor Mesh’s examinations of plaintiff was very limited and occurred almost two years after the accident. The Doctor’s testing methods were highly subjective and devoid of any specific findings that clearly refute the injuries set forth in plaintiff’s bill of particulars. *See*, Hussein v Littman, 287 AD2d 543 (2d Dept 2001.) In fact, the Doctor failed to set forth the objective tests performed to support his findings that the plaintiff had no ongoing disability. Significantly, Dr. Mesh noted plaintiff William Bishop’s complaints of pain in the neck and his having a resolved cervical injury and lumbar sprain or strain. Moreover, Dr. Rothpearl found plaintiff William Bishop to have a subacute fracture on the cervical spine in the mid portion of the dens. He noted this is healing, chronic and “unlikely to be associated with the accident occurring on May 31, 2005.” Grant v Parsons Coach, Ltd., 12 AD3d 484 (2d Dept 2004.) His claim that this was not caused by the subject accident is not clearly supported by objective evidence. Furthermore, defendants’ experts failed to relate their findings to plaintiff’s claim that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented him 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. Sayers v Hot, 23 AD3d 453 (2d Dept 2005.) As such, defendants have failed to make a prima facie showing that plaintiff did not sustain a serious injury as a result of the subject motor vehicle accident and the motion for summary judgment is denied. *Id.* Torres v Safety Cab Corp., 25 AD 3d 548 (2d Dept 2005.)

Consequently, whether plaintiff William Bishop's papers are sufficient to raise a triable issue of fact shall not be considered. *Id.* Zavala v DeSantis, 1 AD 3<sup>rd</sup> 354 (2d Dept 2003.)

**DATED : February 21, 2008**

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**ORIN R. KITZES, J.S.C.**

