

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

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MARIA MARAGOPOULOS and MICHAEL Index No. 5366/2005  
MARAGOPOULOS, Plaintiffs, Motion Date 01/16/07  
Motion Cal. No. 17

- against -

BRUCE FOX  
Defendant.

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The following papers numbered 1 to 4 read on this motion by the defendant for an order granting leave to re-argue his prior motion for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action seeking damages for personal injuries allegedly sustained by the plaintiff Maria Maragopoulos, on September 2, 2004, in a motor vehicle accident. By order, dated September 8, 2006, this court denied defendant's motion for summary judgment. Defendant now moves, pursuant to CPLR §2221[d], to re-argue his prior motion, and upon re-argument, for an order granting summary judgment.

A motion for re-argument allows a party to establish that the court "overlooked or misapprehended the relevant facts" or "misapplied any controlling principle of law". (*Foley v. Roche*, 68 A.D.2d 558,567 [1st Dept. 1979], *leave denied* 56 N.Y.2d 507 [1982] see, CPLR §2221[d]). Defendant's motion for re-argument is granted.

Defendant also moves, pursuant to CPLR §3212, for an order granting summary judgment upon the ground that plaintiff Maria Maragopoulos did not sustain serious injuries as defined by Insurance Law §5102(d). On a motion for summary judgment, parties must lay bare their proofs in non-hearsay form, and the movant must

establish its *prima facie* entitlement to judgment as a matter of law (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

In support of his motion, defendant relies on the pleadings, the Verified Bill of Particulars, and the deposition testimony of plaintiff Maria Maragopoulos. Defendant also submits a copy of a report, dated March 28, 2006, of the defendant's examining orthopedist Barbara Freeman, M.D. However, pursuant to CPLR §2106, a physician's affirmation must be affirmed to be true under penalties of perjury. Thus, this report, in which Dr. Freeman neither swears nor affirms, is a nullity and does not constitute evidentiary proof in admissible form sufficient to support summary judgment. (see, *Offman v. Singh*, 27 AD2d 284 [1st Dept. 2006], *Santoro v. Daniel*, 276 AD2d 478 [2d Dept. 2000]; *Feintuch v. Grella*, 209 AD2d 377 [2d Dept. 1994]; *Monaco v. Davenport*, 277 AD2d 209 [2d Dept. 2000]; *Goldin v. Lee*, 275 AD2d 341 [2d Dept. 2000]; *Napoli v. Cunningham*, 273 AD2d 366 [2d Dept. 2000]). It should also be noted that Dr. Freeman's report states that the plaintiff does suffer from a limited range of motion in her left shoulder.

Defendant additionally submits, for this court's consideration, three affirmed report, dated March 28, 2006, of Steven J. Schwartz, M.D., the defendant's examining neurologist. Dr. Schwartz concludes that the plaintiff has not sustained any permanent injuries as a result of this accident. However, Dr. Schwartz's report states only the percentage of range of motion found in the plaintiff. The report fails to state with particularity which objective tests were conducted to support this conclusion, or to compare the plaintiff's range of motion with those found in the normal range of motion. Thus, Dr. Schwartz's report is insufficient to support defendant's motion for summary judgment. (See *Mandatova v. Mandatova*, 27 Ad3d 531 [2d Dept. 2006]; *Vasquez v. Basso*, 27 Ad3d 728 [2d Dept. 2006]; *Welch v. Penske*, 29 AD3d 783 [2d Dept. 2006]).

Defendant also relies on the affirmed reports, each dated November 3, 2005, of A. Robert Tantleff, M.D., defendant's examining radiologist. However, Dr. Tantleff's reports improperly rely on the unsworn, unsubmitted MRI reports of the plaintiff. Thus, these reports are insufficient to support defendant's motion for summary judgment. (See *Beyel v. Console*, 25 AD3d 636 [2d Dept. 2006]).

Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. (See, *Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979]; *Orwell Bldg. Corp. v. Bessaha*, 5 A.D.3d 573 [2d Dept. 2003]). In the instant action, defendant has failed to meet his

burden of proof that no material issue of fact exists as to the injuries sustained by plaintiff Maria Maragopoulos. Accordingly, defendant's motion for summary judgment is denied in its entirety.

Dated: March 22, 2007

JANICE A. TAYLOR, J. S. C.

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