Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

LEROY WALKER and TANYA WALKER, Plaintiff(s),	Index No.: 14537/03
	Motion Dated: January 25, 2005
-against-	Motion Cal. No.: 33
MAURICE A LYTTLE, Defendant(s).	

The following papers numbered 1-6 read on this motion by the defendant for an Order pursuant to CPLR §3212, dismissing the plaintiff's complaint and granting summary judgment to the defendant upon the ground that the plaintiff's have not met the "serious injury" requirements of Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion Affid.-Exhibits...........	1-4
Answering Affid.-Exhibits..................	5
Reply Affid.-Exhibits......................	6

Upon the foregoing papers it is ordered that this motion by defendant for an Order pursuant to CPLR §3212, is determined as follows:

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, Zuckerman v. City of New York, 49 N.Y.2d 557, 562; Alvarez v. Prospect Hosp., supra).

Upon review of the pleading submitted, the defendant has failed to sustain his burden. The affirmations submitted by Dr. Cantos raise questions of fact as to whether plaintiff sustained a "serious injury" as a result of the motor vehicle accident which occurred on August 14, 2002. Moreover, even assuming arguendo that the defendants met their burden, in opposition to the defendant's motion, the plaintiff has submitted sufficient evidence creating a triable issue of fact with regard to his claim that he sustained a serious injury within the meaning of Insurance Law §5102(d), (Gaddy v. Eyler, 79 N.Y.2d 955, 956-

957). The plaintiff submitted a sworn affidavit of his chiropractor who stated that, upon examination, the degree to which the plaintiff's movements were restricted in his cervical and lumbar spine, and noted that those restrictions had been objectively measured using a range of motion test. The affidavit also states that plaintiff's injuries were permanent. This evidence is sufficient to create a triable issue of fact with regard to the plaintiff's allegation that he sustained a serious injury (Vitale v. Lev Express Cab Corp., 273 A.D.2d 225; Ventura v. Moritz, 255 A.D.2d 506).

Accordingly, defendant's motion for summary judgment is denied.

Dated:

MARGUERITE A. GRAYS
J.S.C.