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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

<u>GAIL OPROMALLA and JOSEPH OPROMALLA,</u> :		
	Plaintiff(s)	: Index No: 20206/97
	-against-	: Motion Date: 7/11/00
		: Motion Cal. No: 43
DONALD F. McNULTY		:
and CHRISTINE T. McNULTY,		:
	Defendant(s)	:
<hr/>		:

The following papers numbered 1 to 9 read on this motion.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1-4
Answering Affidavits.....	5&6
Replying Affidavits.....	7-9

Upon the foregoing papers, the defendants move for summary judgment upon the ground that the plaintiffs have failed to meet the threshold requirements of section 5102 of the Insurance Law.

This action is brought as a result of an automobile accident which occurred on June 2, 1996. Plaintiff Gail Opromalla alleges various multiple injuries to her neck and back which resulted in pain and impairment from normal activities. She claims that she suffers from serious and permanent injuries. Plaintiff Joseph Opromalla alleges various multiple injuries to his neck and right shoulder which resulted in pain and impairment from normal activities.

Defendants' application is supported by affirmed reports prepared by their examining neurologist and orthopedist, Drs. Robert D. Karlan and Richard Nottingham. These affirmations, of examinations performed on each of the plaintiffs on June 1st and 4th, 1998, respectively, indicate that although each of the plaintiffs complained of neck, back, and, in the case of Mr. Opromalla, shoulder pain, neither showed any signs of acute distress or disability that were causally related to the accident in question. Dr. Nottingham stated that tests performed on Gail

Opromalla resulted in what was characterized as "mild" tenderness which did not constitute disability. With respect to plaintiff Joseph Opromalla, Dr. Nottingham stated that that plaintiff suffered from "slight" limitation of motion, that his "shoulder problems significantly anti-dated the injury" and that no residual disability exists. Similarly, Dr. Karlan's reports indicate that neither of the plaintiffs exhibited abnormal signs of neurological disability that are causally related to the accident in question.

In opposition to this motion, the plaintiffs submit an affidavit from Leo E. Batash, M.D., whose practices in the area of Physical Medicine and Rehabilitation, dated May 18, 2000. In this affidavit, prepared in response to this motion for summary judgment, Dr. Batash states that the last time he treated the plaintiffs was on October 5, 1998. He re-examined the plaintiffs on April 4, 2000 as a result of the instant motion.

Specifically, Dr. Batash's affidavit states that he initially found that Gail Opromalla suffered from headaches, cervical derangement and lumbosacral sprains; Joseph Opromalla suffered from cervical derangement and right shoulder and arm sprain and tendinitis. Dr. Batash concluded that these symptoms were caused by the plaintiffs' accident at issue. Upon re-examination, each of the plaintiffs' appeared to exhibit similar symptoms and complained of pain. Range of motion studies revealed limitations of motion and muscle studies revealed limitations leading Dr. Batash to the conclusion that each of the plaintiffs suffered permanent partial disabilities to their cervical and lumbar spines and, in the case of Joseph Opromalla, his right shoulder.

Dr. Batash's affidavit provides incidents of the plaintiffs' losses of range of motion, and the degree to which each varies from the expected norm, but fails to indicate how these observations were arrived at. No evidence is presented that any objective tests were performed, merely the plaintiffs' physician's observations that the plaintiffs' flexion, extension and reflexes have been compromised to varying degrees. See, Grossman v Wright, __A.D.2d__, 707 N.Y.S.2d 233. It is well settled that absent some objective proof of disability stemming from permanent injury that is causally connected to the accident, a plaintiff does not establish serious injury within the meaning of the Insurance Law. Noble v Ackerman, 252 A.D.2d 392, 675 N.Y.S.2d 86, Mobley v Riportella, 241 A.D.2d 443, 660 N.Y.S.2d 57; Lebenfeld v Toner, 251 A.D.2d 551, 673 N.Y.S.2d 929; Snyder v Perez, 246 A.D.2d 526, 667 N.Y.S.2d 413. Nor does Dr. Batash's affidavit, inasmuch as his findings are conclusory and unconnected to any finding

resulting from medical testing, constitute competent medical evidence sufficient to meet the Insurance Law threshold requirement. See, Traugott v Konig, 184 A.D.2d 765, 587 N.Y.S.2d 192.

Furthermore, the evidence presented does not support the plaintiff's claims of permanency. Contrary to Dr. Batash's statements that the plaintiffs last sought medical treatment in October 1998, the plaintiffs each testified at their respective depositions that they only treated with Dr. Batash for between two (2) and four (4) months. The plaintiffs last sought medical attention for the injuries allegedly suffered in this accident, at the latest, in October 1996. Neither is currently under medical care, nor is there evidence that either takes anything more than an over-the-counter analgesic for the injuries complained of. No explanation is given either for the October 1998 visit or for the three and one-half (3½) year gap between treatment and this motion. See, Logarzo v D'Angelis-Hall, 248 A.D.2d 597, 669 N.Y.S.2d 909 (gap of more than one year between decedent's last treatment and death found not to sustain serious injury claim).

This Court finds that the plaintiffs have failed to raise issues of fact with respect to their claims of permanent disability as defined by section 5102 of the Insurance Law.

Defendants' motion for summary judgment is granted. The complaint is dismissed.

Dated: August 7, 2000

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J.S.C.