

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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CANDIDO CRUZ and MARIA CRUZ,  
  
Plaintiffs,  
  
-against-

Index No.: 16151/03  
Motion Date: 1/16/08  
Motion Cal. No.: 10  
Motion Seq. No.: 2

WILSON ROMERO and ESPERANZA ROSADO,  
  
Defendants.  
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The following papers numbered 1 to 11 read on this motion by defendants Wilson Romero and Esperanza Rosado for and order granting summary judgment and dismissing the complaint in as much as plaintiff fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmations in Opposition-Exhibits.....	5 - 9
Affirmation In Reply.....	10 - 11

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiffs Candido Cruz (“plaintiff ”) and Maria Cruz commenced this action against defendants Wilson Romero (“Romero”) and Esperanza Rosado (“Rosado”) to recover damages for serious personal injuries plaintiff allegedly sustained on November 22, 2002, as a result of a motor vehicle accident that occurred at or near the intersection of 31<sup>st</sup> Avenue and 97<sup>th</sup> Street, Queens, New York, between plaintiff’s vehicle and the vehicle operated by defendant Romero. Plaintiff claims, inter alia, that, as a result of the accident, he sustained a cervical disc herniation at C4-5 causing right paracentral nerve root impingement; cervical root lesion at C4-C5 level with radiculopathy; shoulders, arms radiculopathy and radicular pain to the hips and knees with numbness and weakness. Defendants move for summary judgment on the ground that plaintiff failed to meet the “serious injury” threshold requirement of section 5102(d) of the Insurance Law. The aforementioned statute states, in pertinent part, that a “serious injury” is defined as:

a personal injury which results in ...significant disfigurement;  
...permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent

nature which prevents the injured party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The issue of whether the injuries allegedly sustained by plaintiff fall within the definition of a “serious injury,” in the first instance, must be decided by the court. See, Licari v. Elliot, 57 N.Y.2d 230, 238 (1982). In order for a summary judgment motion to be granted by the court, the defendant must establish that there are no triable issues of facts in dispute. Inherent in the court’s consideration of a motion for summary judgment for lack of serious injury is the requisite determination that there are no issues of fact with regard to the injuries sustained by a plaintiff. Thus, the threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendants make a prima facie showing that plaintiff did not sustain a serious injury.

Defendants may meet their burden by presenting the affidavits or affirmations of medical experts who have examined plaintiffs, and who have concluded that no objective medical findings support plaintiffs’ claims. Grossman v Wright, 268 A.D.2d 79 (2<sup>nd</sup> Dept. 2000). Defendants established their prima facie entitlement to judgment as a matter of law by 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 by submission of the medical affirmation of Dr. Alla Mesh, a neurologist, who examined plaintiff on May 3, 2005. Dr. Mesh reported that plaintiff presented with complaints of “occasional headaches, neck, mid back, low back, left shoulder and right foot pain.” Following objective neurological examinations that disclosed no limitations of motion in the cervical, thoracic or lumbar spine or tenderness to palpation or muscle spasm, Dr. Mesh formulated a diagnosis of “[c]ervical, thoracic and lumbar spine sprain/strain, resolved,” and concluded:

Based on a reasonable degree of clinical certainty, the claimant did not demonstrate any objective neurological disability. He is neurologically stable to engage in full activities of daily living as well as active employment. There is no permanency or residual effect.

His stated impression was that:

Mr. Cruz’s neurological examination is presently within normal limits therefore, I believe that he no longer requires any further treatment within my medical specialty, including physical therapy. There is no need for diagnostic testing, household help, special supplies or special transportation.

Defendants also submitted plaintiff’s deposition testimony, which, inter alia, set forth that he was confined to his home for twenty (20) days; that he was out of work for four (4) months,

although he told defendants' examining doctor that he missed four (4) days of work; and that he was limited in his activities, such as playing sports, having sex, lifting his children, grocery shopping and doing things around the house. This is insufficient proof of the existence of a medically determined injury resulting from the accident that prevented plaintiff from performing substantially all of his daily activities for not less than 90 of the first 180 days following the occurrence. Mohamed v Siffrain, 19 AD3d 561 (2<sup>nd</sup> Dept. 2005); Teodoru v Conway Transp. Serv., 19 A.D.3d 479 (2<sup>nd</sup> Dept. 2005); Bruce v New York City Tr. Auth., 16 A.D.3d 608 (2<sup>nd</sup> Dept. 2005). Plaintiff's deposition testimony as to his inability to work and the limitations on his activities is self serving. (Gross v Singson, 2 A.D.3d 583 (2<sup>nd</sup> Dept. 2003)[ ; Mu Ying Zhu v Zhi Rong Lin, 1 A.D.3d 416 (2<sup>nd</sup> Dept. 2003)]["the injured plaintiff's self-serving allegations that she can no longer perform her daily duties and household chores were insufficient to raise a triable issue of fact as to whether she sustained a medically-determined injury of a nonpermanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities."])

The burden now shifts to plaintiff to come forward with sufficient evidence to raise a triable issue of fact as to whether she sustained a serious injury. Gaddy v Eyler, *supra*. In order to demonstrate that a triable issue of fact exists that a serious injury was sustained within the meaning of the Insurance Law, the plaintiff must present objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration Noble v Ackerman, 252 A.D.2d 392 (2<sup>nd</sup> Dept. 1999).

Plaintiff submits the affidavit of Dr. Renan Macias, a neurologist, who began treating plaintiff on November 26, 2002, four days after his accident, and last treated him on February 28, 2003. Dr. Macias' February 28, 2003 report is deficient for the reason that it fails to demonstrate any initial range of motion restrictions contemporaneous with the accident (see Passarelle v Burger, 278 A.D.2d 294 [2000]; Jimenez v Kambli, 272 A.D.2d 581 [2<sup>nd</sup> Dept. 2000]); there is an attempt to cure this deficiency by Dr. Macias setting forth in her October 27, 2007 affidavit restricted range of motion findings as of her 2/12/03 examination, no record of which was attached.. Dr. Macias' affidavit is also insufficient in that it offers no evidence regarding the nature of plaintiff's medical treatments nor any explanation for the nearly four year gap between plaintiff's last treatment in 2003 and the October 27, 2007 date of her affidavit that contained no mention of her having seen plaintiff on that date or any date after February 28, 2003. See Francis v Christopher, 302 A.D.2d 425 [2<sup>nd</sup> Dept. 2002]; Villalta v Schechter, 273 A.D.2d 299 [2<sup>nd</sup> Dept. 2000]; Dimenshteyn v Caruso, 262 A.D.2d 348 [1999]; Marshall v Albano, 182 A.D.2d 614 [2<sup>nd</sup> Dept. 1992]).

Moreover, the affidavit of Dr. Mark Shapiro, the radiologist who interpreted plaintiff's MRI's of his Cervical and Lumbar Spine on January 24, 2003, is of no probative value as no causal connection is made between the results and the plaintiff's accident, nor is there any indication of restrictions. Consequently, the MRI report and affidavit of Dr. Shapiro are insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury without "objective evidence of the extent of alleged physical limitations resulting from the disc injury." Meely v 4 G's Truck Renting Co., 16 A.D.3d 26 [2<sup>nd</sup> Dept. 2005]. "Mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical

limitations resulting from the disc injury and its duration (citations omitted).” Iusmen v. Konopka, 38 A.D.3d 608 (2<sup>nd</sup> Dept. 2007). Thus, plaintiff submitted no competent admissible medical evidence contemporaneous with the accident showing that he suffered from loss of range of motion. See Ranzie v Abdul-Massih, 28 A.D.3d 447 [2<sup>nd</sup> Dept. 2006]; Yeung v Rojas, 18 A.D.3d 863 [2<sup>nd</sup> Dept. 2005]; Nemchyonok v Ying, 2 A.D.3d 421 [2<sup>nd</sup> Dept. 2003]. In the absence of any admissible objective evidence of injury, plaintiff's self-serving affidavit is likewise insufficient to raise a triable issue of fact as to whether he sustained a serious injury. Lastly, notwithstanding plaintiff's contentions to the contrary, plaintiff has failed to submit competent medical evidence that he was unable to perform substantially all of his daily and customary activities for not less than 90 of the first 180 days subsequent to the subject accident. See, Daddio v Shapiro, 44 A.D.3d 699 [2<sup>nd</sup> Dept. 2007]; Alexandre v Dweck, 44 A.D.3d 597 [2<sup>nd</sup> Dept. 2007]; Elder v. Stokes, 35 A.D.3d 799 (2<sup>nd</sup> Dept. 2006); Felix v. New York City Transit Authority, 32 A.D.3d 527 (2<sup>nd</sup> Dept. 2006). Accordingly, defendants' motion for summary judgment is granted and the complaint hereby is dismissed.

Dated: February 19, 2008

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J.S.C.