

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

MARTHA MURILLO

Plaintiff

-against-

ADMORE AIR CONDITIONING, CORP.,
MANUEL CARMOEGA and
KATHLEEN I. RICKARD

Defendant.

Index No: 3903/03

Motion Date: 3/2/05

Motion Cal. No: 21

The following papers numbered 1 to 10 read on this motion by defendant, Rickard, for summary judgment dismissing the cross-claim of defendant, **MANUEL CARMOEGA**, on the grounds that he has not sustained a serious injury within the meaning of Sections 5102 and 5104 of the Insurance Law.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 10

Upon the foregoing papers it is ordered that this motion is granted and defendant, **MANUEL CARMOEGA's**, cross-claim is dismissed.

Defendant, Rickard, has submitted competent medical evidence including the affirmation of his examining orthopedist and MANUEL CARMOEGA's deposition testimony which establish, prima facie, that he did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. (See, Gaddy v. Eyler, 79 NY2d 955 [1992]; Kearse v. New York City Transit Authority, ___ AD3d ___, 789 NYS2d 281 [2005]; Jackson v. New York City Tr. Auth., 273 AD2d 200 [2000]; Greene v. Miranda, 272 AD2d 441 [2000]). Thus, the burden shifts to CARMOEGA to demonstrate the existence of a triable issue of fact by submitting competent medical proof. (see, Gaddy v. Eyler, supra; Licari v. Elliott, 57 NY2d 230, 235 [1982]; Lopez v. Senatore, 65 NY2d 1017 [1985]).

In opposition, CARMOEGA submitted the affidavit of his chiropractor, Dr. Vendittelli, the affirmed cervical MRI report

of Dr. Diamond and his own affidavit. CARMOEGA's proof is deficient, as a matter of law, in several respects and, therefore, insufficient to raise a triable issue of fact. Although defendant, CARMOEGA testified at his deposition that he had previously injured his neck in a work related accident, and had been treated for that injury by Dr. Vendittelli, the doctor opines that the limitations of motion of defendant's cervical spine and the cervical disc herniation at C3-4 and C4-5 and disc desiccation revealed in the MRI are a direct result of the instant auto accident and defendant's prior history is non-contributory. However, in the absence of an objective medical basis, the conclusions, even of a treating doctor is insufficient to raise a question of fact. (See, Napoli v. Cunningham, 273 AD2d 366 [2000]; Grossman v. Wright, 268 AD2d 79 [2000]; Vitale v. Carson, 258 AD2d 647 [1999]; Nadrich v. Woodcrest Country Club, 250 AD2d 827 [1998]; Weaver v. Derr, 242 AD2d 823 [1997].) In view of his failure to explain or indicate his opinion regarding causation is speculative and conclusory (see, Franchini v. Palmieri, 307 AD2d 1056 [2003], aff'd 1 NY3d 536 [2004]; Lorthe v. Adeyeye, 306 AD2d 252, 253[2003]; Dabiere v. Yager, 297 AD2d 831, 832 [2002], lv denied 99 NY2d 503 [2002]; Pajda v. Pedone, 303 AD2d 729, 730 [2003]; Ginty v. MacNamara, 300 AD2d 624, 625 [2002]; Kallicharan v. Sooknanan, 282 AD2d 573, 574 [2001]) and tailored to meet statutory requirements.(See, Lopez v. Senatore, supra; Gousgoulas v. Melendez, 10 AD3d 674 [2004]; Powell v. Hurdle, 214 AD2d 720 [1995]; Giannakis v. Paschilidou, 212 AD2d 502, 503 [1995].)

Moreover, since defendant testified, that he returned to work after the accident and missed only one or two days of work, thereafter, his self-serving affidavit is insufficient to raise a triable issue of fact as to whether he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days following the subject accident .(See, Kravtsov v. Wong, 11 AD3d 516 [2004]; Mu Ying Zhu v. Zhi Rong Lin, 1 AD3d 416 [2003]; Sainte-Aime v. Ho, 274 AD2d 569 [2000]; Jackson v. New York City Tr. Auth., 273 AD2d 200 [2000]) and is conclusive evidence that his injuries are not significant within the meaning of the statute. (Attanasio v. Lashley, 223 AD2d 614 [1996]; Winkler v. Lombardi, 205 AD2d 757 [1994].)

The plaintiff's supplemental affirmation served after the movant served his reply was not considered.

Dated: March 14, 2005
D# 20

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J.S.C.