

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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PIEDAD MARIA PENNA-HERRERA

Plaintiff

-against-

RICHARD B. GOLOMB, PHIL NAT CAB CORP.  
and EDUARDO

Defendants.

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Index No:26163/03

Motion Date: 3/14/07

Motion Cal. No: 15

The following papers numbered 1 to 9 read on this motion by defendant for summary judgment dismissing the complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of Sections 5102 and 5104 of the Insurance Law.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 9

Upon the foregoing papers it is ordered that this motion is granted and the complaint is dismissed.

Defendants have submitted competent medical evidence including the affirmation of their examining neurologist, portions of the plaintiff's medical records and the plaintiff's deposition testimony which establish, prima facie, that the plaintiff 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]; Jackson v. New York City Tr. Auth., 273 AD2d 200 [2000]; Greene v. Miranda, 272 AD2d 441 [2000]). Thus, the burden shifts to the plaintiff 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]). This the plaintiff failed to do.

In opposition, the plaintiff submitted the affidavit of her

treating chiropractor, Dr. Marchese, which is insufficient to raise a question of fact in several respects. Dr. Marchese examined the plaintiff four days after the October 30, 2002 accident and treated her from November 2, 2002 until February 15, 2003. The plaintiff returned to the doctor for reexamination in February, 2007 after the defendants moved for summary judgment, however, neither the doctor nor plaintiff provide any explanation for the four-year gap between the cessation of the plaintiff's treatments and his recent examination (see Pommells v. Perez, 4 NY3d 566, 574[2005]; Pimentel v. Mesa, 28 AD3d 629 [2006]; Vita v. Enterprise Rent-A-Car, 8 AD3d 558 [2004]). Such an unexplained cessation in treatment supports the conclusion that the plaintiff did not sustain a serious injury.

Dr. Marchese failed to address Dr. Burgos', report of the plaintiff's cervical ER x-ray, that the plaintiff suffers from degenerative disc disease of the cervical spine and states, in conclusory language, that the plaintiff's condition is causally related to the accident without any medical basis for his conclusion (see, Watt v. Eastern Investigative Bureau, Inc. 273 AD2d 226 [2000]). Thus, his conclusions are speculative and insufficient to raise a triable issue of fact as to causation (see Gomez v. Epstein, 29 AD3d 950 [2006]; Faulkner v. Steinman, 28 AD3d 604 [2006]; Ifrach v. Neiman, 306 AD2d 380[2003]; see also Mullings v. Huntwork, 26 AD3d 214 [2006]). Nor is the doctor's finding that plaintiff suffers from herniated or bulging discs sufficient to raise a question of fact. The plaintiff must still offer objective evidence of the extent or degree of the alleged physical limitations and their duration, resulting from a disc injury (see Hernandez v. Taub, 19 AD3d 368 [2005]; Noble v. Ackerman, 252 AD2d 392, 394 [1998]). Although Dr. Marchese set forth the alleged limitations of motion in plaintiff's cervical and lumbar spine he found at his first examination in November, 2002, he failed to quantified the limitations he states he found at his latest examination (see D'Amato v. Mandello, 2 AD3d 482 [2003]).

In view of the plaintiff's deposition testimony that she was confined to bed for three days and confined to her home for three weeks, and there is no objective evidence of a medically determined injury resulting from the accident, the plaintiff has failed to raise a triable issue as to whether she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident. (see, McConnell v. Ouedraogo, 24 AD3d 423 [2005]; Vita v. Enterprise Rent-A-Car, 8 AD3d 558 [2004]).

Dated: March 26, 2007  
D# 30

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J.S.C.