

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

VENEZE SMART, et al.,

INDEX NO. 10075/2005

Plaintiffs,

MOTION

DATE September 11, 2007

- against -

IOANNIS SFIRAS, et al.,

MOTION

CAL. NO. 27

Defendants.

MOT. SEQ.

NUMBER 1

The following papers numbered 1 to 7 read on this motion by the defendants for summary judgment dismissing the plaintiffs' complaint for failure to establish the existence of a "serious injury" pursuant to Insurance Law §5102[d].

PAPERS
NUMBERED

Notice of Motion/Affid(s)-Exhibits.....	1 - 4
Affid(s) in Opp.-Exhibits.....	5 - 6
Replying Affidavits.....	7

Upon the foregoing papers the motion is determined as follows:

The defendants' moving papers establish that plaintiffs, Veneze Smart, Shantel Smart and Shauna Smart, were involved in an automobile accident on July 14, 2004 and commenced this action to recover for injuries allegedly sustained therefrom. The defendants contend that the plaintiffs' injuries do not meet the serious injury threshold set forth by New York Insurance Law 5102(d) and their complaint should therefore be dismissed.

In support of their argument, the defendants have offered the affirmations of Donald Forman, M.D., an orthopedic surgeon, and Iqbal Merchant, M.D., a neurologist. The defendants have also submitted copies of the plaintiffs' medical records, including MRI reports from their examining radiologist James R. McCleavey, M.D.

With respect to Veneze Smart, Dr. Forman's affirmation sets forth that he conducted examinations of this plaintiff on September 22, 2006. Dr. Forman observed during his physical examination of Veneze that she had full range of motion in her cervical and lumbar spines as well as both wrists, knees and shoulders and he specified the ranges of motion he observed during his exam and compared it with what is, in his

opinion, the normal range of motion in the affected area. Dr. Forman concluded that Veneze sustained resolved sprains of the cervical and lumbar spines as well as both wrists, knees and shoulders and he opined that she had no ongoing orthopedic disability as a result of the accident. Dr. Merchant's affirmation set forth that he conducted an examination of Veneze on September 26, 2006. Dr. Merchant observed that Veneze had full range of motion in her cervical and lumbar spines by also quantifying the ranges of motion he observed and compared it with what is, in his opinion, the normal range of motion in the affected area. Dr. Merchant concluded that Veneze needed no further neurological treatment and was not disabled. Also submitted as to Veneze were three MRI reports from her treating radiologist, Dr. McCleavey, who determined these scans showed Veneze's cervical and lumbar spines were normal and that her left shoulder was without abnormalities.

As to Shantel Smart, Dr. Forman's affirmation sets forth that he conducted an examination of this plaintiff on January 10, 2007. Dr. Forman observed during his physical examination of Shantel that she had full range of motion in her cervical and lumbar spines as well as both shoulders and her left knee. Dr. Forman specified the ranges of motion he observed during his exam and compared it with what is, in his opinion, the normal range of motion in the affected area. Dr. Forman concluded that Shantel sustained resolved sprains of the cervical and lumbar spines as well as her left knee and shoulder and he opined that she had no ongoing orthopedic disability as a result of the accident. Dr. Merchant's affirmation set forth that he conducted an examination of Shantel on September 26, 2006. Dr. Merchant observed that Veneze had full range of motion in her cervical and lumbar spines by also quantifying the ranges of motion he observed and compared it with what is, in his opinion, the normal range of motion in the affected area. Dr. Merchant concluded that Shantel needed no further neurological treatment and was not disabled. Also submitted as to Shantel were two MRI reports from her treating radiologist, Dr. McCleavey, who determined these scans showed Shantel's cervical and lumbar spines were normal.

Concerning Shauna Smart, Dr. Forman's affirmation sets forth that he conducted an examination of this plaintiff on September 22, 2006. Dr. Forman observed during his physical examination of Veneze that she had full range of motion in her cervical and lumbar spines as well as both elbows, knees and shoulders and he specified the ranges of motion he observed during his exam and compared it with what is, in his opinion, the normal range of motion in the affected area. Dr. Forman concluded that Shauna sustained resolved sprains of the cervical and lumbar spines as well as both wrists, knees and shoulders and he opined that she had no ongoing orthopedic disability as a result of the accident. Dr. Merchant's affirmation set forth that he conducted an examination of Shauna on September 26, 2006. Dr. Merchant observed that Shauna had full range of motion in her cervical and lumbar spines by also quantifying the ranges of motion he observed and compared it with what is, in his opinion, the normal range of motion in the affected area. Dr. concluded that Shauna needed no further neurological treatment

and was not disabled. Also submitted as to Shauna were three MRI reports from her treating radiologist, Dr. McCleavey, who determined these scans showed Shauna's cervical and lumbar spines as well as her brain were normal.

These affirmations and records establish prima facie that the plaintiffs did not sustain serious injuries as the result of the motor vehicle accident that is the subject of this action (See, Licari v Elliott, 57 NY2d 230, Guzman v Paul Michael Management, 266 AD2d 508; see also, Meekly v 4 G's Truck Renting Co., Inc., 16 AD3d 26; Kearse v NYCTA, 16 AD3d 45; Willis v N.Y. City Transit Auth., 14 AD3d 696; Sieradzki v US Express Leasing, 13 AD3d 608; Fauk v Jenkins, 301 AD2d 564). Thus, the burden shifted to the plaintiffs to come forward with sufficient evidence that they sustained serious injuries (See, Gaddy v Eyler, 79 NY2d 955).

In opposition to the motion, the plaintiffs offered, in addition their own affidavits and deposition testimony, the affirmations of their treating physician, Leo H. Batash, M.D, and the affirmed reports of Dr. McCleavey.

As to all the plaintiffs, although Dr. Batash quantifies the recent range of motion deficits he purportedly observed in the plaintiffs' affected body parts, his opinions are not based upon objective tests, but rather predominantly founded in these plaintiffs' subjective complaints of pain which is insufficient (See, Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345, 357-58; Picott v Lewis, 26 AD3d 319; Cennamo v Themistokleous, 22 AD3d 700; Nelson v Amicizia, 21 AD3d 1015). Dr. Batash's notations regarding certain physical manipulation tests performed during the exams does not constitute objective evidence of a serious injury as he "failed to explain the significance of these test results and relate them to the plaintiff['s] injuries" (Carroll v Jennings, 264 AD2d 494). Likewise, his observation of muscle spasm in the cervical and lumbar spines of all the plaintiffs "were inadequate in the absence of proof that these findings were objectively ascertained" (See, Toure v Avis Rent A Car Systems, supra at 357-358; Scudera v Mahbubur, 299 AD2d 535).

As to Veneze Smart in particular, Dr. Batash's reference to EMG/NCV studies that allegedly revealed that Veneze was suffering from radiculopathy is insufficient as he does not state whether he actually performed these test nor did he attach a sworn copy of these reports to his affirmation (See, Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345, 357-58; Wagman v Bradshaw, 292 AD2d 84; Harney v Tombstone Pizza Corp., 279 AD2d 609; Shay v Jerkins, 263 AD2d 475). MRI studies can constitute objective proof, but the scans of Veneze's cervical spine, lumbar spine and left shoulder did not reveal the existence of any injury. While Dr. McCleavey's MRI report of Veneze's right knee notes the existence of a "GLENOHUMERAL JOINT EFFUSION", this ultimately would not create an issue of fact since Dr. Batash's final diagnosis as to Veneze's right knee was that she sustained a "sprain/strain" which does

not constitute a serious injury (See e.g., Harrison v City of New York, 2 AD3d 682; Keena v Trappen, 294 AD2d 405; Rhind v Naylor, 187 AD2d 498).

As to Shantel Smart, MRI scans of her cervical and lumbar spines were normal. Moreover, Shantel does not even claim she sustained any back injury as a result of the accident in the plaintiffs' verified bill of particulars dated January 24, 2006. While Dr. McCleavey's MRI report of Shantel's left shoulder and knee notes the existence of certain abnormalities, again this ultimately would not create an issue of fact since Dr. Batash's final diagnosis was that Shantel sustained sprains and strains of the shoulders and left knee which do not constitute serious injuries.

Turning to Shauna Smart, the MRI scans of her cervical spine, lumbar spine and brain were all normal and thus can not support Dr. Batash's findings with respect to those allegedly affected areas. Indeed, Dr. Batash's final impressions as to Shauna's cervical spine, lumbar spine, shoulders and right knee were that she sustained merely strains and/or sprains which are not serious injuries.

As such, the plaintiffs' proof fails to establish that they sustained a "permanent consequential limitation[s] of use of a body organ or member" or a "significant limitation of use of a body function or system" (See, Toure v Avis Rent A Car Systems, Inc., supra; Dufel v Green, supra; Chinnici v Brown, 295 AD2d 465). Also, since the plaintiffs have adduced no evidence that they has totally lost the use of the affected portions of their bodies, they failed to establish a "permanent loss of use of a body organ, member, function or system" (Oberly v Bangs Ambulance, Inc., 96 NY2d 295).

The plaintiffs' affidavits and deposition testimony failed to establish that they were "curtailed from performing [their] usual activities to a great extent rather than some slight curtailment" (Licari v Elliott, supra at 236). Specifically, the work, household, educational and recreational activities along with the generally described restrictions of motion allegedly incurred by the plaintiffs do not meet the "substantially all" threshold (See, Omar v Goodman, 295 AD2d 413; Delgado v Hakim, 287 AD2d 592; Scott v Leung, 287 AD2d 612; Szabo v XYZ, Two Way Radio Taxi Association, Inc., 267 AD2d 134).

Accordingly, after considering the evidence in a light most favorable to the plaintiffs (Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), the defendants' motion for summary judgment is granted and the plaintiffs' complaint is dismissed.

Dated: November 2, 2007

Peter J. Kelly, J.S.C.