MEMORANDUM

SUPREME COURT KINGS COUNTY **CIVIL TERM PART 13**

LORNA NEMBHARD

Plaintiff, **KRAMER, H., J.**

-against- **DATED: January 14,2004**
INDEX NO. 14588/01

THOMAS DELATORRE, MICHELINE PROSPER and GUY PROSPER,,

Defendants.

The following papers **have been read** on **this** motion:

	Pauers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed)	_____
Opposing Affidavits (Affirmations)	_____
Reply Affidavits (Affirmations)	_____
_____(Affirmation)	_____
Other Papers	_____

Defendants, Guy Prosper and Micheline Prosper move for summary judgment dismissing the complaint on the ground that plaintiff failed to demonstrate the existence of a serious physical injury pursuant to Insurance Law Section 5102(d).

As to the issue of whether the plaintiffs sustained serious **physical injuries,** defendants were required to and did meet their burden of coming forward with sufficient evidence in admissible form to warrant a finding that the plaintiffs did not suffer a serious injury as a matter of law, Paaano v. Kingsbury, 182 A.D.2d 268(2d Dept. 1992), through the sworn reports of Dr. Donald **R.** Tannenbaum, a dentist, who examined the 71 year old plaintiff whose main post accident complaints were lacerations inside the mouth. Dr. Tannenbaum found that while the plaintiff did initially sustain oral and dental trauma, she did not complain of jaw and or dental distress or pain and the lower anterior teeth have healed adequately and there *is* no need for root canal therapy on the lower anterior teeth **and or** the **placement** of **crowns. He** found that the plaintiff **has no present dental needs** and no TMJ disfunction. He found that the plaintiff has no disability and **or** impairment as it

relates to the teeth or jaws and no current intervention is required. Long term prognosis was viewed as excellent.

Dr. Pitman, an orthopedist examined the plaintiff on behalf of the defendant and reported thai the plaintiff complained of bilateral shoulder and some lower back pain. Dr. Pitman found that the plaintiff walked well on toes and heels and does forward bends to six inches below the knee with some lumbar pain on extension. He found the "cervical motion full and full motion and good strength in both shoulders. Straight leg raising test was negative and there was no motor, sensory or reflex loss of the lower extremities." He found that the plaintiff sustained cervical and lumbar sprain and no further treatment was indicated and that the plaintiff was not disabled from her usual occupation."

The onus then shifted to plaintiff to establish a prima facie case of serious injury, The plaintiff has not done so. Plaintiff, relying upon that aspect of the statute that defines serious injury as **a** "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not **less** than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." Insurance Law §5102(d), submitted only her own affidavit.[1]

Plaintiff did not submit a sworn doctor's report. The only evidence she submitted to substantiate the fact that she sustained a *medically determined injury were* various inadmissible unsworn medical records and an inadmissible handwritten unsworn doctor's note that apparently issued on the date of the accident, November 21, 2000 with the box **checked** off 'ndicating that the patient was "totally disabled at that time", but reciting no comment in the **box** that indicated when she could return to work or light duty and no indication that she was in need of housekeeping services.

Since the plaintiff did not submit medical evidence in admissible form, her " self-

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[1]The affidavit recites in pertinent part: "Due to the injury to [her] cervical spine and mouth, [she] was forced to report sick because [she] was unable to work from the date of the accident until I returned to [her] job as a nurse at Harlem Hospital on or about March **15,** 2001. [She] was also confined to her home, except for emergencies and medical treatment, from the date of the accident until [her] return to work [approximately **114 days** immediately following the accident]."

serving statements that [s]he was unable to return to [her] job as a [nurse] as a result of the subject accident, without more, were insufficient to show that [s]he had sustained a medically determined injury or impairment of a nonpermanent nature which prevented [her] from performing substantially all of the material acts which constituted [her] usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident." Tavlor v. Jerusalem Air, Inc., 280 A.D.2d 466, 467(2d Dept. 2001).(This conclusion was reached notwithstanding the fact that a doctor's affidavit was submitted in this case to the effect that the plaintiff had sustained a torn rotator cuff which prevented him from performing substantially all of the material acts which constituted his daily activities for the initial 90 to 180 days). See also, Estrella v. Marano, 255 A.D.2d 358(2d Dept. 1998);Glielmi v. Banner, 254 A.D.2d 255(2d Dept. 1998).

Accordingly, the defendants' motion for summary judgment is granted and the complaint is dismissed. This constitutes the decision and order of the Court.

J.S.C.

HON. JUSTICE HERBERT KRAMER