SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 101503/2005**
COUNTY OF RICHMOND **PART DCM 3** **Motion No.: 3**

MARINA GARANINA, SERGEY GARANIN and LINA GARANINA,

DECISION & ORDER
HON. JOSEPH J. MALTESE

Plaintiffs

against

CHARLES SAREUS and THOMAS CAMPANELLI,

Defendants

The following items were considered in the review of this motion for summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Papers	**3**
Exhibits	**Attached to Papers**
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants seek summary judgment on the ground that the plaintiffs, Lina Garanina and Sergey Garanin, have not sustained a "serious injury" as defined in Insurance Law §5102(d).[1] The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories. (*Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].) Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained. (*Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].) Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease (11 NYCRR §65-2.1[e]), that results in one of the nine ser injury threshold categories. (*See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].)

It is important to keep in mind the policies underlying the enactment of the No-Fault Law and the law's structure when litigating no-fault related issues. Courts have consistently held that the No- Fault Law must be interpreted to fulfill the policies the legislature had in mind. (*See, Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].) It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury" (*see*, e.g., *Licari v. Elliott*, 57 NY2d 230, 237).

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §*5102*(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations (*see, Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848). The burden, in other words, shifts to plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (*see, Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000]). The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*id*). Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

Here, at the defendant's request, the plaintiff, Sergey Garanin, was examined by Jacquelin Emmanuel, M.D., a board certified orthopaedic surgeon. Dr. Emmanuel examined the plaintiff's cervical spine, lumbar spine, left shoulder and left knee and found the range of motions of all to be at the normal ranges of motion. Dr. Emmanuel, in her affirmed to report states each and every range of motion as compared to normal and finds that they are all in the normal range. Ultimately, Dr. Emmanuel found that plaintiff Sergey Garanin had no causally related disability.

The plaintiff, Sergey Garanin, also underwent a neurological examination at the defendant's request by Kuldip Sachdev, M.D., a board certified neurologist. Dr. Sachdev, in his affirmed to report, stated that the plaintiff had a resolved cervical, thoracic and lumbar sprain and that the plaintiff did not sustain any permanent neurological disabilities.

Plaintiff, Lina Garanina, at the defendant's request, was examined by Jacquelin Emmanuel, M.D., a board certified orthopaedic surgeon. Dr. Emmanuel examined the plaintiff's cervical spine, lumbar spine, left shoulder and left knee and found the range of motions of all to be at the normal ranges of motion. Dr. Emmanuel, in her affirmed to report, states each and every range of motion as compared to normal and finds that they are all in the normal range. Ultimately, Dr. Emmanuel found that plaintiff, Lina Garanina, had no causally related disability.

Additionally, Lina Garanina was examined by Kuldip Sachdev, M.D., a board certified neurologist. Dr. Sachdev in his affirmed to report stated that the plaintiff had a resolved cervical and lumbar sprain and that the plaintiff did not sustain any permanent neurological disabilities.

In order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law §*5102* (d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. *(Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000].) The plaintiff here, relies upon the unsigned medical report of Dr. Pavel Kulik. Moreover, the medical report of Dr. Kulik did not contain any affirmation language and is not properly before the court. It is well settled that the plaintiff may not rely upon an unsworn report (*Friedman v. U-Haul Truck Rental*, 216 AD2d

266 [2nd Dept 1995]). Furthermore, the plaintiff relies upon the medical records of Dr. Pavel Kulik. They are as well, not properly before the court as they are not affirmed to, certified, or in any way competent evidence on a motion for summary judgment.

The plaintiff then relies upon the MRI reports for Lina Garanina. The are also not properly before the court. The MRI's were taken on August 11, 2004 at Foster Diagnostic Imaging, P.C. The report was prepared by Steven Prufer, M.D., a board certified radiologist. Additionally, on the letterhead on which the report was prepared appears the names of Dr. Kenneth S. Schwartz, and Melvin Leeds, M.D. In the instant action the plaintiff attempts to make them competent evidence by attaching the certifying affirmation of Donald I. Goldman, M.D., the plaintiff's expert. Specifically, the certification prepared on Donald Goldman, M.D., P.C. stationary states "I saw the MRI films of the L/S & Rt. Shoulder In my office and agree with the radiologist. I certify and affirm that the foregoing report is true to the best of my knowledge under the penalty of perjury CPLR 2106." This is improper as Dr. Goldman, with no association to Foster Diagnostic Imaging, P.C, as well as not being the doctor who prepared the report cannot certify the reports generated by Dr. Prufer. As such, the MRI reports are not properly before the court.

Finally, the plaintiff relies upon the affirmations of Donald I. Goldman, M.D., a board certified orthopaedist. Dr. Goldman finds that both Sergey Garanin and Lina Garanina suffered a serious injury and had decreased ranges of motion as compared to the normal. However, Dr. Goldman wholly omits mentioning both the plaintiffs' admitted prior motor vehicle accident for which they made monetary claims for personal injuries and thus, his conclusions are deemed speculative as a matter of law. (*Franco v. Akram* 26 AD3d 461 [2d Dept 2006]; *Montgomery v. Pena* 19 AD3d 288 [2d Dept 2006]; *Pommels v. Perez* 4 NY3d 566 [2005].)

Furthermore, the plaintiff fails to medically explain the undisputed three-year gap in treatment (*Pommels v. Perez*, supra; *Paykina v. Golden* 21 AD3d 1021 [2d Dept 2005]). Here, the plaintiffs both testified at their deposition that they treated for approximately three months after the accident. Additionally, Sergey Garanin testified that he received health insurance benefits from work and that his daughter Lina Garanina was covered under the insurance policy. Dr. Goldman's affirmation, which details the medical evaluation of the plaintiffs at the time the evaluation was performed, and the only competent evidence before the court, does not medically explain the gap in treatment which is fatal for the opposition to the motion for summary judgment. The Court of Appeals in *Pommels v. Perez*, supra, held that a gap in treatment must be explained because it interrupts the chain of causation between the accident and the claimed injury. (See also, *Smith v. Askew*, 264 AD2d 834 [2nd Dept 1999].)

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2nd Dept 1990]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable (*American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept

1994]). However, in the instant action, the plaintiff's opposition papers were insufficient to raise a triable issue of fact and summary judgment must be granted.

Accordingly, it is hereby:

ORDERED, that the defendants' motion for summary judgment based upon the serious injury threshold, is granted in its entirety and the complaint, as it relates to plaintiffs, Sergey Garanin and Lina Garanina, is dismissed; and it is further

ORDERED, that the remaining plaintiff, Marina Garanina, and the defendants shall appear in DCM 3 at 9:30 AM on **May 14, 2007** for a pre-trial/settlement conference.

ENTER,

DATED: March 9, 2007

Joseph J. Maltese
Justice of the Supreme Court

[1] A serious injury must be a personal injury, "[W]hich results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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 person from performing substantially all of the material acts which constitutes 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]).