SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

ROBERT J VITERI, Plaintiffs, - against - **GLORIA ZAMOR** and **PIERRE ZAMOR,** Defendants.	**INDEX NO.:**	**2004-15275**
	MOTION SEQ. NO.:	001 - MG
	ORIG. MOTION DATE:	01/08/07
	FINAL SUBMIT DATE:	02/28/07

UPON the following papers numbered 1 to 41 read on this Motion:
- Defendants' Motion & Supporting Papers (Pages 1-13 & Exhibits A-F);
- Plaintiff's Opposition (Pages 14-28 & Exhibits 1-3);
- Defendants' Reply (Pages 29-41);

it is,

ORDERED, that the application of Defendants is hereby granted in all respects.

Defendants move this Court for an Order, pursuant to CPLR 3212, granting Summary Judgment in favor of Defendants and against Plaintiff, dismissing the Summons and Complaint of Plaintiff, upon the grounds that no triable issue of fact exists and that as a matter of law Plaintiff has not sustained a "serious injury" as required by §§ 5102 and 5104 of Insurance Law of the State of New York.

This is an action for alleged serious injuries suffered by Plaintiff as the result of a motor vehicle accident which occurred on July 16, 2001.

As to the issue of summary judgment, in order for the Court to grant such relief, it must clearly appear that there are no material issues of fact (***Sillman v Twentieth Century-Fox Film Corp***, 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387 [1957]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]; ***Sillman v Twentieth Century-Fox Film Corp***, *supra*).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (***Zuckerman v City of New York***, *supra*).

As to the issue of serious injury, Insurance Law § 5102(d) sets forth nine specific ways in which Plaintiff can establish that she suffered such an injury, as defined therein:

> " "Serious injury" means a personal injury which 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 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."

The term "significant", as it appears in the statute, has been defined to mean "something more than a minor limitation of use" (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]). The Plaintiff must demonstrate not only the extent or degree of limitation, but also its duration (***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [1991], *app. Den.* 79 NY2d 753, 581 NYS2d 281). The duration of the injury must be more than "fleeting" (***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [1989], *lv. App. Dis.* 76 NY2d 770, 559 NYS2d 978). The term "consequential" has been defined to mean important or significant (***Kordana v Pomelitto***, 121 AD2d 783, 503 NYS2d 198 [1986], *app. Dis.* 68 NY2d 848, 508 NYS2d 425). A "permanent loss" of use of a body organ, member, function or system must be total (***Oberly v Bangs Ambulance, Inc***, 96 NY2d 295, 727 NYS2d 378 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a "qualitative assessment of a plaintiff's condition...provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (***Toure v Avis Rent A Car Sys***, 98 NY2d 345, 746 NYS2d 865, 868 [2002]; *rearg. den.* ***Manzano v O'Neil***, 98 NY2d 728, 749 NYS2d 478).

That leaves the ninth and final category with which to sustain her claim for serious injury: 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. In order to prosecute a claim for serious injury pursuant to the ninth category under Insurance Law § 5102(d), Plaintiff are required to show something more than slight curtailment of the material acts which constitute their usual and customary daily activities, and must support that claim with medical proof attributing such impairment to a 'medically determined' injury (***Giaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992] (Plaintiff must prove that they were "curtailed from performing... usual activities to a great extent rather than some light curtailment"); ***Thompson v Abasi***, 788 NYS2d 48, 2005 NY App Div LEXIS 23 [1 Dpt 2005] ("When construing the statutory definition of a 90/180-day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment"); ***Sigona v New York City Transit Authority***, 255 AD2d 231, 680 NYS2d 228 [1 Dpt 1998]).

Plaintiffs must demonstrate that the motor vehicle accident prevented them from performing a substantial part of their usual and customary daily routine for 90 out of the 180 days immediately following the accident (*see:* ***Pierre v Nanton***, 279 AD2d 621, 719 NYS2d 706 [2 Dpt 2001] (ruling that although Plaintiff claimed he did not work for almost four months after the accident, there was no serious injury because he was not ordered by a doctor to stay home); ***Curry v Velez***; 243 AD2d 442, 663 NYS2d 63 [2 Dpt 1997] (holding that there was no serious injury when the Plaintiff was incapacitated from her employment for a period of approximately four weeks and was no longer able to lift heavy packages); ***Goebel v Harris***, 241 AD2d 539,

661 NYS2d 641 [2 Dpt 1997]).

Furthermore, in order to sustain a claim for serious injury, Plaintiffs are required to establish "competent proof connecting the condition to the accident" (***Rose v Furgerson***, 281 AD2d 857, 859, 721 NYS2d 873, 876 [3 Dpt 2001]; *see also* ***Ceglian v Chan***, 283 AD2d 536, 724 NYS2d 762, 763 [2 Dpt 2001] (holding that objective proof is required that the subject motor vehicle accident was the cause of the disc injuries).

Still further, the Second Department has affirmed the granting of a motion for summary judgment and dismissal of a plaintiff's claim on the basis on an unexplained gap in treatment of 21 months in ***Kim v Budhu***, 709 NYS2d 440 (200), and dismissal of a plaintiff's cause of action noting that there was no explanation for a 16 month lag between cessation of Plaintiff's treatment and the doctor's subsequent re-evaluation in ***Marshall v Albano***, 182 AD2d 614 (1992).

The Court notes that no affidavit was submitted by an individual with personal knowledge of the facts herein in opposition to the instant Motion, and therefore that which was submitted is of no evidentiary or probative value, cannot raise any issues of fact and is insufficient to defeat a motion for summary judgment (*See,* ***Roche v Hearst Corp***, 53 NY2d 767 [1981]; ***Zuckerman v City of New York***, *supra*; ***Columbia Ribbon & Carton Mfg Co v A-1-A Corp***, 42 NY2d 496 [1977]; ***Romano v St Vincent's Medical Center***, 178 AD2d 467 [2 Dept 1991]). As further pointed out by Counsel for Defendants, the affidavit or affirmation of an attorney is not entitled to any probative weight on the issue of whether Plaintiff suffered serious injury (*See,* ***Shaffer v Kasperek***, 79 AD2d 1092 [4 Dept 1981]; ***Carpluk v Friedman***, 269 AD2d 349, 704 NYS2d 94 [2 Dept 2000]).

That being said, after review of all the submissions made herein, the Court first finds that Defendants successfully challenge Plaintiff's ability to meet the requirements set forth herein above establishing serious injury, including but not limited to the nature of the actual injuries and resultant limitations alleged, duration and extent of treatment, no time lost from work, extensive travel defeating claims of limitations of activity, coupled with admitted minor limitations of not lifting over thirty pounds and no sweeping.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Defendants for Summary Judgment in their favor, dismissing Plaintiff's Summons and Complaint, due to the lack of triable issue of fact, and as a matter of law because Plaintiff has failed to demonstrate that he sustained "serious injury", pursuant to Insurance Law §§ 5102 and 5104, is hereby granted in all respects; and it is further

ORDERED, that Defendants' Counsel is hereby directed to serve a copy of this order, with Notice of Entry, upon Plaintiffs' Counsel, upon the Calendar Clerk of this Court and upon the Suffolk County Clerk, within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

Dated: **Riverhead, New York**
April 16, 2007

HON. JEFFREY ARLEN SPINNER, J.S.C.

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

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