SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 102645/2005**
COUNTY OF RICHMOND PART DCM 3 **Motion No.: 1**

MARITZA VALENTIN,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

T.J.'s CAR SERVICE, INC. and FRED MEDNICK,

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**
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 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

[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]).

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 serious 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, the defendants rely upon the affirmation of Dr. Alvin M. Bregman, a board certified orthopaedic surgeon. Dr. Bregman found that the ranges of motion for the cervical spine, the lumbar spine, and both wrists were normal in all areas as compared to normal.[2] Dr. Bregman states that with a reasonable degree of medical certainty, the plaintiff has fully recovered from a cervical spine sprain, a lumbar spine sprain, a right and left wrist sprain and that the plaintiff remains with no disability.

The defendants also rely upon the affirmation of Dr. Terrence McAlarney, a board certified neurologist. However, Dr. McAlarney's affirmation is legally insufficient to be considered as evidence in this summary judgment as it simply contains conclusory statements: i.e. "Range of motion of arms, legs, and spine is normal." (*Grossman v. Wright* 268 AD2d 79 [2d Dept 2000].) Therefore, the court will disregard Dr. McAlarney's affirmation with respect to this decision.

In opposition to the instant motion, the plaintiff relies upon the affirmation of Ronald Porcello, a chiropractor licensed in the State of New York. The Court, however, cannot consider the report of plaintiff's chiropractor as it is not in admissible form (CPLR § 2106; *Doumanis v. Conzo*, 265 A.D.2d 296 [2d Dept 1999]). "In order to make a competent, admissible affirmation, a chiropractor, like most other persons, must first appear before a notary or other such official and formally declare the truth of the contents of the document" (*Doumanis*, supra). Here, the "physician's affirmation" attached as exhibit "c" is not a physician's affirmation, nor is it competent evidence to be placed before this court.

The plaintiff also relies upon the "medical report" of Bhim Nangia, M.D., a board certified neurologist. This report also cannot be considered by the court, as it is not affirmed or sworn to (CPLR § 2106). It is simply a medical report and not properly before the court. The same is true for the MRI report of H. Parekh, M.D. and Robert Scott Schepp, M.D.

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[2]In Dr. Bregman's affirmation, he states the plaintiff's range of motion as compared to the normal range of motion with sufficient particularity.

As the plaintiff offers no competent evidence to rebut the *prima facie* case presented by the defendants to dismiss this action due to the plaintiff's failure to meet the serious injury requirement set forth by the Insurance Law, this court has no choice but to grant the defendant's motion and dismiss this action.

Accordingly, it is hereby:

ORDERED, that the defendants' motion for summary judgment is granted in its entirety and this action is dismissed.

ENTER,

DATED: May 11, 2007

Joseph J. Maltese
Justice of the Supreme Court