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

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

FABIOLA BRITO and **JOSE MADRIGAL,** a minor by his mother and legal guardian, **SANDRA MADRIGAL,**

Plaintiffs,

- against -

DONNA M SCHULZE, ELIZABETH REYES and **IVONNE FIGUEROA,**

Defendants.

INDEX NO.: **2005-12985**

MOTION SEQ. NO.: 001 - CASEDISP
ORIG. MOTION DATE: 03/07/07

MOTION SEQ. NO.: 002 - CASEDISP
ORIG. MOTION DATE: 03/07/07

FINAL SUBMIT DATE: 06/20/07

UPON the following papers numbered 1 to 36 read on these Motions
- Defendants REYES and FIGUEROA's Motion (Pages 1-15 & Exhibits A-G);
- Plaintiff's Opposition (Pages 16-20);
- Defendants REYES and FIGUEROA's Reply (Pages 21-30);
- Defendant SCHULZE's Motion (Pages 31-36 & Exhibits A-G);

it is,

ORDERED, that the application of Defendants REYES and FIGUEROA is hereby granted in all respects; and the unopposed application of Defendant SCHULZE is hereby granted in all respects.

Defendants REYES and FIGUEROA move this Court for an Order:
1. Pursuant to CPLR 3126, precluding Plaintiff MADRIGAL from offering testimony at trial of this action, and dismissing Plaintiff MADRIGAL's Complaint in its entirety; and
2. Pursuant to CPLR 3212, granting Summary Judgment to Defendants REYES and FIGUEROA in the above-captioned action and dismissing Plaintiffs' Complaint as against these Defendants, upon the grounds that no triable issue of fact exists and that as a matter of law Plaintiff BRITO has not sustained a "serious injury' as required by §§ 5102 and 5104 of the Insurance Law of the State of New York; and
3. Dismissing the Cross-Claim of Defendant SCHULZE as against Defendants REYES and FIGUEROA.

Defendant SCHULZE moves this Court for an Order dismissing the Complaint of Plaintiff MADRIGAL, on the grounds that he has not complied with the Order of the Court, and further dismissing the Complaint of Plaintiff BRITO, on the grounds that she has not sustained a "serious injury" as defined in the Insurance Law of the State of New York.

This action arises from claims to recover monetary damages for personal injuries allegedly sustained by Plaintiffs as the result of a motor vehicle accident that occurred on June 27, 2004, at Middle Road at or near its intersection with Ocean Avenue, in the Town f Islip, County of Suffolk, State of New York.

As to that part of the within Motions regarding precluding Plaintiff MADRIGAL from offering testimony

at trial of this action, and dismissing Plaintiff MADRIGAL's Complaint in its entirety on the grounds that he has not complied with the Order of the Court, or otherwise, it is noted that Counsel for Plaintiffs affirms to this Court, in his opposition to the within Motions generally, that his office has not been able to elicit the cooperation of said Plaintiff, who has left the state, and that he cannot therefore put forth a legitimate defense regarding this portion of the Motions. The portion of the Complaint alleged on behalf of Plaintiff MADRIGAL must therefore be dismissed.

As to that part of the within Motion regarding Summary Judgment against Plaintiff BRITO, 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 [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, 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*).

Regarding 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 [1982]). The Plaintiff must demonstrate not only the extent or degree of limitation, but also its duration (***Beckett v Conte***, 176 AD2d 774 [1991], *app. Den.* 79 NY2d 753). The duration of the injury must be more than "fleeting" (***Partlow v Meehan***, 155 AD2d 647 [1989], *lv. App. Dis.* 76 NY2d 770). The term "consequential" has been defined to mean important or significant (***Kordana v Pomelitto***, 121 AD2d 783 [1986], *app. Dis.* 68 NY2d 848). A "permanent loss" of use of a body organ, member, function or system must be total (***Oberly v Bangs Ambulance, Inc***, 96 NY2d 295 [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 [2002]; *rearg den* ***Manzano v O'Neil***, 98 NY2d 728).

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 their usual and customary daily activities for not less than 90 days during the 180 days immediately following occurrence of the injury or impairment. In order to prosecute a claim for serious injury pursuant to this category under Insurance Law § 5102(d), Plaintiff is 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 [1992] (Plaintiff must prove 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 [1 Dpt 1998]).

Plaintiff must demonstrate that the motor vehicle accident prevented her from performing a substantial part of her usual and customary daily routine for 90 out of the 180 days immediately following the accident (*see:* ***Pierre v Nanton***, 279 AD2d 621 [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 [2 Dpt 1997]. Furthermore, in order to sustain a claim for serious injury, Plaintiff is required to establish "competent proof connecting the condition to the accident" (***Rose v Furgerson***, 281 AD2d 857 [3 Dpt 2001]; *see also* ***Ceglian v Chan***, 283 AD2d 536 [2 Dpt 2001] (holding that objective proof is required that the subject accident was the cause of the disc injuries).

As pointed out by Counsel for Defendants REYES and FIGUEROA: Plaintiff BRITO presented for an independent orthopedic medical examination by S. Farkas, MD, on June 20, 2006, a copy of the Report therefrom being attached to the first Motion herein; she reported to said doctor that she did not seek emergency room treatment following the accident and that she was unemployed at the time of said accident; Dr. Farkas found, as to lumbar spine, she showed no spasm or crepitus to palpation, she could forward flex to 95 degrees (90 being normal), lateral bending was 30 degrees (which is normal), reflexes were normal and straight leg testing was negative, she sits and bends forward to remove shoes without indication of discomfort, Dr. Farkas found, as to cervical spine, left and right rotation was 80 degrees (70 being normal), flex and extend was 50 degrees (30 or greater being normal); and she made no complaints of pain during examination. Dr. Farkas concluded: the diagnosis was consistent with resolved cervical and lumbar sprain; not physical therapy or orthopedic treatment was reasonable, related or necessary; there is no objective evidence to indicate the need for diagnostic testing, household help, durable medical equipment, surgery or special transportation; she possesses no orthopedic disability and is capable of gainful employment. An independent radiological review by Joseph J. Macy, MD, a copy of that Report also being attached to the first Motion herein, indicated Plaintiff BRITO's films demonstrated her bones were intact, with no fractures and no findings of a spinal stenosis, and no degeneration of the lumbar discs; a slight herniation of the disc at level L5-S1 shows no evidence of any pressure seen upon the thecal sac or nerve root.

In response, Plaintiff BRITO offers no medical rebuttal. As Counsel for Defendants REYES and FIGUEROA points out, in the specific context of a Motion for Summary Judgment on the issue of "serious injury" threshold, the opponent of the Motion must establish, through competent and probative medical evidence, a *prima facie* case that she maintained a "serious injury" (*See:* ***Giaddy v Eyler***, 79 NY2d 955 [1992]; ***Tatti v Cummings***, 193 AD2d 596 [2 Dept 1993]). Therefore, Summary Judgment must be granted

to Defendants against Plaintiff BRITO, and the Complaint herein must be dismissed in its entirety.

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 REYES and FIGUEROA for an Order:

1. Precluding Plaintiff MADRIGAL from offering testimony at trial of this action, and dismissing his Complaint in its entirety; and
2. Granting Summary Judgment dismissing Plaintiffs BRITO's Complaint as against sais Defendants because she has not sustained a "serious injury' as required by Insurance Law §§ 5102 and 5104; and
3. Dismissing Defendant SCHULZE's Cross-Claim as against said Defendants;

is hereby granted in all respects, the Complaint herein is dismissed, and the action is disposed of; and it is further

ORDERED, that the application of Defendant SCHULZE for an Order dismissing the Complaint of Plaintiff MADRIGAL, and further dismissing the Complaint of Plaintiff BRITO because she has not sustained a "serious injury" as defined in Insurance Law, is hereby granted in all respects, the Complaint herein is dismissed, and the action is disposed of; and it is further

ORDERED, that Counsel for Defendants is hereby directed to serve a copy of this order, with Notice of Entry, upon all other parties, 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
August 21, 2007

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

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

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