SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY - PART 19

Present: HON. WILLIAM R. LAMARCA
Justice

Scan

CARMILE S. ZAINO,

Plaintiff,

-against-

MTA LONG ISLAND BUS AUTHORITY, METROPOLITAN SUBURBAN BUS AUTHORITY and ANGEL M. VELEZ,

Defendants.

Motion Sequence # 001
Submitted July 18, 2007

INDEX NO: 15286/05

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Defendants, MTA LONG ISLAND BUS AUTHORITY, METROPOLITAN SUBURBAN BUS AUTHORITY and ANGEL M. VELEZ (hereinafter collectively referred to as the "MTA"), move for an order, pursuant to CPLR §3212, granting them summary judgment dismissing the complaint on the ground that plaintiff, CARMILE S. ZAINO, has not satisfied the "serious injury" threshold requirement of Insurance Law §5102(d). Plaintiff opposes the motion, which is determined as follows:

This action arises out of an accident that occurred on June 6, 2005, at approximately 10:00 A.M., at the intersection of Mineola Boulevard and Third Street, in Mineola, New York. Plaintiff was a 59 year old pedestrian crossing Third Street in the cross walk while on her way to work as an Executive Creative Director at Bookspan/Doubleday located at 401 Franklin Avenue, Garden City, New York. While crossing the intersection, plaintiff alleges that she was struck from behind by a bus owned by the MTA and operated by VELEZ. The bus was apparently making a left turn from Mineola Boulevard onto Third Street. As a result of the impact, plaintiff was rendered unconscious and was taken by ambulance to Winthrop Hospital.

In the Emergency Room (ER) at Winthrop Hospital, plaintiff was treated by Alain J. Derzie, M.D. She received treatment for head trauma (concussion) and, as a result of severe scalp lacerations, she received stitches to the right side of her head. Plaintiff was also treated for left shoulder lacerations, deformity and swelling; left foot soft tissue swelling and abrasions, left distal third cuboid sprain, and possible non-displaced fracture and left ankle soft tissue trauma. MRI and CT scans were performed at the Hospital and plaintiff was discharged the same day with a soft cast for her left foot and crutches.

Four days later, on June 10, 2005, plaintiff returned to Dr. Derzie at his office where, upon examination, he removed the stitches in plaintiff's scalp. At that time, Dr. Derzie diagnosed plaintiff with a scalp laceration and mild concussion and recommended that she follow up with an orthopedist and also that she seek physical therapy. On June 13,2005, plaintiff was seen by Dorina Druckman, D.O., at Grand

Central Physical Medicine, for complaints about her neck, left foot, left shoulder and right knee. Dr. Druckman referred plaintiff for additional MRIs and x-rays.

Subsequently, on June 20, 2005, plaintiff presented to the ER at St. Vincent's Hospital with complaints of right knee pain with swelling, redness and heat. She received treatment in the ER and was released with a full leg right knee immobilizer and prescription medication.

On June 28, 2005, plaintiff went to see her primary care physician, Dorothy Lebeau, M.D., who, upon examination, advised additional x-rays and referred her to see Lester Lieberman, MD, an orthopedist. Dr. Lebeau recommended that plaintiff use a walker rather than crutches because of her left shoulder injury. On July 13, 2005, plaintiff presented to Dr. Lieberman and on July 15, 2005, MRIs of plaintiff's right knee and left foot were taken.

Thereafter, on or about August 26, 2005, at the recommendation of Dr. Lieberman, plaintiff visited Steven Sheskier, MD, an orthopedic surgeon, who, recommended an ultra sound to rule out post traumatic Morton's Neuroma, and EMG testing to rule out tarsal tunnel. At that time, Dr. Sheskier placed plaintiff's left foot in a short leg walking brace.

Plaintiff states in her affidavit that, during this entire period of time, she continued to receive physical therapy. She testified at her deposition that, as a result of this accident, she missed approximately two months from work (*Zaino Tr.*, p. 9) and, when she returned to work at the New York office of her company (rather than the Garden

City location), she reduced her hours so that she would go into work approximately three days a week for "most of all of August and sometime into September" (*Zaino Tr.*, pp. 11-12). She stated that Dr. Druckman had recommended that she stay out from work for at least another 6 to 8 weeks in addition to the two months that she had already taken off (*Zaino Tr.* pp.11-12). Plaintiff remained completely out of work until August 8, 2005 and, in mid-September, she resumed her full time duties Monday to Friday, 9:00 A.M. to 5:00 P.M. *(Zaino Tr,.*, p.15).

Plaintiff also testified that she lives in a loft apartment in Manhattan. She stated in her affidavit, that, as a result of the accident, she was completely confined to her couch for a period in excess of three (3) months since the cast, crutches, walker and knee brace did not allow her to navigate the steps to her bedroom. She stated that prior to this accident, she "had been a healthy, energetic and active individual, but this accident has had a significant negative impact on my ability to perform the simple things in life, like walking and other outdoor activities, including, gardening, fly fishing and skiing" (*Zaino Aff*, ¶31).

Notably, plaintiff also testified at her deposition that, in the summer of 2003, approximately two years prior to the date of this accident, she fell in the backyard of her upstate home and injured her left ankle and fractured her right leg (*Zaino Tr.*, pp. 111-112).

Plaintiff claims that as a result of the subject accident, she sustained, *inter alia*, a laceration to her scalp requiring 3 stitches, hair loss; fragmentation of the left tibial sesamoid at head of first metatarsal, contusion with capsular avulsion along lateral

aspect of left distal calcaneus, crush injury to left foot; Morton's Neuroma at left 3-4 webspace, a tear of posterior horn right medial meniscus, contusion and abrasion to left shoulder, cerebral concussion, and post concussion syndrome (*Motion*, Ex. "A").

Plaintiff contends in her verified bill of particulars that the injuries she sustained as a result of this accident fall within the following categories of serious injury:

> "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;"

and,

> "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" (*Motion*, Ex. "A" [Bill of Particulars] ¶19).

Notably, plaintiff does not claim that her injuries fall under any other category of Insurance Law §5102(d), including fracture or significant disfigurement. Thus, any other category of serious injury other than those alleged in plaintiff's complaint or bill of particulars, will not be considered by this Court herein (*Melino v Lauster*, 195 AD2d 653, 599 NYS2d 713 [3rd Dept. 1993], *affd* 82 NY2d 828 [C.A.1993]).

Whether plaintiff has established a "serious injury" within the meaning of Insurance Law §5102(d) is for the Court to decide in the first instance (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [C.A.1982]; *McLiverty v Urban*, 131 AD2d 449, 515 NYS2d 235 [2nd Dept. 1987]). The burden of proof on this threshold issue is

initially on the defendant to establish, as a matter of law, that the plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see, Pommels v Perez,* 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 [C.A. 2005]; *see also Grossman v Wright,* 268 AD2d 79, 707 NYS2d 233 [2nd Dept. 2000]).

Defendants are not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*Melino v Lauster, supra*). In addition, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and her submitted exhibits (*cf., Covington v Cinnirella*, 146 AD2d 565, 536 NYS2d 514 [2nd Dept. 1989]).

In support of a claim that the plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician (*see Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). However, unlike movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178, 588 NE2d 76 [C.A.1991]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v Avis Rent A Car Systems,* 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (C.A. 2002), stated that plaintiff's proof of injury must be supported by objective medical

evidence, such as sworn MRI and CT scan tests (*Toure v Avis Rent A Car Sys.*, *supra*). However, the sworn MRI and CT scan tests and reports also must also be paired with the doctor's observations during his physical examination of the plaintiff (*see, Toure v Avis Rent A Car Systems, supra*).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, in *Pommels,* the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v Perez*, *supra*).

A person bringing a claim for damages for personal injuries under the "permanent loss of use of a body organ, member, function or system" category, as in this case, must prove that the permanent loss of use is a total loss of use (*Oberly v Bangs Ambulance, Inc.,* 96 NY2d 295, 727 NYS2d 378, 751 NE2d 451 [C.A.2001]).

Further, when, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v Avis Rent A Car Systems, Inc.*, *supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also

probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares 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 Systems, Inc.*, *supra*). A minor, mild or slight limitation is, however, insignificant within the meaning of the statute (*Licari v Elliot*, *supra*; *see also Grossman v Wright*, *supra*).

Finally, to prevail under the "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", a plaintiff must again provide competent, objective medical proof causing the alleged limitations on plaintiff's daily activities (*Monk v Dupuis*, 287 AD2d 187, 734 NYS2d 684 [3rd Dept. 2001]). Plaintiff must demonstrate that he has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari v Elliott*, *supra*; *see also, Sands v Stark*, 299 AD2d 642, 749 NYS2d 334 [2nd Dept. 2002]). Unlike a claim of serious injury under "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" category, a gap or cessation in treatment is irrelevant as to whether plaintiff satisfied the 90/180 definition of serious injury (*Gomes v Ford Motor Credit Co.*, 10 Misc. 3d 900, 810 NYS2d 838 [Sup. Bronx Co. 2005]).

With these guidelines in mind, the Court now turns to the merits of the motion at hand. In support of their motion, defendants submit, *inter alia*, the affirmed report of

Patrick Dineen, MD, a board certified orthopedic surgeon, who performed an independent medical examination of the plaintiff, on November 20, 2006, the affirmed report of Sarasavani Jayaram, MD, a neurologist, who performed an independent medical examination of the plaintiff, on November 20, 2006, and the unsworn and unaffirmed MRI report of Park Avenue Radiologists, taken on July 15, 2005, of plaintiff's left foot.

The July 15, 2005 MRI report of plaintiff's left foot conclusively shows that plaintiff suffers from "subcutaneous edema" and is "otherwise unremarkable" (*Motion*, Ex."F"). Furthermore, Dr. Dineen's IME, dated November 20, 2006, concludes, in pertinent part, that plaintiff's shoulder range of motion was within normal limits, that her lumbar spine was within normal limits and was negative on all tests administered, that her feet were without swelling or scarring, with a left foot neuroma not related to the accident, and that plaintiff had a normal orthopedic evaluation of the lower back, shoulders, wrists, elbows and ankles, with evidence of maltracking of the right knee Patello Femoral. Dr. Dineen opined, based on his evaluation, that plaintiff has no need for further orthopedic care, household help, transportation or any other treatment. Based on his physical examination of the plaintiff, he found no disability or work restriction (*Motion*, Ex. "D").

Similarly, Dr. Jayaram's independent neurological review, dated November 20, 2006, also found, in pertinent part, negative findings on cervical tests, normal range of motion of cervical spine, negative findings on lumbar tests and normal range of motion of lumbar spine. Dr. Jayaram concluded that plaintiff had a normal neurological

examination, with not need of neurological care or following, with no disability or work restrictions. (*Motion*, Ex. "E").

Based on the foregoing, and based on defendants' remaining proof, including plaintiff's deposition testimony wherein she testified that, in the summer of 2003, she injured her left ankle and fractured her right leg (*Zaino Tr.*, pp. 111-113), the Court finds that defendants have made a *prima facie* showing of entitlement to summary judgment, by establishing, through competent medical evidence, that plaintiff did not sustain a "permanent loss of use of a body organ, member, function or system;" "permanent consequential limitation of use of a body organ or member;" or "significant limitation of use of a body function or system" (Insurance Law §5102[d]).

Moreover, while not alleged in plaintiff's complaint or bill of particulars, the evidence presented by the defendant, including the MRI report of plaintiff's left foot one (1) month and nineteen (19) days after the accident, also established that there is no evidence to substantiate plaintiff's claim of crush injury and fragmentation of the left tibial sesamoid of the left foot. Similarly, plaintiff's own deposition testimony confirms that the scar in question was located at the "upper part" of her head, "toward the center" of her head (*Zaino Tr*, pp. 48-49). Plaintiff received three stitches to the laceration on this top portion of her head "closer to the back on the right hand side" (*Zaino Tr.*, p. 49). Based on the proof presented herein, defendants have successfully established that plaintiff's scar would not be readily discernible by an individual looking at the plaintiff and, therefore, plaintiff's injury can not be considered disfiguring or significant (*Caruso v Hall*, 101 AD2d 967, 477 NYS2d 722 [3rd Dept. 1984] *affd*, 64 NY2d 843 [C.A.1985]).

Notwithstanding the foregoing, defendants have, however, failed to establish, *prima facie* proof, that the plaintiff did not sustain a "medically determined injury or impairment of a non-permanent nature which prevent[ed] [her] from performing substantially all of the material acts which constitute [her] 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]). The requisite that a person be disabled from substantially all of their customary daily activities on a medically derived basis is a strict requirement and one that has not been satisfied in this case (*cf.*, *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A. 1992]; *Licari v. Elliott, supra*).

The record is clear that, as a result of this accident, plaintiff remained out of work for the first 60 days after the accident, and then was on an abbreviated schedule until mid-September. Moreover, she was completely confined to her couch for more than three (3) months. She did not sleep in her own bed in her loft apartment during this time. Also, the medical proof submitted herein confirms that during this time, she was equipped with cast, crutches, walker and a knee brace. Consequently, it is the judgment of the Court that defendants are unable to meet their *prima facie* burden showing, as a matter of law, that plaintiff did not sustain a serious injury within the 90/180 day category. As to the 90/180 day category, defendants' motion for summary judgment dismissal is denied without regard for the sufficiency of the opposing papers.

The burden nevertheless shifts to the plaintiff to demonstrate a triable issue of fact in the remaining categories of Insurance Law 5102(d).

In opposition to the motion, plaintiff submits, *inter alia*, the Winthrop University Hospital records; the affirmed report of plaintiff's primary care physician, Dorothy Lebeau, MD, who examined the plaintiff on June 28, 2005, the sworn report of Dorina Druckman, D.O., a physician at Grand Central Physical Medicine and Rehabilitation, who examined the plaintiff on June 24, 2005, the ER records at St. Vincent's Hospital, dated June 20, 2005, the sworn/affirmed MRI reports of Marc Liebeskind, M.D., dated July 15, 2005, of plaintiff's right knee and left foot, the affirmation of Steven Sheskier, MD, an orthopedic surgeon, together with certified copies of his records, the unsworn/ unaffirmed CT scan of plaintiff's lower extremities, dated August 30, 2005, the unsworn/ unaffirmed ultrasound report of the left forefoot, performed on September 9, 2003; the sworn/affirmed report of David J. Antell, DO, a plastic surgeon who examined the plaintiff on April 22, 2007 for an evaluation of her scars, as well as plaintiff's own affidavit of merit.

To the extent that the plaintiff relies on her Winthrop University Hospital records, the ER records from St. Vincent's Hospital, CT scans of her lower extremities, and her ultrasound report of her left forefoot, these submissions are without any probative value in opposing the defendants' motion since they are either uncertified (*Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2nd Dept. 2006]), or unaffirmed (*Grasso v Angerami*, *supra*; *Bycinthe v Kombos*, 29 AD3d 845, 815 NYS2d 693 [2nd Dept. 2006]; *Pagano v Kingsbury*, *supra*).

Plaintiff has also submitted an undated affirmation of Dr. Steven Sheskier in opposition to defendants' motion. In his affirmation, Dr. Sheskier indicates, in pertinent part, as follows:

> 11. On August 26, 2005, I performed my initial evaluation of Ms. Zaino who has complained of and had persistent pain and swelling, particularly of the lateral aspect of her left foot, with numbness and dysesthesias shooting into her second and third toes. My examination revealed that there was decreased sensation in the second and third toes, positive Tinel over her tarsal tunnel, pain at the 2-3 web and tender over the anterior process of the calcaneocuboid joint. I recommended an Ultrasound to rule out posttraumatic Morton's Neuroma and EMG nerve conduction test as there is also an EMG nerve conduction test to rule out a tarsal tunnel, and placed her in a short-leg walking brace, since there was a possibility of a calcanecuboid injury.
>
> 12. Upon further examination of her left foot on October 21, 2005, there was continued swelling and pain in the heel area. The diagnosis is 3-4 webspace Morton's neuroma found on sonogram and contusion of the heel with CT positive for capsular avulsion, fragmentation and tibial sesamoid with subcortical cyst of the tibial sesamoid with subcortical cyst of the tibial sesamoid.***
>
> 13. On December 2, 2005 at a follow-up visit, I examined Ms. Zaino and she persisted with neuritis in her left foot secondary to crush injury, particularly in the 3-4 webspace. I prescribed physical therapy with modalities, range of motion of the toes and massage and Achilles stretching.

(*Aff. In Opp. Exhibit* "J")

Although Dr. Sheskier claims that plaintiff sustained a fragmentation of the tibial sesamoid pursuant to a CT of the lower extremities, no affirmed copies of this CT report has been offered. Moreover, it is also clear from Dr. Sheskier's report that he did not

personally review those diagnostic tests and that his diagnosis was based upon the unsworn reports of other doctors which is clearly improper (*Williams v Hughes*, 256 AD2d 461, 682 NYS2d 401 [2nd Dept. 1998]; *Sammut v Davis*, 16 AD3d 658, 792 NYS2d 192 [2nd Dept. 2005]; *Garces v YIP*, 16 AD3d 375, 790 NYS2d 712 [2nd Dept. 2005]; *Bycinthe v Kombes, supra*). Thus, Dr. Sheskier's affirmation is less than probative and insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury (*Kauderer v Penta*, 261 AD2d 365, 689 NYS2d 190 [2nd Dept. 1999]).

Plaintiff also presents the sworn medical report of Dr. Dorina Druckman, dated June 24, 2005, who notes, in pertinent part, as follows:

> The following preliminary diagnosis have been made and will be updated periodically:
>
> - 847.0 Cervical Sprain/Strain
> - 847.2 Lumbar Sprain/Strain
> - 719.41 Left Shoulder Joint Pain
> - 923.00 Shoulder Contusion
> - 719.07 Foot Effusion
> - 845.1 Foot Sprain
> - 719.46 Pain in Knee
> - 719.06 Effusion of Knee

As stated above, in order to establish a serious injury, there must be objective evidence of a loss of range of motion or an objective qualitative assessment of plaintiff's physical condition comparing "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, supra).* Moreover, it is well settled that sprains/strains, such as those documented by Dr. Druckman, do not constitute serious injuries as contemplated by the statute (*Castaldo v Migliore*, 291 AD2d 526, 737 NYS2d 862 [2nd Dept. 2002]). While plaintiff,

in opposition to the motion, submits medical evidence that she sustained vertebral sprains/strains resulting in pain, nowhere does plaintiff demonstrate that the claimed loss of use of her cervical and lumbar spine is "total," (*Oberly v Bangs Ambulance*, *supra*) or that the sprains/strains are anything other than a minor, mild or slight limitation (*Licari v Elliot*, *supra*).

In opposing defendants' motion, plaintiff also offers the affirmed report of plaintiff's primary care physician, Dr. Dorothy Lebeau, who examined the plaintiff on June 28, 2005, less than 1 month from date of plaintiff's accident. Dr. Lebeau's report, notes, in pertinent part, as follows:

> Musculoskeletal
> Comments: left foot with mild tenderness over D2 and D3 metatarsal areas withot [sic] pinpoint pain. Mild dorsal edema. Right knee without edema or crepitus.
>
> Skin
> Inspection: scalp without erythema or laceration
> ***
> Plan: will refer for an additional foot x-ray and follow up with orthopedist - needs full physical here. May do better with a roller than crutches based on her shoulder injury.

(*Aff in Opp, Ex. "C"*).

Plaintiff also offers the report of Dr. David J. Antell, a plastic surgeon, who examined the plaintiff, on April 22, 2007, for a scar evaluation. Dr. Antell's report notes, in pertinent part, that although "the lacerations and abrasions do not require any further medical treatment at this time...the scarring is permanent and does require proper care and maintenance, sunblock and skin care to the traumatized area, so the condition does

not worsen" (*Aff in Opp.*, Ex. "N"). Plaintiff's only claim in the bill of particulars was for a scar on her scalp; no description of a shoulder scar was alleged in the bill of particulars. In addition, there is no mention in any of the doctors' reports, including Dr. Lebeau's report, that plaintiff suffered hair loss as a result of this accident. Notwithstanding, scarring with hair loss does not constitute significant disfigurement (*Smith v Mouwad*, 91 AD2d 700, 457 NYS2d 608 [3rd Dept. 1982]).

After a careful reading of the submissions herein, plaintiff has not shown, through admissible medical proof, that she sustained a serious injury to her head, left foot, right knee or left shoulder. Moreover, it is undisputed that she sustained a prior injury to her left ankle and right leg in the summer of 2003. Plaintiff's doctors fail to indicate their awareness that plaintiff sustained these prior injuries (*Bennett v Genas*, 27 AD3d 601, 813 NYS2d 446 [2nd Dept. 2006]). Therefore, their medical opinions that the subject accident caused the injuries observed by them are speculative (*Bennett v Genas, supra*; *Allyn v Hanley*, 2 AD3d 470, 767 NYS2d 885 [2nd Dept. 2003]).

Finally, plaintiff also submits her own self-serving affidavit which, in the absence of otherwise admissible objective medical evidence is insufficient to establish a serious injury within the meaning of the statute (*Glielmi v Banner*, 254 AD2d 255, 678 NYS2d 138 [2nd Dept. 1998]; *Rum v Pam Transport, Inc.*, 250 AD2d 751, 673 NYS2d 178 [2nd Dept. 1998]).

Therefore, it is the judgment of the Court that plaintiff's proof is insufficient to defeat defendants' motion for summary judgment and dismissal of plaintiff's claim of serious injury under the categories of permanent loss of use of a body organ, member,

function or system, permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system (*Grasso v Angerami*, *supra*). However, defendants' motion for summary judgment dismissing plaintiff's complaint is denied insofar as defendants have failed to make a *prima facie* showing, as a matter of law, that plaintiff did not sustain a serious injury within the 90/180 category of Insurance Law §5102(d). Accordingly, this matter will proceed to trial on this limited issue.

It is noted that if, at trial, a jury finds that the plaintiff sustained an injury within the 90/180 category of Insurance Law §5102(d), the no-fault threshold will be satisfied and the plaintiff will be permitted to recover for *all* injuries incurred as a result of the subject accident (*O'Neill v O'Neill*, 261 AD2d 459, 690 NYS2d 277[2nd Dept. 1999]; *Prieston v Massaro*, 107 AD2d 742, 484 NYS2d 104 [2nd Dept. 1985]; *Matula v Clement*, 132 AD2d 739, 517 NYS2d 100 [3rd Dept. 1987], *lv denied* 70 NY2d 610 [C.A.1987]). It is for the trier of fact to determine, in the first place, whether a serious injury has been sustained under the 90/180 category of "serious injury" law. "[A] jury's finding that the plaintiff sustained an injury within *any* of the categories set forth in Insurance Law §5102(d) satisfies the no-fault threshold, thereby *eliminating that issue* from the case and permitting the plaintiff to recovery any damages proximately caused by the accident" (*Preston v Young*, 239 AD2d 729, 657 NYS2d 499 [3rd Dept. 1997], *citing Kelley v Balasco*, 226 AD2d 880, 640 NYS2d 652 [3rd Dept. 1996]; *see also, Matula v Clement*, *supra*).

It is therefore,

ORDERED, that defendants' motion for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff has not satisfied the 90/180 category of Insurance Law §5102(d) is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 1, 2007

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