SUPREME COURT OF THE STATE OF NEW YORK **Index No.:101228/2006**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:002**

JUDITH GAMBINO,

Plaintiff

against

DECISION & ORDER

TONIANN DANIELLE, **HON. JOSEPH J. MALTESE**

Defendants

The following items were considered in the review of this motion to dismiss plaintiff's complaint.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Defendant's motion pursuant to CPLR §§ 3211 and 3212 seeking summary judgment dismissing plaintiff's complaint for her failure to meet the serious injury threshold requirement as defined in Insurance Law § 5102(d) is granted.

Facts

This action arises out of a motor vehicle accident that occurred on May 1, 2003. The undisputed facts are that defendant struck plaintiff's car from behind while the cars were traveling on Four Corners Road, approximately seventy-five (75) feet west of Romer Road on Staten Island, New York. Plaintiff described the accident in her sworn deposition. Plaintiff averred the following:

> Q. How did that impact feel; was it heavy, light, any way you can describe it?
> A. It was not light. It was–it was just like she ran into me.
> Q. As a result of the impact, did your vehicle move?
> A. I think a little bit, it did.
> Q. When you say "a little bit,"in terms of distance, can you describe it in feet, or yards or car lengths?
> A. Not that much. Just, you know, moved up.
> Q. At the time of this accident, were there any vehicles stopped ahead of your car?

A. Yes.

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Q. As a result of the impact to the rear of your vehicle, did your vehicle have contact with the car ahead of you?
A. No.

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Q. While you were out of your car, did you have an opportunity to observe the rear of your Saturn?
A. Yes.
Q. Was there any damage to the rear of your car?
A. Yes.
Q. Could you describe the damage?
A. On the back of my car is a–like one of those spoilers that go on, because her truck was so high and mine was so low. She got me there and on the bumper.
Q. On the trunk bumper?
A. No, not on the trunk. The–
Q. The spoiler which was on the trunk?
A. Yes. On the trunk and the bottom of the bumper.
Q. Was the bumper dented in or pushed in; can you describe it?
A. It was scratched, like.
Q. How about the spoiler, what was wrong with that?
A. I think that was scratched up, too.
Q. Where there any dents on the rear of the Saturn after this accident?
A. I don't remember.
Q. Did you look at the font of her car?
A. Yes.
Q. Was there any damage that you saw to the other vehicle?
A. Yes.
Q. Where was that damage?
A. All her–she had headlights and she had like chrome over them. They were all demolished. They were all on the ground.[1]

At the time of the incident neither the police, nor plaintiff called for an ambulance. Plaintiff testified at her deposition that a couple of days after the accident she sought treatment from Dr. Jacob, a chiropractor. Plaintiff further testified that her treatment with Dr. Jacob lasted approximately two and one half (2 1/2) months.

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[1] Gambino Transcript at 22-23 and 29 and 30.

In addition to the accident and injuries sustained in the current action, plaintiff sustained back and neck injuries in prior accidents.

Defendant argues that plaintiff's injuries are pre-existing and that plaintiff did not meet the serious injury threshold as defined by statute.

Discussion

Defendant seeks summary judgment on the ground that the plaintiff has not sustained a "serious injury" as defined in Insurance Law §5102(d).[2] The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories.[3] Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[4] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease,[5] that results in one of the nine serious injury threshold categories.[6]

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.[7] It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of

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[2] 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]).

[3] *Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].

[4] *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].

[5] 11 NYCRR §65-2.1[e]

[6] *See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].

[7] *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].

"serious injury."[8]

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.

In the case before this court defendant came forward with reports from independent medical exams. Defendant presented sworn affidavits from Dr. David A. Fisher, a radiologist; Dr. Maria Audrie De Jesu, a neurologist; and Dr. Jacquelin Emmanuel, an orthopedic surgeon. Each affidavit utilized objective tests and determined that plaintiff's injuries were the result of a pre-existing condition.

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.[9]. 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.[10] The plaintiff in such a situation must present objective evidence of the injury.

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.[11]

Plaintiff submits an affidavit from Dr. Jerylyn Jacob, a chiropractor, that originally treated plaintiff for the injuries sustained in this accident, as well as for those injuries that occurred in previous accidents. Dr. Jacob conducted a reevaluation of the plaintiff on December 5, 2007 that avers that plaintiff " . . . still suffers from pain in her neck, lower back, shoulders and wrists." In

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[8] *See*, e.g., *Licari v. Elliott*, 57 NY2d 230, 237.

[9] *See*, *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

[10] *See*, *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000]

[11] *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000].

addition, Dr. Jacob attempts to substantiate plaintiff's claim that she sustained additional injuries as a result of her examination at an independent medical examination conducted in May. According to Dr. Jacob's affidavit, the plaintiff resumed treatment with her on June 1, 2007. Dr. Jacob further avers that "MRI testing of Ms. Gambino's right shoulder, performed on July 27, 2007, ***reportedly*** revealed the following additional injuries: tears of the biceps tendon, subscapularis and spuraspinatus tendun." (Emphasis added) Dr. Jacob does not aver independent knowledge of the alleged additional injuries, nor does she state that she examined the MRI report in question.

In the case before the court, plaintiff began treatment with Dr. Jacob approximately a few days after the incident in question in May 2003. Plaintiff's own testimony states that her course of treatment ended approximately two and one half (2 ½) months after it began. In her deposition testimony the following exchange occurred:

> Q. After those two months, how often were you going to the office for treatments?
> A. I stopped.
> Q. Why did you stop?
> A. I wasn't getting any better.
> Q. Did you tell Dr. Jacob that?
> A. Yes.
> Q. Did she give you any advice or recommendations or anything?
> A. No, not really.
> Q. Did she refer you to any physicians?
> A. No, not really.[12]

Substantial delays between cessation of plaintiff's medical treatments post-accident and an expert examination must be explained.[13] Over four years elapsed between the end of plaintiff's treatment in approximately July 2003 her reevaluation in December 2007. Even if this court accepted plaintiff's resumption of treatment in June 2007 for new injuries nearly four years elapsed between treatment.

Dr. Jacob's affidavit does not even attempt to give any reason for this gap in treatment.

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[12] Gambino Transcrip at 44.

[13] *Grossman*, 268 AD2d at 84.

In *Pommells v. Perez*, the Appellate Division, First Department upheld a trial court's summary judgment decision where plaintiff " . . . fail[ed] to explain a nearly four-year gap in treatment." The Appellate Division, reasoned that this gap " . . . renders any conclusion as to causation speculative."[14] This holding was subsequently affirmed by the Court of Appeals.[15]

Furthermore, plaintiff offers no objective evidence that would indicate she was prevented 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 . . ."[16] The mere parroting of language tailored to meet statutory requirements is insufficient.[17] 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.

Conclusion

The defendant made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of *Insurance Law § 5102(d).*[18] The defendant submitted the affirmations of an orthopedist, neurologist and radiologist who examined the plaintiff's MRI reports taken after the accident, and the affirmations of the same set of physicians who examined the plaintiff approximately 4 years after the accident, all of whom concluded that the plaintiff's injuries were pre-existing. In addition, the defendant submitted the transcript of the plaintiff's deposition testimony which, in its totality, indicated that the plaintiff had not sustained a serious injury.[19]

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[14] 4 AD2d 101, [1st Dep't. 2004]

[15] *Pommells v. Perez*, 4 AD3d 101, aff'd, 4 NY3d 566 [2005]

[16] Insurance Law *§5102* [d].

[17] *Id.*

[18] *See Toure v Avis Rent A Car Sys.,* 98 N.Y.2d 345 [2002]*; Gaddy v Eyler,* 79 N.Y.2d 955 [1992].

[19] S*ee Hodges v Jones,* 238 A.D.2d 962, [1997].

The plaintiff's opposition papers were insufficient to raise a triable issue of fact. They appear to have been based upon the plaintiff's subjective complaints of pain[20], and merely tailored to meet the statutory requirements (*see Giannakis v Paschilidou, 212 A.D.2d 502, 622 N.Y.S.2d 112*; *Powell v Hurdle, 214 A.D.2d 720, 625 N.Y.S.2d 634*).

Moreover, the plaintiff failed to submit any competent medical evidence to support a claim that he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days following the subject accident.[21]

Accordingly, it is hereby:

ORDERED, that defendants's motion for summary judgment is granted and the plaintiff's complaint is dismissed.

ENTER,

DATED: February 22, 2008

Joseph J. Maltese
Justice of the Supreme Court

[20] *See Scheer v Koubek,* 70 N.Y.2d 678, [1987]; *Barrett v Howland,* 202 A.D.2d 383, [1994]; *LeBrun v Joyner,* 195 A.D.2d 502, [1993]; *McHaffie v Antieri,* 190 A.D.2d 780, [1993].

[21] S*ee Sainte-Aime v Ho,* 274 A.D.2d 569 [2000]; *Jackson v New York City Tr. Auth.,* 273 A.D.2d 200 [2000]; *Greene v Miranda,* 272 A.D.2d 441 [2000]; *Arshad v Gomer,* 268 A.D.2d 450 [2000]; *Bennett v Reed,* 263 A.D.2d 800 [1999]; *DiNunzio v County of Suffolk,* 256 A.D.2d 498 [1998].