At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 14th day of May 2008.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

RONALD FELDMAN and SHELLI FELDMAN,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. 32333/06

MOHAMMED S. MOHAMMED, EAST VERRAZANO LIMOUSINE, INC., and YEHIEL HABSHUSH,

Defendants.

The following papers numbered 1 to 4 read on this motion: Papers Numbered

Notice of Motion/ Affidavits (Affirmations) Annexed	1
Affidavits (Affirmations) In Support	2
Affirmations in Opposition	3
Reply Affirmations	4

Plaintiffs RONALD FELDMAN and SHELLI FELDMAN claim that on October 26, 2003, the vehicle that they were traveling in was involved in an three-car accident at the intersection of Ocean Parkway and Avenue S in Brooklyn, New York. The other vehicles allegedly involved in the accident were owned and operated by defendants MOHAMMED S. MOHAMMED, EAST VERRAZANO LIMOUSINE, INC., and YEHIEL HABSHUSH. Defendants MOHAMMED S. MOHAMMED (hereinafter MOHAMMED), and EAST VERRAZANO LIMOUSINE, INC (hereinafter EAST) move this Court for summary judgment and dismissal of the instant action, pursuant to CPLR § 3212, on the grounds that the plaintiffs have not met the "threshold" for a "serious injury" as defined in New York Insurance Law § 5102 (d). Defendant YEHIEL HABSHUSH submits and affirmation in support of the co-defendants' motion.

Plaintiff RONALD FELDMAN, in his bill of particulars, claims that as a result of the accident, he sustained "serious injuries" within the meaning and contemplation of the Insurance Law, including "Posterior disc herniation at L1-L2 with ventral thecal sac impression; Posterior disc herniation at L2-L3 with foraminal narrowing; Posterior disc herniation at L3-L4 with foraminal narrowing; Posterior disc herniation at L4-L5 with foraminal narrowing; Posterior disc herniation at L5-S1 with foraminal narrowing, adjacent osseous vertebral edema as well as ventral thecal sac impression; Intervertebral disc space narrowing at L1-L2; Intervertebral disc space narrowing at L4-S1; Facet arthretic changes at L4-S1 disc; Lumbar Spine myofascial derangement; and Lumbar spine sprain/strain". Plaintiff SHELLI FELDMAN, in her bill of particulars, claims that as a result of the accident, she also sustained "serious injuries" within the meaning and contemplation of the Insurance Law, including "Disc herniation at C3-C4; Central

disc herniation at C4-C5 effaces the anterior thecal sac and abuts upon and mildly deforms the spinal cord; Dissication of C4-C5 intervertebral disc; Dissication of C5-C6 intervertebral disc; Dissication of C6-C7 intervertebral disc; Cervical radiculopathy resulting in neuropathic pain syndrome; Cervical strain; Posterior disc herniation at L1-L2 with ventral thecal sac impression; Posterior disc herniation at L2-L3 with ventral thecal sac impression strain/sprain"; Posterior disc herniation at L3-L4 with ventral thecal sac impression; L1-L2 diminished disc space height with anterior disc extension and anterior spurring, as well as adjacent osseous vertebral edema; L4-L5 diminished disc space height with posterior disc herniation extending to compress the thecal sac and result in central canal stenosis; L5-S1 diminished disc space height with posterior disc herniation extending to narrow the foramina; Narrowing of the left L1-L2 disc foramen is noted; Diffuse disc dessication of the lumbar spine; Scoliosis of the lumbar spine; Lumbar-sacral radiculopathy in a neuropathic pain syndrome; Lumbar-sacral sprain; Brachial neuritis/radiculitis; Thoracic radiculopathy".

Summary judgment standard

The proponent of 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. *See* Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649 (3d Dept 1981); Greenburg v Manlon Realty, 43 AD2d 968, 969 (2d Dept 1974); Winegrad v New York University Medical Center, 64 NY2d 851

(1985).

CPLR § 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dept 1990). Summary judgment shall be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. Friends of Animals, Inc., v Associated Fur Mfrs., 46 NY2d 1065 (1979).

Discussion

In support of their motion, defendants MOHAMMED and EAST submit medical reports/affirmations from a neurologist that examined each of the plaintiffs. Dr. Alla Mesh, examined plaintiff RONALD FELDMAN on September 5, 2007 and concluded that the plaintiff had a normal neurological evaluation, that he did not demonstrate any objective neurological disability, and concluded that "he is neurologically stable to engage in full activities of daily living as well as active employment. There is no permanency or residuals." In Dr. Mesh's report, he states that he conducted a physical examination of the plaintiff and when comparing the plaintiff's range of motion with the "normal" range of motion, he found that the plaintiff had full range of motion in his lumbar spine with no spasm upon palpation. Dr. Mesh also noted that plaintiff RONALD FELDMAN had a normal sensory response to pinprick, vibration and proprioception; that his reflexes were symmetrically brisk, equal and active; that he had a normal heel/toe pattern gait with associated arm swing; that there were no cerebral findings or in-

coordination; that the "Babinski response" was negative; that straight leg tests were normal to 90 degrees bilaterally; and that overall his diagnosis was of a normal neurological exam.

Dr. Mesh also conducted an examination of plaintiff SHELLI FELDMAN on September 5, 2007. Upon the completion of his exam, Dr. Mesh concluded that the plaintiff had a normal neurological evaluation, that she did not demonstrate any objective neurological disability, and concluded that "she is neurologically stable to engage in full activities of daily living as well as active employment. There is no permanency or residuals." In Dr. Mesh's report, he states that he conducted a physical examination of the plaintiff and when comparing the plaintiff's range of motion with the "normal" range of motion, found that the plaintiff had full range of motion in her cervical spine and lumbar spine with no spasm upon palpation. He similarly found no tenderness to palpation in the plaintiff's thoracic spine. Dr. Mesh noted that plaintiff SHELLI FELDMAN had a normal sensory response to pinprick, vibration and proprioception; that her reflexes were symmetrically brisk, equal and active; that she had a normal heel/toe pattern gait with associated arm swing; that there were no cerebral findings or in-coordination; that the "Babinski response" was negative; that straight leg tests were normal to 90 degrees bilaterally; and that overall his diagnosis was of a normal neurological exam.

The evidence proffered by the defendants is sufficient for proving as a matter of law that neither plaintiff RONALD FELDMAN, nor plaintiff SHELLI FELDMAN has sustained a "serious injury" pursuant to Insurance Law § 5102 (d), and as such, the burden shifts to the plaintiffs to demonstrate, by the submission of objective proof of the nature and degree of the injury, that either or both plaintiffs did sustain such an injury, or that there are questions of fact as to whether the purported injuries were serious. "The affirmed medical report of the defendants'

examining physician, who examined the plaintiff approximately 1½ years after the motor vehicle accident and opined that he had no disability, was sufficient to satisfy the defendants' burden, in a personal injury case arising from an accident, of making a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of the No-Fault Law; the report was based on the physician's findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spines and shoulders, lack of tenderness or muscle spasm, and the fact that the neurological examination was normal and other tests showed no abnormalities", Willis v. New York City Transit Authority, 14 A.D.3d 696, 789 N.Y.S.2d 223 (2nd Dept., 2005).

In opposition to the defendants' motion, the plaintiffs submit an attorney's affirmation, affidavits from each plaintiff, an affirmation from Dr. David H. Delman on behalf of plaintiff RONALD FELDMAN, and an affirmation from Dr. Ragna C. Krishna on behalf of plaintiff SHELLI FELDMAN. Initially, it should be noted that self-serving statements contained in the plaintiff's attorney's affirmation and in the plaintiff's individual affidavits have very little probative value and will not typically serve as evidence that a plaintiff has sustained a serious injury. "Evidence consisting of counsel's affirmation, a copy of plaintiff's deposition testimony, a copy of an accident report, and photographs of the damaged vehicle, were insufficient to raise a triable issue of fact as to whether plaintiff's injuries were serious within the meaning of the No-Fault Law", Oliva v. Gross, 29 A.D.3d 551, 816 N.Y.S.2d 110, (2nd Dept. 2006).

In Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 746 N.Y.S.2d 865, 774 N.E.2d 1197, (2002), the Court clarified the level of proof necessary to establish a prima facie case of serious injury. The Court ruled that, under the "significant limitation" and "permanent consequential limitation" categories, proof of a numeric percentage or degree of loss

of range of motion is not the only permissible way to establish the requisite limitation of use. An injured party may also establish "serious injury" by an expert's 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. Therefore, if the objective evidence establishes that the affected body part is not functioning as it did before the accident, a limitation of use or a functional impairment is present. Of course, the plaintiff must also show that the limitation is not "minor, mild or slight" in order to meet the requirement of "significant" or "consequential." The Court noted that the "consequential" limitation category required proof that the limitation is permanent, while the "significant" limitation category has no requirement of permanency.

In his affirmation on behalf of plaintiff RONALD FELDMAN, Dr. Delman states that the plaintiff first came to him one day after the accident occurred complaining of severe lower back pain. Dr. Delman relates that he performed a complete physical examination of the plaintiff, including range of motion testing and recommended a treatment plan consisting of physical therapy, massage therapy, electrical stimulation and heat packs. Dr. Delman claims that the plaintiff received treatment at a frequency of 3-4 times per week for approximately three months, and continued thereafter for another five months at a reduced frequency of two times per week. Dr. Delman states that he referred the plaintiff for MRI testing and that he reviewed the MRI "reports" and diagnosed the plaintiff with disc herniations at the L1-2, L2-3, L3-4, L4-5, and L5-S1 levels. Dr. Delman further states that after the plaintiff's initial course of treatment was completed, he concluded that the plaintiff's condition was "largely static", that further treatment was providing little improvement, and that the plaintiff had reached maximum medical

improvement.

It appears that thereafter the plaintiff neither sought nor received any further treatment for a period of more than three years. Despite the fact that Dr. Delman states that he tested the plaintiff's range of motion again at an exam conducted on November 5, 2007, in his affirmation, it is unclear whether the results listed were from his initial exam, or from the exam of November 5, 2007, or from some other exam. Regardless of which test results are referred to in the doctor's affirmation, it is clear that *at least* one set of range of motion test results is missing. In addition, no proof has been offered to verify or establish that the plaintiff actually received any treatment from Dr. Delman. Neither Dr. Delman nor the plaintiff offer any records of treatment or test results in opposition to the motion. With regard to the diagnosis of herniated discs, there is no mention or indication that Dr. Delman personally reviewed the MRI films. Indeed, it appears that in forming his diagnoses and conclusions, Dr. Delman improperly relied upon the diagnosis of the radiologist that originally interpreted the MRI films. It should be noted that conspicuously absent from plaintiff's papers is a copy of the MRI report, much less an affirmation from the radiologist that interpreted it. In fact, aside from Dr. Delman's affirmation, no other medical reports, records or affirmations have been offered for the Court to consider. "The affirmation of plaintiff's physician, which improperly relied upon unattached and unsworn records and reports by other medical providers and failed to set forth objective medical tests utilized, was insufficient to raise a fact issue as to whether the plaintiff sustained a "serious injury" under the No-Fault Law as result of a motor vehicle accident, as required to preclude summary judgment in a personal injury action", Springer v. Arthurs, 22 A.D.3d 829, 803 N.Y.S.2d 170 (2nd Dept. 2005). See also Shay v. Jerkins, 263 A.D.2d 475, 692 N.Y.S.2d 730, (2nd Dept., 1999), wherein the

Court ruled that the "evidence offered was insufficient to establish that the plaintiff sustained a serious injury for purposes of no-fault law's threshold for tort recovery, where the orthopedist failed to indicate in his affidavit that he reviewed the actual magnetic resonance imaging test (MRI) films upon which his opinion was allegedly based, and failed to attach copy of sworn MRI report to his affidavit."

In opposition to the motion, plaintiff SHELLI FELDMAN, offers the affirmation of her treating neurologist, Dr. Ranga C. Krishna. In his affirmation, Dr. Krishna states that he saw the plaintiff on for the first time on November 25, 2003, and then again on October25, 2007, and January 3, 2008. He also states that he previously treated this plaintiff for injuries sustained in an accident that occurred in April of 1999. Dr. Krishna relates that the plaintiff treated with a chiropractor prior to her first visit at his office, and that overall she treated with the chiropractor for a period of twenty-five months. Dr. Krishna also relates that the plaintiff was referred for MRI's and that the results of the MRI's showed that the plaintiff sustained herniated discs at the C4-5, L1-2, L2-3, L3-4, L4-5, and L5-S1 levels. Dr. Krishna then states that he compared the recent MRI findings with the MRI findings from the plaintiff's 1999 accident and diagnosed the plaintiff with an exacerbation of her prior injuries. Dr. Krishna also claims that "throughout the course of Mrs. Feldman's treatment, objective postural, neurological and range of motion testing were conducted". However, his affirmation only lists the results of his tests from October 25, 2007 and fails to provide the results from any other testing that was performed "throughout the course" of the plaintiff's treatment. Dr. Krishna statement that the plaintiff received twenty-five months of chiropractic treatment is unsubstantiated as no affirmation, narrative report or medical records from the chiropractor are provided for the Court to review. Further undermining Dr.

Krishna's statement that the plaintiff received twenty five months of chiropractic treatment is the plaintiff's own deposition testimony wherein she stated that she treated with the chiropractor 2-3 times per week for approximately 2-3 months. Based on the plaintiff's testimony, there is a gap in treatment of approximately three years. Dr. Krishna's opinion that "it appears" that the plaintiff reached maximum medical improvement and that any further treatment would be palliative in nature is unpersuasive, particularly in light of the fact that Dr. Krishna only saw the plaintiff on three occasions. Without further proof, in admissible form, the plaintiff's gap in treatment remains unexplained. See generally, Pommells v. Perez, 4 NY3d 566, 830 N.E.2d 278, 797 NYS2d 380, (Court of Appeals, 2005).

In Colon v. Kempner, 20 A.D.3d 372, 799 N.Y.S.2d 213, (1st Dept. 2005), the Court held that an "automobile passenger did not suffer from a serious injury under the No-Fault Law, where there was three-year unexplained gap in medical treatment for her back pain, her physician stated that further treatment would include therapy, medication, and medical follow-up for symptomatic relief, and the passenger said she took one pain pill a day and still had pain, but had not received any treatment following massage and heat therapy, which ended five months after accident." See also Neugebauer v. Gill, 19 A.D.3d 567, 797 N.Y.S.2d 541, (2nd Dept. 2005), wherein the Court held that the personal injury plaintiff failed to prove that she suffered the requisite "serious injury" within the meaning of the no-fault statute's provision governing the threshold for tort recovery; the plaintiff failed to elicit any testimony from her treating physicians, or introduce medical records in admissible form, establishing what treatment she received for her alleged injuries in the more than four-year period between the date of her accident and the examination conducted by her expert, and she failed to adequately explain the

four-year gap in medical treatment."

With regard to the diagnosis of herniated discs, there is no mention or indication that Dr. Krishna personally reviewed the MRI films. Indeed, it appears that in forming his diagnoses and conclusions, Dr. Krishna improperly relied upon the diagnosis of the radiologist that originally interpreted the MRI films. It should be noted that conspicuously absent from plaintiff's papers is a copy of the MRI report, much less an affirmation from the radiologist that interpreted it. In fact, similar to the opposition offered in support of her husband's claim, aside from the affirmation of Dr. Krishna, no other medical reports, records or affirmations have been offered for the Court to consider. "The affirmation of plaintiff's physician, which improperly relied upon unattached and unsworn records and reports by other medical providers and failed to set forth objective medical tests utilized, was insufficient to raise a fact issue as to whether the plaintiff sustained a "serious injury" under the No-Fault Law as result of a motor vehicle accident, as required to preclude summary judgment in a personal injury action", Springer v. Arthurs, 22 A.D.3d 829, 803 N.Y.S.2d 170 (2nd Dept. 2005). See also Shay v. Jerkins, 263 A.D.2d 475, 692 N.Y.S.2d 730, (2nd Dept., 1999), wherein the Court ruled that the "evidence offered was insufficient to establish that the plaintiff sustained a serious injury for purposes of no-fault law's threshold for tort recovery, where the orthopedist failed to indicate in his affidavit that he reviewed the actual magnetic resonance imaging test (MRI) films upon which his opinion was allegedly based, and failed to attach copy of sworn MRI report to his affidavit."

It should also be noted, that based upon the plaintiff's depositions, wherein they both testified that they were only absent from work for a period of two days each, sufficiently eliminates any argument that either of the plaintiffs sustained 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 activities for not less that 90 days during the 180 days immediately following the occurrence of the injury or impairment".

Based upon the foregoing, the plaintiffs have failed to meet their burden and establish that either plaintiff RONALD FELDMAN or plaintiff SHELLI FELDMAN sustained a "serious injury" as defined and contemplated in Insurance Law § 5102 (d), and as such, the defendants' motions to dismiss the plaintiff's case must be granted.

Conclusion

Accordingly, it is

ORDERED, that the defendants' motion for summary judgement and dismissal of the instant action, pursuant to CPLR § 3212, on the grounds that the plaintiffs have not met the "threshold" for a "serious injury" as defined in New York Insurance Law § 5102 (d), is granted.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE
J. S. C.

HON. BERNADETTE BAYNE