

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

<p>JOSE CRUZ-MALTEZ and VILMA AYALA-CRUZ,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">- against -</p> <p>JOSE FRANCISCO BARRERA and ENTERPRISE LEASING CO.,</p> <p style="text-align: right;">Defendants.</p>
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TRIAL / IAS PART 43
NASSAU COUNTY

Index No. 20564/00

Motion Sequence No. 02

The following papers having been read on this motion:

- Notice of Motion, Affidavits, & Exhibits _____
- Answering Affidavits _____
- Replying Affidavits _____
- Briefs: Plaintiff's / Petitioner's _____
- Defendant's / Respondent's _____

This case is an action for personal injuries arising out of a motor vehicle accident. The plaintiff claims neck and lower back injury occurred when the defendant vehicle operator suddenly made a left turn and struck the plaintiff's vehicle on April 30, 2000 on Bennett Avenue in Hempstead. The defense now moves this Court for an order granting summary judgment to the defense on the grounds that the plaintiff Jose Cruz-Maltez failed to establish a prima facie case of a serious injury within the meaning of Insurance Law § 5102(d). The defense also moves this Court for an order dismissing the complaint of the plaintiff Vilma Ayala Cruz for failing to comply with Court orders for discovery.

The evidence submitted by the defense established, prima facie, that the plaintiff had not sustained a serious injury within the meaning of Insurance Law § 5102(d) (see, *Licari v. Elliott*, 57 N.Y.2d 230[1982]). Once the defense establishes a prima facie entitlement to judgment as matter of law by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), the burden of proof shifts to the plaintiff to come forward with sufficient admissible evidence to create an issue of fact to demonstrate a serious injury(see, *Gaddy v Eycler*, 79 NY2d 955[1992]).

Submitted in opposition to the motion is the affidavit of the plaintiff, a report from Bridge Radiology, P.C.; a report from Xcalibur Chiropractic, P.C.; a report from Pelham Medical Associates, P.C. and a report from Complete Medical Care Services of NY, P.C.

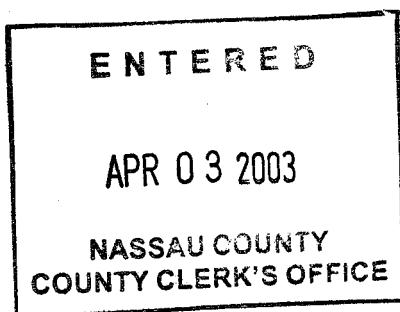
The only medical records submitted in admissible form that will be considered by the court is the report from Complete Medical Care Services of NY, P.C. which is affirmed by Aric Hausknecht, M.D. in accordance with the rule set forth in CPLR § 2106. However, Dr. Hausknecht's report improperly relies in part on the unsworn medical records(see, *Rozengauz v Ha*, 280 AD2d 37 ([2nd Dept 2001])). A bulging or herniated disc may constitute a serious injury within the meaning of Insurance Law § 5102(d), provided the plaintiff submits objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration(see, *Monette v. Keller*, 281 A.D.2d 523; *Duldulao v. City of New York*, 284 A.D.2d 296). Here Dr. Hausknecht's report found that a straight leg raising test was negative, a spurling maneuver was negative, no paraspinal muscular spasm was found and the plaintiff had full range of motion in all joints tested.

Further, plaintiff's subjective complaints of pain and assertions that his complaints of pain prevented him from working in his profession as a painter are , without objective supporting evidence, is insufficient to create a genuine issue of fact warranting a trial on the "90/180" day threshold (see, *Honey v Tombstone Pizza Corp.*, 279 AD2d 609; *Watt v Eastrn Investigative Bureau, Inc.*, 273 AD2d 226).

Accordingly, the motion by the defendants for summary judgment pursuant to Insurance Law 5102(d) dismissing plaintiff's complaint for failure to sustain a serious injury is granted.

So ordered.

Dated: April 1, 2003



ENTER:

J. S. C.