5607

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

CHANTAL D. GUT,

Plaintiff(s),

SUBMISSION DATE: 06/04/02
INDEX No.: 885/00

-against-

MEIR WOLBERGER and TAMAR T. WOLBERGER,

MOTION SEQUENCE #2

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, defendant's motion for summary judgment pursuant to CPLR §3212 is granted.

The instant action involves a motor vehicle accident which occurred on January 26, 1997 at the intersection of Middle Neck Road and Preston Road, Great Neck, County of Nassau, State of New York. Plaintiff claims to have sustained injuries to her cervical spine and lumbar spine including a herniated disc. Plaintiff claims that these injuries are a permanent limitation to her neck and back. Plaintiff was treated and released from North Shore University Hospital Emergency Room.

Plaintiff has claimed that she sustained a serious physical injury that is permanent in nature as a result of the accident. The court finds otherwise. Plaintiff's injuries fail to meet the serious injury requirements of Insurance Law §5102(d) which states:

> 'Serious Injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of a body organ, member

> function or system; permanent consequential limitations of use of a body organ or member; a significant limitation of use of 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 (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment.

Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. Andre v Pomeray, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). The goal of summary judgment is to issue find, rather than to issue determine. Hantz v Fleischman, 155 A.D.2d 415, 457 N.Y.S.2d 350 (2d Dep't 1989). A motion for summary judgment should be granted if the evidence presented demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Nassau Diag. Imag. & Radiation Oncology Assoc. v Winthrop-University Hosp., 197 A.D.2d 563, 564, 602 N.Y.S.2d 650, 651 (2d Dep't 1993); Baly v Chrysler Credit Corp., 94 a.d.2d 781,463 N.Y.S.2d 233 (2d Dep't 1983). "In determining a motion for summary judgment, the court must ascertain whether there are any triable issues of fact in the proof laid bare by the parties' submissions of affidavits." Behar v Ordover, 92 A.D.2d 557, 459 N.Y.S.2d 304 (2d Dep't 1983). Defendant has the initial burden of proving a serious injury was not incurred by the plaintiff. Gaddy v Eyler, 79 N.Y.2d 955, 956-957, 591 N.E.2d 1176, 582 N.Y.S.2d 990 (1992). Once defendant presented their entitlement, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact. See, Kaplan v Hamilton Med. Assoc., P.C., 262 A.D.2d 609, 692 N.Y.S.2d 674 (2d Dep't 1999). Where the subject matter is Insurance Law §5102, summary judgment will be denied where plaintiff fails to sustain his burden of offering sufficient evidence to raise a triable issue of law as to whether he sustained a serious injury. Uber v Heffron, 286 A.D.2d 729, 730 N.Y.S.2d 174 (2001).

Defendant has presented an affirmation from examining doctor Joseph L. Paul, M.D. stating that the plaintiff has no disability, can return to her normal daily activities without any restrictions, and does not need any further treatment or therapy. Dr. Paul also

found that all plaintiff's injuries can be classified as resolved.

In an attempt to present a triable issue of fact, plaintiff presented evidence from an examination given by her doctor on February 26, 1997. He contends that she suffered a permanent consequential limitation to her back and neck. Plaintiff's physician diagnosed her with a herniated disc, acute traumatic cervical sprain, acute traumatic lumbar sprain and myosotis. The treating physician also concluded that plaintiff's injuries were causally related to the accident. Since the examination was conducted a full month after the accident, there is no probative value in the absence of a more recent examination. Chinnici v. Brown, 2002 N.Y. App. Div. (2002). One of the goals of the no fault system is to keep minor personal injury cases arising out of automobile accidents out of the courts. Licari v Elliot, 57 N.Y.2d 230, 441 N.E.2d 1088, 445 N.Y.S.2d 570 (1982).

An examination report dated July 24, 2000 revealed no change in plaintiff's condition. Although plaintiff's doctor presented evidence of disc herniation, that alone does not constitute evidence of a serious injury. Uber v Heffron, 285 A.D.2d 729, 730 N.Y.S.2d 174, (2001). Plaintiff's doctor also failed to provide evidence of the extent or degree of the physical limitations resulting from the herniation, id. See Barbeito v Kesev Taxi, Inc., 281 A.D.2d 379, 721 N.Y.S.2d 279 (2d Dep't 2001); Monette v Keller, 281 A.D.2d 523, 721 N.Y.S.2d 839 (2d Dep't 2001). Plaintiff has also presented insufficient evidence to prove that she will suffer a total loss of use of her cervical or lumbar spine. The affirmation by Dr. Irwin A.S. Spira only states a conclusory diagnosis of plaintiff's condition, and plaintiff admits she is still able to jog. Crespo v Kramer, 2002 N.Y. App. Div. (6463). Furthermore, if plaintiff seeks to present evidence that she suffers a permanent injury, she cannot then claim that she suffered a non-permanent impairment for a period of ninety (90) days during the one hundred eighty (180) days after the accident. Plaintiff must substantiate her claim that the injuries sustained caused a disability that prevented her from performing all or most of the material acts that made up her usual or customary activities for at least ninety (90) out of one hundred eighty (180) days immediately following the accident. Sigona v New York City Transit Authority, 255 A.D.2d 231, 659 N.Y.S.2d 254 (1st Dep't 1997). Plaintiff admits that she only had to miss 3 to 4 weeks of classes, which is far less than the ninety (90) day

statutory requirement.

Furthermore, although plaintiff has presented her own subjective assessments of her pain that does not establish a prima facie case of serious injury Toure v Avis Rent-A-Car Systems, ____ N.Y.2d _____ 2002 WL 1461317. Objective proof is necessary to satisfy the serious injury threshold of §5102(d). Id.

A medical examination taken on August 6, 2001 revealed that plaintiff can return to her normal daily routine and has no disability. Furthermore, plaintiff's medical report dated January 26, 1997, the day of the accident, reveal negative radiology reports.

In the instant matter, plaintiff has not submitted any proof to substantial that her claimed injuries fall within the statute. Itkin v Devlin, 286 A.D.2d 477, 729 N.Y.S.2d 537 (2d Dep't 2001). Plaintiff has failed to rebut defendant's showing that she did not sustain an injury as specified by Insurance Law §5102(d). Accordingly, defendant's motion for an order granting summary judgment dismissing the action is granted and the complaint is dismissed. Since plaintiff has not suffered a serious injury within the meaning of Insurance Law §5102, there is no material issue of fact and summary judgment is appropriate.

This decision constitutes the order of the court.

Dated: JUL 12 2002

J.S.C.
HON. KENNETH A. DAVIS

ENTERED

JUL 17 2002

NASSAU COUNTY
COUNTY CLERK'S OFFICE