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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

Hon. Burton S. Joseph,

Justice.

STACY MOSLEY and ALEXIS DOTSON,

Plaintiffs,

- against -

MELISSA SURIS and ERIC J. SURIS,

Defendants.

Trial/IAS	Part 13
Index No.	10607/2003
Motion No.	001
Motion Date	5/10/2005

Papers Numbered

Notice of Motion, Affirmation & Exhibits Annexed	1
Affirmation in Opposition	2
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Memorandum of Law	

Motion by the attorney for the defendants for an Order pursuant to CPLR 3212, granting the defendants summary judgment on the issue of damages, on the ground that the plaintiffs, Stacy Mosley and Alexis Dotson, failed to prove that they suffered a "serious injury" in the subject motor vehicle accident as defined in Insurance Law 5102(d) and as required by Insurance Law 5104(a), is granted.

This action arises out of an automobile accident which occurred on January 29, 2001. Plaintiff Stacy Mosley was the owner and operator of the motor vehicle. Plaintiff Alexis Dotson was a passenger in plaintiff Stacy Mosley's motor vehicle.

Plaintiff Stacy Mosley was examined on behalf of the defendants by Dr. Burton S. Diamond, a Board Certified Neurologist. He stated the diagnosis is lumbar and the dorsal spram resolved. The neurological examination was normal. There was no evidence of neurological disability for activities or occupation. Plaintiff Stacy Mosely was examined by Craig B. Orduax, M.D. a Board Certified Orthopedist. Dr. Orduax opined that she has a normal objective orthopedic examination with regards to her symptoms of pain in the neck, back and knees. He found no evidence of any post-traumatic neurologic deficit or deformity as a result of the subject automobile accident.

Plaintiff Alexis Dotson was also examined by Dr. Diamond on behalf of the defendants' attorney. Dr. Diamond found that the neurological examination to be normal. He found no evidence of neurological disability for activities or occupation as a result of the subject automobile accident. Dr. Orduax determined that Alexis Dotson had an entirely normal physical examination with regard to the neck and lower back. He found no evidence any post-traumatic neurologic deficit or deformity.

Defendant has made a *prima facie* showing that plaintiffs injuries were not serious within the meaning of Insurance Law 5102(d).

See, Alvarez v. Prospect Hospital, 68 NY2d 320. Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *See, Friends of Animals, Inc. v. Associated Fur Mfg.,* 46 NY2d 1065.

Plaintiff Stacy Mosley has submitted an affirmation from Dr. Anthony Adamo, a

neurologist, dated February 22, 2001. His neurological examination and testing of the plaintiff were almost entirely negative. All testing of the head, extremities, nerves, senses, reflexes and motor strength were entirely normal. Additionally, all of the alleged electro diagnostic studies were normal, except for some minor findings with regard to the right lower extremity which was interpreted as "consistent" with a right "L5-S1" radiculopathy. However, later on in the very same report, under the heading "IMPRESSION", Dr. Adamo says that an "L3-4" radiculopathy "is to be considered" based upon his examination. His report is in consistent, in that it refers to an "L5-S1" radiculopathy, and later on refers to an "L3-4" radiculopathy. The report is equivocal in that it states that those findings are "consistent" with the testing, or must be "considered". The neurologist never saw the plaintiff, Stacy Mosley, again after February 22, 2001. This is significant since the plaintiff testified that she was involved in a subsequent motor vehicle accident (EBT, pp. 42-43).

An unsworn report by Dr. Marx dated February 6, 2001 was submitted on behalf of plaintiff Alexis Dotson. Dr. Marx saw Ms. Dotson on one occasion and appeared to have performed no diagnostic testing. Plaintiff Alexis Doston made eleven (11) visits for physical therapy starting on February 9, 2001 and ending March 5, 2001, about five (5) weeks after the accident.

The MRI reports offered on behalf of both plaintiffs are unsworn. *See, Greggs v. Kurlan,* 290 AD2d 533. Finding of a "herniation" or "bulge" is not, itself, sufficient to establish a "serious injury" under the no-fault statute. *See, e.g., Guzman v. Paul Michael Management,* 266 AD2d 508.

Plaintiff's MRI films were reviewed by a Board Certified Radiologist, Dr. Lastig on

behalf of the defendants. His reports were previously exchanged with plaintiffs' counsel. With regard to the plaintiff, Stacy Mosley, Dr. Lastig concluded that her lumbar MRI (taken on March 19, 2001) demonstrated mild disc desiccation, consistent with degenerative disc disease, unrelated to the subject accident. The study was otherwise normal (no herniations or bulges). With regard to the cervical spine MRI (taken on February 19, 2001), it likewise showed no herniations or bulges, and only mild disc desiccation and "long standing" degenerative osteophytes, unrelated to the subject accident. With regard to the plaintiff, Alexis Dotson, Dr. Lastig reviewed her lumbar MRI (study dated, March 18, 2001) and cervical MRI (study dated, March 18, 2001), and concluded that both were normal (no bulges or herniations seen in the cervical of lumbar spines). The lumbar MRI revealed mild degenerative disc disease/desiccation at the L5-S1 level, unrelated to the subject accident.

With regard to the plaintiff, Stacy Mosley, the affidavit of Dr. Genovese establishes only that he saw her on two occasions, February 5, 2001 and May 8, 2001. The actual office notes for those two visits are not even with the chiropractor's affidavit, so the affidavit, alone, is all the Court has to determine whether sufficient evidence of a "breach" has been submitted. The only documented limitations of the cervical or lumbar spines were those allegedly observed by Dr. Genovese on February 5, 2001. His affidavit does not even state whether, on the next visit (May 8, 2001), the same or similar limitations were noted. Therefore, there is no way to conclude that the alleged limitations persisted for any length of time, let alone are permanent. Without evidence of "duration", the affidavit is insufficient to establish a "significant limitation" or a "permanent limitation". *See, Peralta v. Carta,* 298 AD2d 373; *Grossman v. Wright,* 268 AD2d 79. Any conclusions of the chiropractor, unsubstantiated by objective findings, and tailored only

to meet the statutory language, must be rejected. *See, Lopez v. Senatore,* 65 NY2d 1017. The affidavit of Dr. Genovese does not comment on what the plaintiff's occupation was, or what her normal daily activities were, at the time he was treating her. He merely states, in conclusory form, that she (Stacy Mosley) would not be "fully" able to perform such activities as standing, sitting, walking for long periods, or riding a bicycle.

With regard to the plaintiff, Alexis Dotson, Dr. Genovese similarly states that he saw the plaintiff on only two occasions, March 9, 2001 and January 31, 2005. Again, no office notes are included along with the chiropractor's affidavit for the plaintiff, Alexis Dotson. Alleged limitations of the cervical and lumbar spine are noted on only the first visit, to wit, March 9, 2001. Here, too, no mention is made in Dr. Genovese's affidavit of plaintiff's occupation or daily activities. The only mention of any alleged curtailment of her daily activities is the same as was noted with the plaintiff, Stacy Mosely, i.e., she could not "fully" perform her daily activities of standing, sitting, walking for long periods, or riding a bicycle.

With regard to the "90/180-day" category, in order to qualify, the plaintiff's usual daily activities must be curtailed "to a great extent", rather than some slight curtailment. (*Licari v. Elliot, supra,* 57 NY2d 230, the curtailment, and duration of same, must be proven with objective medical evidence. *See, Toure v. Avis Rent A car Systems, Inc.,* 98 NY2d 345; *Beckett v. Conte,* 176 AD2d 774.

The plaintiffs have failed to come forward with evidence to establish an issue of fact regarding the issue of "serious injury" pursuant to Insurance Law 5102(d) as required by Insurance Law 5104(a).

The defendant motion for summary judgment is granted.

This decision is the Order of the Court and terminates all proceedings under Index No. 10607/2003.

ENTER:

Dated: Mineola, New York
June 10, 2005

J.S.C.

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