SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 39
NASSAU COUNTY

ABRAHAM HOFFER and DEBRA HOFFER.

Plaintiffs.

Sequence No.: 006
Index No.: 000005/01

- against -

ROBERT D. SILICH and SAS TAXI CO., INC.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, motion by the defendants, Robert D. Silich, SAS Taxi Co., Inc. and Long Island Yellow Cab Corp., in the above captioned action, for summary judgment, pursuant to Rule 3212 of the CPLR, dismissing the complaint, herein on the ground that the plaintiffs, Abraham Hoffer and Debra Hoffer, have not sustained a "serious injury" within the purview of Insurance Law §5102(d) is determined as set forth herein.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Dept., in Stewart Title Insurance Company v. Equitable Land Services, Inc., 207 AD2d 880, 881:

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853, Zuckerman v. City of New York, 49 NY2d 557, 562.) Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank v. McAuliffe, 97 AD2d 607), but

> once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v. Prospect Hosp., 68 NY2d 320, 324; Zuckerman v City of New York, supra, at 562)."

The Plaintiffs commenced the instant action to recover for injures they allegedly sustained in an automobile accident in April 1999. At the time of the accident, plaintiff, Debra Hoffer, was riding as a passenger in a vehicle operated by her father, plaintiff, Abraham Hoffer. As they headed northbound on Gardeners Avenue toward Hempstead Turnpike in Levittown, New York, Debra Hoffer cautioned Mr. Hoffer to watch out for two children on the side of the road. Mr. Hoffer stopped his vehicle and was subsequently struck in the rear by a taxi driven by the defendant, Robert D. Silich, and leased from defendant, SAS Taxi Co., Inc.

Insurance Law §5102(d) defines a "serious injury" as

> "... a personal injury which 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 nonpermanent 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 days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

The Plaintiffs both claim that they presently experience pain in their neck, back and shoulders as a result of the automobile accident. In support of their motion for summary judgment dismissing the complaint, defendants offer a medical report prepared by Dr. Joseph Lopez, M.D., an orthopedist who examined plaintiffs on December 21, 2001 and reviewed the medical records for each plaintiff including MRI's of each taken after the accident. In his affirmed report, Dr. Lopez concludes with respect to the plaintiff Abraham Hoffer that the cervical strain he sustained in the accident is now resolved and "there is no disability for this claimant from an orthopedic point of view." Dr. Lopez fails, however, to explain his finding that, "examination of the cervical spine reveals approximately 50 percent of normal flexion, extension, lateral bending and rotation." Based on this, defendants have not established that plaintiff Abraham Hoffer has not sustained a serious injury according to Insurance Law §5012(d). (See, Mangum v. Trabulsi, 294 A.D.2d 472.) Consequently, it need not be considered whether plaintiff Abraham Hoffer's opposition papers raise a triable issue of fact. (See, Papadonikolakis v. First Fidelity Leasing Group, Inc., 283 AD2d 470.)

With respect to the plaintiff, Deborah Hoffer, Dr. Lopez opines that the cervical and upper back strain that she sustained in the accident is now resolved and that "there is no disability for the claimant from an orthopedic point of view." Based on Dr. Lopez's reports, the defendants have adequately established, prima facie, that the plaintiff Deborah Hoffer's injuries are not serious within the meaning of Insurance Law §5102. "Thus, it was incumbent on the plaintiffs to come forward with admissible evidence sufficient to raise a triable issue of fact." Schroeder v. Benson, 292 A.D.2d 438, 439. (See, also, Grossman v. Wright, 268 A.D.2d 79.)

In opposition to the motion, the plaintiff offers medical reports prepared by Dr. Victor Chehebar, a board certified neurologist, to demonstrate that there is a triable issue of fact that a "serious injury" has been sustained. Dr. Chehebar initially treated both plaintiffs in April 1999. Deborah Hoffer was treated by Dr. Chehebar through April 2000. Dr. Chehebar again examined both Abraham Hoffer and Debra Hoffer in September of 2002. Regarding Deborah Hoffer, Dr. Chehebar explains:

> " In the absence of any prior or subsequent injuries, the patient suffers from cervical radiculopathy secondary to C6/7 disc herniation, thoracic spasms with underlying degenerative disc disease in the thoracic spine. These injuries are causally related to the motor vehicle accident of 4/3/99, and permanent in nature. These opinions are made within a reasonable degree of medical certainty. They are based on the patient's history, symptoms and positive objective evidence including range of motion and kinematic testing. Supporting diagnostic studies include MRI of the cervical spine performed on 4/10/99, EMG/NCV studies performed on 7/8/99."

In his reports Dr. Chehebar refers to the fact that both plaintiffs were also treated by Dr. Peter Adamczak, a chiropractor, and Dr.S. Walters.

"It is well settled that plaintiff's subjective complaints of pain and limitation, unaccompanied by objective medical proof of serious injury, will not suffice to defeat summary judgment." (Pinales v. CSC Holdings, Inc., 2002 NY Slip Op 5041OU; 2002 N.Y. Misc. LEXIS 1313.) Further the Court in Sauer v. Marks, (278 A.D.2d 301, 302) states that, "projections of permanent limitations have no probative value in the absence of a recent examination." Although Dr. Chehebar performed a range of motion test on plaintiff, Deborah Hoffer, in September of 2002, he does not specify which objective test he performed in concluding that plaintiff has sustained a permanent injury. Where evidence is offered by the plaintiff's medical expert as to specific quantification of the degree of limitation in the injured party's range of motion, the plaintiff's burden to establish a triable issue as to serious injury is not satisfied if the medical expert does not testify to the objective tests used to arrive at his conclusions. (See, Mitchell v. Kowalski, 272 A.D.2d 530.)

Further, the plaintiff, Deborah Hoffer, has failed to adequately explain her gap in treatment beginning in early 2000 and lasting through September 2002. This court finds that "the affirmations by the plaintiff's physician were insufficient to establish an issue of fact as to whether the plaintiff suffered a "permanent consequential limitation or use of a body organ or member", or a "significant limitation of use of a body function or system" as they did not provide any explanation for the gap between the plaintiff's last medical treatment and her subsequent visit to the physician. (See, Rum v. Pam Transport, Inc., 250 A.D.2d 751.) In her affidavit plaintiff Deborah Hoffer states:

> "However, in March 2000, I stopped chiropractic treatment and did not seek additional physical therapy not only because my no-fault physical therapy benefits were previously denied in October 1999, but because I did not feel that my neck was getting any better. I do not believe that further physical therapy or chiropractic treatment will help me or give me any further benefit or improvement to my neck, since I did not feel any improvement over the course of almost one (1) year of physical therapy and chiropractic treatment."

Concerning the discontinuation of the plaintiff's no-fault benefits, the court in Pinales v. CSC Holdings, Inc., (__AD2d __, 2002 NY Slip Op 5041OU; 2002 N.Y. Misc. LEXIS 1313), states that, "Plaintiff testified at his examination before trial that he stopped treatment because his no-fault benefits were discontinued. However, no substantiation of this claim is provided to the court, nor is any evidence submitted concerning plaintiff's actual financial ability, or lack thereof, to obtain treatment." Similarly, in the present situation, plaintiff has failed to provide evidence concerning her financial ability to continue treatment.

Additionally, although plaintiff states that she did not feel continuing treatment would have benefitted her, her own doctor disagrees. In his report for the court, Dr. Chehebar states that on plaintiff Debra Hoffer's April 27, 2000 visit, "Physical therapy was recommended." A plaintiff's subjective belief that the medical treatment no longer benefits her should not be a basis for discontinuance where a "serious injury" has been alleged. Rather a doctor's opinion concerning medical treatment should determine whether or not such treatment should cease. (See, Toure v. Avis Rent A Car Sys. 98 NY2d 345.) Dr. Chehebar's medical report suggests that further physical therapy would have benefitted plaintiff Deborah Hoffer.

Plaintiffs failed to come forward with sufficient evidence to raise an issue of fact as to whether the injured plaintiff sustained a medically-determined injury which prevented him from performing substantially all of his customary and usual daily activities during at least 90 out of the first 180 days following the accident. (Philippe v. Ivory, ___ A.D.2d ___, 747 N.Y.S.2d 184.) At her examination before trial plaintiff testified as follows:

> Q. Are there any activities that you used to engage in on a regular basis that you no longer are able to engage in as a result of the

injuries you sustained in this accident?

A. I can't say any longer but it's been affected by.

Q. What are those activities?

A. Well, it's difficult to stay on the computer for long periods of time and with my work I need to be on the computer.

Q. Anything else?

A. Well, driving is definitely more difficult.

Q. You do drive to work, though; correct?

A. Yes I do.

Plaintiff Deborah Hoffer also states that she has been given a promotion at work since the accident occurred:

Q. When did you get the promotion?

A. It was March of 2001.

The responses given by the plaintiff, Deborah Hoffer, do not "raise an issue of fact concerning plaintiffs' ability to perform customary and usual daily activities during at least 90 out of the first 180 days following the accident." (Insurance Law §5012(d)). Although she claims that it is difficult to drive and perform some of her work activities, she admits that she drives to work everyday and received a promotion at work since the accident in April 1999. In fact, Deborah Hoffer did not miss any work as a result of the accident. Additionally, there is no reference in plaintiff's medical report, prepared by Dr. Chehebar, instructing her to refrain from certain activities as a result of her alleged injuries.

The Plaintiff, Deborah Hoffer, has failed to meet her burden concerning the threshold issue of whether or not a serious injury, according to Insurance Law § 5102(d), has occurred as a result of the April 3, 1999 motor vehicle accident with defendants. Accordingly, the defendants' motion for summary judgment dismissing the complaint of the plaintiff, Deborah Hoffer, is granted. Defendant's motions, as it pertains to the plaintiff, Abraham Hoffer, is denied.

So Ordered.

ENTERED

DEC 18 2002

NASSAU COUNTY
COUNTY CLERK'S OFFICE

A.J.S.C.

Dated: December 16, 2002