

5

**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice**

**TRIAL/IAS, PART 31
NASSAU COUNTY**

**KAREN ROSENBERG AND JAKE
ROSENBERG.**

Plaintiffs.

**Sequence No.: 002
Index No.: 010666/04**

- against -

CALOGERO MANNING.

Defendant.

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	

Upon reading the papers submitted and due deliberation having been had herein, defendant's motion for summary judgment is hereby denied.

Plaintiff Karen Rosenberg allegedly suffered personal injuries as a result of an automobile accident between the car in which she was driving and that which was owned and operated by defendant Calogero Mannino on December 1, 2001. Plaintiff claims to have suffered the following injuries:

"Herniated lumbar disc at L5-S1; bulging discs at C3-4 and C4-5; post-traumatic lumbosacral radiculopathy; cervical with an element of right ulnar neuritis at the cubital tunnel; cervical sprain/strain; lumbar sprain/strain; headaches; myofascial pain syndrome; depression and anxiety."

Defendant moves for summary judgment to dismiss the complaint on the basis that the plaintiff did not sustain serious injuries as defined by Insurance Law §5102(d).

In order to succeed on a motion for summary judgment, the defendant must demonstrate that there are no issues of fact by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). In opposing a motion for summary judgment, plaintiff

must demonstrate that a genuine issue of material fact through admissible evidence. Zuckerman v. City of New York, supra. Plaintiff must prove she sustained serious injuries as defined by Insurance Law §5102(d).

Insurance Law §5104(a) provides “[n]otwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury, or for basic economic loss.”

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.”

In support of his motion, defendant annexes the medical reports of Ms. Rosenberg’s various medical providers provided by plaintiff in the course of discovery herein. Having reviewed said reports the court notes the following:

- 1) the March 8, 2002 report of radiologist Dennis R. Rossi, M.D. indicates the presence of L5-S1 disc herniation with no compression of the neural structures;
- 2) the April 1, 2002 report of radiologist Rossi indicates a disc bulge at C3-4 “which just touches the anterior margin of the cervical cord” and a C4-5 bulge with a very slight posterior listhesis of C4 or C5;
- 3) the November 24, 2003 report of neurologist Vandama K. Soni, M.D. notes cervical and lumbosacral radiculopathy; and
- 4) the April 16, 2002 report of neurologist Ezra Bendit, M.D. notes “lumbosacral radiculopathy on the left side.”

Having reviewed these reports, the court notes that in none of them does defendant demonstrate that Ms. Rosenberg, based upon the injuries which were noted by said experts, did not suffer a serious injury. Where defendant’s proof submitted in support of the motion fails to establish that plaintiff did not suffer a causally related injury or an injury which does not constitute a serious injury as defined by the statute, the court will find that defendant failed to meet his burden. See, Kearse v. New York City Transit Authority, 16 A.D.3d 45 (2nd Dep’t 2005); Gray v. Lasurdo, 302 A.D.2d 560 (2nd Dep’t 2003). Defendant is reminded that at this

stage he had the obligation of proving initially that there is no serious injury, a burden usually not accomplished by reports of treating physicians not tailored to the issues found in motor vehicle accident lawsuits.

Where, as here, defendant fails to make a *prima facie* showing of entitlement to summary judgment, the court will deny the motion, regardless of the sufficiency of the opposition papers. Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993); Alvarez v. Prospect Park Hospital, 68 N.Y.2d 320 (1986).

Accordingly, the court finds that defendant has failed to meet his burden and hereby denies defendant's motion for summary judgment.

So Ordered.


A.J.S.C.

Dated: February 7, 2007

ENTERED

FEB 09 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**