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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present: **HON. ANTHONY L. PARGA**
Justice

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KATIE L. SACHSENMAIER,

INDEX NO. 15018/06

Plaintiff,

-against-

MOTION DATE: 7/25/08
SEQUENCE NO. 001

IRVING BERKOWITZ and ARLENE R. BERKOWITZ,

Defendants.
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Notice of Motion, Affs. & Exs.....1
Affirmation In Opposition & Exs.....2
Reply Affirmation & Exs.....3

Upon the foregoing papers, it is ordered that the motion by the defendants for an order granting summary judgment dismissing the Complaint on the ground that the plaintiff did not sustain a serious injury (Insurance Law §5102(d)) is granted.

This is an action to recover damages for the personal injuries sustained by the plaintiff as a result of a two car rear-end motor vehicle accident which occurred at on Austin Boulevard in Island Park, N.Y. on May 1, 2004. Plaintiff was the operator of a motor vehicle. The other car was owned by defendant Irving Berkowitz and operated by defendant Arlene Berkowitz.

Plaintiff's injuries, as enumerated in the Bill of Particulars, include cervical disc bulges, radiculitis, cervical sprain/strain and cervical derangement, right shoulder

sprain and restriction in motion thereof. Plaintiff was confined to bed and home for three days and was not confined to the hospital. She missed three days from school as a senior high school student.

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

In support of this application, defendants note plaintiff's sworn testimony describing a prior accident in 2004 and in February 2007 and her resumption of her summer job and college activities after the May 2004 accident.

Defendants' doctor, John Killian, conducted an orthopedic examination of plaintiff on November 30, 2007 and reviewed her medical records and history. After an examination with objective methods of measuring body and organ functions, Dr. Killian concluded: "There were no positive subjective or objective findings in this examination to confirm Ms. Sachsenmaier's complaints. Based on this examination I would conclude that she has fully recovered from the problems with the neck and right shoulder region for which she was treated after this accident. There is no objective evidence of any residual impairment or disability."

Defendants have met their burden of a *prima facie* showing that plaintiffs did not sustain a serious injury within the meaning of Insurance Las §5102(d) (*Toure v. Avis Rent A Car System*, 98 NY2d 345 (2002)).

In opposition, plaintiff submits the sworn report of neurologist, M. Tahir. After an examination on June 20, 2004 by Dr. Massoff, a chiropractor, Dr. Tahir reviewed Dr. Massoff's notes and concludes: "..injuries are the direct result of the motor vehicle accident on May 11, 2004. There is a direct causal relationship established between the above injuries ant he motor vehicle accident on May 11, 2004. Katie Sachsenmaier's mechanism of injuries is entirely consistent with the clinical presentation. There has been moderate to severe trauma to the spine." However, there is no indication that Dr. Tahir examined plaintiff.

The unsworn report of her treating chiropractor setting forth objective medical findings of her injuries is not in admissible form and thus is insufficient to raise an issue of fact. (Butera v Woodhouse, 267 A.D.2d 1039 (1999)).

The medical evidence provided by the plaintiff in this action is clearly insufficient to raise a triable issue of fact.. Unsworn reports from a treating physician cannot be considered in opposition to defendants' summary judgment motion in this personal injury action.

Plaintiff's statements, and those of her doctor reiterating her claims, that she was otherwise limited due to her own subjective complaints of pain, are also insufficient to defeat summary judgment (*Georgia v. Ramataur*, 180 AD2d 713 (2nd Dept. 1992); *Scheer v. Koubek*, 70 NY2d 678 (1987)).

Dated: September 10, 2008.

Anthony L. Parga, J. S. C.