

SCAN

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

**Present:**

**HON. F. DANA WINSLOW,  
Justice**

**JOCELYN R. SWANN,**

**TRIAL/JAS, PART 9  
NASSAU COUNTY**

**Plaintiff,**

**MOTION DATE: 12/08/06**

**-against-**

**MOTION SEQ. NO.: 001  
INDEX NO.: 14230/05**

**ROBERT J. SCARPELLI and FINANCIAL  
SERVICES VEHICLE TRUST,**

**Defendants.**

**The following papers read on this motion (numbered 1-3):**

- Notice of Motion.....1**
- Affirmation in Opposition.....2**
- Reply Affirmation.....3**

Defendant Robert J. Scarpelli's motion for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff Jocelyn R. Swann, age 21, alleges that on September 9, 2003 at approximately 10:20am, a motor vehicle owned and operated by her came into contact with a vehicle owned and operated by defendant Robert J. Scarpelli ("defendant"). The accident occurred in the vicinity of Bayshore Road and the entrance ramp to the eastbound Southern State Parkway, Bayshore. Defendant now moves for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**.

**Insurance Law § 5102(d)** provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a

fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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 days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (numbered by the Court). Plaintiff's complaint and bill of particulars make claims alleging dismemberment, significant disfigurement, fracture, permanent loss of a body organ or member, permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system and a medically determined injury which prevented plaintiff from performing her customary activities for ninety days during the one hundred eighty days immediately following the occurrence of plaintiff's injury.

In support of his motion for summary judgment, defendant submits a report of examination, dated August 2, 2006 and affirmed on September 1, 2006, of orthopedist Sol S. Farkas, MD covering an examination of August 2, 2006.

Dr. Farkas found that physical examination of the cervical spine revealed "80 degrees of rotation left and right (70 to 80 degree rotation left and right is normal) and 50 degrees of flexion and extension (30 to 50 degrees of flexion and extension is normal)." Dr. Farkas found "no spasm or crepitus to palpation," deep tendon reflexes of 2+, motor examination of 5+ and negative Tinel's sign at the elbow and wrist. Dr. Farkas noted that plaintiff had no complaints of pain.

With respect to the lumbar spine, Dr. Farkas' examination revealed that plaintiff could "forward flex 90 degrees (90 degrees forward flexion normal)" and "lateral bend [to] 30 degrees (30 degrees lateral bending normal)." Dr. Farkas reported plaintiff had no complaints of pain and normal deep tendon reflexes "at both the Achilles tendon and patellar tendon regions," normal toe and heel walking and a negative straight raise test. Dr. Farkas also found equal sensation in plaintiff's upper and lower extremities. Dr. Farkas diagnosed a "resolved cervical sprain" and "resolved lumbar sprain." With respect to causation, Dr. Farkas stated "if the history stated by [plaintiff] is correct, then there could be a causal relationship between [plaintiff's] original

complaints and the reported accident.” Dr. Farkas concluded, based on “available medical documentation,” that plaintiff suffers from no “orthopedic impairment,” or permanent injuries, may “perform usual duties of occupation” and “carry out the daily activities of living, without restriction.” Dr. Farkas noted that the radiologic films he reviewed revealed a “straightening of the lumbar spine and herniated disc of the cervical spine” but that he found no clinical findings to correlate with these results. Dr. Farkas also commented that the treatment plaintiff received was consistent with her injuries, although somewhat “excessive.”

Defendant also submits the deposition testimony of plaintiff conducted on June 20, 2006. Plaintiff testified that she was taken by ambulance to Good Samaritan Hospital where she was evaluated and released from the emergency room. She testified that she next sought medical care “a couple of days later” at Liberty Orthopedics, previously known as Brentwood Pain and Rehabilitation, where she complained of neck, back and mouth pain. She testified that she received acupuncture, and massage and chiropractic treatments for several months but then stopped treatment due to pregnancy. Plaintiff testified that she missed 45 days of work as a support counselor to mentally retarded adults (in her bill of particulars, she claims she missed 35 days). Plaintiff testified that after the accident she went back to work full time but could no longer lift some of the patients and that she is still doing the same type of work although a “lighter” type for a different agency. Plaintiff claims that she still has back pain and it is difficult for her to sit down “for certain periods of time and stand up for a certain period of time or just like stand up and change [her baby’s] diaper.”

Taking into account the evidence provided in defendant’s physician’s report, including the recitation of the various clinical tests performed during the examinations, the Court finds that defendant has failed to make a *prima facie* demonstration that plaintiff Jocelyn R. Swann did not sustain a serious injury within the meaning of §5102(d).

Defendant made a *prima facie* showing that plaintiff did not sustain dismemberment, significant disfigurement, fracture or permanent loss of a body organ or member, and has satisfied his burden, although barely, of establishing that plaintiff did not suffer from a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, on the basis of the medical report of Dr. Farkas, which is the only

medical report submitted by defendant. However, the Court finds that defendant did not adequately address plaintiff's claim that she suffered from a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. Defendant failed to provide any documentation which shows that plaintiff's condition was normal for the first three to six months following the accident. Dr. Farkas' opinion that plaintiff did not suffer from any orthopedic impairment and that her injuries had resolved was based upon an examination which occurred almost three years post accident. Dr. Farkas did not relate his findings to the relevant period immediately following the accident. *See Torres v. Performance Automobile Group, Inc.*, 2007 WL 258960; *Jocelyn v. Singh Airport Service*, 35 AD3d 668; *Nakanishi v. Sadaqat*, 35 AD3d 416; *Lopez v. Geraldino*, 35 AD3d 398; *Faun Thai v. Butt*, 34 AD3d 447.

Since defendant failed to make a *prima facie* showing that plaintiff did not suffer from a serious injury, it is unnecessary for the Court to consider whether plaintiff's opposition is sufficient to raise a triable issue of fact. *See Vazquez v. Basso*, 27 AD3d 728; *Facci v. Kaminsky*, 18 AD3d 806; *Nembhard v. Delatorre*, 16 AD3d 390; *Hennessy v. Verizon New York, Inc.*, 8 AD3d 619; *Coscia v. 938 Trading Corp.*, 283 AD2d 538. If a *prima facie* case were made, the Court would need to consider the two affirmed reports submitted by plaintiff in opposition to defendant's motion, one of which is a report, dated February 3, 2004, by Anne Brutus, MD of Brentwood Pain & Rehabilitation Services, P.C. The Court cannot refrain from noting that the Court's research has produced a decision, dated June 28, 2005, by United States District Judge Leo Glasser covering an action in which Dr. Brutus was one of the defendants. Judge Glasser held that a complaint by State Farm Mutual Automobile Insurance Company ("State Farm") against Dr. Brutus and another defendant made out a claim for RICO conspiracy. State Farm alleged that the defendants ordered unnecessary Current Perception Threshold tests ("CPT tests") on insureds during treatment sought for injuries sustained in motor vehicle accidents, materially misrepresented the nature of the CPT tests in billing codes submitted to State Farm and that documents submitted by defendants in support of charges for these tests were false and misleading. **State Farm Mutual Automobile Insurance Co. v. CPT Medical Services**

P.C., 375 FSupp2d 141.

The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

**ORDERED**, defendant ROBERT J. SCARPELLI's motion for summary judgment dismissing the complaint of plaintiff JOCELYN SWANN, on the grounds that plaintiff JOCELYN SWANN failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **denied**.

Defendant Robert J. Scarpelli shall serve all parties with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the Court.

Dated:

*H/11*

,2007

ENTER:

*[Handwritten signature]*

J.S.C.

**ENTERED**

MAY 29 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**