SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

--x

DARLENE MANCUSO and
RONALD E. MANCUSO,

Plaintiffs,

-against-

MAHENDER R. GADIPALLY.

Defendant.

--x

MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 21
INDEX No: 9277-04
Motion Seq. No. 02
DECISION & ORDER

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The defendant, Mahender R. Gadipally ("Gadipally"), moves by Notice of Motion, pursuant to CPLR § 3212 and New York Insurance Law § 5102(d) for an Order dismissing the plaintiffs', Darlene Mancuso ("Darlene") and Ronald E. Mancuso ("Ronald"), Complaint on the ground that Darlene did not sustain a statutorily defined "serious injury" as a proximate result of the motor vehicle accident.

On September 14, 2003, plaintiff, Ronald, owned and operated a certain motor vehicle bearing New York registration number BBG8999 in which plaintiff, Darlene, was a passenger. At the said time, the plaintiffs were traveling westbound on the Grand Central Parkway on the exit ramp approximately ½ mile south of the Long Island Expressway located in the County of Queens, State of New York. Plaintiffs then collided with a certain motor vehicle bearing New York registration number CMM8730, which was owned and operated by defendant, Gadipally.

On July 8, 2004, the plaintiffs commenced the instant action against defendant,

Gadipally, seeking to recover for personal injuries they sustained as a result of the above-referenced accident. Darlene alleges that she sustained a "serious injury" as set forth in § 5102(d) of the Insurance Law of the State of New York, therefore, sustaining an economic loss in excess of "basic economic loss" pursuant to CPLR § 5104 (a).

A motion for summary judgment is granted when the moving party first makes out a "prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact." *Stewart Title Insurance Company v. Equitable Land Services Inc.,* 207 AD2d 880, 881 (2d Dept 1994). The burden then shifts to the non-moving party "to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action." *Id.*

Under the "No-Fault Law," in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *See Licari v. Elliot*, 57 NY2d 230 (1982):

New York Insurance Law § 5102(d) defines "serious injury" as follows:

> Serious Injury means 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 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.

In support of a claim that the plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. *See Pagano v. Kingsbury*, 182 AD2d 268 (2d Dept

1992). Once the burden shifts, it is incumbent upon the plaintiff in opposition to defendant's motion to produce prima facie evidence in admissible form to support the claim for serious injury. Therefore, a medical affirmation or affidavit, which is based upon a physician's personal examination and observations of a plaintiff is an acceptable method of providing a doctor's opinion regarding the existence and extent of a plaintiff's serious injury. *See O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 (1st Dept 1998).

To maintain a claim that a plaintiff has sustained a serious injury under the "permanent consequential limitation of use of a body organ or member," or "significant limitation of use of a body function or system" statutory definitions of New York Insurance Law § 5102, an expert's qualitative assessment of a plaintiff's condition is probative, provided that: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2d Dept 1992). Further, an expert's designation of a numeric percentage is acceptable. *Id.*

In support of the instant motion, the defendant has submitted the affirmed medical report of neurologist Rajpaul Singh, M.D., dated 12/05/005, concerning a neurological examination of the plaintiff, Darlene. Dr.Singh found that Darlene did "not demonstrate any objective neurological disability in relation to the MVA accident."

Further, defendant has submitted the affirmed medical report of orthopedic Harvey Fishman M.D., dated 12/15/05, concerning an orthopedic evaluation of the plaintiff, Darlene. Dr. Fishman diagnosed Darlene with "Cervical Spine Sprain/Strain and Lumbosacral Sprain/Strain Superimposed on Chronic Pre-existing Conditions Aggravated by a Chronic Knee

Problem." Notably, sprains/strains are considered soft tissue injuries that do not qualify as a "serious injury." *See Gaddy v. Eyler,* 79 NY2d 955 (1992) (sprains and strains with minor limitation of movement of the neck and back to not qualify as a "serious injury"). Therefore, Darlene's diagnosis by Dr. Fishman of cervical and lumbosacral "strains" do not qualify as a serious injury.

This court finds that the evidence set forth satisfies the defendant's initial burden of proof demonstrating, *prima facie*, that plaintiff Darlene did not sustain a statutorily defined "serious injury."

In opposition to the instant motion, plaintiffs have submitted the affirmed medical report of chiropractor, Shari L. Eskin, dated 05/18/06. Dr. Eskin's diagnosis of Darlene revealed permanent injuries constituting "a disc herniation at L5-S1 with annular fissure, disc bulge at L4-L5 and exacerbation of her previous cervical post surgical condition" as a result of the subject accident. The report also states that Dr. Eskin "performed range of motion testing using a Goni-ometer which revealed a decrease by 75% in all planes of her [Darlene's] lumbar spine."

Based upon the above-mentioned medical affirmations, the court finds that the plaintiff, Darlene, has met the burden of producing evidence of "permanent consequential limitation of use of a body organ or member and/or "significant limitation of use of a body function or system." The above medical affirmations are sufficient to create an issue of fact as to whether plaintiff, Darlene, suffered a "serious injury." Accordingly, the above-mentioned physicians detail the plaintiff's symptoms, providing a qualitative assessment of the plaintiff's condition setting forth the objective basis for his opinion in comparison to the plaintiff's limitations to normal function,

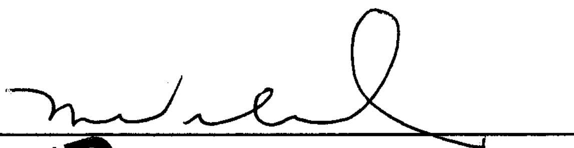
purpose and use of the affected organ, member, function or system. *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2d Dept 1992).

Upon the instant application, defendant's motion, pursuant to CPLR § 3212 and New York Insurance Law § 5102 on the ground that plaintiff Darlene did not sustain a statutorily defined "serious injury" as a result of the above-referenced motor vehicle accident is **DENIED.**

The parties are directed to appear for trial in DCM at August 1, 2006 at 9:30 a.m.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: June 29, 2006
Mineola, NY

ENTER: 

HON. MICHELE M. WOODARD, J.S.C

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