

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19
Justice

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ANGEL ARBOLEDA and JORGE BLANCO,

Index No: 914/03
Motion Date: 4/20/05
Motion Cal. No: 6

Plaintiffs,

-against-

MARIE PALMIERI and ALFRED PALMIERI,

Defendants.
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The following papers numbered 1 to 12 read on this motion by defendants for an order, pursuant to CPLR 3212, granting summary judgment on the threshold issue.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 6
Answering Affidavits-Exhibits.....	7 - 10
Reply.....	11 - 12

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action to recover for personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident occurring on September 21, 2002. Defendants move for summary judgment on the ground that plaintiffs failed to meet the “serious injury” threshold requirement of section 5102(d) of the Insurance Law, which states, in pertinent part, that a “serious injury” is defined as:

a personal injury which results in ...significant disfigurement;
...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 party from performing substantially all of the material acts which constitute such person 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 issue of whether the injuries allegedly sustained by plaintiff fall within the definition

of a “serious injury,” in the first instance, must be decided by the court. See, Licari v. Elliot, 57 N.Y.2d 230, 238 (1982). In order for a summary judgment motion to be granted by the court, the defendant must establish that there are no triable issues of facts in dispute. Inherent in the court’s consideration of a motion for summary judgment for lack of serious injury is the requisite determination that there are no issues of fact with regard to the injuries sustained by a plaintiff. Thus, the threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendant makes a prima facie showing that plaintiff did not sustain a serious injury.

Here, in support of the summary judgment motion and assertion that plaintiffs did not sustain a “serious injury,” defendants submit, inter alia, documentary evidence in the form of the sworn medical reports of Drs. Kenji Miyasaka, and Edward Toriello, orthopedists, who found that plaintiffs Arboleda and Blanco, respectively, did not demonstrate any objective disability, impairment or loss of function. This evidence is sufficient to meet defendants’ burden of showing that plaintiffs’ injuries were neither significant nor permanent. Once the defendant submits evidence establishing that the plaintiff did not sustain a serious injury within the meaning of section 5102(d) of the Insurance Law, the burden shifts to plaintiff to produce evidentiary proof in admissible form demonstrating the existence of a triable issue of fact. See, Echeverri v. Happe, 256 A.D.2d 304 (1998); Gaddy v. Eyler, 79 N.Y.2d 955, 956-957 (1992); Licari v. Elliott, *supra*, 57 N.Y.2d at p. 235 (1982).

In opposition to the motion, plaintiff Arboleda submitted, inter alia, the medical reports of Dr. Aric Hausknecht, a neurologist, and Dr. Jerry Lubliner, an orthopedist. Based upon their respective examinations and medical reviews, Dr. Hausknecht found that plaintiff Arboleda sustained Lumbosacral and cervical derangement with C4-5 and L4-5 bulges, and C6-7 disc herniations. He further opines that plaintiff Arboleda suffers from permanent restrictions and disability which are causally related to the accident, and as a consequence, “will form the basis for degenerative joint disease in the future,” and states that plaintiff Arboleda is “an appropriate candidate for epidural steroids or surgical intervention.” Dr. Lubinder found similarly, and stated that plaintiff Arboleda will continue to have permanent and recurring pain, limitations in mobility, decreased sensation and permanent deformities.

It is well-settled that an affirmation or medical report of a plaintiff’s doctor consisting of conclusory assertions founded only upon subjective complaints of pain is insufficient to raise a triable issue of fact. See, generally, Lopez v. Zangrillo, 251 A.D.2d 382 (1998); Mobley v. Riportella, 241 A.D.2d 443 (1997). Here, the medical reports set forth expert opinions that based upon the respective doctor’s objective examination and quantifying of the diminution of plaintiff’s range of motion, plaintiff sustained a permanent disability as a result of the automobile accident. Plaintiff Arboleda thus has met his burden by submitting sufficient evidence creating a triable issue of fact with regard to his claim that he sustained a serious injury within the meaning of Insurance Law § 5102 (d). See, Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345 (2002); Ventura v. Moritz, 255 A.D.2d 506 (1998); Washington v. Mercy Home For Children, 232 A.D.2d 549 (1996). Conversely, as plaintiff Blanco has failed to interpose opposition to defeat defendants’ prima facie showing, defendants’ motion for summary judgment is granted to the extent that the complaint of

plaintiff Jorge Blanco hereby is dismissed.

Dated: August 9, 2005

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J.S.C.