

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

STEPHEN ALLEN,

Plaintiff, Index No.: 11609/05

- against -

JASON GENTLES, SHEREENE S. MCDERMOTT-
CLARKE, STACY HITSKY, IRA RUBEN and
CATHERINE RUBIN,

Defendants.

- - - - - x

The following papers numbered 1 to 12 on this motion:

	<u>Papers Numbered</u>
Defendant Hitsky's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	1-4
Defendants Gentles & McDermott-Clarke's Notice of Cross Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	5-8
Plaintiff's Affirmation in Opposition- Affidavit(s)-Exhibit(s)	9-10
Defendant Gentles & McDermott-Clarke's Reply Affirmation-Exhibit(s)	11-12

By notice of motion, defendant, Stacey Hitsky (Hitsky), seeks an order of the Court, pursuant to CPLR §3212, granting her summary judgment and dismissing the complaint on the grounds that plaintiff did not suffer a serious injury within the meaning of N.Y. Ins. Law §5102(d) and §5104(a).

Defendants, Jason Gentles and Shereene S. McDermott-Clarke, file a cross-motion for the same relief.

Plaintiff files an affirmation in opposition and defendant, Gentles and McDermott-Clarke file a reply.

The underlying cause of action is a claim by plaintiff, for personal injuries alleged to have been sustained in a motor vehicle accident on March 15, 2005, on Manetto Hill Road at or near the intersection of Sunnyside Boulevard, Town of Oyster Bay, County of Nassau, New York.

In support of their motion for summary judgment and dismissal, defendants, Gentles and McDermott-Clarke, submit the affirmed reports of Dr. Naunihal S. Singh, based upon an examination conducted on March 6, 2006, and Dr. S. Farkas, based upon an examination conducted on February 27, 2006.

Dr. Singh offered the opinion that plaintiff had resolved cervical and lumbar sprains, but conceded that plaintiff suffered post-traumatic tension headaches. Although the doctor found plaintiff's range of motion to be normal, no objective tests were listed or described in arriving at that conclusion. Dr. Singh notes the mild posterior bulging and paracentral herination in the lumbar spine without explanation.

Dr. S. Farkas also concluded that plaintiff had resolved cervical and lumbar sprain. Dr. Farkas found plaintiff's rotation and flexion range of motion greater than average, once again with little or no description of the objective tests administered. Dr. Farkas failed to address plaintiff's lumbar disc herniation at all.

The Court notes that defendant, Hitsky, adopts the motion papers of defendants, Gentles and McDermott Clarke.

On a motion for summary judgment the defendant has the burden of coming forward with sufficient evidence in admissible form to warrant as a matter of law a finding that plaintiff has not suffered a "serious injury" (See Pagano v. Kingsbury, 182 AD2d 268 [2nd Dep't. 1992]). If the defendant fails to meet this burden, the motion will be denied; and in such instances the merits of plaintiff's claim will not be examined (Jones v. Jacob, 1 AD3d 485 [2nd Dep't. 2003]).

Accordingly, inasmuch as defendants have failed to meet their burden, the motion for summary judgment is denied.

Dated: Jamaica, New York
January 2, 2007

JOSEPH P. DORSA
J.S.C.