

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

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IRAM SHEIK and MOISEY ISKHAKOV,

Plaintiffs,

-against-

DRAH CAB CORP., JOSEPH ISKHAKOV,  
LAUREN PAQUARELLA and LAUREEN GYUMOLES

Defendants.

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Index No: 11273/05

Motion Date:12/6/06

Motion Cal. No.: 24

The following papers numbered 1 to 12 read on this motion by defendants, DRAH CAB CORP., JOSEPH ISKHAKOV, for summary judgment dismissing the complaint as to the plaintiff, MOISEY ISKHAKOV, on the grounds that plaintiff has not sustained a serious injury within the meaning of Sections 5102 and 5104 of the Insurance Law; and cross-motion by plaintiffs for summary judgment in their favor as to liability.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits ....	5 - 8
Answering Affidavits-Exhibits.....	9 - 10
Replying Affidavits.....	11 - 12

Upon the foregoing papers it is ordered that the plaintiffs' cross-motion for summary judgment as to liability is granted.

The court, by order dated October 24, 2005, granted summary judgment dismissing the complaint insofar as it was asserted against the co-defendants LAUREN PAQUARELLA and LAUREEN GYUMOLES. Since it is undisputed that the plaintiffs were passengers in the taxi driven by the defendant, Iskhakov, and owned by the defendant, Drah Cab Corp., and the defendants have submitted no evidence that the plaintiffs caused or contributed to the cause of the accident, summary judgment as to liability is granted in favor of plaintiffs.

The defendants' motion for summary judgment is granted and the complaint insofar as it asserts a cause of action on behalf of the plaintiff, MOISEY ISKHAKOV, is dismissed and the remainder of the action is severed.

Defendants have submitted competent medical evidence including the affirmation of their examining orthopedist and neurologist, and the plaintiff's deposition testimony which establish, prima facie, that the plaintiff, MOISEY ISKHAKOV, did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident. (See, Gaddy v. Eyler, 79 NY2d 955 [1992]; Jackson v. New York City Tr. Auth., 273 AD2d 200 [2000]; Greene v. Miranda, 272 AD2d 441 [2000]). Thus, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting competent medical proof. (see, Gaddy v. Eyler, supra; Licari v. Elliott, 57 NY2d 230, 235 [1982]; Lopez v. Senatore, 65 NY2d 1017 [1985]). This the plaintiff failed to do.

The affirmation of Dr. James, the plaintiff's treating physician, dated November 3, 2006 is insufficient to raise an issue of fact. A herniated and/or bulging disc may constitute a serious injury, however, a plaintiff has the burden to provide objective medical evidence to establish the extent or degree of the alleged physical limitations resulting from the disc injury (see Diaz v. Turner, 306 AD2d 241 [2004]; Davis v. New York City Transit Authority, 294 AD2d 531 [2002]). In this regard, Dr. James' affirmation based upon his examinations conducted over two years prior to signing the affidavit, not on any recent medical examination (see Murray v. Hartford, 23 AD3d 629 [2005]; Brown v Tairi Hacking Corp., 23 AD3d 325 [2005]; Hernandez v. DIVA Cab Corp., 22 AD3d 722 [2005]) is insufficient proof of the duration of the plaintiff's alleged limitations of motion of his cervical or lumbar spine (see, Sainte-Aime v. Ho, 274 AD2d 569 [2000]; Schultz v. Von Voight, 216 AD2d 451, aff'd 86 NY2d 865; Bucci v. Kempinski, 273 AD2d 333, see also Hall v. Gala Trade 2000 Ltd., 11 AD3d 362 [2004] , lv denied 4 NY3d 705[2005]).

Insofar as plaintiff claims that he suffers from erectile dysfunction, Dr. James statement in his Initial Evaluation, dated September 21, 2004, that a causal relationship exists between the accident and, inter alia, plaintiff's complaint of erectile dysfunction, the affirmation is insufficient to raise a triable issue of fact. Dr. James has failed set forth what objective tests he performed and the objective medical evidence which supports his conclusion that the plaintiff suffers from erectile dysfunction as a result of the subject accident (see, Sims v. Megaris, 15 AD3d 468 [2005]; Napoli v. Cunningham, 273 AD2d 366 [2000]; Grossman v. Wright, 268 AD2d 79 [2000]; Vitale v. Carson, 258 AD2d 647 [1999]). Opinions, even of a treating physician,

which are unsupported by acceptable objective proof, are insufficient to raise a question of fact to defeat a motion for summary judgment (Merisca v. Alford, 243 AD2d 613 [1997]; Antoniou v. Duff, 204 AD2d 670 [1997]; see, Lincoln v. Johnson, 225 AD2d 593, 593-594 [1996]). Moreover, Dr. James has failed to even allege the existence of such condition in his affirmation .

Finally, in the absence of objective evidence of a medically determined injury causally connected to the accident and based upon plaintiff's deposition testimony that he returned to school without missing any time, the plaintiff has failed to raise a triable issue of fact as to whether he sustained a medically determined injury of a nonpermanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for 90 out of 180 days following the accident (see, Mu Ying Zhu v. Zhi Rong Lin, 1 AD3d 416 [2003]; Ersop v. Variano, 307 AD2d 951 [2003]; Ingram v. Doe, 296 AD2d 530 [2002]).

Dated: December 12, 2006  
D# 28

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J.S.C.