

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

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PEDRO SUAREZ and DIANA SUAREZ,
Plaintiff,

Index No.: 924/02
Motion Date: 6/9/04
Motion Cal. No.: 34

-against-

IOANNIS TERTIPIS & FARKADON INC.,
Defendant.

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The following papers numbered 1 to 9 read on this motion by defendants for an order granting summary judgment in his favor and dismissing the complaint of plaintiff Diana Suarez on the ground that plaintiff Diana Suarez has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation-Exhibits.....	8-9

Upon the foregoing papers it is ordered that the motion for an order granting summary judgment in defendants' favor and dismissing the complaint of Diana Suarez on the ground that plaintiff Diana Suarez has not sustained a serious injury within the meaning of Section 5102 of the Insurance Law is granted for the following reasons:

This action arises out of a motor vehicle accident between the car being operated by plaintiff Pedro Suarez, wherein plaintiff Diane Suarez was a passenger, and the motor vehicle being operated by defendant Tertipis and owned by defendant Farkadon Inc., on April 12, 2000, on the Grand Central Parkway, about 50 feet west of Jewel Avenue, Queens County, New York. Plaintiffs commenced this action and alleged in their complaint that they suffered serious injuries from this accident.

Initially, it is for the court in the first instance to determine whether plaintiff has established a prima facie case of sustaining a serious injury within the meaning of Insurance Law 5102 (d). *See, Licari v Elliot*, 57 NY2d 230,237 (1982); *Armstrong v Wolfe*, 133 AD2d 957,958 (3rd Dept. 1987.) The analysis of the meaning of serious injury has a long history beginning with *Licari v Elliott*, *supra*, and applying what could be discerned from the legislative intent, the Court of Appeals, analyzing the word "significant", wrote that "the

word 'significant' as used in the statute pertaining to 'limitation of use of a body function or system' should be construed to mean something more than a minor limitation of use. We believe that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute" (Licari v Elliott, supra, at 236.) The Court of Appeals reiterated this analysis in Dufel v Green, 84 N.Y.2d 795 (1995), in which it wrote that the legislative intent of the "no-fault" legislation was to weed out frivolous claims and limit recovery to major or significant injuries.

To grant summary judgment it must clearly appear that no triable issue of fact is presented. Miceli v Purex Corp., 84 AD2d 562 (2d Dept. 1981.) Additionally, summary judgment should be granted in cases where the plaintiff's opposition is limited to "conclusory assertions tailored to meet statutory requirements" (Lopez v Senatore, 65 N.Y.2d 1017.) The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. Bronson v March, 127 AD2d 810 (2d Dept. 1987.)

In support of this motion, defendants have submitted, *inter alia*, an affirmed report of Dr. Weilland, a neurologist, who examined plaintiff on December 18, 2002, and an affirmed report of Dr. Weiss, an orthopedist, who examined plaintiff on January 6, 2003 . Dr. Weilland reviewed plaintiff's medical records and performed an examination of plaintiff, at defendant's request and concluded that plaintiff had a resolved cervical and lumbar spine sprain and was without a neurological disability and was not in need of additional treatment. He further found her fit to perform all of her daily activities and continue gainful employment. Doctor Weiss reviewed plaintiff's medical records and performed an examination of plaintiff, at defendant's request and concluded that plaintiff had suffered sprain injuries and had fully recovered from them. The Doctor concluded plaintiff had fully recovered and had no orthopedic disability and was not in need of additional treatment.

The Court finds that defendants have submitted proof in admissible form which establishes that plaintiff Diana Suarez has not suffered a serious injury within the meaning of Insurance Law § 5102. Consequently, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. *See*, Gaddy v Eyler, 79 N.Y.2d 955 [1992] ; Greggs v Kurlan, 290 AD2d 533 (2d Dept 2002.) As such, the plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see*, Powell v Hurdle, 214 A.D.2d 720 [2d Dept. 1995].) Further, courts have consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (*see*,

Grossman v. Wright, 268 A.D.2d 79 (2d Dept 2000.) Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff. *Id.* In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained. *Id.* Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. *Id.* This burden has not been met by plaintiff.

In opposition, plaintiff Diana Suarez has submitted, inter alia, an attorney's affirmation, a copy of her deposition transcript, an unsworn report of Dr. Louca, a chiropractor, dated April 25, 2000, an unsworn report of Dr. Futoran, a physiatrist, dated September 25, 2001, and an affirmation of Dr. Koyen, dated January 23, 2004, that indicates on October 29, 2003, he reviewed plaintiff's medical records and performed an examination of her.

Doctor Koyen performed various tests upon plaintiff and concluded that she suffered from a cervical and lumbar sprain and strain and a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system in that the injuries have caused a diminution in the ranges of motion. The Doctor found that these injuries were caused by the April 12, 2000 accident. Doctor Koyen referred to reports of Doctor Futoran and relied upon that Doctor's findings in coming to his own conclusions.

Plaintiff's proof of an attorney's affirmation is not admissible probative evidence on medical issues. Armstrong v Wolfe, *supra* at 958. Similarly, her own deposition testimony is not admissible probative evidence on medical issues. *Id.* Moreover, her subjective complaints of pain, unsupported by credible medical evidence, are insufficient to show serious injury. Georgia v Ramautar, 180 AD2d 713 (2d Dept. 1992.) In this vein, Dr. Koyen's affirmation is incompetent since it fails to specifically state what objective tests were done, the manner in which they were performed and what results were obtained. *See*, Wadi v. Tepedino, 242 AD2d 327 (2d Dept. 1997.) Additionally, to the extent tests were conducted, they were subjective in nature since they relied upon plaintiff's complaints of pain. *See*, Toure v Avis, 98 NY2d 345, 357 (2002.) Moreover, to the extent that Dr. Koyen relied upon an unsworn records of Dr. Futoran, his conclusions are inadmissible. Figueroa v Westbury Trans, Inc., 304 AD2d 614 (2d Dept 2003.) The court is also mindful of the 3 ½ year gap between the subject motor vehicle accident and plaintiff's initial treatment with Dr. Koyen.

In any event, the failure to submit any medical report or record, in admissible form,

regarding plaintiff's treatment for the first 3 ½ years after the accident is unexplained. Consequently, plaintiff has failed to submit competent, objective medical evidence to establish a causal connection between his alleged injuries as found by Dr. Koyen and the subject accident. Vaughan v Baez, 305 AD2d 101 (1st Dept 2003.) As such, the doctor's affirmation primarily consists of conclusory and speculative assertions, seemingly tailored to meet statutory requirements. *Id.*; Lagois v. Pub. Adm'r, 303 AD2d 644 (2d Dept 2003.) Accordingly, plaintiff's submissions have failed to raise a triable issue of fact that he sustained a serious injury. *See*, Gaddy v Eyler, 79 NY2d 955 (1992); Malpica v Lavergne, 294 AD2d 340 (2d Dept 2002.). Consequently, defendants' motion for an order of summary judgment and dismissal of Diana Suarez' complaint and all counterclaims is granted. CPLR 3212.

Dated: June 14, 2004

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ORIN R. KITZES, J.S.C.