SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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WILLIAM MENDOZA,

Plaintiff,

-against-

MARIA RIVERA and M.F. VASQUEZ-RIVERA,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 2759/2011
Motion Date: April 6, 2012
(adjourned to May 11, 2012)

The following papers numbered 1 to 6 were read on the motion for summary judgment by defendants alleging that the plaintiff did not meet the serious injury threshold as defined in Insurance Law § 5102(d):

Notice of Motion-Affirmation-Exhibits A-G.. 1-3

Affirmation in Opposition-Exhibits 1-10. . . . . 4-5[1]

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

This is an action in personal injury stemming from a motor vehicle accident on June 17, 2008 at the intersection of Route 52 and Route 300, Newburgh, New York wherein plaintiff was a passenger in a motor vehicle which was allegedly struck in the rear by a vehicle owned by defendant Maria Rivera and operated by defendant M.F. Vasques-Rivera. This Court previously

[1]It should be noted that this Court received defendants' reply on May 14, 2012, after the return date of this motion and the reply will therefore no be considered.

granted plaintiff's motion for summary judgment on liability and ordering the matter proceed to trial on the issues of damages only. Defendants now move this Court for summary judgment claiming that the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102(d). In support of their motion, defendants submit various MRI reports noting the existence of herniated and bulging cervical discs and positive findings on an EMG. Defendants further submit the affirmed medical report of Dr. Robert Hendler who found after only a visual inspection of plaintiff's range of motion, that plaintiff's range of motion was within normal limits but acknowledges the existence of the very medical reports which demonstrate the existence of medical conditions he now claims are not present. Dr. Hendler offers no explanation for the miraculous disappearance of these conditions.

Plaintiff opposes the motion claiming the defendants' failure to come forth with a prima facie case on the serious injury issue and notes further that even if a prima facie case had been made out, the affirmed medical report of a pain management specialist confirms the existence of objective medical evidence of restricted ranges of motion by plaintiff causally related to the accident, thus creating an issue of fact.

"Summary judgment is a drastic remedy that 'should not be granted where there is any doubt as to the existence of a triable issue' (citations omitted). In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court (citations omitted)." *Russell v A. Barton Hepburn Hosp.*, 154 AD2d 796, 797 (3rd Dept. 1989); *See also, Moskowitz v Garlock*, 23 AD2d 943, 944 (3rd Dept., 1965).

While summary judgment is an available remedy in some cases, its dire effects preclude

its use except in "unusually clear" instances. *Stone v Aetna Life Ins. Co.*, 178 Misc. 23, 25 (Sup. Ct., New York County,1941). "A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a 'day in court.'" *Wanger v Zeh*, 45 Misc2d 93, 94, (Sup. Ct., Albany County, 1965), *aff'd* 26 AD2d 729 (3rd Dept.1966). Given the fact that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is arguable, or "fairly debatable," summary judgment must be denied. *Bakerian v H.F. Horn*, 21 AD2d 714 (1st Dept. 1964); *Jones v County of Herkimer*, 51 Misc2d 130, 135 (Sup. Ct., Herkimer County, 1966); *Town of Preble v Song Mountain, Inc.*, 62 Misc2d 353, 355 (Sup. Ct., Courtland County, 1970); *See also, Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 404 (1957).

The movant has the burden of submitting evidence, in admissible form, to support his motion. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). It is well established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center,* 64 NY2d 851, 853 (1985); *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341, 357 N.Y.S.2d 478, 480 (1974). *Finkelstein v. Cornell University Medical College*, 269 AD2d 114, 117 (1st Dept. 2000). The moving party must affirmatively demonstrate the merits of its claim or defense, and cannot obtain summary judgment merely by "pointing to gaps in its opponent's proof." *Kajfasz v Wal-Mart Stores, Inc.,*

288 AD2d 902, 902 (4th Dept. 2001); *Dodge v City of Hornell Industrial Development Agency,* 286 AD2d 902, 903 (4th Dept. 2001)*; Frank v Price Chopper Operating Co., Inc.,* 275 AD2d 940 (4th Dept. 2000).

The defendant's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers". *Winegrad v New York University Medical Center, supra,* 64 NY2d at 853; *See, also, Miccoli v Kotz,* 278 AD2d 460, 461 (2nd Dept. 2000); *Karras v County of Westchester,* 272 AD2d 377, 378 (2nd Dept. 2000); *Fox v Kamal Corporation,* 271 AD2d 485 (2nd Dept. 2000); *Gstalder v State of New York,* 240 AD2d 541, 542 (2nd Dept. 1997); *Lamberta v Long Island Railroad,* 51 AD2d 730, 730-731 (2nd Dept. 1976); *Greenberg v Manlon Realty, Inc.,* 43 AD2d 968, 969 (2nd Dept. 1974).

In the instant case, defendant failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident (*see Toure v Avis Rent A Car Sys.,* 98 NY2d 345 (2002); *Gaddy v Eyler,* 79 NY2d 955 (1992); *Walker v Village of Ossining,* 18 AD3d 867 (2nd Dept. 2005).

A serious injury is defined in the Insurance Law §5102(d) as:

> 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.

A defendant must demonstrate that all injuries presented by plaintiff fail to establish a serious injury. *Minori v Hernandez Trucking Co. Inc.*, 239 AD2d 322 (2nd Dept. 1997). Missing

even one will result in the denial of defendant's motion for summary judgment. *See, Meyer v Gallardo*, 260 AD2d 556, 557 (2nd Dept. 1999). Failing to affirmatively demonstrate that an alleged injury was not causally related to the subject accident requires a denial of defendant's motion for summary judgment as having failed to make out a prima facie case. *See, Lubrano v Brown*, 251 AD2d 383 (2nd Dept. 1998); *Fouad v Riser*, 246 AD2d 508 (2nd Dept. 1998), *Feuerman v Achtar*, 246 AD2d 577 (2nd Dept. 1998).

Defendants failed to address whether plaintiff sustained "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" one of the elements of a serious injury as defined in Insurance Law §5102(d). The fact that defendants failed to submit any admissible evidence demonstrating that plaintiff could not perform his usual and customary activities for 90 of the first 180 days following the accident necessitates denial of a defendants' motion for summary judgment as a matter of law. *See, Russell v Knopp*, 202 AD2d 959 (4th Dept. 1994); *see also, Paolini v Sienkiewicz*, 262 AD2d 1020 (4th Dept. 1999).

With respect to the neck, back and shoulder injuries, defendants' examining physician, Dr. Robert Hendler, stated that plaintiff's range of motion was "with normal values", commenting on the degrees of range of motion he found. Dr. Hendler's findings, however, were not based upon objective tests for range of motions, but rather, as he stated, "by visual measurement." *See, Chiara v Dernago*, 70 AD3d 746, 747 (2nd Dept. 2010); *Giammalva v Winters*, 59 AD3d 595 (2nd Dept. 2009). This failure to conduct objective range of motion testing

is fatal to a summary judgment motion of this type. *See, Chiara v Dernago*, 70 AD3d 746-747 (2nd Dept. 2010); *Giammalva v Winters*, 59 AD3d 595-596 (2nd Dept. 2009); *Cedillo v Rivera*, 39 AD3d 453, 454 (2nd Dept. 2007).

Since defendants failed to meet their burden in the first instance, it is unnecessary to decide whether plaintiff's opposition raised a triable issue of fact. *See, Chiara*, 70 AD3d at 747; *Giammalva*, 59 AD3d at 596.

Therefore, defendants' motion for summary judgment is denied they failed to prove a prima facie case.

The foregoing constitutes the decision and order of this Court.

Dated: May 17, 2012 E N T E R
Goshen, New York

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HON. CATHERINE M. BARTLETT,
A.J.S.C.