

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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MARIE CARMEN CHERY,

Plaintiff

**DECISION AND ORDER
ON MOTION FOR
SUMMARY JUDGMENT**

-against-

Index No. 9102/06

LAVAUD SOUFFRANT and JEAN RICOT,

Defendants

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Margaret Garvey, J.

The following papers, numbered 1 to 3, were considered in connection with *Defendants'* motion for an Order, pursuant to *CPLR Rule 3212*, granting Summary Judgment and dismissing the Complaint;:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION/EXHIBITS	1
AFFIRMATION IN OPPOSITION	2
REPLY AFFIRMATION IN SUPPORT OF MOTION	3

Upon the foregoing papers, the Court now rules as follows:

This action stems from a two-car motor vehicle accident which occurred on July 24, 2006 on Union Road at the intersection of Jasinski Drive, in the Village of Spring Valley, County of Rockland, State of New York. At the time of the incident, *Plaintiff* alleges that she was operating a motor vehicle when it was struck by another car that was being operated by *Defendant* LAVAUD SOUFFRANT and which was owned by *Defendant* JEAN RICOT. The action was commenced, on November 9, 2006, with the filing of the Summons and Complaint with the

County Clerk; issue was joined with the service of a responsive pleading, which is dated December 11, 2006. By Notice of Motion, *Defendants* now seeks an Order, pursuant to *CPLR Rule 3212* and *Insurance Law §§ 5102 (d)* and *5104* granting Summary Judgment and dismissing the Complaint, on the ground that Plaintiff did not, as a result of the accident, incur a "serious injury". Plaintiff opposed the motion.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact [*Giuffrida v. Citibank Corp., et al.*, 100 NY2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers [*Lecanino v. Gonzalez*, 306 AD2d 250 (Second Department, 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial [*Gonzalez v. 98 Mag Leasing Corp.*, 95 NY2d 124 (2000), citing *Alvarez*, supra, and *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988) *Zuckerman v. City of New York*, 49 NY2d 557 (1980)].

In this matter, *Defendants* have established their entitlement to judgment, as a matter of law on the issues of whether or not Plaintiff has sustained: (1) a permanent loss of use of a body organ, member, function or system; (2) a permanent consequential limitation of use of a body organ or member; or (3) a significant limitation of use of a body function or system. *Defendants* have done so by providing the Court with evidence (e.g. transcript of Plaintiff's deposition and reports from the independent medical experts who examined Plaintiff) that indicates that Plaintiff did not, in fact, sustain a "serious injury", as that term is defined in the aforementioned categories. The burden, then, shifted to Plaintiff to produce admissible

evidence showing one or more disputes of material fact on those issues [*Fleet Credit Corp. V. Harvey Hutter & Co. Inc.*, 207 AD2d 380 (Second Department, 1994)]. However, although *Plaintiffs* opposed the motion, the papers submitted were not sufficient to raise an issue of fact on the aforementioned categories. Therefore, *Plaintiff* has not met her burden in opposing the motion as it relates to whether or not she has sustained a "serious injury" in the categories of (1) a permanent loss of use of a body organ, member, function or system; (2) a permanent consequential limitation of use of a body organ or member; or (3) a significant limitation of use of a body function or system.

However, *Defendants* have failed to carry their burden on the issue of whether or not *Plaintiff* has sustained a "serious injury" as defined by her having received a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constitute her 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. Consequently, that branch of the motion shall be denied

Accordingly, it is hereby

ORDERED that *Defendants'* motion for Summary Judgment is granted on the issues of whether or not *Plaintiff* has sustained a "serious injury" in the categories of (1) a permanent loss of use of a body organ, member, function or system; (2) a permanent consequential limitation of use of a body organ or member; or (3) a significant limitation of use of a body function or system and the Complaint is dismissed as to those allegations; and it is further

ORDERED that *Defendants'* motion for Summary Judgment on the 90/180 day issue is denied; and it is further

ORDERED that counsel shall appear before the undersigned at 9:30 a.m. on December 18, 2008 for the previously scheduled pre-trial conference; and it is further


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ORDERED that, immediately after the pre-trial conference, counsel shall proceed to the Court's Mediation Part for the previously scheduled mediation conference; and it is further

ORDERED that the trial of this matter remains scheduled for January 5, 2009.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
December 9, 2008


HON. MARGARET GARVEY
Justice of the Supreme Court