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SHORT FORM ORDER

INDEX No. 09-36284
CAL. No. 11-01202MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-27-11
MOTION DATE 11-17-11
ADJ. DATE 11-30-11
Mot. Seq. # 002 - MD
003 - MD

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DIGNA MUNOZ, RORIN LAZO and MELONY MUNOZ, a minor by her mother and legal guardian, DIGNA MUNOZ,

Plaintiffs,

- against -

BRYAN PASTER-TORRES, BRIAN L. WHALEN and PEDRO MUNOZ,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause (002) by the defendant Pedro Munoz, dated September 26, 2011, and supporting papers 1-11; (2) Notice of Cross Motion (003) by the defendants Bryan Paster-Torres and Brian L. Whalen, dated October 27, 2011, and supporting papers 12-16; (3) Affirmation in Opposition by the plaintiffs, dated November 22, 2011, and supporting papers 17-23; (4) Reply Affirmation by the defendants Bryan Paster-Torres and Brian L. Whalen, dated November 25, 2011, and supporting papers 24-25 ; (5) Reply affirmation by defendant Pedro Munoz dated November 28, 2011, and supporting papers 26-27; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (002) by the defendant Pedro Munoz pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint asserted on behalf of Rorin Lazo and Melony Munoz on the basis that they did not sustain "serious injuries" as defined by Insurance Law §5102(d) is denied; and it is further

ORDERED that motion (003) by the defendants Bryan Paster-Torres and Brian L. Whalen pursuant to CPLR 3212 for an order dismissing the complaint asserted on behalf of Rorin Lazo and Melony Munoz on the basis that they did not sustain "serious injuries" as defined by Insurance Law §5102(d) is denied.

This is an action sounding in negligence wherein the plaintiffs seek damages for personal injuries they claim to have sustained as a result of a motor vehicle accident which occurred on March 28, 2009 on Maple Avenue, approximately 1000 feet north of its intersection with Route 111 in Smithtown, New York. The plaintiffs, Digna Munoz, Rorin Lazo and Melony Munoz were passengers in the vehicle operated by Pedro Munoz when it came into contact with the vehicle operated by Bryan Paster-Torres and owned by Brian L. Whalen.

The defendants seek summary judgment dismissing that part of the complaint asserted on behalf of Rorin Lazo and Melony Munoz on the basis that they did not sustain "serious injuries" as defined by Insurance Law §5102(d).

The 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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v***

Fidel Corp. Services, Inc., 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** , *supra*).

In support of motion (002), the defendant has submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiffs' verified bill of particulars; an unsigned and uncertified copy of the transcript of the examination before trial of the plaintiff Rorin Lazo dated July 30, 2010; the unsigned but certified transcript of the examination before trial of Melony Munoz with proof of service upon plaintiff's counsel pursuant to CPLR 3116; and the sworn report of Isaac Cohen, M.D. dated May 25, 2011 concerning his independent orthopedic examination of the plaintiff Rorin Lazo; the sworn reports of David Fisher, M.D. concerning his independent radiology review of the cervical MRI dated April 27, 2009, the lumbar MRI dated April 27, 2009, and the right shoulder MRI dated April 29, 2009 conducted on Rorin Lazo; and the sworn report of Michael J. Katz, M.D. concerning his independent orthopedic examination of Melony Munoz dated February 15, 2011 .

In support of motion (003), the defendants have submitted, inter alia, an attorney's affirmation; untabbed copies of the pleadings, answer and plaintiffs' verified bill of particulars; an unsigned and uncertified copy of the transcript of the examination before trial of the plaintiff Rorin Lazo dated July 30, 2010; the unsigned but certified transcript of the examination before trial of Melony Munoz with proof of service upon plaintiff's counsel pursuant to CPLR 3116; and the sworn report of Isaac Cohen, M.D. dated May 25, 2011 concerning his independent orthopedic examination of the plaintiff Rorin Lazo; the sworn reports of David Fisher, M.D. concerning his independent radiology review of the cervical MRI dated April 27, 2009, the lumbar MRI dated April 27, 2009, and the right shoulder MRI dated April 29, 2009 conducted on Rorin Lazo; the report dated April 8, 2011 by Peter J. Ajemian, M.D. concerning his orthopedic evaluation of Rorin Lazo; the sworn report of Michael J. Katz, M.D. concerning his independent orthopedic examination of Melony Munoz dated February 15, 2011; and various discovery demands and disclosure.

The transcripts of the examination before trial of Rorin Lazo submitted with motions (002) and (003), which are not signed, certified or accompanied with proof of service pursuant to CPLR 3116 are not in admissible form pursuant to CPLR 3212, and are not considered in support of these applications (*see*. ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d

752 [2d Dept 2006]), are not accompanied by an affidavit. The certified transcript of Melony Munoz, which has not been objected to by the plaintiff (*see, **Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]) is considered.

Upon review of the foregoing, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaints asserted on behalf of Rorin Lazo or Melony Munoz. Dr. Cohen stated that there were no medical records available for his review. None of the expert physician's reports are supported by copies of the medical records and/or reports upon which they base their separate opinions as required pursuant to ***Friends of Animals v Associated Fur Mfrs***., supra. Expert testimony is limited to facts in evidence. (*see, also, **Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]).

By way of the plaintiffs' verified bill of particulars, it is claimed that as a result of this accident Rorin Lazo sustained a disc herniation at L4-5 with deformity of the epidural fat and lateral recess; disc bulge at L5-S1; disc bulge at C3-4 with flattening of the dural sac; disc bulge at C4-5 with flattening of the dural sac; disc bulge at C5-6 with flattening of the dural sac; straightening of the normal cervical lordosis; internal derangement of the right shoulder; impingement syndrome of the right shoulder; supraspinatus of the right shoulder; and arthropathy of the right AC joint of the right shoulder.

Dr. Cohen set forth that Mr. Lazo was seen after the accident at St. Catherine of Sienna Hospital where he was treated and released after x-ray examinations of the lumbar spine and right shoulder. He does not comment on the findings demonstrated on those radiographic exams. He continues that Mr. Lazo denied any history of traumatic injury or past medical and surgical history. He notes that Mr. Lazo was out of work for approximately two months as a result of the injuries sustained in the accident. Upon examination of Mr. Lazo's lumbosacral and cervical spine, and right shoulder, Dr. Cohen obtained range of motion measurements which were determined visually and with a goniometer. Dr. Cohen set forth the range of motion measurements he obtained and compared those range of motion findings with normal ranges of motion values set forth in a spectrum of normal values. When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown (*see **Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; ***Lee v M & M Auto Coach, Ltd.***, *supra*; ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]), thus raising factual issues. Additionally, the normal range of motion values for the cervical and lumbar spine set forth by Dr. Cohen differ from those set forth by Dr. Katz, raising further factual issues.

Additionally, the report dated April 8, 2011 by Peter J. Ajemian, M.D. concerning his orthopedic evaluation of Rorin Lazo sets forth restrictions in range of motion findings upon evaluation of Mr. Lazo's right shoulder, lumbar spine, and cervical spine, raising inconsistent findings with those of Dr. Cohen concerning his orthopedic evaluation of Mr. Lazo. Also, Dr. Ajemian has compared his cervical range of motion findings to a spectrum of normal range of motion values. Thus, the report by Dr. Ajemian raises factual issues which further preclude summary judgment. It is additionally noted that Dr. Ajemian refers to

the various MRI reports and findings demonstrated on those reports, which findings raise factual issue with Dr. Fisher's report. Dr. Ajemian notes that the cervical MRI demonstrates multilevel disc bulging with flattening of the dural sac; arthropathy along the anterior undersurface of the AC joint consistent with bony impingement and fluid in the subacromial space of the right shoulder, and tendinosis of the distal supraspinatus without tear; and disc herniation consisting of left-sided extension at L4-5 associated with downward extrusion into the left lateral recess, and bulging disc at L5-S1 with right greater than left facet arthropathy. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2d Dept 2002]).

Dr. Fisher's reports raise factual issues which further preclude summary judgment from being granted. Dr. Fisher has set forth impressions of diffuse degenerative changes throughout the cervical spine, most pronounced from C2-3 through C5-6 with respect to Rorin Lazo's MRI studies of the cervical spine, but he does not set forth the basis for his opinion and has not provided a copy of the original report for this examination. Dr. Fisher has also set forth that there are degenerative changes at L4-5 demonstrated on Mr. Lazo's lumbar spine, but does not set forth the basis for such impression. He has not provided a copy of the original report concerning the MRI study. The original x-ray report of Mr. Lazo's right shoulder has not been provided either.

Based upon the foregoing, the moving defendants have not demonstrated prima facie entitlement to summary judgment dismissing the complaint as asserted on behalf of Rorin Lazo on the basis that he did not sustain a serious injury.

Melony Munoz claims that she sustained injuries consisting of straightening of the normal cervical lordosis; increased lumbar lordosis; lumbar scoliosis; lumbar radiculitis; cervical radiculitis; right knee derangement; cervical sprain, thoracic sprain, and lumbar sprain.

The report by Dr. Michael Katz, submitted with regard to his examination of Melony Munoz, sets forth his findings based upon an orthopedic evaluation. Melony Munoz had pleaded that she sustained lumbar and cervical radiculitis, however, no report from a neurologist who examined the plaintiff on behalf of the moving defendants has been submitted to rule out said neurological involvement or injury (*see*, ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). The absence of a report of a neurological examination of the plaintiff raises factual issue which precludes summary judgment on the issue of whether the plaintiff sustained a serious injury within the meaning of Insurance Law §5102 (d). Thus, the defendants have not established prima facie entitlement to summary judgment dismissing that part of the complaint asserted on behalf of Melony Munoz.

Defendants' examining physicians did not examine the plaintiffs during the statutory period of 180 days following the accident, thus rendering defendant physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether either plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]; *see*, ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the physicians do not comment on the same.

It is noted that Melony Munoz testified that she still has pain in her back and cannot sit for a long time. She gets sharp pains if she is on her back. She really likes running, but her knee bothers her a lot when she runs. She had an MRI of her right knee, however, the report concerning the study has not been provided to this court.

These factual issues raised in defendant's moving papers preclude summary judgment. The defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).

Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motions (002) and (003) are denied.

Dated: 2/17/12

Peter H. Mayer
PETER H. MAYER, J.S.C.