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SHORT FORM ORDER

INDEX No. 09-35244
CAL No. 11-02091MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 1-19-12 (#002)
MOTION DATE 2-17-12 (#003)
ADJ. DATE 4-24-12
Mot. Seq. # 002 - MD
003 - MD

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ERIC RAMIREZ,

Plaintiff,

- against -

C.A. CASTANEDA-VALLE and LUIS M. HENRIQUEZ,

Defendants.

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Upon the following papers numbered 1 to 44 read on this motion to compel and this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 23 - 35 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17 - 20 ; Replying Affidavits and supporting papers 21 - 22; 43 - 44 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendants C. A. Castaneda-Valle and Luis Henriquez for an order pursuant to CPLR §§ 3124 and 3126(c) compelling plaintiff Eric Ramirez to comply with their discovery request and the motion (#003) by defendants C. A. Castaneda-Valle and Luis Henriquez seeking summary judgment dismissing plaintiff's complaint hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants C. A. Castaneda-Valle and Luis Henriquez for an order compelling plaintiff Eric Ramirez to comply with the supplemental notice for discovery and inspection dated October 18, 2011 or precluding plaintiff from offering any evidence at trial to support his claim for injuries and damages is denied; and it is further

ORDERED that the motion by defendants C. A. Castaneda-Valle and Luis Henriquez seeking summary judgment dismissing the complaint based on plaintiff's failure to sustain a "serious injury" within the meaning of Insurance Law § 5102(d) is denied.

Plaintiff Eric Ramirez commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Spur Drive South and Islip Avenue in the Town of Islip on May 4, 2009. The accident allegedly occurred when the vehicle operated by defendant Luis Henriquez and owned by defendant C. A. Castaneda-Valle crossed the yellow line into plaintiff's lane of travel, striking the front left side of the vehicle operated by plaintiff. At the time of the accident, plaintiff was traveling westbound on Spur Drive and defendant Henriquez was traveling eastbound on Spur Drive, and it was raining. Plaintiff, by his bill of particulars, alleges that he sustained various personal injuries as a result of the accident, including a bulging disc at level C4/C5; cervical, left shoulder and bilateral wrist strains; a labral tear of the left shoulder; and panic attacks. Plaintiff alleges that as a result of the injuries he sustained in the collision he was confined to his bed for approximately three days and to his home for approximately two months. Plaintiff further alleges that he was incapacitated from his employment as an ambulette driver for approximately two months.

Defendants now move for an order compelling plaintiff to comply with their supplemental notice for discovery and inspection dated October 18, 2011. In particular, defendants assert that plaintiff has failed to provide them with a duly executed Health Insurance Portability and Accountability Act ("HIPAA") complaint authorization for all records and magnetic resonance images ("MRI") films from the facility where a left shoulder MRI examination was performed in 2006. In support of the motion, defendants submit copies of the pleadings, a copy of the supplemental notice for discovery and inspection at issue, and a copy of a letter from Zilkha Radiology, dated December 1, 2011, stating that the facility does not have any records for plaintiff for the "time frame that [defendants] requested." Defendants also submit copies of the correspondence between plaintiff's and defendants' counsel dated November 16, 2011 and July 9, 2011, and copies of plaintiff's duly executed HIPAA-complaint releases. Plaintiff opposes the motion on the ground that the note of issue and certificate of readiness already have been filed and, therefore, discovery is complete. Plaintiff also contends that defendants have not established an unusual or unanticipated circumstance that developed subsequent to the filing of the note of issue to warrant additional pre-note discovery. In opposition to the motion, plaintiff submits the note of issue and certificate of readiness, filed on October 4, 2011.

CPLR 3101 (a) states, in pertinent part, that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof (*see* ***Cirale v 80 Pine Street Corp.***, 35 NY2d 113, 359 NYS2d 1 [1974]; ***Conte v Count of Nassau***, 87 AD3d 558, 929 NYS2d 741 [2d Dept 2011]). This provision has been liberally construed to provide disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Pub. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). The trial court has broad discretion to supervise discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice (*see* CPLR 3103(a); ***Andon v 302-304 Mott St Assocs.***, 94 NY2d 740, 709 NYS2d 873 [2000]; ***Congel v Malfitano***, 84 AD3d 1145, 924 NYS2d 129 [2d Dept 2011]). Moreover, "[i]t is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the discovery provisions of the CPLR when that party has waived

the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue" (***Cynthia B. v New Rochelle Hosp. Med. Ctr.***, 60 NY2d 452, 456-57, 470 NYS2d 122 [1983]; *see* CPLR 3121(a); ***Romance v Zavalle***, 98 AD3d 726, 950 NYS2d 390 [2d Dept 2012]; ***Farkas v Orange Regional Med. Ctr.***, 97 AD3d 720, 948 NYS2d 651 [2d Dept 2012]). However, "the principle of 'full disclosure' does not give a party the right to uncontrolled and unfettered disclosure" (***Buxbaum v Castro***, 82 AD3d 925, 925, 919 NYS2d 175 [2d Dept 2011], *quoting* ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531, 531, 845 NYS2d 124 [2d Dept 2007]).

Under the instant circumstances, defendants have failed to demonstrate the existence of unusual or unanticipated circumstances that developed subsequent to the filing of the note of issue, which requires additional pretrial proceedings to prevent substantial prejudice to its case (*see* ***Wigand v Modlin***, 82 AD3d 1213, 919 NYS2d 868 [2d Dept 2011]; ***Owen v Lester***, 79 AD3d 992, 915 NYS2d 277 [2d Dept 2010]). Once the note of issue has been filed, any further pretrial disclosure is only allowed upon a showing of "unusual or unanticipated circumstances" and "substantial prejudice" (*see* ***Arons v Jutkowitz***, 9 NY3d 393, 850 NYS2d 345 [2007]; ***Jones v Grand Opal Constr. Corp.***, 64 AD3d 543, 883 NYS2d 253 [2d Dept 2009]; ***James v New York City Tr. Auth.***, 294 AD2d 471, 742 NYS2d 855 [2d Dept 2002]). In addition, a compliance conference was held on October 4, 2011, and there is no evidence that defendants raised any objections to the stated note of issue filing date or informed the Court that plaintiff had failed to provide certain authorizations (*see* ***Sereda v Sounds of Cuba, Inc.***, 95 AD3d 651, 944 NYS2d 538 [1st Dept 2012]; ***Co-Star Constr. v Fray***, 281 AD2d 339, 722 NYS2d 516 [1st Dept 2001]; ***Ford v J.R.D. Mgt. Corp.***, 238 AD2d 307, 656 NYS2d 946 [2d Dept 1997]; ***Henry L. Fox Co. v Sleicher***, 186 AD2d 537, 588 NYS2d 795 [2d Dept 1992]). Defendants also failed to move to vacate the note of issue within 20 days after its filing on October 17, 2011 (*see* 22 NYCRR § 202.1[e]; ***Owen v Lester***, 79 AD3d 992, 915 NYS2d 277 [2d Dept 2010]; ***Singh v 244 W. 39th St. Realty, Inc.***, 65 AD3d 1325, 866 NYS2d 226 [2d Dept 2009]; ***James v N. Y. City Tr. Auth.***, *supra*). Instead, on October 18, 2011, defendants sent plaintiff a supplemental notice of demand for discovery and inspection requesting an authorization for access to his medical records and MRI films for the MRI examination performed in 2006.

Defendants also move for summary judgment on the basis that plaintiff failed to sustain an injury within the meaning of the "serious injury" threshold requirement of Insurance Law § 5102(d) as a result of the accident. In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical records, and the affirmed medical reports of Dr. Isaac Cohen and Dr. Melissa Sapan Cohn. Dr. Cohen performed an independent orthopedic examination of plaintiff at defendants' request on March 17, 2011, and Dr. Sapan Cohn conducted an independent radiological review of the magnetic resonance images ("MRI") film of plaintiff's left shoulder performed on June 30, 2009. Plaintiff opposes the motion on the ground that defendants have failed to meet their burden of establishing that he did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject accident. Plaintiff also asserts that as a result of the subject accident he sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law. In opposition to the motion, plaintiff submits his own affidavit, and the sworn medical reports of Dr. Albert Zikha, Dr. Michael Setton, and Dr. Richard Tabershaw.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d

900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

Insurance Law § 5102 (d) defines a "serious injury" 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 seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants failed to establish, prima facie, their entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Astudillo v MV Transp., Inc.***, 84 AD3d 1289, 923 NYS2d 722 [2d Dept 2011]). Notably, the medical report of defendants' expert orthopedist, Dr. Cohen, is deficient, since the normal range of motion measurements that he set forth for plaintiff consists of variable ranges of motion, thereby, leaving the court to speculate as to the normal values and under what circumstances those variable ranges occur (*see* ***McLaughlin v Rizzo***, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]). In addition, almost all of the measurements ascribed to plaintiff's left shoulder and cervical region are at the low end of

the so-called "normal" ranges for such movements. Specifically, Dr. Cohen states in his medical report that an examination of plaintiff's left shoulder reveals "forward flexion of 165 degrees (normal 162-172 degrees), abduction of 180 degrees (normal 177-191 degrees), external rotation of 105 degrees (normal 96-112 degrees), and internal rotation of 65 degrees (normal 64-74 degrees)." Dr. Cohen states that an examination of plaintiff's cervical spine reveals "flexion of 50 degrees (normal 45-65 degrees), hyperextension of 50 degrees (normal 45-65 degrees), left and right lateral bending are to 50 degrees (normal 40-52 degrees), and right and left rotational motion is to 80 degrees (normal 63-93 degrees)." Dr. Cohen opines that the contusions to plaintiff's left shoulder and the strains to his cervical spine that he sustained as a result of the subject accident have resolved. Dr. Cohen further states that plaintiff's examination was essentially unremarkable, that he was unable to corroborate whether plaintiff sustained a left labrum tear to his left shoulder, that plaintiff is not disabled and that he may continue to work without restrictions. In addition, the medical report of defendants' expert radiologist, Dr. Sapan Cohn, is insufficient to meet defendants' burden on the motion (*see* ***Gaccione v Krebs***, 53 AD3d 524, 863 NYS2d 444 [2d Dept 2008]). Dr. Sapan Cohn states in her report that "the possibility of a small tear cannot be completely excluded [and] that an MRI arthrography is necessary for further evaluation." Thus, defendants' proof failed to objectively demonstrate that plaintiff did not suffer a serious injury within the meaning of the Insurance Law to his left shoulder or cervical spine as a result of the subject accident (*see* ***Tricario v Vitale***, 5 AD3d 761, 773 NYS2d 572 [2d Dept 2004]; ***Aronov v Leybovich***, 3 AD3d 511, 770 NYS2d 741 [2d Dept 2004]).

Inasmuch as defendants failed to meet their prima facie burden, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is denied.

The foregoing constitutes the Order of this Court.

Dated: October 15, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION