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SHORT FORM ORDER

INDEX No. 09-25635
CAL. No. 201002298MV



SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

***PRESENT:***

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 1-27-11
ADJ. DATE 5-5-11
Mot. Seq. # 001 - MD

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JOSEPH MARCIAL and BRIDGETTE MARCIAL,

Plaintiffs,

- against -

UCP ASSOCIATION OF GREATER SUFFOLK, INC. and BREANNA TRAPANI,

Defendants.

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SEIDEN, KAUFMAN & BOSEK, ESQS.
Attorney for Plaintiffs
One Old Country Road
Carle Place, New York 11514

SMITH MAZURE DIRECTOR WILKINS
Attorney for Defendants
111 John Street, 20th Floor
New York, New York 10038

Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-14 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15-23 ; Replying Affidavits and supporting papers _____; Other ___; it is,

***ORDERED*** that motion (seq. #001) by the defendants, UCP Association of Greater Suffolk, Inc. and Breanna Trapani, pursuant to CPLR 3212 and Insurance Law §§ 5102 (d) and 5104, for summary judgment dismissing the complaint as asserted by the plaintiff, Joseph Marcial, on the basis that he has failed to meet the serious injury threshold, is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by the plaintiff, Joseph Marcial, in a motor vehicle accident on February 16, 2009, on Motor Parkway at or near its intersection with Express Drive North, County of Suffolk, State of New York, when he was operating his vehicle and it was struck by the vehicle owned by UCP Association of Greater Suffolk, Inc., and operated by Breanna Trapani.

By his bill of particulars, Joseph Marcial alleges that as a result of the accident, he sustained injuries consisting of, *inter alia*, lumbar disc herniation at L4-5 impinging on the anterior aspect of the spinal canal and the nerve roots bilaterally; lumbar sprain and strain with muscle spasms, severe pain, tenderness, swelling, and permanent and significant restriction and limitation of motion; posterior disc herniation at C5-6 and C6-7 abutting the anterior aspect of the spinal cord; possible cervical radiculopathy; cervical sprain, strain, with muscle spasms, severe pain, swelling, tenderness, and permanent and/or significant restriction and limitation of motion; right knee sprain, strain, contusion;

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peripatellar bursitis; severe pain, swelling, tenderness, and permanent and/or significant restriction and limitation of motion.

The defendants now seek summary judgment dismissing the complaint on the basis that the injuries claimed by Joseph Marcial fail to meet the threshold imposed 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 present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1979]) and 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*).

It is for the court to determine in the first instance whether a *prima facie* showing of "serious injury" has been made out (*see* ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]).

In support of this motion, the defendants have submitted, *inter alia*, an attorney's affirmation; a copy of the summons and complaint and defendants' answer, and a copy of plaintiffs' bill of particulars; unsigned copies of the transcripts of the examinations before trial of Joseph Marcial and Bridgette Marcial, each dated July 8, 2010; an uncertified copy of plaintiff's hospital record prepared June 9, 2009; the sworn report of William A. Healy, III, M.D. dated September 8, 2010 concerning his independent orthopedic examination of the plaintiff; the sworn report of Howard B. Reiser, M.D. dated September 8, 2010 concerning his independent neurology examination of the plaintiff; the sworn report of Edward A. Toriello, M.D. dated June 16, 2009 concerning his independent orthopedic examination of the plaintiff; and a letter of transmission of the plaintiffs' deposition transcripts. The unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (*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]), however, are accompanied by a letter demonstrating service of the transcripts to counsel for the plaintiffs (*see* CPLR 3116) and are thus considered on this motion. The hospital record is not in admissible form pursuant to CPLR 3212.

Based upon a review of the foregoing, it is determined that the defendants have not established *prima facie* entitlement to summary judgment dismissing the complaint.

Dr. Toriello conducted the orthopedic examination of the plaintiff's cervical spine, right and left shoulders, right elbow, right and left wrists and hands, lumbosacral spine, and right and left knees. He measured the ranges of motion relative to his examination of those parts of the body, as set forth in his report, using a goniometer, and compared his findings to the stated normal range of motion values. He opines that the plaintiff reveals evidence of a resolved cervical hyperextension injury, resolved low back strain, and resolved right knee contusion, and that he has no orthopedic disability. However, it is noted

that upon examination of the plaintiff's lumbosacral spine, that Dr. Toriello found decreased flexion of 60 degrees when compared with the normal range of lumbar flexion of 90 degrees. Dr.Toriello then states that the range of motion examination is a subjective test under the voluntary control of the individual being tested, thus raising credibility issues which are to be determined by the trier of fact. The court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

Dr. Toriello has also set forth the materials he reviewed, including the plaintiff's medical records, and the MRI reports of plaintiff's lumbar spine. He states the report reveals a disc herniation at L4-5, impinging on the anterior aspect of the spinal canal and the nerve roots bilaterally. Dr. Toriello fails to address the plaintiff's claimed cervical disc herniations. Dr. Toriello states that based upon the history and the physical examination, that the injuries appear to be causally related to the accident. 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]). Here, Dr. Toriello has submitted admissible evidence to demonstrate findings of a herniated lumbar disc and a deficit in the lumbar flexion range of motion. While such injuries may constitute evidence of serious injury based upon objective findings, the defendants' expert does not comment on the cause of the cervical disc herniations and does not rule out that the cervical herniated discs were not caused by the subject accident.

The defendants have also submitted the report of Dr. William Healy concerning his independent orthopedic examination of the plaintiff. He sets forth that the plaintiff does not have a history of prior injury to those parts of the body he examined. He sets forth the materials, and medical records and reports he reviewed. Dr. Healy indicates that the MRI of the plaintiff's cervical spine, dated May 22, 2009, shows subligamentous posterior disc herniation at C5-6 and C6-7 abutting the anterior aspect of the spinal cord, and states there are EMG studies consistent with right C6 cervical radiculopathy. Dr. Healy also notes that the lumbar MRI report dated April 9, 2009 shows posterior disc herniation at L4-5, impinging the anterior aspect of the spinal canal and the nerve roots bilaterally. Dr. Healy states that although the plaintiff had an MRI showing an L4-5 impinging disc, as well as C5-6 and C6-7 subligamentous posterior disc, that the plaintiff did not show clinical findings consistent with radiculopathy on the date of the examination, thus raising factual issue with the EMG findings and determinations made relative to that test. Dr. Healy does not believe that further intervention is needed and that the plaintiff has sustained full and maximal recovery.

Dr. Healy does not address the issue of proximate cause of the injuries and does not rule out that the herniated discs were not caused by the subject accident, nor does he dispute that the plaintiff sustained such injuries. Thus, Dr. Healy has not established *prima facie* that the plaintiff did not sustain a serious injury based upon the diagnosis of both cervical and lumbar herniated discs. Dr. Healy sets forth his range of motion findings upon examination of the plaintiff's lumbar spine, cervical spine, both shoulders, elbows, wrists and knees, and compares those findings to his stated normal range of motion values. However, Dr. Healy and Dr. Toriello have set forth differing normal range of motion values for lumbar extension and lateral rotation, and for cervical flexion and rotation. Dr. Healy did not state a measurement for cervical rotation. Thus, this Court is left to speculate as to what the normal ranges of motion are, and what the range of motion for cervical rotation finding was upon Dr. Healy's examination (*see* ***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]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Dr. Healy has also failed to set forth the objective method employed to obtain the range of motion measurements he reported for the plaintiff's cervical and lumbar spine, such as the goniometer, inclinometer or arthroidal protractor (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff.

Howard Reiser, M.D. has set forth in his report concerning his independent neurological evaluation of the plaintiff that Mr. Marcial presents with ongoing subjective post-traumatic symptoms of intermittent pain in his posterior neck and low back regions. He continues that there is no ongoing symptom to suggest neurological involvement and that he finds no objective deficit. However, Dr. Reiser does not indicate what the "ongoing symptom" is which would suggest neurological involvement. Dr. Resier does not indicate that he performed an EMG study as part of his examination to compare with the prior EMG studies referenced by Dr. Healy, and merely states that the findings of the EMG were minimal, and that the doctor's impression is based on equivocal results. In contrast, Dr. Healy set forth in his report that the EMG studies results were consistent with right C6 cervical radiculopathy, thus raising a factual issue with Dr. Reiser's conclusion with regard to the July, 2009 EMG study. Dr. Reiser does not conclude that the herniated lumbar and cervical discs were not caused by the subject accident. Although the cervical MRI revealed disc herniation at C5-6 and C6-7 abutting the anterior aspect of the spinal cord, and the lumbar MRI revealed posterior disc herniation at L4-5 impinging the anterior aspect of the spinal canal and the nerve roots bilaterally, Dr. Reiser does not comment on these reported findings or their significance from a neurological perspective.

Additionally, the defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendants physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the 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 [3d 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 defendants' experts do not comment on the same.

Based upon the foregoing, the defendants have not established *prima facie* that the plaintiff did not sustain a serious injury within the meaning of Insurance law § 5102 (d) or 5104.

Accordingly, this motion is denied.

Dated: August 1, 2011

Hon. Joseph Farneti
Acting Justice Supreme Court

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**