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SHORT FORM ORDER

INDEX No. 09-34309
CAL No. 10-01752MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 1-4-11
ADJ. DATE 5-26-11
Mot. Seq. # 003 - MG; CASEDISP

THOMAS BARBARO and THERESA BARBARO,

Plaintiffs,

- against -

RAEES ISHTIAQUE,

Defendant.

PUGATCH & NIKOLIS
Attorney for Plaintiffs
1205 Franklin Avenue
Garden City, New York 11530

RICHARD T. LAU & ASSOCIATES
Attorney for Defendant
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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 16 - 23; Replying Affidavits and supporting papers 24 - 25; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Raees Ishtiaque seeking summary judgment dismissing plaintiffs' complaint is granted.

Plaintiff Thomas Barbaro commenced this action against defendant Raees Ishtiaque to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of County Road 83 and Hawkins Path in Selden, New York on February 11, 2009. Plaintiff, by his complaint, alleges, among other things, that he was traveling southbound on County Road 83 when he brought his vehicle to a stop for a red traffic light at its intersection with Hawkins Path. After the light turned green and he began to proceed across the intersection, plaintiff alleges that he was struck in the rear by the vehicle owned and operated by defendant Raees Ishtiaque. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject accident, including exacerbation and reactivation of previously quiescent herniated discs at levels C3 through C5; cervical and lumbar radiculopathy; exacerbation and reactivation of a previously quiescent left convex scoliotic deformity at level L2-L3; significant lateral recess stenosis at levels L3 through L5; and restriction of motion of the cervical and lumbar regions of his spine. Plaintiff further alleges that he has been and

continues to be partially disabled since the time of the accident. Plaintiff was retired at the time of the accident. In addition, plaintiff's wife, Theresa Barbaro, instituted a claim for loss of consortium.

Defendant now moves for summary judgment on the basis that the injuries allegedly sustained by plaintiff as a result of the subject accident do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, copies of plaintiff's uncertified medical records, and the sworn medical reports of Dr. Michael Katz and Dr. Alan Greenfield. Dr. Katz conducted an independent orthopedic examination of plaintiff at defendant's request on July 6, 2010. Dr. Greenfield performed an independent radiological review of the magnetic resonance imaging ("MRI") films of plaintiff's cervical and lumbar spines at defendant's request on November 9, 2010. Plaintiff opposes the motion on the ground that defendant failed to meet his prima facie burden demonstrating that he did not sustain an injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. In the alternative, plaintiff alleges that he sustained injuries within the "limitations of use" categories of the Insurance Law. In opposition to the motion, plaintiff submits his own affidavit, the sworn medical report of Dr. Pieter Keuskamp, a neurologist, the affidavit of Robert Spagnoli, plaintiff's physical therapist, and the unsworn medical report of Dr. Steven Winter, a radiologist, who reviewed the MRI film of plaintiff's cervical spine on October 19, 2010.

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 also* ***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 [2d Dept], *affd* 64 NYS2d 681, 485 NYS2d 526 [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."

In order to recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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 may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Dufel v Green***, *supra*). A

minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see* ***Caulkins v Vicinanzo***, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

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, i.e., 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, defendant established his prima facie entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(a) as a result of the subject accident by submitting the affirmed medical reports of his examining physicians and a copy of plaintiff's deposition transcript (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Al-Khilwei v Truman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Young Hwan Park v Orellana***, 49 AD3d 721, 854 NYS2d 447 [2d Dept 2008]; ***Cooper v LI Constr., Inc.***, 45 AD3d 623, 845 NYS2d 454 [2d Dept 2007]). In his affirmation, Dr. Katz states that an examination of plaintiff reveals full range of motion in plaintiff's cervical and lumbar spines, in his right hand, and in his upper and lower extremities. Dr. Katz opines that the cervical and lumbosacral strains and radiculitis that plaintiff sustained as a result of the subject accident have resolved, and that there are no signs or symptoms of permanency relative to his neck or back that are causally related to the subject accident. Dr. Katz's report concludes that plaintiff is not disabled and that plaintiff suffers from multi-level degenerative changes in the cervical and lumbar regions of his spine, which date back to a prior motor vehicle

accident in 2006, and that the subsequent progressive changes relate to degeneration, not the subject accident.

Similarly, Dr. Greenfield states in his medical reports that plaintiff suffers from multi-level degenerative changes in his spine that are not causally related to the subject accident, which have been evolving over the years. Dr. Greenfield states a comparison between plaintiff's cervical spine MRI examination following his 2006 motor vehicle accident and cervical spine MRI examination following the subject accident reveals that plaintiff underwent an anterior surgical stabilization/fusion of level C3-C4, with metallic hardware in place in August 2007, and that the previously observed disc herniation at level C3-C4 is no longer evident. Dr. Greenfield states that the remaining findings between the two MRIs are virtually the same. Additionally, Dr. Greenfield states that in comparing plaintiff's lumbar spine MRI after the previous accident with the lumbar spine MRI after the subject accident, there are no findings on the current MRI that are causally related to the subject accident, and that the two studies are virtually identical, showing chronic longstanding degenerative changes in plaintiff's lumbar region of his spine.

In opposition, the evidence submitted by plaintiff failed to raise a triable issue of fact as to whether he sustained an injury to the cervical and lumbar regions of his spine within the limitations of use categories of the Insurance Law (*see* ***Perl v Meher***, 74 AD3d 930, 902 NYS2d 632 [2d Dept 2010]; ***Krerimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]). Initially, the Court notes that the MRI report of Dr. Winter and the medical reports of Dr. Keuskamp, dated March 19, 2009 and June 11, 2009, are inadmissible since they are unsworn and, therefore, without probative value (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Chanda v Varughese***, 67 AD3d 947, 890 NYS2d 88 [2d Dept 2009]; ***Sutton v Yener***, 65 AD3d 625, 884 NYS2d 163 [2d Dept 2009]). In any event, Dr. Winter's report failed to express any opinion as to whether plaintiff's injuries were caused or aggravated by the subject accident (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009]; ***Ferber v Madorran***, 60 AD3d 725, 875 NYS2d 518 [2d Dept 2009]; ***Luizzi-Schwenk v Singh***, 58 AD3d 811, 872 NYS2d 176 [2d Dept 2009]).

Additionally, the affirmation of Dr. Keuskamp failed to raise a triable issue of fact, because it failed to adequately address plaintiff's prior motor vehicle accident in 2006, and is so perfunctory that the court is left to speculate as to whether plaintiff was asymptomatic prior to the subject accident or whether the subject accident aggravated a previously quiescent injury (*see* ***Lea v Cucuzza***, 43 AD3d 882, 842 NYS2d 468 [2d Dept 2007]; ***Suarez v Abe***, 4 AD3d 288, 722 NYS2d 317 [1st Dept 2004]; *cf.* ***McKenzie v Redl***, 47 AD3d 775, 850 NYS2d 545 [2d Dept 2007]). Furthermore, while Dr. Keuskamp explains that plaintiff has sustained an exacerbation of a prior cervical injury, which resulted in a significant limitation in the range of motion in his cervical spine, Dr. Keuskamp's report fails to show that contemporaneous with the subject accident plaintiff had significant range of motion limitations in his cervical region (*see* ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Prop., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]). Likewise, the affidavit of Robert Spanoli failed to demonstrate that plaintiff exhibited a significant limitation of motion in the cervical region of his spine contemporaneous with the subject accident (*see* ***Jack v Acapulco Car Serv., Inc.***, 72 AD3d 646, 897

NYS2d 648 [2d Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 890, 894 NYS2d 481 [2d Dept 2010]; ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]). In any event, a physical therapist "cannot by definition diagnose or make prognoses and is incompetent to determine the permanency or duration of a physical limitation" (***Delaney v Lewis***, 256 AD2d 895, 897, 682 NYS2d 270 [3d Dept 1998]; *see* ***Howard v Espinosa***, 70 AD3d 1091, 898 NYS2d 267 [3d Dept 2010]; ***Brandt-Miller v McArdle***, 21 AD3d 1152, 801 NYS2d 834 [3d Dept 2005]; ***Tornatore v Haggerty***, 307 AD2d 522, 763 NYS2d 344 [3d Dept 2003]) and, as a consequence, Mr. Spanoli's affidavit fails to raise a triable issue of fact as to whether plaintiff sustained a serious injury under the Insurance Law (*see* ***Brush v Levy***, 303 AD2d 536, 756 NYS2d 456 [2d Dept 2003]).

Moreover, plaintiff has failed to demonstrate that he sustained a serious injury in the lumbar region of his spine as a result of the subject accident (*see* ***Gaddy v Eyler***, *supra*; ***Ambos v New York City Tr. Auth.***, 71 AD3d 801, 895 NYS2d 879 [2d Dept 2010]; ***Taylor v Flaherty***, 65 AD3d 1328, 887 NYS2d 144 [2d Dept 2009]). Dr. Keuskamp in his medical report states that there is no evidence of clinical progression in plaintiff's lumbar spine stenosis, and that the aggravation to plaintiff's lumbar spine as a result of the subject accident, is the result of the "normal progression of [plaintiff's] underlying lumbar spinal stenosis rather than acute traumatic aggravation of this condition and, thus, there is no direct causal relationship between the accident and the progression of his lumbar spinal stenosis symptoms." In addition, plaintiff's affidavit was insufficient to raise a triable issue of fact as to whether he sustained an injury within the limitations of use categories of Insurance Law § 5102(a) (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Riley v Randazzo***, 77 AD3d 647, 908 NYS2d 445 [2d Dept 2010]; ***Hargrove v New York City Tr. Auth.***, 49 AD3d 692, 854 NYS2d 182 [2d Dept 2008]). Finally, neither plaintiff nor any of his experts addressed plaintiff's substantial gap in treatment (*see* ***Pommells v Perez***, *supra*, *cf.* ***Eusebio v Yannetti***, 68 AD3d 919, 892 NYS2d 127 [2d Dept 2009]). Indeed, at his deposition, plaintiff testified that although his No-Fault benefits were terminated after approximately 1½ months of treatment, he did not inquire as to whether his private health insurance would cover the expenses for him to continue treatment. Accordingly, defendant's motion for summary judgment is granted.

Dated: 7/30/11

Daniel Martin
J.S.C.

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