STATE OF NEW YORK
SUPREME COURT **COUNTY OF RENSSELAER**

GARY D. LENNOX,

Plaintiff,

-against-

Index No.: 216711
RJI No.: 41-0059-2006

AUDREY E. McHUGH and
TIMOTHY McHUGH,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the instant action seeking recovery for injuries sustained as a result of an automobile accident that occurred on January 7, 2003. Plaintiff was in the front passenger seat of an automobile stopped at a traffic signal when an automobile driven by defendant Audrey McHugh collided with the rear end of such car.

Defendants have made a motion for summary judgment pursuant to CPLR 3212 on the ground that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102(d). Defendants rely upon an affirmation of an orthopedic surgeon, medical records from plaintiff's treating health care providers and the transcripts of plaintiff's examination before trial in support of the motion.

The Court is mindful that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue (Sternbach v Cornell University, 162 AD2d 922, 923 [Third Dept., 1990]). The focus should be on issue identification rather than issue determination (Sternbach v Cornell University, supra). 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 in admissible form to demonstrate the absence of any material issues of fact (see Zuckerman v City of NY, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, supra; Alvarez v Prospect Hosp., supra; see also Wahila v Kerr, 204 AD2d 935, 936-937 [Third Dept., 1994]). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and

determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [Third Dept., 1995]; Boyce v Vazquez, 249 AD2d 724, 725 [Third Dept., 1998]).

Under Insurance Law § 5102 (d) a serious injury is defined 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.

Plaintiff's bill of particulars alleges that he sustained a significant limitation of use of a body function or system based upon injuries to his neck, both shoulders, back and right arm and hand, together with a medically determined injury or impairment which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for 90 out of the first 180 days immediately following the accident.

As the moving party, defendants, in the first instance, are required to present evidence in admissible form sufficient to establish that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 [d] (see Tankersley v Szesnat, 235 AD2d 1010, 1011[Third Dept., 1997]; Tompkins v Burtnick, 236 AD2d 708 [Third Dept., 1997]; Podwirny v De Caprio, 194 AD2d 1057 [Third Dept., 1993]; Weaver v Derr, 242 AD2d 823, 824 [Third Dept., 1997]; Kristel v Mitchell, 270 AD2d 598 [Third Dept.,

2000]). It is only if such a showing is made that the burden shifts to plaintiff to proffer competent medical evidence based upon objective medical findings and diagnostic tests to support his claim (see Gaddy v Eyler, 79 NY2d 955, 957 [1992]; Eisen v Walter & Samuels, 215 AD2d 149, 150 [First Dept., 1995]; Tankersley v Szesnat, supra; Jordan v Baine, 241 AD2d 894, 895 [Third Dept., 1997]).

Defendants submitted an affirmation and medical report from Bryan S. Bilfield, M.D. Dr. Bilfield conducted an examination of plaintiff approximately three and one half years after the accident. He found normal range of motion in plaintiff's neck and shoulders with no evidence of either atrophy or spasm. Based upon imaging studies in plaintiff's records, he opined that the only objective evidence with respect to plaintiff's complaints indicated degenerative disc disease of the cervical spine as well as arthritis of the right shoulder joint. He concluded that there was no evidence of permanency or disability related to the accident. Dr. Bilfield's opinion with respect to the condition of the plaintiff as of the time of the examination is supported by the medical records and the physical examination of the plaintiff and is sufficient to meet defendants' burden with respect to the claimed significant limitation of use category.

Dr. Bilfield's affirmation also included a statement that there was no "medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing all of the material acts which constituted her [sic] usual and customary activities for not less than 90 days during the 180 days immediately following the motor

vehicle accident on January 7, 2003." The phrase merely parrots the statutory language. The affirmation is devoid of any factual basis for the opinion with respect to the 90/180 day category. "Such conclusory statements do not constitute the prima facie evidentiary showing that is required of the proponent of a summary judgment motion (see, Winegrad v New York Univ. Med. Ctr., supra, at 852-853)." (Christiana v Benedictine Hosp. 248 AD2d 910, 913 [Third Dept., 1998]).

Defendants also rely upon plaintiff's medical records which show that upon examination four days after the accident he was authorized to return to work as soon as he stopped taking hydrocodone for pain. He was consistently allowed to do all activities "as tolerated," rendering all restrictions self-imposed. His examination approximately one month post accident indicated that his shoulder was mostly resolved and that he had some neck discomfort. He had returned to work on light duty. Two months post accident, the medical records indicated that he continued to work, with his neck pain resolved and his shoulder improving. Three months post accident, his treating physician's records indicate that plaintiff was going about full activities, as tolerated, but that plaintiff stated that he could not hang sheet rock or work as a carpenter due to the pain. His doctor noted a "lack of hard findings" supporting the extent of his disability. The Court finds that plaintiff's medical records establish an absence of objective proof of a medically determined injury and meet defendants' burden with respect to the 90 out of 180 day category (see Tuna v Babendererde, 32 AD3d 574 [Third Dept., 2006]; Gonzalez v Green, 24 AD3d 939, 940

[Third Dept., 2005]; Drexler v Melanson, 301 AD2d 916 [Third Dept., 2003]). Defendants have therefore made a prima facie showing that plaintiff did not sustain a serious injury under either of the claimed categories.

Plaintiff has submitted an affidavit from his treating orthopaedic surgeon, James P. Furlong, II, M.D., in opposition to the motion. Dr. Furlong does not address the 90 out of 180 day category of injury. As such, plaintiff has failed to raise a triable issue of fact as to whether the restrictions on his daily activities to which he testified in his examination before trial resulted from a medically determined injury caused by the subject accident.

While Dr. Furlong opines that plaintiff has suffered a serious injury to his cervical spine, neither the affidavit nor the medical report upon which it is based set forth any quantification of the decrease in the range of motion or the nature of the tests performed nor do they compare plaintiff's current range of motion with the normal range for a person of plaintiff's age. The affidavit also fails to quantify or compare the limitations on lifting and carrying or performing other activities (see Toure v Avis Rent A Car Sys., 98 NY2d 345, 350 [2002]; Gonzalez v Green, 24 AD3d at 940-941). In addition, the doctor's opinion does not address the pre-existing condition of degenerative cervical disc disease nor does it attempt to distinguish the injuries sustained in the accident from the pre-existing condition by objective evidence (see Pommells v Perez, 4 NY3d 566, 580 [2005]; Suarez v Abe, 4 AD3d 288, 289-290 [First Dept., 2004]; Pinkowski v All-States Sawing & Trenching, 1 AD3d 874, 875-876 [Third Dept., 2003]; Franchini v Palmieri,

307 AD2d 1056, 1057-1058 [Third Dept., 2003], affd 1 NY3d 536 [2003]).

Similarly, while Dr. Furlong's affidavit does include objective evidence of an injury to the shoulder in the form of evidence of a possible small tear of the superior glenoid labrum, there is no attempt to relate the tear to the symptoms alleged by plaintiff or to quantify the extent of plaintiff's disability. There is also no mention of the pre-existing arthritic condition of plaintiff's shoulder, which was characterized as severe in an MRI taken several months after the accident.

Furthermore, Dr. Furlong's affidavit does not address the significant gap in treatment commencing three months after the accident (see Pommells v Perez, 4 NY3d at 574-575). Such failure is especially critical under the facts of this case. The force of the rear end accident appears to have been quite minor, with the car in which plaintiff was a passenger sustaining only a cracked plastic rear bumper. Plaintiff's medical records indicate substantial improvement over the first three months post accident. Thereafter, a gap in treatment of in excess of six months occurred. It is thus just as likely that plaintiff's injuries from the accident had fully resolved leaving plaintiff's current complaints attributable to his pre-existing degenerative conditions. It is therefore determined that plaintiff has failed to show the existence of a triable issue of fact as to whether he sustained a serious injury in the significant limitation of use or 90 out of 180 days categories.

Accordingly, it is

ORDERED, that defendants' motion for summary judgment dismissing plaintiff's complaint is hereby granted.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for the defendants, who are directed to enter this Decision/Order without notice and to serve plaintiff's counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
March 23,2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Defendants' Notice of Motion, dated October 27, 2006; Affidavit of Thomas J. Reilly, Esq., dated October 27, 2006 with Exhibits A-H annexed; Affirmation of Bryan S. Bilfield, M.D. dated October 27, 2006 with Exhibits J-P annexed;
Memorandum of Law dated October 27, 2006;

Affidavit of Mario D. Cometti, Esq., sworn to December 19, 2006; Affidavit of James P. Furlong, II, M.D. sworn to December 19, 2006 with Exhibits A-C annexed;
Memorandum of Law dated December 19, 2006;

Reply Affidavit of Thomas J. Reilly, Esq., dated December 28, 2006;
Memorandum of Law dated December 28, 2006.