SHORT FORM ORDER

INDEX NO. 04-00885
CALENDAR NO. 06-01440-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-3-06
ADJ. DATE 2-2-07
Mot. Seq. # 001 MG; CASEDISP

PATRICK KELLEHER, Plaintiff, – against – SCOTT R. KAEPPEL, KATHERINE JIMENEZ and CONSUELO JIMENEZ, Defendants.	LESLIE TENZER, ESQ. Attorney for Plaintiff 1125 Deer Park Avenue Babylon, NY 11703 DAVID N. SLOAN, ESQ. Attorney for Defendant Kaeppel 30 Jericho Executive Plaza, Suite 200W Jericho, NY 11753 JAMES P. NUNEMAKER, JR. & ASSOCS. Attorneys for Defendants Jimenez PO Box 9040 Jericho, NY 11753

Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17 - 26; Replying Affidavits and supporting papers 29 - 31; Other 27- 28; 32 - 34; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Katherine Jimenez and Consuelo Jimenez for summary judgment dismissing the complaint against them is granted; and it is

ORDERED that summary judgment dismissing the claims against defendant Scott Kaeppel is granted.

Plaintiff Patrick Kelleher commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on Middle Country Road in the Town of Brookhaven on December 15, 2002. The accident allegedly happened when a vehicle

driven by defendant Scott Kaeppel made a left turn on Middle Country Road in front of the path of a vehicle owned by defendant Consuelo Jimenez and driven by defendant Katherine Jimenez. Plaintiff, a passenger in the vehicle driven by defendant Katherine Jimenez, alleges in his bill of particulars that he sustained numerous injuries in the accident, including a disc herniation effacing the thecal sac at level C7-T1; a disc bulge at level C6-C7; limited movement and "severe spasm" in the cervical region; and cervicogenic headaches. He further alleges that he was "confined to bed and home intermittently" for one month after the accident, and that he remains partially disabled.

Defendants Katherine and Consuelo Jimenez now move for summary judgment dismissing the complaint on the ground that plaintiff is precluded by Insurance Law §5104 from recovering for non-economic loss, as he did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d). Defendants' submissions in support of the motion include copies of the pleadings; a transcript of plaintiff's deposition testimony; an x-ray report concerning plaintiff's cervical spine dated February 5, 2003; an MRI report concerning plaintiff's brain dated January 5, 2004; and sworn medical reports prepared by defendants' experts, Dr. S. Farkas, and Dr. Sheldon Feit. At defendants' request, Dr. Farkas, an orthopedist, conducted an examination of plaintiff in April 2006 and reviewed various medical records related to the alleged injuries. Dr. Feit, a radiologist, conducted an independent review of a magnetic resonance imaging (MRI) study of plaintiff's cervical spine that was performed in January 2003. Also submitted with the moving papers was a sworn medical report prepared by Dr. Chacko, a neurologist, who performed an independent examination of plaintiff on behalf of the No Fault carrier in January 2004.

Plaintiff opposes the motion for summary judgment, arguing that the proof submitted by defendants fails to establish prima facie that he did not suffer an injury within either the "significant limitation of use" category or a nonpermanent injury within the 90/180 category. Alternatively, plaintiff alleges that the affirmation by his treating neurologist, Dr. Cecily Anto, and the report and records of his treating chiropractor, Dr. Jeffrey Block, raise a triable issue of fact as to whether he sustained injuries within those two categories. A review of Dr. Anto's affidavit shows that she examined plaintiff on seven occasions during the period from January 7, 2003 to February 4, 2004, and that plaintiff complained at such examinations of pain in his cervical region and intermittent headaches. The Court notes that the medical records from Block Chiropractic submitted by plaintiff reflect only four months of treatment.

Insurance Law § 5102 (d) defines "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.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***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 also may 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]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see*, ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The medical evidence presented by the Jimenez defendants establishes prima facie that plaintiff did not suffer a serious injury as a result of the accident (*see*, ***Hasner v Budnik***, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2006]; ***Meely v 4 G's Truck Renting Co.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Abrahamson v Premier Car Rental of Smithtown***, 261 AD2d 562, 691 NYS2d 83 [2d Dept 1999]). At a deposition conducted on February 2, 2006, plaintiff testified that he began suffering neck pain and headaches one to two weeks after the accident, at which time he sought treatment at Block Chiropractic. He testified that he received regular chiropractic treatments for his neck pain for approximately 16 months, and then received approximately two months of physical therapy. Plaintiff testified that although the No Fault carrier refused to reimburse for chiropractic treatments after one year, he used his own insurance benefits for about four months to pay for chiropractic care, and that he switched to physical therapy because No Fault benefits would pay for such treatment. Further, he testified that he did not leave his house, except to attend doctor appointments, for approximately two months after the accident, and that he was unemployed when the accident occurred.

Dr. Farkas' sworn report states that plaintiff presented with complaints of dizziness and neck pain "depending upon his activities." It states that plaintiff exhibited normal range of motion in his cervical and thoracolumbar regions, and that there was no evidence of spasm or crepitus during stating positioning or active range of motion testing. It states that plaintiff could toe and heel walk without difficulty, that his muscle strength and deep tendon reflexes were

normal, and that his sensation was intact. Dr. Farkas opines that plaintiff suffered cervical and thoracolumber sprains as a result of the accident, and that such conditions are resolved. He concludes that plaintiff is not disabled and may perform the usual activities of daily living without restriction. Further, the report prepared by Dr. Feit states, in relevant part, that a review of the MRI films of plaintiff's cervical spine showed a normal study, with no evidence of any disc bulges or hernitations, no foraminal stenosis, no spinal cord abnormalities, and no paraspinal soft tissue lesions.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see*, ***Gaddy v Eyler***, *supra*). A plaintiff claiming injury within the "significant limitation of use" category must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitations of movement and their duration (*see*, ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [2d Dept 1991], *lv denied*). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see*, ***Iusmen v Konopka***, __ AD3d __, 2007 WL 766192 [2d Dept, March 13, 2007]; ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of limitations that are based on a recent examination of plaintiff (*see*, ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). In addition, a plaintiff claiming serious injury who terminates treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see*, ***Joseph v Layne***, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; ***Batista v Olivo***, *supra*).

Contrary to the assertions by plaintiff's counsel, the evidence presented in opposition to the motion fails to raise a triable issue of fact. The Court notes that the unsworn MRI report regarding plaintiff's cervical spine submitted in opposition to the motion was considered in its determination of this motion, as defendants included such report in their moving papers, and it is clear their expert reviewed and referred to such report (*see*, ***Zarate v McDonald***, 31 AD3d 632, 819 NYS2d 288 [2d Dept 2006]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]; ***Perry v Pagano***, 267 AD2d 290, 699 NYS2d 882 [2d Dept 1999]). However, the unsworn medical report and records prepared by plaintiff's treating chiropractor, Jeffrey Block, lack probative value and were not considered (*see*, ***Grasso v Angerami***, *supra*; ***Legendre v Siqing Bao***, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; ***Hernandez v Taub***, 19 AD3d 368, 796 NYS2d 169 [2d Dept 2005]).

Dr. Anto avers in her affirmation that plaintiff demonstrated limitations in cervical joint function during an examination conducted on January 23, 2003, and that he complained of

"discomfort" in his cervical spine "at the extreme of movements" during examinations conducted in February and March 2003. Although it appears range of motion testing was performed by Dr. Anto, conspicuously absent from the affirmation are the degrees of cervical motion measured during the period that plaintiff was treating with Dr. Anto, or any indication that other clinical tests were performed during such examinations to confirm plaintiff's complaints of pain and numbness (*see*, ***Murray v Hartford***, *supra*; ***Ersop v Variano***, 307 AD2d 951, 763 NYS2d 482 [2d Dept 2003]; ***Kassim v City of New York***, 298 AD2d 431, 748 NYS2d 265 [2d Dept 2002];***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). Further, Dr. Anto's last examination of plaintiff occurred in February 2004 (*see*, ***Ranzie v Abdul-Massih***, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]; ***Constantinou v Surinder***, 8 AD3d 323, 777 NYS2d 708 [2d Dept 2004]), and neither she nor plaintiff have offered an explanation for the cessation of medical treatment less than 1½ years after the accident (*see*, ***Pommells v Perez***, *supra*; ***Manning v Tejeda***, __ AD3d __, 2007 WL 766103 [2d Dept, March 13, 2007]). Moreover, it is clear that Dr. Anto impermissibly relied on the unsworn reports by plaintiff's treating chiropractor and radiologists in reaching her conclusions that plaintiff suffers from herniated and bulging discs as a result of the accident, and that such conditions have caused a significant limitation in spinal joint function and prevented him from performing his normal activities for more than 90 days of the 180 days following the accident (*see*, ***Iusmen v Konopka***, *supra*; ***Elder v Stokes***, 35 AD3d 799, 828 NYS2d 138 [2d Dept 2006]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Friedman v U-Haul Truck Rental***, 216 AD2d 266, 627 NYS2d 765 [2d Dept 1995]). Accordingly, Dr. Anto's conclusions regarding the cause, duration and significance of plaintiff's injuries are rejected as speculative and tailored to meet the statutory threshold (*see*, ***Cervino v Gladysz-Steliga***, 36 AD3d 744, 829 NYS2d 169 [2d Dept 2007]; ***Knijnikov v Mushtaq***, 35 AD3d 545, 827 NYS2d 198 [2d Dept 2006]; ***D'Alba v Yong-Ae Choi***, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]; ***Bennett v Genas***, 27 AD3d 601, 813 NYS2d 446 [2d Dept 2006]).

Thus, as no other admissible medical evidence was proffered by plaintiff showing substantially restricted movement in plaintiff's cervical region shortly after the subject accident and the duration of such restrictions, plaintiff failed to raise a triable issue as to whether he sustained injuries within the "significant limitation of use" category (*see*, ***Iusmen v Konopka***, *supra*; ***Zinger v Zylberberg***, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; ***Felix v New York City Tr. Auth.***, *supra*). The Court notes that it is well established that the existence of a herniated or bulging disc, in and of itself, is not evidence of a serious injury (*see*, ***Umanzor v Pineda***, __ AD3d __, 2007 WL 1016894 [2d Dept, April 3, 2007]; ***Iusmen v Konopka***, *supra*; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, *supra*), and that a plaintiff's subjective complaints of pain are insufficient to raise a triable issue of fact (*see*, ***Ranzie v Abdul-Massih***, *supra*; ***Kinchler v Cruz***, 22 AD3d 808, 802 NYS2d 754 [2d Dept 2005]; ***Cennamo v Themistokleous***, 22 AD3d 700, 804 NYS2d 401 [2d Dept 2005]; ***Barrett v Howland***, 202 AD2d 383, 608 NYS2d 681 [2d Dept 1994]). Plaintiff also failed to present competent medical evidence raising a triable issue as to whether he sustained

injuries that rendered him unable to perform substantially all of his daily activities for not less than 90 days of the 180 days immediately after the accident (*see*, ***Cervino v Gladysz-Steliga***, *supra*; ***Zinger v Zylberberg***, *supra*; ***Sainte-Aime v Ho***, *supra*). Finally, absent any admissible objective evidence of a serious injury, plaintiff's self-serving affidavit, which contradicts portions of his deposition testimony, is insufficient to defeat summary judgment (*see*, ***Iusmen v Konopka***, *supra*; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]; ***Elder v Stokes***, *supra*; ***Felix v New York City Tr. Auth.***, *supra*).

Accordingly, the motion for summary judgment dismissing the complaint against the Jimenez defendants on the ground that plaintiff's injuries do not meet the serious injury threshold is granted. In view of this determination, the Court also grants summary judgment dismissing the claims against defendant Kaeppel (*see*, CPLR 3212 [b]).

Dated: APR 23 2007

J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION