

**Ogoff v Sinram**

2008 NY Slip Op 30864(U)

March 4, 2008

Supreme Court, Nassau County

Docket Number: 6413-05/

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**CHAD OGOFF,**

**TRIAL/IAS, PART 7  
NASSAU COUNTY**

**Plaintiff,**

**MOTION DATE: 1/17/08**

**-against-**

**MOTION SEQ. NO.: 002  
INDEX NO.: 016413/05**

**NANCY L. SINRAM and PETER J. SINRAM,**

**Defendants.**

**The following papers read on this motion (numbered 1-3):**

**Notice of Motion.....1**  
**Affirmation in Opposition.....2**  
**Affirmation in Reply.....3**

Defendants Nancy L. Sinram and Peter J. Sinram’s (“defendants”) motion for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff Chad Ogoff, age 24, alleges that on October 17, 2002 at approximately 3:15 p. m., a motor vehicle operated by plaintiff came into contact with a vehicle owned by defendant Peter J. Sinram and operated by defendant Nancy L. Sinram. The accident occurred on Horton Avenue at or near the intersection of Delmonico Place, Village of Valley Stream in Nassau County. Defendants now move for an order dismissing plaintiff’s complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a “serious injury” within the meaning of **Insurance Law §5102(d)**.

**Insurance Law §5102(d)** provides that a “serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function

or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a fracture (4), permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The Court finds that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiff from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated February 13, 2007, of orthopedist Leon Sultan, MD, PC, covering an examination of that date, affirmed report of examination of neurologist S. Murthy Vishnubhakat, MD, dated February 25, 2007, covering an examination of February 22, 2007 and affirmed report of radiologist Sondra J. Pfeffer, MD dated April 9, 2007, covering a review of left shoulder x-rays performed on October 18, 2002 and a review of an MRI Arthrogram performed on December 5, 2002. Defendants also submit unaffirmed reports of examination of plaintiff's orthopedist, Craig L. Levitz, MD covering examinations of November 19, 2002, December 17, 2002 and January 7, 2003, unaffirmed narrative report of Dr. Levitz dated January 12, 2004 covering those examinations, unaffirmed report of examination of Dr. Levitz, dated October 3, 2006, covering an examination of that date and unaffirmed report of plaintiff's radiologist Harold M. Augenstein, MD, dated December 5, 2002 covering an MR Arthrogram of plaintiff's left shoulder performed on that date. The Court notes that the report of a physician which is

not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106; Grasso v. Angerami**, 79 NY2d 814; **Rodriguez v. Huerfano**, 46 AD3d 794; **Duke v. Saurelis**, 41 AD3d 770; **Young Soo Lee v. Troia**, 41 AD3d 469. However, the Court may consider the reports of Drs. Levitz and Augenstein because they were submitted by defendants and prepared by physicians of plaintiff. *See* **Kearse v. NYC Transit Authority**, 16 AD3d 45; **Meely v. 4 G's Truck Renting Co., Inc.**, 16 AD3d 26; **Mantila v. Luca**, 298 AD2d 505; **Pagano v. Kingsbury**, 182 AD2d 268.

Dr. Sultan reports that plaintiff complained that his left shoulder has decreased range of motion and often feels as if it is “coming out.” Upon examination, Dr. Sultan provided range of motion testing, comparing the results to normal, of the left shoulder and the cervical spine. With respect to the left shoulder, Dr. Sultan noted normal range of motion testing with the exception of abduction and forward elevation. The range of motion testing of the cervical spine yielded normal results. Dr. Sultan examined plaintiff’s MRI of his left shoulder, and noted that its findings are consistent with a Hill-Sachs deformity which is according to Dr. Sultan “a chronic lesion that usually develops over a period of years after multiple dislocations.” Dr. Sultan states further, “the left shoulder MRI also describes no significant adjacent narrow signal alteration to suggest the lesion is acute leading me to believe that in fact this is an old unrelated lesion that is accounting for [plaintiff’s] current complaints and examination findings.” Dr. Sultan noted that plaintiff’s “ongoing permanent partial left shoulder impairment” would be easily amenable to surgical correction which plaintiff was not yet ready to undergo.

Dr. Vishnubhakat provides range of motion testing, comparing the results to normal, of the cervical and lumbar spines and noted normal results. Dr. Vishnubhakat also reported negative straight leg raise test with some back and thigh discomfort, no spasms or tenderness in the cervical and lumbar spines, normal muscle strength in the upper and lower extremities, deep tendon reflexes of 2++ throughout, normal sensory examination, normal toe, heel and tandem walking and normal finger-to-nose and heel-to-shin testing

and negative Romberg and Babinski signs.

With respect to the left shoulder range of motion, comparing the results to normal, Dr. Vishnubhakat found decreased range of motion in forward elevation and abduction. Plaintiff's left shoulder adduction and internal and external rotation were normal. Dr. Vishnubhakat concluded that his examination "failed to reveal any neurologic dysfunction pertaining to brain, spinal cord, nerve roots or neurovascular bundle" and that plaintiff does not exhibit any neurologic disability. Dr. Vishnubhakat opined that plaintiff's problems with his left shoulder are orthopedic in nature without neurologic sequelae.

Dr. Pfeffer opines that x-rays taken one day post accident reveal a chronic Hill-Sachs deformity of the humeral head and "no evidence [of] acute (trauma related) fracture or dislocation." Dr. Pfeffer also found that the MRI-arthrogram performed seven weeks post accident, reveals Hill-Sachs deformity of the humeral head with "anterior labral degeneration and tearing" and an intact rotator cuff. Dr. Pfeffer concludes "insofar as the presence of chronic Hill-Sachs deformity of the humeral head implies prior anterior dislocation of the humeral head relative to the scapular glenoid, labral tearing may be attributable to prior injury, or to chronic instability (on a congenital basis). A search for pre-trauma medical records is advised."

Defendants also submit the deposition testimony of plaintiff conducted on January 25, 2007. Plaintiff testified that one day following the accident, he went to Franklin General Hospital where he had x-rays of his left shoulder and neck. Plaintiff testified that within a week he saw Dr. Levitz of Orlin & Cohen who took x-rays of his left shoulder and sent him for an MRI arthrogram due to a tear. He testified that Dr. Levitz informed him he would need arthroscopic surgery but that if he did not want to have surgery, he could have physical therapy. Plaintiff stated that he went for physical therapy at Orlin & Cohen every week for two months and that for four and one half years, he has been thinking of having the surgery. Plaintiff testified that prior to the accident, he had not been

in any kind of accident where he injured his shoulder. Plaintiff asserts that he has shoulder and back pain if he sits in one position for too long and can no longer lift his shoulder past a certain point without causing it to “pop” out. In terms of activities, he can no longer do chores such as take out the garbage or play pool in his house.

The Court finds that the reports of defendants’ examining physicians, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, so as to satisfy the Court that an “objective basis” exists for their opinions. Specifically, defendants’ physicians have opined that plaintiff’s left shoulder injury is consistent with a chronic or congenital condition. Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff Chad Ogoff did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a “serious injury” sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition plaintiff submits unaffirmed narrative reports of Dr. Levitz, dated January 12, 2004 (the “January 12 Report”) and December 20, 2006. Plaintiff attaches a separate undated and incomprehensible one sentence affirmation which provides, that Dr. Levitz “under the penalties of perjury to CPLR 2106, does hereby affirm the contents of my reports dated January 12, 2004, as well as the report that dated December 20, 2006 as the preparation date” which presumably affirms the aforementioned reports. The Court finds that said affirmation does not comply with **CPLR §2106** as it is undated and does not affirm as to the truth of the contents of the reports. *See Jones v. Schmitt*, 7 Misc.3d 47; **Ruiz v. Security Sales Corp.**, 2001 WL 1602981. However, the Court may consider the January 12 Report of Dr. Levitz because it was submitted by defendants. *See Kearsse v. NYC Transit Authority, supra*; **Meely v. 4 G’s Truck Renting Co., Inc., supra**; **Mantila v. Luca, supra**; **Pagano v. Kingsbury, supra**. The January 12 Report is a narrative report summarizing Dr. Levitz’s examinations of plaintiff on November 19, 2002

and December 17, 2002. On November 19, 2002, with respect to plaintiff's left shoulder, Dr. Levitz states that he found a very sublaxable left shoulder, positive O'Brien and Andrews labral signs and signs for labral pathology, a click, and full range of motion and noted that plaintiff can be "easily dislocated posteriorly and anteriorly." Dr. Levitz stated that he counseled plaintiff on the need for surgery and that he recommended trying a course of physical therapy. Dr. Levitz also reported on his examination of December 17, 2002 when he noted that plaintiff's left shoulder exhibited excessive external rotation, 2+ instability, no muscle atrophy or neurological injury. Dr. Levitz's stated that an MR-Arthrogram "demonstrated a moderate Hill-Sachs lesion, showed the osteochondral fracture of the humeral head associated with dislocation. It also showed a tear of his glenoid labrum characteristics of a dislocation." Dr. Levitz diagnosed a "shoulder dislocation with osteochondral fracture. Glenoid labrum tear." The Court notes that there are no comments provided under the subsection entitled 'Prognosis and Causal Relationship.'

The Court can also consider an unaffirmed MRI report by Dr. Augenstein submitted by defendants covering plaintiff's left shoulder performed on December 5, 2002 which revealed "Hill-Sachs deformity of the humeral head", "torn anterior cartilaginous glenoid labrum" and "no evidence of rotator cuff tear." Plaintiff has submitted a subsequently executed affirmed report of Dr. Augenstein, dated January 2, 2008 wherein he attempts to equate his findings of a Hill-Sachs deformity with an osteochondral fracture. Dr. Augenstein asserts that Dr. Levitz "refers to the Hill-Sachs deformity of humeral head as an Osteochondral fracture. The findings [of the MRI] were also consistent with an osteochondral fracture." Dr. Augenstein fails to adequately identify Dr. Levitz's findings. Dr. Augenstein's affirmation is therefore purportedly based, in part, on an unsworn report of another physician. *See Gonzales v. Fiallo*, 2008 NY Slip Op. 00452; *Ali v. Mirshah*, 41 AD3d 748; *Phillips v. Zilinsky*, 39 AD3d 728; *Sammot v. Davis*, 16 AD3d 658; *Garces v. Yip*, 16 AD3d 375; *Friedman v. U-Haul Truck Rental*, 216 AD2d 266. In

addition, Dr. Augenstein fails to provide any explanation as to why a finding of a fracture was not set forth in his December 5, 2002 MRI report.

Plaintiff also submits an affidavit, sworn to on December 28, 2007. Plaintiff attests that as a result of the accident he experienced severe injuries to his back and neck which continue to cause pain. Plaintiff claims that he stopped treating when he no longer received no fault benefits and that he has constant problems with his left shoulder. Plaintiff states that he “cannot bend down as far as I used to, I cannot lift heavy items the way that I did before the accident without being in severe pain. I am unable to play pool.”

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not plaintiff sustained a “serious injury” within the meaning of **Insurance Law §5102(d)**. Even if the Court were to find that there is sufficient evidence to support plaintiff’s tenuous contention that his injury constituted a fracture so as to qualify as a serious injury under **§5102(d)**, the Court finds that plaintiff has not proffered evidence indicating that his injury was causally related to the accident. In fact, plaintiff has not come forward with any medical evidence, responsive to the affirmations of defendants’ physicians. Plaintiff presents no evidence to refute the assertions by Drs. Sultan and Pfeffer that plaintiff’s left shoulder condition may be chronic or congenital in nature. Likewise, plaintiff offers no medical evidence to refute the findings of plaintiff’s MRI report that “there is no significant adjacent marrow signal alteration to suggest this is acute.” The lack of evidence as to causation renders Dr. Levitz’s statement in his January 12, 2004 unaffirmed report submitted by defendants that plaintiff’s injuries are “directly related” to the accident, highly speculative. *See Pommells v. Perez*, 4 NY3d 566, 579; *Siegel v. Sumaliyev*, 46 AD3d 666; *Roman v. Fast Lane Car Service, Inc.*, 46 AD3d 535; *Abreu v. Bushwick Building Products & Supplies, LLC*, 43 AD3d 1091; *Gomez v. Epstein*, 29 AD3d 950; *Bycinthe v. Kombos*, 29 AD3d 845; *Giraldo v. Mandanici*, 24 AD3d 419.

It is also the determination of this Court that the “gap in treatment” may be fatal to plaintiff’s claim that the evidence submitted is sufficient to raise a triable issue as to whether or not plaintiff sustained a “serious injury” within the meaning of **Insurance Law § 5102(d)**. There is a gap in treatment between the purported end of plaintiff’s physical therapy treatment in early 2003 and one visit to Dr. Levitz on January 7, 2003 and a visit to Dr. Levitz on October 3, 2006. In fact, in the report covering the October 3, 2006 examination, Dr. Levitz states that he has not seen plaintiff in three years. Plaintiff asserts in his affidavit that he “stopped treating in large part because my no-fault benefits were cut off and I was afraid of owing my doctors large amounts of money.” Plaintiff also claims that he treated sporadically and that he does home exercises. “While a cessation of treatment is not dispositive—the law surely does not require a record of needless treatment in order to survive summary judgment—a plaintiff who terminates therapeutic measures following the accident, while claiming “serious injury,” must offer some reasonable explanation for having done so.” **Pommells v. Perez**, *supra* at 574. It is unnecessary for the Court to determine whether plaintiff has provided a reasonable explanation for his over three year gap in treatment (**Pommells v. Perez**, *supra*; **Francovig v. Senekis Cab Corp.**, 41 AD3d 643. *See also* **Black v. Robinson**, 305 AD2d 438. ), as the Court has found that plaintiff has failed to raise an issue of fact even without considering this gap.

Moreover, plaintiff’s complaints of subjective pain do not by itself satisfy the “serious injury” requirement of the no-fault law. **Scheer v. Koubek**, 70 NY2d 678; **Ranzie v. Abdul-Massih**, 28 AD3d 447; **Nelson v. Amicizia**, 21 AD3d 1015; **Kivlan v. Acevedo**, 17 AD3d 321; **Rudas v. Petschauer**, 10 AD3d 357; **Barrett v. Howland**, 202 AD2d 383. Plaintiff’s affidavit does not raise an issue of fact as it consists of self serving and conclusory statements with respect to plaintiff’s current pain and abilities. *See* **Mercado v. Garbacz**, 16 AD3d 631. Plaintiff has also failed to submit competent medical evidence that the injuries that he sustained rendered him unable to perform all of his usual and customary daily activities for ninety days of the first one hundred eighty days

following the accident.

The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

**ORDERED**, defendants NANCY L. SINRAM and PETER J. SINRAM's motion for summary judgment dismissing the complaint of plaintiff CHAD OGOFF, on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**.

Defendants shall serve plaintiff with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the Court.

Dated:

3/4

, 2008

ENTER:

*[Handwritten signature]*  
J.S.C.

**ENTERED**

MAR 26 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**