SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ALBERT J. SARRO, JR. and TINA SARRO,

Plaintiffs,

-against-

JOSEPH L. GRAVENESE and THERESA M. SMITH,

Defendants.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 7393/07
Motion Seq. Nos.: 01,02,03 & 04

DECISION AND ORDER

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Plaintiffs Albert J. Sarro and Tina Sarro move by Notice of Motion for an Order pursuant to CPLR§3212 granting them Summary Judgment on the issue of liability.

Defendant Theresa M. Smith cross-moves pursuant to CPLR§3211 for Summary Judgment dismissing the complaint and all cross claims insofar as asserted against her.

Defendant Joseph L. Gravenese cross-moves pursuant to CPLR§3212 for Summary Judgment dismissing the complaint on the ground that the Plaintiffs Sarro have not sustained serious injuries within the meaning of Insurance Law § 5102[d].

Plaintiff Anthony J. Sarro cross-moves pursuant to CPLR§3212 for Summary Judgment dismissing the counterclaims interposed against him.

On October 12, 2005, at approximately 9:00 am, the Plaintiff-driver, Albert J. Sarro and his wife Tina Sarro, had come to a complete stop in heavy traffic while proceeding northbound on Bethpage State Parkway (Gravenese Dep., 16). After they had been stopped for some 5-10 seconds, they were struck from behind by a vehicle operated by Co-Defendant Theresa M. Smith (A. Sarro Dep., 7-8; 10-11; T. Sarro Dep., 8).

Smith, in turn, had also been stopped about a half car length behind the Plaintiffs (Smith Dep., 16). Some five seconds after she came to a complete stop – and with her foot on the brake, Smith's car was propelled into the Sarro vehicle when it was struck from behind by a car operated by Co-Defendant Joseph L. Gravenese (Smith Dep., 17-18).

According to Albert Sarro, the impact to his car was "heavy" – although the air bags did not deploy – and his vehicle was thereafter propelled some five to ten feet to the right of its original position (A. Sarro Dep., 14-15). The police arrived and offered medical assistance, which both Plaintiffs declined (A. Sarro Dep., at 26). Neither Plaintiff sought post-accident emergency room treatment, and no claims for lost wages have been advanced.

The Sarros – who were on route to a funeral at the time – did not lose consciousness and did not experience bleeding (T. Sarro Dep., 10). After the accident, the Sarros drove the car to the funeral, and thereafter attended a post-funeral meal with family members (A. Sarro Dep., at 18-19, 27-28).

Albert Sarro had been involved in a prior automobile accident in 1998, which resulted in injuries to his neck (A. Sarro Dep., 31-33). Moreover, Sarro, who was employed by the Nassau County Department of Public Works has been out of work since 2002, when he allegedly sustained a work-related injury to his right arm, for which he has received worker's compensation benefits (A. Sarro Dep., 37, 56-58).

The Sarro Plaintiffs thereafter commenced the within action against Smith and Gravenese alleging, *inter alia,* that they both sustained serious injuries within the meaning of Insurance Law § 5102[d], *i.e.*, various disc herniations/disc bulges and a "straightening of the curvature of the cervical spine with loss of the normal lordosis (Groveman unpaginated Aff., at 2).

The Defendants have answered, denying the material allegations of the complaint, and interposed counterclaims as against Plaintiff Albert Sarro.

Both Sarro Plaintiffs now move and cross move for summary judgment on the issue of liability and Albert Sarro separately moves for dismissal of the Defendants' counterclaims against him.

Co-Defendant Smith moves for summary judgment dismissing the complaint and all claims insofar as asserted against her, on the grounds that she bears no liability in the occurrence of the accident.

The motions should be granted to the following extent:

Preliminarily, the Court notes that Co-Defendant Gravenese does not oppose the Plaintiffs' motions and the cross motion by Smith with respect to the issue of liability for the automobile accident, but instead, cross moves to dismiss the complaint on the ground that neither Plaintiff has sustained a serious injury within the meaning of Insurance Law § 5102[d].

Inasmuch as Gravenese has not opposed these applications – and since the facts confirm that the

Defendant Gravaense's vehicle struck Smith's stationary vehicle from behind and propelled it into the Sarros' then similarly stationary vehicle – the respective motion and cross motion by Smith and the "counterclaim" by Plaintiff Albert J. Sarro are **granted** (*see, Hyeon Hee Park v. Hi Taek Kim,* 37 AD3d 416 [2d Dept 2007]; *Doria v. Cassamajor*, 36 AD3d 752, 753 [2d Dept 2007]; *Abrahamian v. Tak Chan*, 33 AD3d 947, 949 [2d Dept 2006]; *Calabrese v. Kennedy*, 28 AD3d 505; *Good v. Atkins*, 17 AD3d 315 [2d Dept 2005] *cf., Tutrani v. County of Suffolk,* 10 NY3d 906, [2008]; *Bovt v. Subaru Auto Leasing, Ltd.*, 50 AD3d 612 [2d Dept 2008]). Contrary to the Plaintiffs' contentions, the Smith and Gravenese depositions while unsigned, are properly certified and therefore constitute, competent evidentiary submissions on the motions (*see, Morchik v. Trinity School*, 257 AD2d 534 [1st Dept 1999]; CPLR§ 3116 *see also*, *White Knight Ltd. v. Shea*, 10 AD3d 567 [1st Dept 2004]; *Bennett v. Berger*, 283 AD2d 374 [1st Dept 2001]).

Turning to Gravenese's "serious injury" motion to dismiss, the Court agrees that the sworn medical affidavit submitted by Defendant Gravenese has established his *prima facie* entitlement to judgment as a matter of law with respect to the claim that neither Tina nor Albert Sarro sustained a serious injury within the meaning of Insurance Law §5102[d] (*e.g., Seck v. Minigreen Hacking Corp.*, 53 AD3d 608, [2d Dept 2008]; *Silla v. Mohammad*, 52 AD3d 681 [2d Dept 2008]).

With respect to Tina Sarro, the conclusory, opposing medical opinions submitted by Dr. Benatar and Raymond Cecora – a physical therapist – rely upon examinations apparently conducted in October of 2005 – some 2 ½ years prior to the submission of their current opinions (Unpaginated Benatar Aff., at 1; Unpaginated Cecora Aff., at 1). It is settled that projections of permanent injury and purported limitations have no probative value in the absence of a recent medical examination (*Landicho v. Rincon, 53* AD3d 568, [2d Dept 2008]; *Cornelius v. Cintas Corp.*, 50 AD3d 1085 [2d Dept 2007]; *Deutsch v. Tenempaguay*, 48 AD3d 614 [2d Dept 2008]; *Albano v. Onolfo,* 36 AD3d 728 [2d Dept 2007]).

In any event, the purported range of motion computations set forth by both experts fail to identify and/or adequately explain the specific objective tests which produced the alleged limitations and do not clearly set forth the normal range for each area of limitation set forth (*Cornelius v. Cintas Corp., supra; Malave v. Basikov,* 45 AD3d 539 [2d Dept 2007]; *Bailey v. Ichtchenko*, 11 AD3d 419 [2d Dept 2004]; *Candia v. Omonia Cab Corp.*, 6 AD3d 641, 642-643 [2d Dept 2004]). Additionally, the Court agrees that the physical therapist is not qualified to offer a medical opinion with respect to the alleged causal nexus between Tina Sarro's alleged injuries and the occurrence of the underlying accident.

Similarly, with respect to Albert Sarro, the undated expert medical affirmation submitted by Dr. Benatar does not identify a specific date when the examination relied upon was conducted (Unpaginated Benatar Aff., at 2). Although – and to the extent it possesses any probative import – Plaintiffs' counsel mentions two examination dates for Dr. Benatar, these dates (November, 2005 and November, 2007) are some two years apart with no explanation offered as to the significant gap between each (*see*, page 5, unpaginated Groveman Aff., at 5) (*see, Seebaran v. Mendonca*, 51 AD3d 658, 659 [2d Dept 2008]; *Cruz v. Calderone,* 49 AD3d 798 [2d Dept 2008]; *Doherty v. Ajaib*, 49 AD3d 800 [2d Dept 2008] *see also, Pommells v. Perez*, 4 NY3d 566, 577 [2005]). The Court notes that Dr.

Benatar's affirmation is also vague as to Sarro's treatment history since it does not indicate how many times he treated with Sarro. Indeed, none of the Plaintiffs' opposing medical submissions include any contemporaneously generated office records – or any documentation for that matter – which actually substantiates the existence of office visits or a specific course of treatment.

Dr. Benatar's conclusory references to purported "tenderness" in various body areas and to related range of motion percentages, do not identify the objective testing methodologies employed and apparently rest upon the Plaintiff's subjective complaints of pain (Benatar [Albert Sarro] unpaginated Aff., at 2)(*Kelly v. Rehfeld,* 26 AD3d 469 [2d Dept 2006]).

Although the Plaintiffs' have submitted MRI reports in which disc herniations were identified, it is settled that "[t]he mere existence of a herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Rabolt v. Park*, 50 AD3d 995 [2d Dept 2008]; *Hargrove v. New York City Transit Authority,* 49 AD3d 692 [2d Dept 2008]) – evidence which is lacking upon the record presented (*Marrache v. Akron Taxi Corp.*, 50 AD3d 973 [2d Dept 2008]).

Lastly, and to the extent that the Albert Sarro relies upon the opinion of his chiropractor, Dr. Jason T. Birnhak, the Court notes that the affidavit submitted thereby makes reference to a single examination which apparently occurred two years after the accident and over a year prior to the subject motion to dismiss (*Deutsch v. Tenempaguay, supra see, D'Onofrio v. Floton, Inc.*, 45 AD3d 525 [2d Dept 2007]). Further, while Dr. Birnhak states, *inter alia*, that he recommended 6-8 weeks of treatment, there is nothing in his affidavit indicating that this regime of treatment was actually followed by the Plaintiff. Nor does the record contain contemporaneously generated materials, reports, billing statements, *etc.*, which document any course of treatment or any specific office visits.

The Court has considered the Plaintiffs' remaining submissions – including their own self-serving affidavits (*Michel v. Blake*, 52 AD3d 486 [2d Dept 2008]; *Rashid v. Estevez*, 47 AD3d 786, 788 [2d Dept 2008]) and concludes that they are insufficient to establish a triable issue of fact with respect to the existence of a serious injury by either Plaintiff (*Penaloza v. Chavez*, 48 AD3d 654, 655 [2d Dept 2008]).

As such, the Defendants' applications for Summary Judgment are **granted** and the Plaintiffs' Complaint is **dismissed**.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: August 21, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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