[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER PART 22

Index Number : 113979/2007

BELEN, HECTOR

VS.

BAUMAN, ARAM

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	(1)
Answering Affidavits — Exhibits	(2)
Replying Affidavits	(3)

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendants Aram Bauman and Leslie Jaye Goff (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint of Plaintiff Hector Belen ("Plaintiff") on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff alleges in his Verified Bill of Particulars that, as a result of the accident, he sustained a serious injury under NY Insurance Law §5102(d) by incurring lower back pain radiating into the left lower extremity, numbness and tingling in the left lower extremity, traumatic cervical ligamentous strain, traumatic lumbosacral strain with left sided nerve root irritation, anterolisthesis of L5 on SI, sacroiliac joint dysfunction, neck pain, muscle spasm. Plaintiff further contends to have been confined to his bed for one week and to his home for two weeks.

Under New York 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

Dated: _____

_____
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ✓ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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 can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Defendants' Expert Reports

In support of this motion, Defendants submit the affirmed expert reports of Dr. C.M. Sharma, a neurologist and Dr. Mark Pitman, an orthopedic surgeon. Dr. Sharma examined Plaintiff on June 24, 2009. His impression was that Plaintiff suffered from subjective cervical and lumbar pains and had a normal neurological examination. Dr. Sharma measured the range of motion of Plaintiff's cervical spine and noted flexion was 50/50, extension 60/60, right and left lateral rotation 80/80 and right and left lateral flexion as 45/45. He determined that range of motion for the lumbar spine was flexion 90/90, extension 25/25, right and left lateral rotation as 30/30 and right and left lateral flexion as 25/25. Dr. Sharma also inspected Plaintiff's gait, coordination, posture, strength and reflexes. He concluded that Plaintiff did not suffer from any neurological problems casually related to the accident.

Dr. Pitman also examined Plaintiff on June 24, 2009. He performed range of motion measurements with a gonionmeter and reported that cervical measurements were flexion 45 degrees compared to 45 degrees normal, extension 45 degrees compared to 45 degrees normal, right and left lateral flexion 45 degrees compared to 30-45 degrees normal, and right and left rotation 60 degrees compared to 60 degrees normal. Dr. Pitman determined that shoulder range of motion measurements were right and left forward elevation 180 degrees compared to 180 degrees normal, right and left abduction 180 degrees compared to 180 degrees normal, right and left adduction 45 degrees compared to 45 degrees normal, right and left internal rotation 70 degrees compared to 70 degrees normal, and right and left external rotation 90 degrees compared to 90 degrees normal. He further measured the lumbar spine range of motion as flexion 90 degrees compared to 90 degrees normal, extension 30 degrees compared to 30 degrees normal, right and left lateral flexion 30 degrees compared to 30 degrees normal, and right and left rotation 30 degrees compared to 30 degrees normal. Dr. Pitman concluded that Plaintiff sustained cervical and lumbar sprains that have resolved and has no present disability.

Defendants' expert reports satisfy their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]). Plaintiff must now bear the burden of overcoming Defendants' submissions by demonstrating that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as defined by New York Insurance Law §5102(d), to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Plaintiff's Expert Report

In opposition to Defendants' motion, Plaintiff submits the medical records of Advanced Health Professionals ("Advanced Health") ranging from October 22, 2004 to February 2005. A follow-up evaluation was completed at Advanced Health on February 15, 2006 by Dr. Henry Rubinstein. In an effort to provide proper foundation for the Advanced Health records, Plaintiff submits the affidavit of Reuben Malkiel, a chiropractor. Dr. Malkiel states that he is affiliated with Advanced Health and provides "chiropractic care and treatment" to patients there. He also states that he has provided care for Plaintiff. Further, Dr. Malkiel affirms that "a complete and accurate copy of the medical records maintained by Advanced Health with respect to all the treatment and care rendered for [Plaintiff]"is attached and that such records are kept in the practice of the physicians and staff in the "ordinary course of business." Lastly, Dr. Malkiel states that "to the best of [his] knowledge, all the entries and notations in the attached records [are] true and accurate and appropriately reflect the evaluations, examinations, and treatment rendered to [Plaintiff]."

The attached records include what appear to be Spanish language personal information sheets filled out by Plaintiff, MRI reports from Dr. O.G. Choy, ultrasound reports by Dr. Lynwood Hammers of Hammers Healthcare Imaging, Advanced Health billing records, a "personal injury final report" dated February 16, 2006 signed by Dr. Felix Almentero and Dr. Malkiel, Plaintiff's medical authorization and other correspondence between attorneys and Advanced Health, a report of Dr. Henry Rubinstein dated February 15, 2006, handwritten records, injury reports of Dr. Felix Almentero and a report of Dr. Roger Kaye, neurologist, dated November 30, 2004.

Analysis

Dr. Malkiel's affidavit is insufficient to lay the proper foundation for admissibility of the variety of documents contained within the Advanced Health records. To properly satisfy Plaintiff's burden of proof, evidence must be sworn and in admissible form (*See Grasso v Angerami*, 79 N.Y.2d 813 (1991); *Shinn v Catanzaro*, 1 AD3d 195 (1st Dept 2003); *Charlton v Almaraz*, 278 A.D.2d 145 (1st Dept 2000); *Lowe v Bennett*, 122 A.D.2d 728 (1st Dept 1986), *aff'g* 69 N.Y.2d 700 (1986); *Zoldas v Louise Cab Corporation*, 108 A.D.2d 378 (1st Dept 1985); *Mobley v Riportella*, 241 A.D.2d 443 (2nd Dept 1997); *Hagan v Thompson*, 234 A.D.2d 420 (2nd Dept 1996). At most, Dr. Malkiel's affidavit is sufficient to lay the foundation for the

admission of his records as business records. The only such record of any import is a "Personal Injury Final Report" with a dictation date of February 16, 2006. In that report, which is signed by Dr. Malkiel and another doctor, Dr. Felix Almentero, Plaintiff's examination reveals lumbar spine range of motion measurements as flexion of 21 degrees compared to 60 degrees normal, extension of 22 degrees compared to 25 degrees normal, right lateral flexion of 21 degrees compared to 25 degrees normal and left lateral flexion of 23 degrees compared to 25 degrees normal. The report also states that Kemp's, Yeoman's and Nachlas tests were all performed and were positive. Plaintiff's final diagnosis is stated as lumbar spine strain/sprain with joint dysfunction and anterolisthesis of L5-S1 and posttraumatic tension headaches.

Plaintiff has failed to demonstrate a limitation of range of motion by objective medical findings that are "based on a recent examination of the plaintiff"unless an explanation otherwise is provided (*Thompson v. Abbasi*, 15 AD3d 95 [1st Dept 2005] *quoting Grossman v Wright*, 268 AD2d 79, 84, 707 NY2d 233 [2000]; *Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]). Further, Courts have held that an examination performed two to three years before the date of defendants' motion is insufficiently recent to be considered. (*See Mejia v DeRose*, 35 AD3d 407 [2006]; *Beckett v Conte*, 176 AD2d 774 [1991]; *Tudisco v James*, 28 AD3d 536 [2006] [examinations held one year before defendant's motion were insufficient to meet plaintiff's burden on summary judgment]).

Plaintiff's most recent examination is dated February 16, 2006. This examination is not recent and therefore not sufficient to provide evidence of Plaintiff's injury. Therefore, Plaintiff does not submit any objective medical findings that can provide evidence of a triable issue of fact and Plaintiff's claims of serious injury under New York Insurance Law §5102(d) must be dismissed (*see Grasso v Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 [1991]).

Plaintiff additionally submits his deposition transcript in opposition to summary judgment. However, Plaintiff's self-serving deposition statements are entitled to little weight and are insufficient to raise triable issues of fact (*See Zoldas v Louise Cab Corp.*, 108 A.D.2d 378, 383 [1st Dept 1985]; *Fisher v Williams*, 289 A.D.2d 288 [2d Dept 2001]). Plaintiff has therefore failed to meet his burden to demonstrate that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Based on Plaintiff's failure to raise any triable issues of fact to rebut Defendants' objective medical evidence, summary judgment is granted (*See* CPLR §3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is granted, and the Plaintiff's summons and complaint is dismissed; and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry, within 30 days.

This constitutes the decision and order of the court.

George J. Silver

George J. Silver, J.S.C.

GEORGE J. SILVER

Dated: March 19, 2010
New York County