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

PRESENT: Hon. GEORGE J. SILVER, Justice PART 22

EMELINDA FERRERAS and
SANTOS FERRERAS
vs.
CLARENCE RILEY and JEAN MARTE

INDEX NO. 106666/2008
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion to/for Summary Judgment

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause — Affidavits— Exhibits | 1 |
| Answering Affidavits — Exhibits | 2 |
| Replying Affidavits | |

FILED
JUL 06 2010
COUNTY CLERK'S OFFICE
NEW YORK

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, Defendant Jean Marte ("Defendant") moves pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint on the grounds that Plaintiffs Emelinda and Santo Ferreras (collectively "Plaintiffs") did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff Emelinda Ferreras alleges in her Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury including a C6-C7 disc herniation with impingement, C5-C6 disc bulge with impingement, lumbar spine strain/sprain, left knee joint effusion and edema and bone bruise of the right leg. Plaintiff Santo Ferreras alleges in his Verified Bill of Particulars that he sustained serious injury including a laceration three centimeters in length, requiring five sutures, and focal bulges at C3-C4, with impingment of the thecal sac.

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER/JUDG.

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.

Defendants' Expert Reports

"[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]). Reports by a defendant's own retained physician must be in the form of sworn affidavits or affirmations because a party may not use an unsworn medical report prepared by the party's own physician on a motion for summary judgment. Defendant may also rely upon plaintiff's sworn testimony or plaintiff's unsworn treating physician's records (*see Arjona v Calcano*, 7 AD3d 279, 280 [1st Dept 2004]; *Nelson v Distant*, 308 AD2d 338, 339 [1st Dept 2003]; *McGovern v Walls*, 201 AD2d 628, 628 [2d Dept 1994]). 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" (*Grossman v Wright*, 268 AD2d 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]).

Plaintiff Emelinda Ferreras

In support of this motion, Defendant submits the affirmed expert reports of Dr. Charles Bagely, Dr. Robert Tantleff, Dr. Stanley Bleifer and a partial copy of Plaintiff's deposition transcript. Dr. Bagley conducted a neurological examination of Plaintiff on May 27, 2009. He determined that Plaintiff did not suffer from any range of motion limitation of her cervical or lumbar spine by using a goniometer and comparing Plaintiff's range of motion to normal. Dr. Bagley concluded that Plaintiff was not neurologically disabled. Dr. Tantleff reviewed Plaintiff's cervical MRI film taken on April 11, 2006. Dr. Tantleff determined that discogenic changes were present in the cervical and lumbar region and that there was minimal focal disc protrusion of no consequence at C6/C7. He also found a minimal atraumatic noncompressive degenerative traction bulge at C5/C6. Overall, Dr. Tantleff determined that there was no evidence of acute or recent injury. Dr. Bleifer performed an orthopedic examination of Plaintiff on May 26, 2009. He conducted range of motion testing of Plaintiff's cervical and lumbar spine, shoulders, knees and ankles. Dr. Bleifer did not find any limitations when comparing Plaintiff's range of motion to normal. He concluded that Plaintiff suffered from a cervical sprain, left shoulder sprain/strain, lumbar sprain, left knee and left shoulder contusion and right leg contusion, all of which have resolved. Defendant's expert reports satisfy Defendant's 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 Santo Ferreras

In support of this motion, Defendant submits the affirmed expert reports of Dr. Charles Bagely, Dr. Bryan Forley, Dr. Robert Tantleff and a partial copy of Plaintiff's deposition transcript. Dr. Bagely performed a neurological examination of Plaintiff on June 30, 2009. He conducted range of motion testing using a goniometer and comparing Plaintiff's motion to normal. Dr. Bagley found limitations in Plaintiff's cervical and lumbar spine, but attributed these limitations to self-restriction. Dr. Forley, a plastic surgeon, performed a scar review of Plaintiff's

chin scarring on May 26, 2009. He determined that the scar is permanent with mild hypertrophy of the upper half of the scar. Dr. Tantleff reviewed Plaintiff's MRI film of his cervical spine taken on April 27, 2006 and concluded that there were discogenic changes and a reactive change at C3-C4, but no evidence of disc bulge, protrusion or herniation.

Dr. Bagley's and Dr. Tantleff's reports satisfy Defendant's burden of establishing *prima facie* that Plaintiff did not suffer a serious injury as to his back and neck injuries (*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]). However, Defendant has failed to present evidence sufficient to meet her initial burden of establishing a *prima facie* whether Plaintiff's alleged scar injury constituted a disfigurement under New York Insurance Law §5102. Additionally, "once a *prima facie* case of serious injury has been established and the trier of fact determines that a serious injury has been sustained, plaintiff is entitled to recover for all injuries incurred as a result of the accident" (*see Obdulio v Fabian*, 33 AD3d 418, 419 [1st Dept. 2006]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

Plaintiff's Expert Reports

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]).

Plaintiff Emelinda Ferreras

In opposition to Defendant's motion, Plaintiffs submits the affirmation of Dr. Peter Kaganowicz and Dr. Mark Shapiro. Dr. Kaganowicz treated Plaintiff Emelinda Ferreras from March 28, 2006 and most recently reexamined her on April 6, 2010. He conducted range of motion testing and found limitations in motion of her cervical spine. Dr. Kaganowicz concluded that Plaintiff suffered from a C6-C7 disc herniation, C5-C6 disc bulge and a cervical spine straing/sprain. Dr. Kaganowicz's report is sufficient to overcome Defendant's submissions and raise a question of fact as to Plaintiff's injuries (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Dr. Shapiro reviewed Plaintiff's MRI film of her cervical spine and concluded that there was a focal herniation at C6-C7 and a focal bulge at C5-C6, both impinging on the thecal sac. Dr. Shapiro also reviewed Plaintiff's MRI of her left knee, concluding that she suffered from joint effusion and abnormal signal in the posterior horn of the medial meniscus without definite articular extension. However, Dr. Shapiro does not discuss causation in his report. Plaintiff must demonstrate that a serious injury was sustained through the presentation of nonconclusory expert evidence *causally linking* the 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]). As such, Dr. Shapiro's report cannot substantiate a serious injury.

Plaintiff additionally submits unaffirmed and uncertified medical records Harlem Hospital. Medical records that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*See Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Therefore, Plaintiff's medical records and will not be considered. Plaintiff also submits her own deposition transcript. 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 Santo Ferreras

In opposition to Defendant's motion, Plaintiffs submit the affirmation of Dr. Peter Kaganowicz Dr. Mark Shapiro and Dr. Stephanie Cooper-Vastola. Dr. Kaganowicz examined Plaintiff on April 6, 2010. He conducted range of motion testing and found limitations in extension, lateral flexion and rotation in Plaintiff's cervical spine. Dr. Kaganowicz concludes that these limitations in motion are related to the C3-C4 disc bulge with impingement and were sustained as a result of the present motor vehicle accident. Dr. Kaganowicz's report is sufficient to overcome Defendant's submissions and raise a question of fact as to Plaintiff's back injuries (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Though Defendant has not presented sufficient evidence to meet their burden in regards to Plaintiff's scar, Plaintiff presents the report of Dr. Cooper-Vastola that described the scar as a 3cm x .5cm pigmented scar that is permanent and disfiguring.

Dr. Shapiro reviewed Plaintiff's MRI film of the cervical spine taken on April 27, 2006. He determined that Plaintiff had a C3-C4 focal bulge impinging on the thecal sac. However, Dr. Shapiro did not opine as to the causation of this injury. Plaintiff must demonstrate that a serious injury was sustained through the presentation of nonconclusory expert evidence *causally linking* the 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]). As such, Dr. Shapiro's report cannot substantiate a serious injury.

Plaintiff additionally submits unaffirmed and uncertified medical records Harlem Hospital. Medical records that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*See Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Therefore, Plaintiff's medical records and will not be considered. Plaintiff also submits his own deposition transcript. 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]).

90/180 Category

A defendant can establish the nonexistence of a serious injury under the 90/180 category of Insurance Law §5102(d) by citing to evidence, such as plaintiff's own testimony, demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting his usual and customary daily activities for the prescribed period *(see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Further, Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiffs' Verified Bill of Particulars states that they were confined substantially to their home for approximately two months. This time period is far less than the 90/180 category requires (*see Copeland*, 6AD3d at 253 [1st Dept 2004] [home and bed confinement for less than the prescribed period evinces lack of serious injury]).

Permanent Loss Category

Further, To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiffs have not demonstrated that they sustained a permanent and total loss of use of their spine, knee or any other body function. Therefore, Defendant's summary judgment motion as to Plaintiffs' permanent loss claim under New York Insurance Law §5102(d) is granted.

Accordingly, it is hereby

ORDERED that Defendant Jean Marte's motion for summary judgment as to Plaintiffs' claim under permanent consequential limitation, significant limitation and significant disfigurement categories of New York Insurance Law §5102(d) is denied; and it is further

ORDERED that Defendant Jean Marte's motion for summary judgment is denied as to Plaintiffs' claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendant Jean Marte's motion for summary judgment is granted as to Plaintiffs' claim under the permanent loss category of Insurance Law §5102(d); and it is further

ORDERED that Defendant Jean Marte is to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

**Dated: June 29, 2010**
**New York, New York**

George J. Silver, J.S.C.

George J. Silver, J.S.C.

GEORGE J. SILVER

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