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SHORT FORM ORDER

INDEX No. 08-18786

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 1-15-10
ADJ. DATE 3-24-10
Mot. Seq. # 004 - MD

JOSEPH ANATRA and KRISTEN MARZANO, Plaintiffs, - against - STEPHEN HURST, KATHLEEN HURST and KATIE WYSOCKI, Defendants.	BONGIORNO LAW FIRM, PLLC Attorneys for Plaintiffs 250 Mineola Boulevard Mineola, New York 11501 HANNUM FERETIC PRENDERGAST Attorneys for Counterclaim 55 Broadway, Suite 202 New York, New York 10006 RUSSO, APOZNANSKI & TAMBASCO Attorneys for Defendants 875 Merrick Avenue Westbury, New York 11590

Upon the following papers numbered 1 to 30 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14 - 28 ; Replying Affidavits and supporting papers 29 - 30 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Stephen Hurst, Kathleen Hurst, and Katie Wysocki seeking judgment dismissing plaintiffs' complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiffs Joseph Anatra and Kristen Marzano as a result of a motor vehicle accident at the intersection of North Carle Avenue and South Railroad Avenue on April 11, 2006. The accident allegedly occurred when the vehicle operated by defendant Katie Wysocki and owned by defendants Stephen Hurst and Kathleen Hurst struck the rear of the vehicle operated by plaintiff Marzano while it was stopped waiting to make a left turn. Plaintiff Anatra was a front-seat passenger in the vehicle operated by plaintiff Marzano at the time of the accident.

Plaintiff Anatra, by his bill of particulars, alleges that he sustained various personal injuries as a result of the subject accident, including herniated discs at levels C5 through C7, and levels L1-L2 and L4-

L5; bilateral radiculopathy at level C6; aggravation of asymptomatic injury; hypoesthesia in the left side at level C6 dermatome radiating into the left hand and hypoesthesia in the left side at level C7 dermatome radiating into the left hand; altered interondontiad space and rotatation malposition at level C2; reversed cervical curvature; right-side radiculopathy at level L4; and rotatation malposition at levels L3 through L5. In addition, plaintiff Marzano, by her bill of particulars, alleges that she sustained various personal injuries as a result of the subject accident, including disc herinations at levels T11-T12, and levels L1-L2; exaggerated lordosis; vertebral hemangioma at level T12; hypoesthesia at levels L4 through L5; and C6-C7; right-side radiculopathy at level L4-L5, and level C5-C6; and post traumatic stress disorder. Plaintiff Marzano also alleges that she missed two weeks from her employment as a bartender and manager at Shady Al's Sports Bar.

Defendants now move for summary judgment on the basis that plaintiffs are unable to establish that their alleged injuries meet the "serious injury" threshold as required by Insurance Law § 5102(d). Defendants, in support of the motion, submit a copy of the pleadings, copies of plaintiff Marzano's deposition transcript, and the sworn medical reports of Dr. Stanley Ross, and Dr. Sheldon Feit. Dr. Ross conducted an independent orthopedic examination of plaintiffs Anatra and Marzano at defendants' request on August 10, 2009. Dr. Feit performed an independent radiological review of the magnetic resonance imagining ("MRI") films of plaintiff Anatra's lumbosacral spine and cervical spine at defendants' request on August 6, 2009 and August 15, 2009. Plaintiffs oppose the instant motion on the ground that defendants have failed to establish their prima facie burden that their injuries do not constitute "serious injuries" within the meaning of Insurance Law § 5102(d). In the alternative, plaintiffs assert that the proof submitted in opposition to the motion demonstrates that they sustained injuries within the "significant limitation of use" categories and the "90/180" category as a result of the subject accident. Plaintiffs, in opposition to the motion, submit the unsworn medical reports of Dr. Frederic Mendelsohn and Dr. Sal Inserra, the sworn medical report of Dr. Anthony Gagliardi, and the affidavit of Dr. Raymond Semente, a chiropractor. Plaintiffs also submit copies of plaintiff Anatra's and plaintiff Marzano's No Fault denial of benefits notification, dated December 15, 2006 and February 1, 2007, respectively.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, *supra*; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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.***, *supra*; ***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, such as, 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 [1992]). A defendant may also 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 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v Kingsbury***, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the "serious injury" threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [1991]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]). A plaintiff claiming injury under either of the "limitation of use" categories also must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Hackett v AAA Expedited Freight Sys.***, 54 AD3d 721, 865 NYS2d 101 [2008]; ***Ferraro v Ridge Car Serv.***, *supra*; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2007]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2008]; ***Laruffa v Yui Ming Lau***, *supra*; ***John v Engel***, 2 AD3d 1027, 768 NYS2d 527 [2003]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]). A sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746

NYS2d 865 [2000]; ***Dufel v Green***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Furthermore, a plaintiff alleging injury within the "limitation of use" categories who ceases treatment after the accident must provide a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Ferebee v Sheika***, 58 AD3d 675, 873 NYS2d 93 [2009]; ***Besso v DeMaggio***, 56 AD3d 596, 868 NYS2d 681 [2008]).

Dr. Ross in his medical report states that plaintiff Marzano has full range of motion in her cervical spine, and that there is no evidence of muscle spasm or tenderness upon palpation of her paracervical muscles bilaterally. In particular, he states that plaintiff Marzano exhibits flexion of 50 degrees (normal is 50 degrees), extension of 60 degrees (normal is 60 degrees), bilateral lateral flexion of 45 degrees (normal is 45 degrees), and bilateral rotation of 80 degrees (normal is 80 degrees). Dr. Ross's report also states that plaintiff has full range of motion in her lumbar spine and that her straight leg raise is negative bilaterally. Specifically, he states that she exhibits flexion of 60 degrees (normal is 60 degrees), extension of 25 degrees (normal is 25 degrees), and bilateral lateral bending of 25 degrees (normal is 25 degrees). Dr. Ross opines that plaintiff Marzano's cervical, thoracic, and lumbar spine sprains/strains have resolved and that her right shoulder and right knee sprains have resolved. Dr. Ross's report concludes that plaintiff Marzano has no evidence of an orthopedic disability.

Here, although the Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [1991]), defendants have failed to prove their prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff Marzano did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McDonald v Pookie Hacking Corp.***, 37 AD3d 430, 829 NYS2d 616 [2007]; ***Agathe v Tun Chen Wang***, 33 AD3d 737, 822 NYS2d 766 [2006]). Dr. Ross's report is deficient in that he fails to address any findings for plaintiff's bilateral rotation in her lumbar spine, while opining that she has full range of motion in that region. By failing to provide specific range of motion measurements and to compare those findings to what is deemed normal, or to quantify the range of motion findings in degrees for the aforementioned rotations, the report of defendants' examining physician leaves it to this Court to speculate as to whether the ranges of motion concerning plaintiff's lumbar spine are normal or abnormal (*see* ***Doherty v Galla***, 46 AD3d 610, 848 NYS2d 269 [2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2006]; ***Dioguardi v Weiner***, 288 AD2d 253, 733 NYS2d 116 [2001]; ***Meyer v Gallardo***, 260 AD2d 556, 688 NYS2d 624 [1999]; ***Minori v Hernandez Trucking Co.***, 239 AD2d 322, 657 NYS2d 199 [1997]). This omission prevents defendants from satisfying their prima facie burden. Since neither Dr. Ross's report nor the remainder of defendants' evidence excludes the possibility that plaintiff Marzano suffered a "serious injury" in the subject accident, defendants are not entitled to summary judgment (*see* ***Eybers v Silverman***, 37 AD3d 403, 830 NYS2d 240 [2007]; ***Agha v Alamo Rent A Car***, 35 AD3d 639, 827 NYS2d 261 [2006]; ***Lesane v Tejada***, 15 AD3d 358, 790 NYS2d 44 [2005]).

Defendants have also failed to establish their prima facie burden that plaintiff Anatra did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) (*see* ***Gaddy v Eyler***, *supra*). Despite the fact that defendants' radiological expert, Dr. Feit, in his affirmed report, states that plaintiff

Anatra suffers from pre-existing degenerative disc disease in his cervical and lumbar spines, defendants' orthopedic expert, Dr. Ross, in his affirmed report, indicates the existence of a significant limitation in plaintiff Anatra's left wrist, three-years post accident (*see* ***Dieujuste v Kiss Mgt. Corp.***, 60 AD3d 514, 875 NYS2d 464 [2009]; ***Zamaniyan v Vrabeck***, 41 AD3d 472, 835 NYS2d 903 [2007]; ***Smith v Delcore***, 29 Ad3d 890, 814 NYS2d 554 [2006]; ***Sano v Gorelik***, 24 AD3d 747, 805 NYS2d 854 [2005]; ***Omar v Bello***, 13 AD3d 430, 786 NYS2d 563 [2004]). Dr. Ross's report states that plaintiff Anatra exhibits the following ranges of motion in his left wrist: palner flexion of 60 degrees (normal is 80 to 90 degrees), dorsiflexion of 60 degrees (normal is 60 degrees), pronation and supination of 80 degrees (normal is 80 degrees), radial deviation of 20 degrees (normal is 15 to 20 degrees), and ulnar deviation of 30 degrees (normal is 30 degrees). Thus, Dr. Ross's conclusion that plaintiff Anatra's left wrist/hand sprain/strain has resolved and that there is no evidence of an orthopedic disability is rendered speculative and conclusory (*see* ***Sullivan v Johnson***, 40 AD3d 624, 835 NYS2d 367 [2007]).

Inasmuch as defendants have failed to establish their entitlement to judgment as a matter of law, the sufficiency of plaintiffs' papers in opposition to the instant motion need not be considered (*see* ***Ayotte v Gervasio***, 81 NY2d 1062, 601 NYS2d 463 [1993]; ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2007]; ***Joissaint v Starrett-1 Inc.***, *supra*; ***Cedillo v Rivera***, 39 AD3d 453, 835 NYS2d 238 [2007]; ***Doggett v Kelly***, 294 AD2d 464, 742 NYS2d 557 [2002]; ***Chapin v Taylor***, 273 AD2d 188, 708 NYS2d 465 [2000]). Accordingly, defendants' motion for summary judgment is denied.

Dated: 15 July 2010

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION