SHORT FORM ORDER

INDEX No. 08-18206
CAL. No. 09-02592-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 1-15-10
ADJ. DATE 4-9-10
Mot. Seq. # 001 - MotD

HUGO MUY and MARIA E. LOPEZ, Plaintiffs, - against - MELISSA O'CONNOR and KEVIN O'CONNOR, Defendants.	KEEGAN & KEEGAN, ROSS & ROSNER, L.L.P. Attorneys for Plaintiffs 147 North Ocean Avenue, P.O. Box 918 Patchogue, New York 11772 RUSSO, APOZNANSKI & TAMBASCO Attorneys for Defendants 875 Merrick Avenue Westbury, New York 11590

Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13 - 20 ; Replying Affidavits and supporting papers 21 -22 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Melissa O'Connor and Kevin O'Connor seeking summary judgment dismissing plaintiffs' complaint is decided as follows.

This is an action to recover damages for injuries allegedly sustained by plaintiffs Hugo Muy and Maria Lopez as a result of a motor vehicle accident that occurred on September 5, 2006. The accident allegedly occurred when the vehicle operated by defendant Melissa O'Connor and owned by defendant Kevin O'Connor struck the rear of the vehicle operated by plaintiff Muy while it was stopped at a shopping center's parking lot's stop sign. Plaintiff Maria Lopez was the front seat passenger in the vehicle operated by her husband, plaintiff Muy, when the accident occurred. By his bill of particulars, plaintiff Muy alleges that he suffers from straightening of the cervical lordosis, sublaxation of the cervical veterbral bodies with brachial radicular syndrome, and muscle spasms as a result of the subject accident. He alleges that he was confined to his home for approximately one week following the accident, that he was totally incapacitated from his employment for one week after the accident, and that he presently remains partially incapacitated from his employment as a truck driver. In addition, by her bill of particulars, plaintiff Lopez alleges that she sustained a herniated disc at level C3-C4, disc bulges at levels C4 through C7, and cervical strains and tears as a result of the subject accident. Plaintiff Lopez

also alleges that she was partially incapacitated from her employment as an independent house cleaner contractor, and that her inability to perform her normal duties caused her to terminated her employment in June 2007.

Defendants now move for summary judgment on the basis that plaintiffs cannot 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 the plaintiffs' deposition transcripts, and the sworn medical reports of Dr. Stanley Ross, Dr. Iqbal Merchant, and Dr. Sheldon Feit. Dr. Ross conducted an independent orthopedic examination of plaintiff Muy at defendants' request on November 5, 2009. Dr. Merchant conducted an independent neurological examination of plaintiff Lopez at defendants' request on November 5, 2009. Dr. Feit performed an independent radiological review of the magnetic resonance imaging ("MRI") films of plaintiff Lopez's cervical spine at defendants' request on November 1, 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 their affidavits and the affidavit of Dr. Brett Desing, a chiropractor.

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]).

Dr. Ross's report states, in pertinent part, that an examination of plaintiff Muy's cervical spine reveals that he has full range of motion. Specifically, the report states that plaintiff Muy exhibits flexion of 50 degrees (normal is 50 degrees), extension of 60 degrees (normal is 60 degrees), right and left lateral flexion of 45 degrees (normal is 45 degrees), and right and left rotation of 80 degrees (normal is 80 degrees). It states that there is no muscle spasm or tenderness noted upon palpation of plaintiff Muy's paracervical muscles, and that plaintiff Muy's muscle strength is 5/5 bilaterally. The report states that plaintiff Muy's sensation to light touch and pinprick is within normal limits. Dr. Ross opines that the cervical spine/strain that plaintiff Muy sustained as result of the subject accident has resolved. The report concludes that plaintiff Muy does not evince any evidence of an orthopedic disability.

Similarly, Dr. Merchant's report states, in relevant part, that an examination of plaintiff Lopez reveals that she has full range of motion in cervical and thoracolumbar spines. In particular, the report states that the measurement of plaintiff Lopez's cervical range of motion demonstrates flexion of 50 degrees (normal is 50 degrees), extension of 60 degrees (normal is 60 degrees), right and left rotation of 80 degrees (normal is 80 degrees), and right and left lateral flexion of 45 degrees (normal is 45 degrees). The report states that plaintiff Lopez's lumbar spine exhibits forward flexion of 90 degrees (normal is 90 degrees), extension of 30 degrees (normal is 30 degrees), right and left extension of 30 degrees (normal is 30 degrees), and right and left lateral flexion of 30 degrees (normal is 30 degrees). It states that there is no muscle spasm or tenderness upon palpation of plaintiff Lopez's thoracic or lumbar spines. The report states that there is mild tenderness in plaintiff Lopez's cervical spine, but that no muscle spasm is observed. It states that plaintiff Lopez's bilateral straight leg test is negative and that her motor systems are normal, with no atrophy. The report states that plaintiff Lopez has normal sensation in all modalities tested, that she ambulates with a normal gait, and that she is able to get on and off an examination table without difficulty. It further states that plaintiff Lopez is able to walk on her heels and toes, and that her grasp and coordination are normal. Dr. Merchant opines that the cervical spine sprains/strains that plaintiff Lopez sustained as a result of the subject accident have resolved and that plaintiff Lopez does not have any evidence of a neurological disability.

In addition, Dr. Feit's medical report states a review of the MRI of plaintiff Lopez's cervical spine reveals that she has pre-existing degenerative changes. It states that the observed disc bulges at levels C3 through C7 are not posttraumatic, but are degenerative and secondary to annular degeneration and/or ligamentous laxity. Dr. Feit opines that the MRI findings are not causally related to the subject accident.

Here, defendants have established, prima facie, their entitlement to judgment as a matter of law that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law § 5104(d) as a result of the subject accident through the submission of plaintiffs' deposition testimony, and the reports of their medical experts (*see* ***DeJesus v Cruz***, __ AD3d __, 2010 NY Slip Op 4119 [1st Dept 2010]; ***Lopez v Adul-Wahab***, 67 AD3d 598, 889 NYS2d 178 [2009]; ***DeJesus v Paullino***, 61 AD3d 605, 878 NYS2d 20 [2009]). The Court initially notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995 [2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [1991]). Defendants' experts tested the ranges of motion in each plaintiff's cervical and lumbar spines using a goniometer and set forth the specific measurements, as well as compared each plaintiff's range of motion to the normal ranges (*see* ***Staff v Yshua***, *supra*). Both of defendants' experts found that each plaintiff has full ranges of motion in their cervical spines, and that neither plaintiff is disabled. Moreover, the unequivocal medical reports of defendants' expert radiologist, Dr. Feit, demonstrates that plaintiff Lopez had pre-existing degenerative disc disease at all of the levels of her cervical spine where she alleges her injuries were sustained (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2009], *lv denied* 13 NY3d 706, 887 NYS2d 4 [2009]; ***Jean v Kabaya***, 63 AD3d 509, 881 NYS2d 891 [2009]; ***Houston v Gajdos***, 11 AD3d 514, 728 NYS2d 839 [2004]). Therefore, the burden has shifted to plaintiffs to raise a triable issue of fact as to whether either of them sustained a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]; ***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]).

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]).

In opposition to defendants' prima facie showing, plaintiff Lopez has failed to raise a triable issue of fact as to whether she sustained a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the accident (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]; ***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]). Plaintiff Lopez has proffered insufficient medical evidence to demonstrate that she sustained an injury within the "limitation of use" categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]), or within the "90/180" category (*see* ***Jack v Acapulco Car Serv., Inc.***, __ AD3d __, 897 NYS2d 648 [2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2000]). Plaintiff Lopez's deposition testimony that she is unable to work and that sometimes she is unable to drive because she becomes dizzy was not supported by any objective medical evidence (*see* ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2006]).

In addition, plaintiff Lopez's reliance on the affidavit of Dr. Desing, who examined her on March 18, 2010, is insufficient to defeat defendants' motion for summary judgment (*see* ***Colvin v Maille***, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]). Although Dr. Desing in his affidavit attests to the fact that plaintiff Lopez has both herniated and bulging discs in her neck, "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (***Pommells v Perez***, *supra* at 574; *see also* ***Pierre v Nanton***, 279 AD2d 621, 719 NYS2d 706 [2001]; ***Guzman v Michael Mgt.***, 266 AD2d 508, 698 NYS2d 719 [1999]). Moreover, Dr. Desing's conclusions that "Ms. Lopez's present cervical condition with accompanying limited range of motion and radiating pain are a direct result of the motor vehicle accident of September 5, 2006" are without probative value, since he improperly relied upon the unsworn medical report of Dr. Mindy Pfeffer in reaching his conclusions (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Singh v Mohamed***, 54 AD3d 933, 864 NYS2d 498 [2008]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2007]). Despite the fact that Dr. Desing opines that "any degenerative changes noted [in the MRI of plaintiff Lopez] are consistent with the [fact that] the injury occurred more than one year prior to the MRI," he failed to refute defendants' expert's opinion that plaintiff suffers from pre-existing degenerative changes in her cervical spine that are not causally related to the subject accident with admissible objective medical evidence (*see* ***Pommells v Perez***, *supra*; ***Barry v Future Cab Corp.***, 71 AD3d 710, 896 NYS2d 432 [2010]). "Where a defendant in an action seeking damages for a "serious injury" presents evidence that a plaintiff's alleged pain and injuries are

related to a pre-existing condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation" (***Pommells v Perez***, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; *see* ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). Furthermore, while Dr. Desing noted significant limitations in plaintiff Lopez's cervical spine during a recent examination, neither he nor plaintiff Lopez proffered any objective medical evidence that revealed the existence of significant limitations of motion in plaintiff Lopez's cervical region that were contemporaneous with the subject accident (*see* ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2010]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2010]; ***Rivera v Bushwick Ridgewood Prop. Inc.***, 63 AD3d 712, 880 NYS2d 149 [2009]).

However, plaintiff Muy, in opposition, has raised a triable issue of fact as to whether he sustained a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the accident (*see* ***Walker v Esses***, 72 AD3d 938, 899 NYS2d 321 [2010]; ***Yeong Hee Kwak v Villamar***, 71 AD3d 762; 894 NYS2d 916 [2010]; ***Parker v Singh***, 71 AD3d 750, 896 NYS2d 437 [2010]; ***Sanevich v Lyubomir***, 66 AD3d 665, 885 NYS2d 635 [2009]). The affidavit submitted by Dr. Desing, who began treating plaintiff Muy on November 6, 2006, reveals that plaintiff Muy had significant limitations in his cervical spine contemporaneous with the subject accident, and that significant limitations were still present when plaintiff Muy was re-examined on March 18, 2010, almost four years post accident. Dr. Desing states in his affidavit that he used a computer analyzed digital inclinometer to measure plaintiff Muy's ranges of motion and he concludes that plaintiff Muy has suffered a permanent loss of range of motion in his cervical spine as a result of the subject accident. Dr. Desing's affidavit states that the injuries plaintiff Muy sustained to his cervical spine prevent him from enjoying and performing his daily activities without pain and discomfort. It states that the ranges of motion testing performed by plaintiff Muy produced significant pain, which indicates functional impairment. Thus, "where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1998]; *see* ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [2008]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [1996]). Although disc bulges and herniations, standing alone are not evidence of a "serious injury" under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]). Accordingly, defendants' summary judgment motion dismissing plaintiffs' complaint is granted as to the "serious injury" claim of plaintiff Lopez, but denied as to the "serious injury" claim of plaintiff Muy.

Dated: 7-19-2010

Hon. Denise F. Molia
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION