SHORT FORM ORDER

INDEX No. 07-40140
CAL. No. 10-00451-MV

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 4-29-10
ADJ. DATE 5-26-10
Mot. Seq. # 001 - MD

GILBERT PICARD and VERONIQUE PICARD, Plaintiffs, - against - OSCAR A. HERNANDEZ and TAXI EL UNIVERSAL, Defendants.	GRUNDFAST & HIGHAM, ESQS. Attorneys for Plaintiffs 207 Hallock Road, Suite 207 Stony Brook, New York 11790 BAKER, McEVOY, MORRISSEY, et al. Attorneys for Defendants 330 West 34th Street, 7th Floor New York, New York 10001

Upon the following papers numbered 1 to 19 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 - 17 ; Replying Affidavits and supporting papers 18 - 19 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Oscar Hernandez and Taxi El Universal seeking summary judgment dismissing plaintiffs' complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Gilbert Picard as a result of a motor vehicle accident at the intersection of Caleb's Path and Evergreen Avenue on December 31, 2004. The accident allegedly occurred when the front left side of the vehicle operated by plaintiff was struck by the vehicle operated by defendant Oscar Hernandez and owned by defendant Taxi El Universal after it failed to stop at a stop sign. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject accident, including, disc herniations at levels C6-C7 and L5-S1; disc bulges at levels C5-C6 and levels L2 through L5; straightening of the cervical lordosis; lumbar radiculopathy; and cervical, lumbar, and thoracic spines strains/sprains. Plaintiff also alleges that he was confined to his bed for approximately two weeks following the accident and that he was incapacitated from his employment as a bus driver for over two months after the accident. Plaintiff Veronique Picard interposed a claim for loss of services of her husband as result of the subject accident.

Defendants now move for summary judgment on the basis that plaintiff's injuries do not meet the "serious injury" threshold required by Insurance Law § 5102(d). In support of the motion, defendants submit a copy of the pleadings, a copy of plaintiff's deposition transcript, the sworn medical reports of Dr. Edward Weiland, Dr. S. Farkas, and Dr. A. Robert Tantleff. Dr. Weiland conducted an independent neurological examination of plaintiff at defendants' request on January 28, 2010. Dr. Farkas conducted an independent orthopedic examination of plaintiff at defendants' request on December 15, 2009. Dr. Tantleff performed an independent radiological review of the magnetic resonance image ("MRI") film of plaintiff's cervical and lumbar spines at defendants' request on September 28, 2008 and December 6, 2008, respectively. Plaintiffs oppose the instant motion on the ground that defendants have failed to establish that Gilbert Picard did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). Alternatively, plaintiffs assert that the evidence submitted in opposition demonstrates that Gilbert Picard sustained an injury within the "limitation of use" category and the "90/180" category. In opposition, plaintiffs submit the sworn medical report of Dr. Lyudmila Trimba, dated April 26, 2010.

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, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). 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***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***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***,182 AD2d 268, 587 NYS2d 692 [1992]). 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]).

Dr. Weiland in his affirmed medical report states that an examination of plaintiff's cervical spine reveals that plaintiff exhibits flexion of 45 degrees (normal is 45 to 60 degrees), right and left lateral rotation of 80 degrees (normal 70 to 80 degrees), and right and left lateral flexion of 45 degrees (normal is 4- to 45 degrees). The report also states that an examination of plaintiff's lumbar spine reveals that plaintiff exhibits flexion of 90 degrees (normal is 80 to 90 degrees), extension of 30 degrees (normal is 30 degrees), and right and left lateral flexion of 30 degrees (normal is 30 to 40 degrees). It states that an examination of plaintiff's thoracic spine reveals that plaintiff has full range of motion in this area and that there is no pain to palpation to the musculature. Dr. Weiland's report states that an examination of plaintiff's shoulders reveals that plaintiff exhibits forward elevation of 150 degrees (normal is 150 to 170 degrees), backward elevation of 40 degrees (normal is 40 degrees), abduction of 150 degrees (normal is 150 degrees), adduction of 30 degrees (normal is 30 degrees), external rotation of 90 degrees (normal is 90 degrees), and internal rotation of 40 degrees (normal is 40 to 45 degrees). It states that there is no sciatic notch tenderness, that there is no evidence of calvarial swelling, and that the straight leg raising test was unlimited to 90 degrees. The report states that there is peripheral evidence of degenerative osteoarthropathy in plaintiff's upper and lower extremities and that there is signs of active tissue inflammation or soft tissue swelling in the axial structures. Dr. Weiland opines that plaintiff's cervical, thoracic, and lumbar spines strains/sprains, and contusion of the knees have resolved. The report concludes that there is no evidence of any neurological deficits and that plaintiff is capable of performing his normal daily living activities.

Likewise, Dr. Farkas in his affirmed report states that an examination of plaintiff's thoracolumbar spine reveals that plaintiff exhibits forward flexion of 90 degrees (normal is 90 degrees), lateral bending of 30 degrees (normal is 30 degrees), and bilateral rotation of 45 degrees (normal is 45 degrees). The report states that there is no evidence of spasm or crepitus upon palpation, that plaintiff is able to toe and heel walk without difficulty, and that the straight leg raising test was negative. It states that an examination of plaintiff's cervical spine reveals that plaintiff exhibits bilateral rotation of 80 degrees (normal is 70 to 80 degrees), and flexion and extension of 50 degrees (normal is 50 degrees). The report states that there is no spasm or crepitus upon palpation and that the Tinel's sign is negative. It states that an examination of plaintiff's shoulders reveals that plaintiff exhibits abduction of 175 degrees (normal is 17 to 180 degrees) and internal rotation to L3 (normal is L4 or higher). The report states that an examination of plaintiff's knees reveals that plaintiff exhibits full range of motion, that there is no effusion noted, and that the knees are stable. Dr. Farkas's report concludes that plaintiff does not have an orthopedic impairment and that plaintiff is capable of performing his usual duties of his occupation, and his normal daily living activities.

Here, defendants have met their prima facie burden establishing that plaintiff did not sustain a

"serious injury" within the meaning of Insurance Law § 5102(d) inasmuch as the affirmed medical reports of their experts concluded, based upon objective range of motion tests, that plaintiff has full range of motion in his cervical, lumbar, and thoracic spines (*see* ***McIntosh v O'Brien***, 69 AD3d 585, 893 NYS2d 154 [2010]; ***Saetia v VIP Renovations Corp.***, 68 AD3d 1092, 891 NYS2d 471 [2009]; ***Dietrich v Puff Cab Corp.***, 63 AD3d 778, 881 NYS2d 463 [2009]; ***DiFilippo v Jones***, 22 AD3d 788 [2005]; ***Casella v New York City Tr. Auth.***, 14 AD3d 585, 787 NYS2d 883 [2005]). 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]). Dr. Weiland and Dr. Farkas were unequivocal in their medical reports in stating that plaintiff does not have any orthopedic or neurological disabilities and that he is capable of performing his normal daily living activities. Also, Dr. Weiland and Dr. Farkas, after examining plaintiff and reviewing his respective medical records, concluded that plaintiff was not seriously or permanently injured by the subject accident. Additionally, Dr. Tantleff clearly states, after reviewing the MRI of the plaintiff's cervical and lumbar spines that there is no evidence of acute or recent injury to plaintiff's cervical spine or lumbar spine. Dr. Tantleff and Dr. Weiland state that plaintiff suffers from degenerative disc changes in his cervical spine and lumbar spine that are consistent with plaintiff's age and are unrelated to the subject accident. Moreover, reference to the plaintiff's own deposition testimony sufficiently refuted the "limitation of use" categories of injury under Insurance Law § 5102(d) (*see* ***Colon v Tavares***, 60 AD3d 419, 873 NYS2d 637 [2009]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2008]). Therefore, defendants have shifted the burden to plaintiff to come forth with medical evidence in admissible form to demonstrate that the injuries he sustained meet the "serious injury" threshold and are causally related to the subject accident (*see* ***Gaddy v Eyler***, *supra*).

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, plaintiff primarily relies upon the affidavit of Dr. Lyudmila Trimba, who states that plaintiff first received treatment from him on April 21, 2010 and April 26, 2010. Dr. Trimba states that during plaintiff's initial visit he performed a full physical examination of plaintiff, which revealed that he had tenderness in his cervical spine, lumbar spine, right shoulder and right knee. He states that plaintiff had decreased ranges of motion in his cervical spine, lumbar spine, and right shoulder. Dr. Trimba opined that plaintiff had sustained sprains and strains to his cervical, thoracic, lumbar spines, lumbar radiculopathy, chronic neck and low back pain, right shoulder and knee contusions, miofasciitis, disc bulges and disc herniations in his cervical and lumbar spines as a result of the subject accident. Upon his re-examination of plaintiff, Dr. Trimba states that plaintiff continues to have tenderness in his thoracic and lumbosacral paraspinal muscles, and his right glenohumeral and acriomioclavicular joints, and diffuse tenderness in his right knee. He states that plaintiff continues to have decreased ranges of motion in his cervical and lumbar spines. Dr. Trimba opines that plaintiff's prognosis for symptomatic and functional improvement is guarded, and that he has moderate limitations in using his right shoulder and right knee for repetitive movements. Dr. Trimba concludes that plaintiff's injuries are permanent and that he suffers from permanent moderate partial disability with permanent limitations as a result of the subject accident.

Plaintiff's opposition fails to meet his burden (*see* ***Gaddy v Eyler***, *supra*). In opposition, plaintiff has proffered insufficient medical evidence to demonstrate that he sustained an injury within the "limitation of use" categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]). The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [1988]). Plaintiff, in the instant matter, has failed to proffer any competent medical evidence that revealed the existence of significant limitations in his right shoulder, right knee, or cervical and lumbar regions contemporaneous with the subject accident (*see* ***Nieves v Michael***, 73 AD3d 716, 901 NYS2d [2010]; ***Fung v Uddin***, 60 AD3d 992, 876 NYS2d 469 [2009]; ***Garcia v Lopez***, 59 AD3d 593, 872 NYS2d 719 [2009]). Furthermore, plaintiff's expert did not address the findings of defendants' radiologist and neurologist, who concluded that the changes seen in plaintiff's cervical and lumbar regions are degenerative in nature and have no causal relationship or association with the subject accident (*see* ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2009]). When 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* ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]).

Further, neither the plaintiff nor his expert explained the extensive gap in treatment that occurred

between the time plaintiff stopped treatment and his most recent examination on April 26, 2010 (*see* ***Pommells v Perez***, *supra*; ***Garcia v Lopez***, *supra*; ***Berktas v McMillian***, 40 AD3d 563, 835 NYS2d 388 [2007]). Plaintiff testified at an examination before trial that he stopped receiving treatment because he had to return to work. However, plaintiff did not present any evidence to establish that he was ineligible for No-Fault benefits, and that, despite being employed, he was unable to afford to pay for additional medical care (*see* ***Mohamed v Siffrain***, 19 AD3d 561, 797 NYS2d 532 [2005]; ***Neugebauer v Gill***, 19 AD3d 567, 797 NYS2d 541 [2005]; ***Villalta v Schechter***, 273 AD2d 299, 710 NYS2d 87 [2000]).

Nevertheless, defendants have failed to establish their burden of demonstrating that plaintiff did not sustain an injury within the "90/180" category, and therefore, have failed to shift the burden to plaintiff to produce evidence with respect to this claim (*see* ***Patel v DeLeon***, 43 AD3d 433, 840 NYS2d 819 [2007]; ***Lopez v Geraldino***, 35 AD3d 398, 825 NYS2d 143 [2006]; ***Lowell v Peters***, 3 AD3d 778, 770 NYS2d 796 [2004]). The reports of defendants' experts fail to address this particular category of "serious injury" and the independent examinations by defendants' experts took place almost six years after the subject incident (*see* ***Ali v Rivera***, 52 AD3d 445, 859 NYS2d 713 [2008]; ***DeVille v Barry***, 41 AD3d 763, 839 NYS2d 216 [2007]; ***Sayers v Hot***, 23 AD3d 453, 805 NYS2d 571 [2005]). Moreover, while a plaintiff's deposition testimony may be used by a defendant to demonstrate that the plaintiff did not sustain a nonpermanent injury during the 90 days out of the 180 days immediately following the accident (*see e.g.* ***Neuburger v Sidoruk***, 60 AD3d 650, 875 NYS2d 144 [2009]; ***Shaw v Jalloh***, 57 AD3d 647, 869 NYS2d 189 [2008]; ***Sanchez v Williamsburg Volunteer of Hatzolah***, 48 AD3d 664, 852 NYS2d 287 [2008]), here, plaintiff's deposition testimony regarding his ability to work and perform other daily activities after the accident was insufficient to meet defendants' burden on the motion (*see* ***Tinsley v Bah***, 50 AD3d 1019, 857 NYS2d 180 [2008]; ***Torres v Performance Auto. Group, Inc.***, 36 AD3d 894, 829 NYS2d 181 [2007]; *cf.* ***Geliga v Karibian***, 56 AD3d 518, 867 NYS2d 519 [2008]). In fact, plaintiff testified that he is a school bus driver and that he performs tiling and ceramic work, but because of the injuries he sustained to his cervical and lumbar regions, and his right shoulder as a result of the subject accident, he was unable to engage in his employment or substantially perform his usual daily living activities for over three months (*see* ***Zeman v Valenti***, 302 AD2d 593, 755 NYS2d 306 [2003]; ***Temple v Doherty***, 301 AD2d 979, 755 NYS2d 448 [2003]). Accordingly, defendants' motion for summary judgment is denied.

Dated: 7 OCT - 2010

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**