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SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK
COUNTY OF NASSAU – PART 4

Present: HON. UTE WOLFF LALLY
Justice

FRANK RUSSO and SUSAN RUSSO,

Plaintiffs,

-against-

NICHOLAS PANDULLO and CARLOS PANDULLO,

Defendants.

Motion Sequence #1
Submitted September 20, 2010

INDEX NO: 16985/08

The following papers were read on this motion for summary judgment

Notice of Motion and Affs.....1-7
Affs in Opposition.....8-13
Affs in Reply.....14&15
Memorandum of Law.....16

This motion by the defendants, Nicholas Pandullo and Carlos Pandullo (collectively referred to herein as "Pandullo"), for an Order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the plaintiffs' complaint on the grounds that neither plaintiff Frank Russo's nor plaintiff Susan Russo's injuries satisfy the "serious injury" threshold as required in Insurance Law § 5104(d) as defined in Insurance Law §5102(d) is denied.

This action arises out of a motor vehicle occurrence that took place on August 18, 2007 at approximately 7:10 p.m. near the intersection of Newbridge Road and Jerusalem Avenue, North Bellmore, Town of Hempstead, County of Nassau, State of

New York. At the time of the accident, plaintiff Frank Russo was the driver of a vehicle stopped at a red light at the intersection. At his oral examination before trial, Frank Russo testified that he was stopped at the red light for ten to fifteen seconds before he felt an impact to the rear of his car by the defendants' vehicle. Plaintiff, Susan Russo was a passenger seated in the back seat on the passenger's side in plaintiff's car. She was sitting next to their infant child who was also siting in the back seat but on the driver's side. Injuries are not claimed for the infant.

The police and EMS were summoned to the scene of the accident and Susan Russo was transported via ambulance to the Emergency Room at Nassau University Medical Center where she presented with pains in her back and right shoulder. She was examined and discharged the same day with a diagnosis of cervical sprain and strain. Frank Russo testified that upon impact, he immediately felt stiffness, soreness and pain in his shoulders, neck and back. He refused the ambulance in order to care for their infant daughter.

At the time of the occurrence plaintiff, Frank Russ, 47 years of age and was unemployed. He gained employment in the winter of that year doing administrative work in the food service industry. He states in his bill of particulars that he was confined to his bed and home partially and intermittently since August 18, 2007. At his deposition, plaintiff testified that as a result of this accident, he is no longer able to sleep through the night without having to lift his arms above the shoulder and head; that he has lost power in his arms when he lifts; that he is no longer able to pick up his 5-year old daughter without difficulty and pain and that he is no longer able to hold pans out straight. He testified that he can no longer do any work that requires arm strength,

including basic household duties, cleaning, and backyard work. He stated that he can no longer play tennis or handball.

At the time of the accident, plaintiff, Susan Russo, was 43 years of age and unemployed. She states in her bill of particulars that he was confined to her bed and home "partially and intermittently since August 18, 2007". At her deposition, plaintiff testified that "there is nothing [she] can no longer do" as a result of this accident. She did state, however, that she can no longer sit for long periods of time without having to get up. She also stated that she can no longer lift her daughter or do a lot of strenuous work with her right arm without having difficulty.

In their bill of particulars, plaintiffs allege, that, as a result of this accident, they sustained, the following injuries:

Frank: partial articular and intrasubstance supraspinatus tendon tear of the left shoulder; tear through the equator of the anterior labrum - left shoulder; tear of the superior labrum of the left shoulder; articular and intrasubstance tear of the supraspinatus tendon with diffuse fraying - right shoulder; tearing of the superior labrum with extension below the equator anteriority - right shoulder; sprain, strain and derangement of the left shoulder; left lateral disc herniation at T4-5; paracentral herniation at T9-10 indenting the spinal cord; bulging discs at C4-C5; C6-C7 disc herniation with mass effect on the spinal cord; sprain, strain and derangement of the cervical spine; bilateral C5-C6 cervical radiculopathy; left disc herniation at C5-C6 with mass effect on the spinal cord.

Susan: sprain, strain and derangement of the cervical spine; and multiple contusions right shoulder and neck.

Both plaintiffs claim that their respective injuries fall within the following three categories of the serious injury statute: to wit, permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and 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.

In moving for summary judgment dismissing of the plaintiffs' complaint on the grounds that neither plaintiff has sustained a serious injury defendants are not required to disprove any category of serious injury which has not been pled by the plaintiff (*Melino v Lauster*, 82 NY2d 828). Moreover, even pled categories of serious injury may be disproved by the defendants by means other than the submission of medical evidence, including the plaintiffs' own testimony and their submitted exhibits (*Michaelides v Martone*, 186 AD2d 544; *Covington v Cinnirella*, 146 AD2d 565, 566).

In support of a claim that the plaintiffs have not sustained a serious injury, defendants may rely either on the sworn statements of the defendants' examining physician or the unsworn reports of the plaintiff's examining physician (*see Pagano v Kingsbury*, 182 AD2d 268). It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (CPLR 2106; *see also Pichardo v Blum,* 267 AD2d 441).

When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff, in opposition to defendants' motion must produce evidence in admissible form to support the claim for serious injury (*see Licari v Elliot*, 57 NY2d 230). In order to be sufficient to establish a *prima facie* case of serious physical injury, the affirmation or

affidavit must contain medical findings, which are based on the physician's own examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints. However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v Angerami*, 79 NY2d 813).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems, 98 NY2d 345,* stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Id.* at p 353). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (Gonzalez v Vasquez, 301 AD2d 438). However, even the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*Toure, supra*).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Id.* at p. 566). The Court held that while "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer

some reasonable explanation for the gap in treatment or cessation of treatment" (*Id.*; see also *Neugebauer v Gill*, 19 AD3d 567).

In order to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law required that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v Eyler*, 79 NY2d 955; *Scheer v Koubeck*, 70 NY2d 678; *Licari v Elliot*, *supra*). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (Id.; *Grossman v Wright*, 268 AD2d 79, 83).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (see *Toure*, *supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id.*).

In order to prevail under the "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" category, a plaintiff must demonstrate through

competent, objective proof, a "medically determined injury or impairment of a non permanent nature" (Insurance Law §5102[d]) "which would have caused the alleged limitations on the plaintiff's daily activities (*Monk v Dupuis*, 287 AD2d 187, 191), and, furthermore, a curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment" (*Licari v Elliott*, *supra* at 236; *see also Sands v Stark*, 299 AD2d 642).

Unlike a claim of serious injury under "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories, a gap or cessation in treatment is irrelevant as to whether plaintiff sustained a non-permanent medically determined injury which prevented the plaintiff from performing substantially all material acts which constituted such person's daily activities for not less than 90 days during the 180 days immediately after the accident (*Gomez v Ford Motor Credit Co.*, 10 Misc.3d 900 [Supreme Court, Bronx County, 2005]).

With these guidelines in mind, this Court will now turn to the merits of defendants' motion at hand. For the sake of clarity, this Court will address each plaintiff's injuries separately and in turn.

Frank Russo

With respect to Frank Russo, in support of their motion, the defendants sole submission is the affirmed to report of Dr. Alan J. Zimmerman, MD, an orthopedic surgeon who performed an orthopedic examination of the plaintiff on behalf of the defendants on September 10, 2009.

In his report, Dr. Zimmerman, notes, in pertinent part, as follows:

The claimant was involved in a motor vehicle accident in 2000 injuring his back.
***
Cervical Spine:
***
No tenderness noted. No spasm noted. The claimant holds his head rigid during the interview and during the examination. However, in unguarded moments such as lying down, sitting up, and testing his reflexes, he turns his head from side to side and demonstrates a far greater range of motion than he permits during direct examination.

Cervical spine range of motion was as follows:

Motion	Claimant	Normal
Flexion	45°	45-60°
Extension	45°	45-60°
Lateral Right	45°	30-60°
Lateral Left	45°	30-60°
Rotation Right	60°	45-60°
Rotation Left	60°	45-60°

These movements are carried out without complaint of pain.

Thoracic Spine: No tenderness, no spasm and that there was full right and left back rotation.

Shoulders: The following were tested and negative bilaterally: Impingement sign; Supraspinatus Testing; Spasm.

Shoulder range of motion was as follows:

		Claimant		Normal	
Forward Elevation	(R)	180°		180°	
		(L)	*110°*		*180°*
Abduction	(R)	180°		180°	
		(L)	90°		180°
Adduction	(R)	45°		45°	
		(L)	45°		45°
Internal Rotation		(R)	70°		70°
		(L)	70°		70°
External Rotation		(R)	90°		90°
		(L)	90°		90°

***
DIAGNOSIS:
Cervical sprain, resolved. Right and left shoulder sprain, resolved. Thoracic sprain, resolved.

CONCLUSIONS: All of the cervical MRI findings are degenerative, pre-existing, and not causally related. All of the MRI findings demonstrate degenerative tears on both shoulders. Again, the thoracic spine findings are all degenerative as evidenced by the multiplicity of levels involved. In regards to the EMG testing, there is no evidence of cervical radiculopathy. There is no clinical support for a diagnosis of carpal tunnel syndrome. If, indeed, this is present, it is not causally related to the accident of August 18, 2007.

DISABILITY AND WORK COMMENTARY: Per my physical evaluation based on the objective findings, the claimant has no disability.

As the defendants' exclusively rely upon the orthopedic examination by Dr. Zimmerman, this Court finds that the defendants have failed to establish their *prima facie* entitlement to summary judgment as a matter of law. First, it is plain that Dr. Zimmerman's medical conclusions are inconsistent with his own findings. Dr. Zimmerman opines that Frank Russo's injuries are "fully resolved" and that he has suffered no disability whatsoever as of his examination performed in 2009. However, Dr. Zimmerman himself finds significant limitations in mobility in Frank Russo's left arm during his examination of the plaintiff including forward elevation was decreased to 110 degrees (normal 180 degrees) and abduction was decreased to 90 degrees (normal 180 degrees). Further, while noting the reduction in movement, Dr. Zimmerman also fails entirely to explain how as 50% reduction in movement is consistent with his medical opinion that all of Frank Russo's injuries are "fully resolved."

Moreover, Dr. Zimmerman comes to a cursory conclusion that all of plaintiff's injuries are degenerative in nature and therefore not causally related to the subject motor vehicle accident. It is true that the Court of Appeals in *Pommels v. Perez*, has held that a preexisting condition interrupts the chain of causation between the accident and the claimed injury (*Pommells*, *supra* at p. 566). However, a preexisting condition

that is asymptomatic prior to a motor vehicle accident does not shift the burden to the plaintiff to address the prior injury under *Pommells v. Perez*. In this case, the plaintiff, Frank Russo, clearly testified at his deposition as follows:

Q: Prior to this accident, did you ever injure your neck prior to this accident?
A: No.
Q: Prior to this accident, did you ever injure either one of your shoulders?
A: No.
Q: Prior to this accident, did you ever injure your upper back?
A: No.
Q: Prior to this accident, did you ever experience pain in your neck?
A: No.
Q: Did you ever experience pain in your shoulders, either one?
A: No.
Q: Did you ever experience pain in your upper back?
A: No.
(*Frank Russo Tr.*, pp. 45-46)

Where complaints of pain or injury do not occur until the plaintiff suffers an accident subsequent to the automobile accident, the subsequent accident may be proven to be the cause of the injury (*Wallingford v Perez*, 11 AD3d 390). Therefore, in light of the evidence on this record demonstrating that Frank Russo's "condition" was asymptomatic prior to the subject motor vehicle accident, this Court finds that the defendants have failed to carry their *prima facie* burden that the plaintiff has not sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system."

Defendants have also failed to carry their burden with respect to disproving plaintiff's claim that his injuries satisfy the 90/180 category of Insurance Law §5102(d). Initially, it is noted that the defendants' physician, Dr. Zimmerman, first examined the plaintiff more than two years after the accident. Although Dr. Zimmerman states that the plaintiff was not disabled when he examined Frank Russo, he does not address the

possibility that he had a medically determined injury or impairment immediately following the accident that affected his activities during the 180 days immediately following the accident (*Jocelyn v Singh Airport Service*, 35 AD3d 668; *Thai v Butt*, 34 AD3d 447). Taken together with plaintiff's sworn testimony that as a result of this accident, he was substantially impaired from performing many material acts which constitute his daily activities for not less than 90 of the first 180 days after the accident, this Court finds that the defendants have failed to establish their *prima facie* entitlement to summary judgment as a matter of law with respect to Frank Russo's injuries. As such, their motion is denied in its entirety and this court, therefore, need not address the sufficiency of plaintiff, Frank Russo' evidence (*Trantel v Rothenberg*, 286 AD2d 325; *Papadonikolakis v First Fidelity Leasing Group, Inc.*, 283 AD2d 470).

Susan Russo

Initially, it is noted that plaintiff's claims of serious injury under the 90/180 category of Insurance Law § 5102(d) is contradicted by her own testimony wherein she states that "there is nothing I can no longer do" as a result of this accident. She also states that she was only confined to her bed "partially and intermittently since August 18, 2007" which when taken together with her testimony that she was unemployed at the time of the accident, raises doubts as to whether such confinement was in fact medically related. Nevertheless, the fact that she admittedly is not curtailed in her usual activities "to a great extent rather than some slight curtailment" (*Licari*, *supra* at p. 236; *see also Sands v Stark*, 299 AD2d 642), leads this Court to determine that the plaintiff, Susan Russo, has effectively abandoned her 90/180 claim for purposes of defendants' initial burden of proof on a threshold motion (*Joseph v Forman*, 16 Misc.3d 743

[Supreme Court Nassau 2007]). Thus, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, "permanent consequential limitation of use of a body organ or member"; and, "significant limitation of use of a body function or system."

With respect to Susan Russo, in support of their motion, the defendants submit the affirmed to report of Dr. Alan J. Zimmerman, MD, an orthopedic surgeon who performed an orthopedic examination of the plaintiff on September 10, 2009; and two separate affirmed to radiology reviews by Dr. Sheldon Feit, M.D., of MRI films of plaintiff's lumbosacral spine and right shoulder by Dr. Sheldon Feit, M.D.

Initially, it is noted that the MRI film reviews by Dr. Sheldon Feit, M.D. do not constitute competent medical evidence and as a result will not be considered by this Court in support of defendants' motion (*Gonzalez v Vasquez*, 301 AD2d 438). It is clear from his reports that Dr. Feit, a radiologist reading the MRI films, did not have said MRIs taken under his supervision (*Fiorillo v Arriaza,* 24 Misc.3d 1215(A) [Sup. Ct. Nassau 2007]; see also *Sayas v Merrick Transportation*, 23 AD3d 367). As such, Dr. Feit is required to pair the findings of the MRI films with a physical examination (*Silkowski v Alvarez*, 19 AD3d 476). This he fails to do. Thus, his reports cannot be considered by this Court in support of defendants' instant motion.

Therefore, with respect to Susan Russo, the defendants sole submission is the report of Dr. Alan J. Zimmerman, MD.

In his report, Dr. Zimmerman, notes, in pertinent part, as follows:

> PAST MEDICAL HISTORY BY ACCOUNT OF THE CLAIMANT: The claimant had a C-Section, right carpal tunnel release and right trigger thumb release. The claimant slipped and fall [sic] on 7/1/09 sustaining an injury to her neck and back.

She had a prior injury at an unknown time, but prior to the accident of 2007, at which time she fractured her right hand.
***
CERVICAL SPINE
***
No tenderness noted. No spasm noted.

Cervical spine range of motion was as follows:

Motion	Claimant	Normal
Flexion	45°	45-60°
Extension	45°	45-60°
Lateral Right	45°	30-60°
Lateral Left	45°	30-60°
Rotation Right	60°	45-60°
Rotation Left	60°	45-60°

These movements are carried out without complaint of pain.

THORACIC SPINE: No tenderness, no spasm and that there was full right and left back rotation.

SHOULDERS: The following were tested and negative bilaterally: Impingement sign; Supraspinatus Testing; Spasm. The claimant points to the supraspinatus region on the right as the site of her shoulder complaints.

Shoulder range of motion was as follows:

		Claimant		Normal	
Forward Elevation	(R)	180°		180°	
		(L)	180°		180°
Abduction	(R)	180°		180°	
		(L)	180°		180°
Adduction	(R)	45°		45°	
		(L)	45°		45°
Internal Rotation		(R)	70°		70°
		(L)	70°		70°
External Rotation		(R)	90°		90°
		(L)	90°		90°

These movements are carried out with complaints.

LUMBAR SPINE: The following were tested and noted to be negative: Lasegue; Supine straight leg raise; Reverse seated straight leg raise; No spasm was noted. No tenderness noted. *The claimant complains of marked back pain on flexion of her hips and knees, which should relive – not aggravate – her pain.*
***

Lumbar spine range of motion was a follows:

	Claimant		Normal
Flexion	*85°*		*90°*
Extension	30°		30°
Lateral Flexion (R) 30°		30°	
Lateral Flexion (L) 30°		30°	
Rotation (R)	30°		30°
Rotation (L)	30°		30°

These movements are carried out with complaints of pain.

***

DIAGNOSIS:
1.) Cervical and lumbar sprains, resolved.
2.) Subsequent neck and back injuries.
3.) The shoulder complaints are cervical in origin.

CONCLUSIONS: The findings of supraspinatus tendinopathy on MRI are irrelevant since the claimant's shoulder complaints all relate to her neck with referred pain to her shoulder. Regardless, all of the alleged MRI findings are degenerative and not traumatic. In regard to the cervical and lumbar MRIs, all of the findings are degenerative and preexisting , as evidenced by the multiplicity of levels involved. In regard to the subsequent accident, I have no details as to the claimant's condition at the time of the subsequent accident as to indicate what residuals she had from her initial accident, if any.

DISABILITY AND WORK COMMENTARY: Per my physical evaluation based on the objective findings the claimant has no disability.

Defendants have again failed to establish their *prima facie* entitlement to summary judgment as a matter of law. Dr. Zimmerman's report with respect to Susan Russo suffers from the same infirmities as his report of Frank Russo's evaluation. Again, it is plain that Dr. Zimmerman's medical conclusions are inconsistent with his own findings. Dr. Zimmerman opines that Susan Russo's injuries are "resolved" and that she has suffered no disability as of his examination performed in 2009. However, Dr. Zimmerman himself finds significant limitations in mobility in the flexion of her lumbar spine which was decreased to 85 degrees (normal 90 degrees). In addition, Dr. Zimmerman notes that unlike the range of motion testing for her cervical spine, the

range of motion testing for plaintiff's shoulders and lumbar spine were carried out with complaints of pain. Moreover, his conclusions that all of his findings are degenerative and preexisting as opposed to being traumatic are not supported by an medical explanation whatsoever. As stated above, a preexisting condition "that is asymptomatic prior to a motor vehicle accident does not shift the burden to the plaintiff to address the prior injury under *Pommells v. Perez*. In this case, the plaintiff, Susan Russo, clearly testified at her deposition as follows:

Q: Prior to this accident, had you ever injured your neck before?
A: No.
Q: Had you ever injured your lower back before?
A: No.
Q: Had you ever injured your right shoulder?
A: No.
Q: Prior to this accident, had you ever experienced pain in your neck, lower back or right shoulder?
A: No.
Q: Since the accident, have you re-injured either your neck, your lower back, or your right shoulder?
A: I had an accident two weeks ago in the supermarket, I fell.
***
Q: Which portions of your body did you injure in the accident?
A: My back and my head.
Q. Back and hip?
A: Head.
Q: Your lower back?
A: Lower and midback.
(*Susan Russo Tr.*, pp. 62-63)

While defendant's expert, Dr. Zimmerman, does address the fact that the plaintiff was involved in a subsequent accident in 2009, in which she injured her head and back, his failure to demonstrate that her present complaints were causally related to the more recent accident as opposed to the subject accident renders his findings speculative (*Joseph v A and H Livery*, 58 AD3d 688). Further, it cannot be overlooked by this Court

that plaintiff's complaints of pain did not occur until the subject accident. Accordingly, in light of the evidence on this record demonstrating that Susan Russo's injuries were asymptomatic prior to the subject motor vehicle accident, this Court finds that the defendants have also failed to sustain their *prima facie* burden that Susan Russo has not sustained a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" (*Wallingford v. Perez*, 11 AD3d 390).

Therefore, this Court finds that the defendants have failed to establish their *prima facie* entitlement to summary judgment as a matter of law with respect to Susan Russo's injuries. As such, their motion is denied in its entirety and this court, therefore, need not address the sufficiency of plaintiff, Susan Russo' evidence (Trantel, supra; Papadonikolakis, supra).

Defendants' motion is denied in its entirety.

Dated: December 2, 2010

UTE WOLFF LALLY, J.S.C.

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