SHORT FORM ORDER

INDEX No. 08-32633
CAL. No. 10-01209-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-18-10
ADJ. DATE. 8-25-10
Mot. Seq. # 002 - MD

JERALD POWELL, Plaintiff, - against - JOSE A. ALVARADO, Defendant.	KUJAWSKI & DELLICARPINI Attorney for Plaintiff 1637 Deer Park Avenue, P.O. Box 661 Deer Park, New York 11729 PICCIANO & SCAHILL, P.C. Attorney for Defendant/Third-Party Plaintiff 900 Merchants Concourse, Suite 310 Westbury, New York 11590
JOSE A. ALVARADO, Third-Party Plaintiff, - against - DELORES TREADWELL, Third-Party Defendant.	JOHN T. RYAN & ASSOCIATES Attorney for Third-Party Defendant 633 East Main Street, Suite 3 Riverhead, New York 11901

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated June 23, 2010, and supporting papers (including Memorandum of Law dated ___); (2)Affirmation in Opposition by the plaintiff, dated August 18, 2010, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by defendant Jose Alvarado seeking summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Jerald Powell as a result of a motor vehicle accident that occurred in the parking lot of a thrift store located at 181 Second Avenue in Brentwood, New York on October 11, 2005. The accident allegedly occurred when the vehicle operated by defendant Jose Alvarado struck the rear of a parked vehicle operated by Delores

Treadwell as it was reversing out of a parking space. At the time of the accident, plaintiff was exiting the front seat of Ms. Treadwell's vehicle. 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 C3 through C6 and levels L2 through S1; disc bulges at level C5-C6 and level L4-L5; cervical and lumbar radiculopathy; tendonitis and derangement of the left knee; contusion of the left shoulder; and contusion and derangement of the right wrist. Plaintiff alleges that he has been partially disabled since the date of the accident, because of the injuries he sustained. Plaintiff further alleges that he was incapacitated from his employment in the stock/shipping and receiving department at Macy's for approximately four to five months as a result of the subject accident.

Defendant now moves for summary judgment on the basis that plaintiff's injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, a copy of plaintiff's deposition transcript, and the sworn medical reports of Dr. Richard Pearl, Dr. Joseph Stubel, and Dr. Steven Peyser. At defendant's request, Dr. Pearl conducted an independent neurological examination of plaintiff on November 10, 2009, and Dr. Stubel conducted an independent orthopedic examination of plaintiff on December 4, 2009. At defendant's request, Dr. Peyser performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's cervical spine on December 2, 2009. Plaintiff opposes the instant motion on the ground that defendant has failed to establish his prima facie burden that the injuries he sustained as a result of the subject accident do not come within the meaning of the "serious injury" threshold requirement of Insurance Law § 5102(d). In the alternative, plaintiff asserts that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" categories and the "90/180 days" category. In opposition to the motion, plaintiff submits the sworn medical reports of Dr. Benjamin Nachamie, Dr. Robert Snitkoff, and Dr. Socorro Vicente. Plaintiff also submits the unsworn medical report of Dr. Sima Anand, and the unsworn computer signal range of motion examination report of Dr. Socorro Vicente.

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]).

Moreover, 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]). Further, 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]).

Here, defendant failed to establish his prima facie burden that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Orejuela v Francis***, 71 AD3d 857, 895 NYS2d 851 [2010]; ***Cedillo v Rivera***, 39 AD3d 453, 835 NYS2d 238 [2007]). Defendant relies upon the affirmed medical reports of Dr. Pearl, a neurologist, and Dr. Stubel, an orthopedist, who each conclude that plaintiff has full range of motion in his cervical and lumbar regions, that the cervical and lumbosacral sprains that he sustained as a result of the subject accident have resolved, and that plaintiff is capable of performing his daily living activities without restriction. However, Dr. Pearl's and Dr. Stubel's reports are deficient, in that they each failed to provide any range of motion findings for plaintiff's left shoulder, left knee, or right wrist. 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 areas, the report of defendant's examining physicians leaves it to this Court to speculate as to whether plaintiff's ranges of motion 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]). While defendant's examining radiologist, Dr. Peyser, reviewed the MRI of plaintiff's cervical spine, plaintiff's claimed injuries went beyond merely that region of his body. These omissions prevent defendant from satisfying his prima facie burden. As a consequence, defendant's proof fails to objectively demonstrate that plaintiff did not sustain a permanent consequential or significant limitation of use of his left shoulder, left knee, or right wrist as a result of the subject accident (*see* ***Dzaferovic v Polonia***, 36 AD3d 652, 829 NYS2d 148 [2007]; ***Browdame v Candura***, *supra*; ***Aronov v Leybovich***, 3 AD3d 511, 770 NYS2d 741 [2004]).

Furthermore, despite defendant's examining experts indicating in their reports that plaintiff advised that he had been unable to work for one year after the subject accident, defendant never adequately addressed the claim that plaintiff sustained a medically-determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see* ***Guzman v Joseph***, 50 AD3d 741, 855 NYS2d 638 [2008]; ***Torres v Performance Auto. Group, Inc.***, 36 AD3d 894, 894, 829 NYS2d 181 [2007]; ***Lopez v Geraldino***, 35 AD3d 398, 825 NYS2d 143 [2006]). Where, as here, a plaintiff is claiming that he or she has sustained an injury within the 90/180 days category, it is incumbent upon the examining medical expert to relate his findings to this category of serious injury for the period of time immediately following the subject accident (*see* ***Takaroff v A.M. USA, Inc.***, 63 AD3d 1142, 882 NYS2d 264 [2009]; ***Scinto v Hoyte***, 57 AD3d 646, 870 NYS2d 61 [2008]; ***Colacino v Andrews***, 50 AD3d 615, 854 NYS2d 771 [2008]; ***Daddio v Shapiro***, 44 AD3d 699, 844 NYS2d 76 [2007]). Although each doctor concludes that plaintiff has full range of motion at the time plaintiff's examinations were conducted, neither doctor addressed the possibility that he had a medically-determined injury or impairment immediately following the accident during the 180 days immediately following the accident (*see* ***Coburn v Samuel***, 44 AD3d 698, 843 NYS2d 659 [2007]; ***Talabi v Diallo***, 32 AD3d 1014, 820 NYS2d 904 [2006]; ***Sayers v Hot***, 23

AD3d 453, 805 NYS2d 571 [2005]). Defendant's neurologist and orthopedist examined plaintiff more than four years after the subject accident. Similarly, the affirmed report of Dr. Peyser fails to address this category of serious injury, despite concluding that plaintiff suffers from spondylitic degenerative changes in his cervical spine that are not casually related to the subject accident (*see* ***Ali v Rivera***, 52 AD3d 445, 859 NYS2d 713 [2008]; ***Museau v New York City Tr. Auth.***, 34 AD3d 772, 823 NYS2d 908 [2006]; ***Talabi v Diallo***, 32 AD3d 1014, 820 NYS2d 904 [2006]; ***Volpetti v Yoon Kap***, 28 AD3d 750, 814 NYS2d 236 [2006]).

Having determined that defendant failed to establish his prima facie entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiff's papers submitted in opposition were sufficient to raise a triable issue of fact (*see* ***Spanos v Harrison***, 67 AD3d 893, 889 NYS2d 227 [2009]; ***McNulty v Buglino***, 40 AD3d 591, 836 NYS2d 198 [2007]; ***Mondi v Keahon***, 32 AD3d 506, 820 NYS2d 625 [2006]). Accordingly, defendant's motion for summary judgment is denied.

Dated: 12/27/10

PETER H. MAYER, J.S.C.