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SHORT FORM ORDER

INDEX No. 08-32590
CAL. No. 10-02292MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 3-9-11
ADJ. DATE 7-13-11
Mot. Seq. # 001 - MD

STEVEN P. SYPHER, Plaintiff, - against - GERTRUDYS LOPEZ, Defendant.	KEEGAN & KEEGAN, ROSS & ROSNER, LLP Attorney for Plaintiff 147 North Ocean Avenue, P.O. Box 918 Patchogue, New York 11772 SOBEL & SCHLEIER, L.L.C. Attorney for Defendant 464 New York Avenue, Suite 100 Huntington, New York 11743

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 - 16 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17-20 ; 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 defendant Gertrudys Lopez seeking summary judgment dismissing plaintiff's complaint is denied.

Plaintiff Steven Sypher commenced this action against defendant Gertrudys Lopez to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Horton Avenue and Reeves Avenue in Riverhead, New York on March 20, 2008. Plaintiff, by his complaint, alleges, among other things, that he was traveling southbound on Horton Avenue when his vehicle was struck on the driver's side by the vehicle owned and operated by defendant Gertrudys Lopez after she failed to stop at a stop sign controlling her direction of travel on westbound Reeves Avenue. As a result of the impact between the Sypher and Lopez vehicles, the Sypher vehicle was pushed into a pole. Plaintiff, by his bill of particulars, alleges that he sustained various personal injuries as a result of the subject accident, including loss of consciousness; abrasion to the left side of the face; scar to the left side of the face; concussion; head injuries to the left side of the head; and post concussion syndrome and headaches. Plaintiff alleges that as a result of the injuries he sustained in the accident he was confined to his bed and home for approximately five months.

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Defendant now moves for summary judgment on the basis that the injuries allegedly sustained by plaintiff as a result of the subject accident do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the affirmed medical reports of Dr. Ira Chernoff and Dr. Mathew Chacko. At defendant's request, Dr. Chernoff conducted an independent orthopedic examination of plaintiff on August 2, 2010, and Dr. Chacko conducted and independent neurological examination of plaintiff on September 27, 2010. Defendant also submits the unsworn copies of plaintiff's medical records from Stony Brook University Medical Center and Peconic Bay Medical Center. Plaintiff opposes the motion on the ground that defendant has failed to meet her prima facie burden of demonstrating that he did not sustain an injury within the meaning of the Insurance Law as a result of the subject accident. Alternatively, plaintiff asserts that he sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law as a result of the accident. In opposition, plaintiff submits his own affidavit and a letter, dated May 16, 2011, from his primary care physician, Dr. Kenneth Barry.

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]). 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 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 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."

To recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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.***, *supra*; ***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, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]).

Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see* ***Caulkins v Vicinanzo***, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

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 [2d Dept 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 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the 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 [4th Dept 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 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Defendant's examining orthopedist, Dr. Chernoff, states in his medical report that an examination of plaintiff revealed that his "neck range of motion" is "hyperextension 20 degrees (normal is 20 degrees), rotation is 30 degrees (normal is 80 degrees), that he is able to forward bend 1-inch chin to chest (normal chest to chin), and that his power testing is 5/5 in the upper extremities." Dr. Chernoff's report states that an examination of plaintiff's left shoulder revealed "flexion to 180 degrees, left to 100 degrees (normal is 180 degrees). Internal rotation to the mid-back on the right and to the hip on the left (normal mid back). Abduction is 90 degrees (normal is 90 degrees). The claimant has mild tenderness over the left AC. He has a positive impingement of the left shoulder." Dr. Chernoff's report concludes that the alleged cervical sprains that plaintiff sustained as a result of the subject accident have resolved, that plaintiff has a history of Arnold-Chiari malformation, and that plaintiff is not disabled.

Likewise, defendant's examining neurologist, Dr. Chacko, states in his medical report that an examination of plaintiff's cervical spine revealed he has full range of motion in that region, that there is tenderness in the cervical area, but no muscle spasm was felt upon palpation, and that he has normal tone and strength in his upper and lower extremities. Dr. Chacko's report concludes that plaintiff is not disabled and is capable of performing his normal daily living activities without restriction, and that his neurological examination does not reveal any clear focal neurological deficits.

Based upon the adduced evidence, defendant failed to meet her prima facie burden of establishing that plaintiff did not sustain an 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*; ***Smith v Hartman***, 73 AD3d 736, 899 NYS2d 648 [2d Dept 2010]). The medical reports of defendant's examining orthopedist and neurologist were insufficient to eliminate all triable issues of fact (*see* ***Granovskiy v Zarbaliyev***, 78 AD3d 656, 909 NYS2d 667 [2d Dept 2010]). Dr. Chernoff failed to perform adequate range of motion testing of plaintiff's cervical spine, and, during the limited range of motion testing that he performed, found significant range of motion limitations in the cervical region of plaintiff's spine and in plaintiff's left shoulder during an examination that was conducted more than two years after the accident (*see* ***Cues v Tavarone***, 85 AD3d 846, 925 NYS2d 346 [2d Dept 2011]; ***Britt v Bustamante***, 77 AD3d 781, 909 NYS2d 138 [2d Dept 2010]; ***Quiceno v Mendoza***, 72 AD3d 669, 897 NYS2d 643 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581, 893 NYS2d 157 [2d Dept 2010]; ***Held v Heideman***, 63 AD3d 1105, 883 NYS2d 246 [2d Dept 2009]). In addition, Dr. Chernoff and Dr. Chacko each noted tenderness in the cervical area, and Dr. Chernoff noted that plaintiff had a positive impingement of the left shoulder. Therefore, their findings belie their conclusions that plaintiff did not sustain a causally related injury as a result of the subject accident (*see* ***Sparks v Detterline***, 86 AD3d 601, 926 NYS2d 914 [2d Dept 2011]; ***Fields v Hildago***, 74 AD3d 740, 907 NYS2d 15 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581, 893 NYS2d 157 [2d Dept 2010]). And while both Dr. Chernoff and Dr. Chacko state that plaintiff has a history of Arnold-Chiari malformation, the records submitted by defendant failed to show that plaintiff, prior to the subject accident, had any symptoms from said condition or that the causes of his headaches were as a result of such condition, and not causally related to the subject accident (*see* ***Germain v Irizarry***, 82 AD3d 833, 918 NYS2d 523 [2d dept 2011]; ***Clark v Basco***, 83 AD3d 1136, 921 NYS2d 345 [3d Dept 2011]; ***Kuperberg v Montalbano***, 72 AD3d 903, 899 NYS2d 344 [2d Dept 2010]). In fact, the report of plaintiff's treating neurologist, Dr. Michael Guido, submitted by defendant in support of her motion, states that plaintiff's "Chiari malformation is asymptomatic," and that the headaches/post concussion headaches are causally related to the subject accident.

Lastly, defendant failed to meet her prima facie burden of showing that plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts constituting his usual and customary activities for not less than 90 days during the 180 days immediately following the accident (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Ismail v Tejeda***, 65 AD3d 518, 882 NYS2d 915 [2d Dept 2009]; ***Scinto v Hoyt***e, 57 AD3d 646, 870 NYS2d 61 [2d Dept 2008]). Neither Dr. Chernoff nor Dr. Chacko related any of their findings to the 90/180 category of serious injury (*see* ***Ballard v Cunneen***, 76 AD3d 1037, 908 NYS2d 443 [2d Dept 2010]; ***Hossain v Singh***, 63 AD3d 790, 882 NYS2d 137 [2d Dept 2009]; ***Torres v Performance Auto. Group, Inc.***, 36 AD3d 894, 894, 829 NYS2d 181 2d Dept [2007]). While a defendant is permitted to use a plaintiff's deposition testimony to establish that he or she did not sustain a nonpermanent injury that prevented him or her from performing substantially all of his or her material daily activities for at least 90 of the 180 days immediately following the accident (*see e.g.* ***Mercado-Arif v Garcia***, 74 AD3d 446, 902 NYS2d 72 [1st Dept 2010]; ***Richards v Tyson***, 64 AD3d 760, 883 NYS2d 575 [2d Dept 2009]; ***Neuburger v Sidoruk***, 60 AD3d 650, 875 NYS2d 144 [2d Dept 2009]; ***Saetia v VIP Renovations Corp.***, 68 AD3d 1092, 891 NYS2d 471 [2d Dept 2009]), defendant's reliance on plaintiff's testimony in the instant matter is insufficient to meet her burden on the motion (*see* ***Neuburger v Sidoruk***, 60 AD3d 650, 875 NYS2d 144 [2009]; ***Tinsley v Bah***,

50 AD3d 1019, 857 NYS2d 180 [2008]; ***Torres v Performance Auto. Group, Inc.***, *supra*; *cf.* ***Geliga v Karibian***, 56 AD3d 518, 867 NYS2d 519 [2008]). Indeed, plaintiff, at his deposition, testified that Dr. Guido told him not to return to work, but to rest, and that he was unable to return to work until the end of June or beginning of July 2008. Thus, defendant failed to objectively demonstrate that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident (*see* ***Astudillo v MV Transp., Inc.***, 84 AD3d 1289, 923 NYS2d 722 [2d Dept 2011]; ***Fudol v Sullivan***, 38 AD3d 593, 831 NYS2d 504 [2d Dept 2007]; ***Abraham v Bello***, 29 AD3d 497, 816 NYS2d 118 [2d Dept 2006]).

Inasmuch as defendant failed to establish her prima facie entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see* ***Pfeiffer v New York Cent. Mut. Fire Ins. Co.***, 71 AD3d 971, 900 NYS2d 71 [2d Dept 2010]; ***McKenzie v Redl***, *supra*). Accordingly, defendant's motion for summary judgment is denied.

Dated: OCT 04 2011

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X___ NON-FINAL DISPOSITION