SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.: 15796-08

PRESENT:
HON. DANIEL MARTIN

Motion Date: 11/18/10
Submitted: 12/16/10
Motion Sequence Nos.: 01 - **MD**
02 - **MD**

JUAN ROSA,

Plaintiff,

-against-

SANDRA L. SACHSE AND EUGENIA L. WOODS,

Defendants.

PLAINTIFF'S ATTY:
Cannon & Acosta, LLP.
1923 New York Avenue
Huntington Station, NY11746

DEFENDANTS' ATTYS:
Martyn, Toher & Martyn
330 Old Country Road, Ste. 211
Mineola, New York 11501

Law Offices of Robert P. Tusa
898 Veterans Memorial Hwy., Ste. 320
Happaugue, NY 11788

The following named papers have been read on this motion:	
Order to Show Cause/Notice of Motion	X
Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	X

ORDERED that the motion by defendant Sandra Sachse seeking summary judgment dismissing plaintiff's complaint and all cross claims against her is denied; and it is further

ORDERED that the cross motion by defendant Eugenia Woods seeking summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Juan Rosa as a result of a motor vehicle accident that occurred at the intersection of Oak Street and Maple Avenue in Patchogue, New York on October 3, 2007. The vehicle owned and operated by defendant

Sandra Sachse, after passing on the right side of another vehicle waiting to make a left turn, allegedly struck the front of the vehicle owned and operated by defendant Eugenia Woods while it was stopped waiting to make a left turn onto Maple Avenue. Plaintiff was a front seat passenger in the vehicle operated by his wife, defendant Woods, at the time of the accident. 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 C5 through C7, T11 through S1, and L1 through L4; a wedge fracture at level T12; and wedge fracture deformities at levels T11 and L1. Plaintiff further alleges that he was confined to his home for approximately one month after the subject accident.

Defendant Sachse now moves for summary judgment on the basis that plaintiff's alleged injuries do not come within the meaning of 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 sworn medical reports of Dr. Arthur Bernhang and Dr. Sheldon Feit. At defendant's request, Dr. Bernhang conducted an independent orthopedic examination of plaintiff on August 19, 2009, and Dr. Feit performed an independent radiological review of the magnetic resonance images ("MRI") examinations of plaintiff's cervical spine performed on November 29, 2007, and of plaintiff's lumbosacral spine performed on December 2, 2007. Defendant Woods cross-moves for summary judgment on the basis that plaintiff's injuries fail to meet the serious injury threshold requirement of Insurance Law § 5102(d). In support of the cross motion, defendant Woods relies on the evidence submitted by defendant Sachse on her motion for summary judgment. Plaintiff opposes the motion and cross motion on the ground that defendants failed to establish prima facie that the injuries he sustained as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102(d). In the alternative, plaintiff asserts that he sustained injuries within the "limitations of use" and the "90/180 days" categories of Insurance Law § 5102(d). In opposition to the motions, plaintiff submits the sworn medical report of Dr. Michele Rubin and the affidavit of Todd Goldman.

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 [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 fails to 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]).

Based upon the adduced evidence, defendants have failed to establish a prima facie case that plaintiff did not sustain a serious injury 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 [2010]). Defendants both rely upon the medical report of Dr. Bernhang, the examining orthopedic surgeon. Dr. Bernhang in his examination of plaintiff found that plaintiff had significant limitations in the cervical region of his spine when he conducted range of motion testing more than two years post accident, and that plaintiff's straight leg raising test was positive (*see* ***Kjono v Fleming***, 69 AD3d 581, 893 NYS2d 157 [2010]; ***Held v Heideman***, 63 AD3d 1105, 883 NYS2d 246 [2009]; ***Torres v Garcia***, 59 AD3d 705, 874 NYS2d 527 [2009]). Also, despite claims that plaintiff suffered injuries to his thoracolumbosacral spine, Dr. Bernhang failed to conduct any range of motion testing on this region of plaintiff's spine (*see* ***Connors v Flaherty***, 32 AD3d 891, 822 NYS2d 555 [2006]; ***Madatova v Madatova***, 27 AD3d 531, 811 NYS2d 760 [2006]). Dr. Bernhang's conclusions that plaintiff's complaints are subjective, and that the findings of restrictions in plaintiff's cervical and lumbar spine are not correlated with objective findings, are conclusory and without probative value (*see* ***Borras v Lewis***, 79 AD3d 1084, 913 NYS2d 577 [2010]; ***Kim v Orouke***, 70 AD3d 995, 893 NYS2d 892 [2010]; ***Powell v Prego***, 59 AD3d 417, 872 NYS2d 207 [2009]).

The affirmed report of Dr. Feit, likewise, failed to shift the burden to plaintiff to produce evidence of a serious injury (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Dr. Feit in his medical report indicated that there was no evidence of any discernible abnormalities in plaintiff's cervical spine, but that plaintiff suffered from pre-existing degenerative spondylosis in his lumbar spine. Dr. Feit concluded that there was no causal relationship between plaintiff's alleged accident and the findings on the MRI examinations. However, defendants'

examining orthopedist observed restrictions in plaintiff's cervical range of motion, some of which were significant. Although defendants' examining orthopedist concluded that plaintiff's injuries in his thoracolumbosacral spine were pre-existing, he failed to provide a foundation for such conclusion (*see* ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Bengaly v Singh***, 68 AD3d 1030, 890 NYS2d 352 [2009]). The discrepancy in the findings of defendants' expert physicians regarding the cause of plaintiff's cervical and thoracolumbosacral injuries presents an issue of credibility for the jury (*see* ***Barrett v New York City Tr. Auth.***, 80 AD3d 550, 914 NYS2d 269 [2011]; ***Jacobs v Rolon***, 76 AD3d 905, 908 NYS2d 31 [2010]; ***Mercado-Arif v Garcia***, 74 AD3d 446, 902 NYS2d 72 [2010]). Thus, the proof submitted by defendants failed to objectively demonstrate that plaintiff did not suffer a permanent consequential or significant limitation of use of his cervical and lumbar spine as a result of the subject accident (*see* ***Fudol v Sullivan***, 38 AD3d 593, 831 NYS2d 504 [2007]; ***Abraham v Bello***, 29 AD3d 497, 816 NYS2d 118 [2006]).

Inasmuch as defendants failed to establish their 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 on that matter (*see* ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2005]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2001]). Accordingly, the motion and the cross motion for summary judgment are denied.

So Ordered.

Dated: March 30, 2011
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.