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SHORT FORM ORDER

INDEX No. 09-50093
CAL No. 12-01151MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 11-9-12
ADJ. DATE 1-29-13
Mot. Seq. # 001 - MD

MARIA VANEGAS-LOPEZ and JOSE RODRIGUEZ,

Plaintiffs,

- against -

J.P. ROLAND and ARISTAR MAINTENANCE,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 16-22; Replying Affidavits and supporting papers 23-24; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendants J.P. Roland and Aristar Maintenance Service, Inc., pursuant to CPLR 3212 for summary judgment on the basis that the plaintiffs, Maria Vanegas-Lopez and Jose Rodriquez, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This is an action wherein plaintiffs, Maria Vanegas-Lopez and Jose Rodriquez, seek damages for personal injuries allegedly sustained in a motor vehicle accident which occurred on July 29, 2009, on Greenwich Street at or near its intersection with Dale Avenue, in Hempstead, New York, when the vehicle operated by Maria Vanegas-Lopez was struck by the vehicle operated by defendant J.P. Roland and owned by Aristar Maintenance. Jose Rodriquez was a passenger in the Vanegas-Lopez vehicle at the time of the accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has

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been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of motion (001), the defendants have submitted, inter alia, an attorney's affirmation, a copy of the summons and complaint, defendants' answer with counterclaim, reply to counterclaim, and plaintiff's verified bill of particulars; copies of the transcripts of the examinations before trial of Mari Vanegas-Lopez and Jose Rodriquez, each dated April 20, 2011; the sworn reports of Lee Kupersmith, M.D. dated June 7, 2011 concerning his independent orthopedic examination of plaintiff Vanegas-Lopez and Alan B. Greenfield, M.D. dated July 2, 2011 concerning his independent radiology review of the lumbar spine MRI, and the cervical spine MRI each dated August 15, 2011 of plaintiff Vanegas-Lopez; and the sworn reports of Lee Kupersmith,

M.D. dated June 7, 2011 concerning his independent orthopedic examination of plaintiff Jose Rodriquez, and Alan B. Greenfield, M.D. dated July 2, 2011 concerning his independent radiology review of the thoracic spine MRI, and the lumbar spine MRI each dated August 15, 2011 of plaintiff Rodriquez.

By way of the bill of particulars, the plaintiff, Maria Venagas-Lopez, alleges that as a result of this accident, she sustained a disc herniation at C5-6 impinging the neural canal; disc bulge at L4-5 impinging the neural canal; cervical radiculopathy; straightening of the cervical lordosis; and thoracic spine sprain.

By way of the bill of particulars, the plaintiff, Jose Rodriquez, alleges that as a result of this accident, he sustained a disc herniation at L3-4 extending into the neural foramen; disc herniation at L5-S1 impinging the neural canal; scoliosis; cervical spine sprain/strain; thoracic spine sprain/strain; lumbar spine sprain/strain; and lumbar radiculopathy.

Upon review of the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that either Maria Vanegas-Lopez or Jose Rodriquez did not sustain a serious injuries as defined by Insurance Law § 5102 (d) as to either category of injury. The moving papers are insufficient as a matter of law and raise triable issues of fact which preclude the granting of summary judgment as to each defendant.

The defendants have failed to support their motion with copies of the medical records and initial test results for the MRI studies submitted to by the plaintiffs, and as reviewed by defendants' experts, Allan Greenfield, M.D. and Lee Kupersmith, M.D. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]). Thus, factual issues are raised based upon this failure to provide the same, precluding summary judgment.

Despite both plaintiffs alleging that they sustained radiculopathy as a result of the accident, no report by a neurologist who examined the plaintiffs on behalf of the moving defendants has been submitted as required (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), further precluding summary judgment.

Dr. Kupersmith has set forth that the MRI report of Maria Vanegas-Lopez's cervical spine reveals a cervical herniated nucleus pulposis. He does not state the level of the herniation, but does opine that if the accident history given is accurate, then a causal relationship with the accident exists. He does not comment with regard to the MRI of the plaintiff's lumbar spine, thus raising factual issues which preclude the granting of summary judgment.

Dr. Greenfield has set forth that he reviewed Vanegas-Lopez's lumbar spine MRI, but has not provided this court with the original report by plaintiff's treating physicians. He set forth in a conclusory manner, unsupported by evidentiary proof, that the MRI of the lumbar spine was normal with no findings attributable to the accident. Upon reviewing, the MRI of the Vanegas-Lopez's cervical spine, Dr. Greenfield found that there was disc desiccation and dehydration indicative of degenerative disc disease at C5-C6 with minimal asymmetrical disc bulging greater to the right with flattening of the dural sac, and degenerative bone spur formation, and foraminal narrowing at that level. He stated that these findings are degenerative and longstanding, but does not give a basis for this conclusory opinion, thus raising factual issues precluding

summary judgment. Although he noted straightening of the cervical lordosis, he ruled out muscular spasm as the cause, without demonstrating clinical correlation for such opinion, raising further factual issues.

As to plaintiff Jose Rodriquez, Dr. Kupersmith set forth the materials and records he reviewed, indicating that Rodriquez's EMG/NCV testing of September 3, 2009 reveals bilateral S1 radiculopathies, but as noted above, no independent neurological report has been submitted by the defendants concerning this injury, precluding summary judgment. Dr. Kupersmith further indicates that Rodriquez's lumbar MRI report reveals central disc herniation at L3-4 with extension of the disc into the neuroforamen bilaterally, and focal left foraminal herniation at 5-S1 creating impingement on the neural canal. Dr. Kupersmith, as the examining orthopedist, stated that these findings were per the report only, but he did not dispute their existence and opined that if the history given is correct, then causal relationship exists between the injuries to the neck, mid back and low back, and the subject accident. Thus, summary judgment is precluded.

Dr. Greenfield opined that the MRI examination of Rodriquez's thoracic spine is unremarkable. He continued that the lumbar spine MRI of plaintiff Rodriquez, taken August 15, 2009 after the accident, indicates disc desiccation and dehydration indicating degenerative disc disease from L3 to S1, however, he did not state the duration of these degenerative findings which he set forth in a conclusory manner unsupported with evidentiary proof. He continued that these discs from L3-4 and L5-S1 are minimal in size, however, he does not set forth measurements to demonstrate that they are minimal, raising further factual issues. He concluded that there are no findings in this lumbar MRI study which are attributable to the accident, but did not state a basis for such opinion, such as prior injury to this twenty nine year old male.

Additionally, the defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendants' physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether either plaintiff was unable to substantially perform all of the material acts which constituted their respective usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the examining physicians do not comment on this time period.

Based upon the foregoing, the defendants have not established prima facie entitlement to summary judgment on either category of injury set forth in Insurance Law § 5102 (d).

The factual issues raised in defendant's moving papers preclude summary judgment. The defendants failed to satisfy the burden of establishing, prima facie, that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury", it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (001) by the defendants for summary judgment dismissing the complaint is denied.

The foregoing constitutes the Order of this Court.

Dated: February 26, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

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