[* 1]

SHORT FORM ORDER

COPY

INDEX No. 11-11594
CAL. No. 13-00087MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 4-29-13
ADJ. DATE 6-7-13
Mot. Seq. # 001 - MotD

CARMEN COSANO-CRUZ and DAVID TIRADOS, Plaintiffs, - against - JOSE CRUZ, Defendant.	CANNON & ACOSTA, LLP Attorney for Plaintiffs 1923 New York Avenue Huntington Station, New York 11746 RICHARD T. LAU & ASSOCIATES Attorney for Defendant P.O. Box 9040 Jericho, New York 11753-9040

Upon the following papers numbered 1 to 30 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 23 - 30 ; Replying Affidavits and supporting papers ___; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Jose Cruz seeking summary judgment dismissing the complaint is granted in part, and is otherwise denied.

Plaintiffs Carmen Cosano-Cruz and David Tirados commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Suffolk Avenue and Quinn Place in the Town of Islip on November 10, 2010. It is alleged that the accident occurred when the vehicle owned and operated by defendant Jose Cruz struck the rear of the vehicle operated by plaintiff Cosano-Cruz, which was stopped at a red traffic light. Plaintiff Tirados was a front seat passenger in the vehicle operated by his wife, plaintiff Cosano-Cruz, at the time of the accident.

By her bill of particulars, plaintiff Cosano-Cruz alleges, among other things, that she sustained various personal injuries as a result of the subject accident, including left and right shoulder derangement, glenohumeral joint fusion and effusion of the right and left shoulder, and supraspinatus impingement of the acromioclavicular ("AC") arch of the right shoulder. Plaintiff Cosano-Cruz further

RST

alleges that she was confined to Southside Hospital for approximately two days, and to her home and bed for approximately two weeks as a result of the injuries she sustained in the subject collision. By his bill of particulars, plaintiff Tirados alleges that he also sustained various personal injuries as a result of the subject collision, including disc herniations at levels T11-T12 and L4-L5, supraspinatus impingement syndrome of the AC arch of the left shoulder, and cervical radiculopathy. Plaintiff Tirados further alleges that he was confined to his home and bed for approximately two weeks immediately following the subject accident due to the injuries he sustained.

Defendant now moves for summary judgment on the basis that plaintiffs did not sustain an injury within the meaning of the "serious injury" threshold requirement of § 5102(d) of the Insurance Law as a result of the subject accident. In support of the motion, defendant submits copies of the pleadings, the plaintiffs' deposition transcripts, plaintiff Cosano-Cruz' medical records regarding the injuries at issue, and the sworn medical reports of Dr. Michael Katz and Dr. Steven Peyser. At defendant's request, Dr. Katz conducted independent orthopedic examinations of plaintiff Cosano-Cruz and plaintiff Tirados on November 27, 2012. Also at defendant's request, Dr. Peyser performed an independent review of the magnetic resonance images ("MRI") film of plaintiff Cosano-Cruz' lumbar spine performed on December 20, 2010

Plaintiffs oppose the motion on the grounds that defendant failed to meet his prima facie burden that they did not sustain a serious injury as required by § 5102(d) of the Insurance Law as a result of the subject accident, and that their evidence in opposition demonstrates that they sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law. In opposition to the motion, plaintiffs submit the sworn medical reports of Dr. Michele Rubin, Dr. Joseph Perez and Dr. Alvin Stein, and the affidavit of Dr. Nicholas Martin.

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* ***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 [2d Dept 1984], *aff'd* 64 NY2d 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 [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*).

Here, defendant has established his prima entitlement to judgment as a matter of law that plaintiff Cosano-Cruz did not sustain a serious injury within the meaning of § 5102 (d) of the Insurance Law as a result of the subject accident (***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendant's examining orthopedist, Dr. Katz, used a goniometer to test plaintiff Cosano-Cruz' ranges of motion in her spine and shoulders, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Katz states in his medical report that an examination of plaintiff Cosano-Cruz revealed she had full range of motion in her spine and shoulders, that there was no evidence of tenderness or muscle spasms upon palpation of the paraspinal muscles, that her gait was normal, and that there was no evidence of swelling, erythema or induration in her shoulders. Dr. Katz states that the straight leg raising test was normal, that there was no deformity about the clavicle or AC joint, and that there was no impingement, crepitation or joint line tenderness in plaintiff Cosano-Cruz' AC joint. Dr. Katz opines that the strains and bilateral shoulder contusion that plaintiff Cosano-Cruz sustained as a result of the subject accident have resolved. Dr. Katz concludes that the examination of plaintiff Cosano-Cruz did not reveal any objective findings of an orthopedic disability, that her prognosis is good, that she is not disabled, and that is capable of full time employment as an office worker and her activities of daily living.

Moreover, defendant's examining radiologist, Dr. Peyser, states in his report that the finding of mild facet hypertrophy at level L3-L4 visualized on the MRI study of plaintiff Cosano-Cruz' lumbar spine is consistent with developmental-type change, and that there are no post traumatic-type changes observed on the MRI study that are causally related to the subject accident.

In addition, defendant demonstrated, prima facie, that plaintiff Tirados did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject accident (*see* ***Palumbo v Forster***, 103 AD3d 865, 962 NYS2d 271 [2d Dept 2013]; ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; ***Hayes v Vasillios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]). Dr. Katz

states that an examination of plaintiff Tirados revealed that he had full range of motion in his spine and shoulders, that there was no evidence of tenderness or muscle spasm upon palpation of his spinal muscles, and that the sensory examination revealed full sensation to light touch. Dr. Katz states that plaintiff Tirados's gait was normal without antalgic or Trendelburg component, that the straight leg raising test was negative, and there was no swelling, erythema, induration or impingement in plaintiff Tirados's shoulders. Dr. Katz states that there was no evidence of deformity, crepitation or joint line tenderness in the clavicle or AC joint of plaintiff Tirados's shoulder. Dr. Katz concludes that the cervical and lumbosacral strain with radiculopathy and left shoulder contusion that plaintiff Tirados sustained as a result of the subject collision have resolved, and that the examination did not show any signs of permanence relative to plaintiff Tirados's musculoskeletal system. Dr. Katz further states that plaintiff Tirados is not disabled and is capable of his full time full duty work in his capacity as a machine operator, and that he is capable of his daily living activities.

Furthermore, plaintiff Cosano-Cruz's and plaintiff Tirados's deposition testimonies demonstrate that "substantially all" of their daily activities were not curtailed (*see e.g.* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Kolodziej v Savarese***. 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]). In fact, each plaintiff testified that they received physical therapy for approximately four months, two to three times per week, and that they did not miss any time from their employment. In addition, plaintiff Cosano-Cruz testified that she only missed "a couple of classes" from her night time classes to obtain her general equivalency diploma. Therefore, plaintiffs' claims only indicate a slight curtailment of their daily activities, which is not sufficient to establish a serious injury within the 90/180 category (*see* ***Licari v Elliott***, *supra*; ***Siew Hwee Lim v Dan Dan Tr., Inc.***, 84 AD3d 1213, 923 NYS2d 677 [2d Dept 2011]).

Defendant, having made a prima facie showing that plaintiffs did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiffs to come forward with evidence to overcome defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). 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 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "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***, *supra* at 798). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83

AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, plaintiff Cosano-Cruz has failed to raise a triable issue of fact to refute defendant's prima facie showing that she did not sustain a serious injury as a result of the accident (*see* ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]). Plaintiff Cosano-Cruz has proffered insufficient medical evidence to demonstrate that she sustained an injury within the limitations of use categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]), or within the 90/180 category of the Insurance Law (*see* ***Jack v Acapulco Car Serv., Inc.***, 72 AD3d 646, 897 NYS2d 648 [2d Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]). The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [3d Dept 1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [3d Dept 1988]). The medical report of Dr. Joseph Perez, who examined plaintiff Cosano-Cruz on December 15, 2010, and the medical report of Dr. Alvin Stein, who conducted a physical examination of plaintiff Cosano-Cruz on April 13, 2013, are insufficient to defeat summary judgment. As each doctor examined plaintiff Cosano-Cruz on only one occasion, and Dr. Stein having done so years after the subject accident, their findings as to the cause and duration of plaintiff Cosano-Cruz's alleged limitations in her shoulders are rejected as speculative, conclusory and tailored to meet the statutory requirements (*see* ***Smith v Reeves***, 96 AD3d 1550, 946 NYS2d 750 [4th Dept 2012]; ***Vaughan v Baez***, 305 AD2d 101, 758 NYS2d 648 [1st Dept 2003]; *see also* ***Thompson v Abbasi***, 15 AD3d 95, 788 NYS2d 48 [1st Dept 2005]). Furthermore, Dr. Perez's report states that plaintiff Cosano-Cruz already had returned to work performing her normal duties approximately one month after the subject accident's occurrence.

Moreover, the medical report of Dr. Michele Rubin merely establishes that plaintiff Cosano-Cruz sustained small glenohumeral joint effusions in her shoulders and a possible supraspinatus impingement syndrome related to the AC arch of her right shoulder. However, Dr. Rubin's report fails to address the issue of causation, since she does not attribute the observed joint effusion or impingement syndrome in plaintiff's shoulders to the subject accident (*see* ***Shaji v City of New Rochelle***, 66 AD3d 760, 886 NYS2d 764 [2d Dept 2009]; ***Scotto v Suh***; 50 AD3d 1012, 857 NYS2d 185 [2d Dept 2008]). Lastly, plaintiff Cosano-Cruz's submissions failed to address her lengthy gap in treatment (*see* ***Pommells v Perez***, *supra*).

However, plaintiff Tirados has raised a triable issue of fact as to whether he sustained an injury within the meaning of the serious injury threshold requirement of § 5102(d) of the Insurance Law (*see* ***Stanley v Caddie Serv. Co., Inc.***, __ AD3d __, 2013 NY Slip Op 06357 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]; ***Park v Shaikh***, 82 AD3d 1066, 918 NYS2d 887 [2d Dept 2011]), and as to whether such injuries were causally related to the subject accident (*see* ***Windisch v Fasano***, 105 AD3d 1039, 963 NYS2d 401 [2d Dept 2013]; ***Jilani v Palmer***, 83 AD3d 786 [2d Dept 2011]). Plaintiff Tirados primarily relies upon the affidavit of his treating chiropractor, Dr. Nicholas Martin, who began treating him on December 3, 2010, and re-examined him on April 24, 2013. In his affidavit, Dr. Martin opines, based upon his contemporaneous and recent examinations, that

plaintiff Tirados sustained a cervical strain and lumbar derangement, which resulted in significant range of motion limitations in his spine, and that such restrictions are directly related to the subject motor vehicle accident (*see* ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Tai Ho Kang v Young Sun Cho***, 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]; ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2d Dept 2010]). Additionally, Dr. Martin states that when plaintiff Tirados was dismissed from his treatment on March 22, 2011, he had received maximum benefit from the provided treatment and that any additional treatment would have been palliative in nature, despite the fact plaintiff Tirados still was symptomatic (*see e.g.* ***Echevarria v G&G Classic, Inc.***, 91 AD3d 902, 937 NYS2d 608 [2d Dept 2012]; ***Jean-Baptiste v Tobias***, 88 AD3d 962, 931 NYS2d 645 [2d Dept 2011]; ***Abdelaziz v Fazel***, 78 AD3d 1086, 912 NYS2d 103 [2d Dept 2010]; ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]).

Accordingly, the branch of the motion seeking summary judgment dismissing the cause of action asserted by plaintiff Carmen Cosano-Cruz is granted, and the branch of the motion seeking summary judgment dismissing the cause of action asserted by plaintiff David Tirados is denied.

Dated: 10-28-13

Hon. Denise F. Molia
A.J.S.C.

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