SHORT FORM ORDER

INDEX No. 10-3991
CAL No. 11-00979MV

COPY

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 9-27-11
ADJ. DATE 11-29-11
Mot. Seq. # 001 - MD

CHRISTOPHER MOBAYED and JENNIFER MOBAYED,

Plaintiff,

- against -

MICHAEL LUNA,

Defendant.

COSTANTINO & COSTANTINO, ESQS.
Attorney for Plaintiffs
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Copiague, New York 11726

MARKS, O'NEILL, O'BRIEN & COURTNEY
Attorney for Defendant
530 Saw Mill River Road
Elmsford, New York 10523

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated August 19, 2011, and supporting papers (including Memorandum of Law dated _____); (2) Affirmation in Opposition by the plaintiffs, dated November 21, 2011, and supporting papers; (3) Reply Affirmation by the defendant, dated November 22, 2011, 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 the motion by defendant Michael Luna seeking summary judgment dismissing plaintiff's complaint is denied.

Plaintiff Christopher Mobayed commenced this action against defendant Michael Luna to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred on the eastbound Long Island Expressway, near its intersection with 164th Street, in Queens, New York on December 16, 2009. The accident allegedly occurred when the vehicle operated and owned by defendant struck the rear of plaintiff's vehicle while it was stopped in traffic. As a result of the impact between plaintiff's vehicle and defendant's vehicle, plaintiff's vehicle was propelled forward into the preceding vehicle. By his bill of particulars, plaintiff alleges, among other things, that he sustained various personal injuries as a result of the subject collision, including a herniated disc in his cervical

spine, cervical radiculopathy, numbness and tingling in left and right lower extremities, and headaches. Plaintiff alleges that he was confined to his bed and home for approximately five days immediately after the accident. Plaintiff further alleges that he was incapacitated from his employment as a result of the subject accident for approximately five days. Plaintiff's wife, Jennifer Mobayed, instituted a derivative claim for loss of services.

Defendant now moves for summary judgment on the basis that plaintiff's alleged injuries fail to meet the "serious injury" threshold requirement of the Insurance Law. In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Isaac Cohen, M.D., and Mathew Chacko, M.D. At defendant's request, Dr. Cohen conducted an independent orthopedic examination of plaintiff and Dr. Chacko conducted an independent neurological examination of plaintiff in March 2011. Plaintiff opposes the motion on the grounds that defendant failed to meet his burden, and that he sustained injuries within the "limitations of use" categories of § 5102(d) of the Insurance Law as a result of the accident. In opposition to the motion, plaintiff submits his own affidavit, uncertified copies of his medical reports, and the sworn medical reports of Steven Mendelsohn, M.D., Borimir Darakchiev, M.D., and Anand Persaud, M.D.

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 [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."

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 failed to establish, prima facie, his entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Astudillo v MV Transp., Inc.***, 84 AD3d 1289, 923 NYS2d 722 [2d Dept 2011]). Defendant's examining orthopedist, Dr. Cohen, states in his medical report that an examination of plaintiff reveals that he has full range of motion in his cervical and thoracolumbar spine, that there is no evidence of muscle spasm upon palpation of the paravertebral muscles, that there is no evidence of muscle atrophy, and that the straight leg raising test is negative. Dr. Cohen opines that plaintiff's lumbar examination was normal and that his cervical sprain is "superimposed over severe pre-existent degenerative disc disease of [the] cervical spine." However, Dr. Cohen's conclusion that plaintiff has full range of motion in his cervical spine is belied by the fact that he noted significant range of motion limitations in plaintiff's forward flexion and hyperextension of his cervical spine (*see* ***Taylor v Taylor***, 87 AD3d 1129, 930 NYS2d 32 [2d Dept 2011]; ***Rhodes v Stoddard***, 79 AD3d 997, 912 NYS2d 908 [2d Dept 2010]; ***Kjono v Fleming***, 69 AD3d 581, 893 NYS2d 157 [2d Dept 2010]). In addition, despite Dr. Cohen concluding that plaintiff is capable of performing his normal daily living activities in an unrestricted fashion and that his mild subjective cervical spine complaints do not manifest themselves in any clinical findings, he states that he "cannot explain, on an anatomical basis, numbness of all five digits in both [of plaintiff's] hands as a consequence of this cervical spine sprain," and that plaintiff's pre-existing conditions were exacerbated on a temporary basis by the subject accident (*see* ***Ambroselli v Team Massapequa, Inc.***, 88 AD3d 927, 931 NYS2d 652 [2d Dept 2011]; ***Pero v Transervice Logistics, Inc.***, 83 AD3d 681, 920 NYS2d 681 [2d Dept 2011]).

Similarly, defendant's examining neurologist, Dr. Chacko, states in his medical report that an examination of plaintiff reveals that he has full range of motion in his cervical spine, that the examination does not reveal any clear focal neurological deficits, and that plaintiff has degenerative disc disease and cervical spondylosis in his cervical spine, which is pre-existing and not causally related to the accident. Dr. Chacko concludes that the strains that plaintiff sustained to his cervical spine are causally related to the subject accident, but that he is not disabled at the present time and is capable of performing his normal daily living activities. However, despite Dr. Chacko's conclusion that plaintiff has full range of motion in his cervical spine, he noted significant range of motion limitations in plaintiff's cervical region during an examination that occurred approximately 15 months after the subject accident (*see* ***Edouazin v Champlain***, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]; ***Roc v Dommond***, 88 AD3d 862, 931 NYS2d 522 [2d Dept 2011]; ***Grisales v City of New York***, 85 AD3d 964, 925 NYS2d 633 [2d Dept 2011]). While Dr. Chacko opined that the "mild limitations" noted in plaintiff's cervical spine were voluntary, he failed to explain or substantiate, with objective medical evidence, the basis for his conclusion (*see* ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Swensen v MV Transp., Inc.***, 89 AD3d 924, 933 NYS2d 96 [2d Dept 2011]; ***Artis v Lucas***, 84 AD3d 845, 921 NYS2d 910 [2d Dept 2011]).

Finally, although both Dr. Cohen and Dr. Chacko opined that plaintiff's magnetic resonance imaging findings concerning his cervical spine revealed pre-existing degenerative changes, neither Dr. Cohen nor Dr. Chacko provided any foundation for such conclusion (*see* ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Bengaly v Singh***, 68 AD3d 1030, 890 NYS2d 352 [2d Dept 2009]; ***Buono v Sarnes***, 66 AD3d 809, 888 NYS2d 79 [2d Dept 2009]). Consequently, defendant failed to objectively demonstrate that plaintiff did not sustain a serious injury within the limitations of use category of Insurance Law § 5102(d) (*see* ***Aronov v Leybovich***, 3 AD3d 511, 770 NYS2d 741 [2d Dept 2004]).

Since defendant failed to establish his prima facie burden, the sufficiency of plaintiff's papers in opposition to the motion need not be considered (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Accordingly, defendant's motion for summary judgment dismissing the complaint is denied.

Dated: 2/24/12

PETER H. MAYER, J.S.C.