Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Ivan Zakharyuk and Olena Yakubovska,

Plaintiffs,

-against-

Paul Romann,

Defendant.

Index No.: 44114/2010

Motion Sequence No.: 001; MD
Motion Date: 11/2/12
Submitted: 2/6/13

Motion Sequence No.: 002; XMD
Motion Date: 12/19/12
Submitted: 2/6/13

Attorney for Plaintiffs:

Nicholas Panzini, Esq.
365 Broadway, Suite 2C
Amityville, NY 11701

Attorney for Defendant:

Boeggeman, George & Corde, P.C.
1 Water Street, Suite 425
White Plains, NY 10601

Clerk of the Court

Upon the following papers numbered 1 to 31 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 15; Notice of Cross Motion and supporting papers, 16 - 25; Answering Affidavits and supporting papers, 26 - 29; Replying Affidavits and supporting papers, 30 - 31; it is

ORDERED that the motion by defendant for summary judgment dismissing the complaint against him on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by plaintiffs for an order granting them partial summary judgment on the issue of liability is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs when their vehicle was rear-ended by a vehicle owned and operated by defendant, Paul Romann, on Travis Street in the Town of Babylon, New York, on April 11, 2010. At the time of the accident, plaintiff Olena Yakubovska was a passenger in a vehicle owned and operated by plaintiff Ivan Zakharyuk.

By their bill of particulars, plaintiffs allege that, as a result of the subject accident, plaintiff Ivan Zakharyuk sustained serious injuries including radiculopathy and nerve root impingement at right L5; cervical and lumbar foraminal stenosis; aggravation and/or exacerbation of pre-existing lumbar spinal condition; lumbar and cervical discopathy; degenerative changes at L4-L5 and C3-C4; disc protrusion at L5-S1; foraminal narrowing at L4-L5 and L5-S1; disc extrusion at C4-C5; and cervical radiculopathy at C3-C4. Plaintiff Olena Yakubovska sustained serious injuries including herniated discs at C3-C4, C4-C5 and C5-C6; left knee bucket handle tear of the medial meniscus; mild articular cartilage thinning; cervical and thoracic spin sprain/strain; left knee internal derangement; aggravation and/or exacerbation of pre-existing left knee condition; and lumbar radiculopathy at L5.

Defendant now moves for summary judgment dismissing the complaint against him on the ground that plaintiffs have not sustained a serious injury as defined in Insurance Law § 5102 (d).

Insurance Law § 5102 (d) defines "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "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 (*see* ***Perl v Meher***, 2011 NY Slip Op 8452, 2011 NY Lexis 3320 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos*** 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran*** 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

On August 16, 2011, approximately one year and four months after the subject accident, defendant's examining orthopedist, Dr. Daniel Rich, examined plaintiff Zakharyuk using certain orthopedic and neurological tests, including Lhermitte's test, Phalen's test, Tinel's test, Lasegue test, and Babinski test. All the test results were negative. Dr. Rich performed range of motion testing on plaintiff Zakharyuk's cervical and lumbar spine using a goniometer. With respect to the plaintiff Zakharyuk's cervical spine, Dr. Rich indicated that flexion was 30 degrees (normal 35-45 degrees); extension was 35 degrees (normal 35-45 degrees); right and left lateral bending were 30 degrees (normal 45 degrees); and right and left rotation were 40 degrees and 35 degrees respectively (normal 60-80 degrees). Regarding plaintiff Zakharyuk's lumbar spine, Dr. Rich indicated that extension was 25 degrees with pain (normal 30 degrees); right and left lateral bending were 25 degrees and 30 degrees respectively (normal 30-40 degrees); and right and left rotation were 20 degrees (normal 30-40 degrees). Dr. Rich indicated that, regarding lumbar spine flexion, plaintiff Zakharyuk's finger to floor distance was 16.5 inches (normal variable). With regard to plaintiff Zakharyuk's knees, Dr. Rich opined that they were "functional" and "well maintained," and plaintiff Zakharyuk had "painless range of motion" in his knees.

On October 5, 2012, the defendant's examining radiologist, Dr. Sondra Pfeffer, reviewed two MRI examinations of plaintiff Zakharyuk's lumbar spine, performed on May 11, 2010 and February 8, 2007, and an X-ray of plaintiff Zakharyuk's lumbar spine, performed on April 16, 2010. Dr. Pfeffer also reviewed an MRI examinations of plaintiff Zakharyuk's cervical spine, performed on May 11, 2010. Dr. Pfeffer opined that plaintiff Zakharyuk's cervical and lumbar spine injuries were pre-existing degenerative disc disease, and that the condition of his lumbar spine was unchanged since 2007, when an MRI was taken following a prior motor vehicle accident.

Here, defendant failed to make a *prima facie* showing that plaintiff Zakharyuk did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). Dr. Rich's report is insufficient to sustain defendant's *prima facie* burden. Dr. Rich reported range of motion testing results for plaintiff Zakharyuk's cervical and lumbar spine that were expressed in certain or definitive numerical degrees without providing the corresponding certain or definitive normal values, and instead gave ranges or spectrums of degrees up to 20 degrees for the normal standards of comparison, i.e. normal cervical

rotation 60 to 80 degrees (*compare* ***Spencer v Golden Eagle, Inc.***, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]; *see* ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown, and the Court is left to speculate (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; *see also* ***Lee v M & M Auto Coach, Ltd.***, *supra*). Moreover, Dr. Rich failed to specify the degree of range of motion of plaintiff Zakharyuk's knees (*see* ***Browdame v Candura***, 25 AD3d 747. 807 NYS2d 658 [2d Dept 2006]). Furthermore, although plaintiff Zakharyuk claimed in his bill of particulars that he sustained radiculopathy and nerve root impingement at right L5 as a result of this accident, defendant has not submitted a report from a neurologist who examined the plaintiff ruling out the claimed neurological injury (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, *supra*; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]). Dr. Pfeffer's report is also insufficient to sustain defendant's *prima facie* burden. As to an alleged preexisting condition of plaintiff Zakharyuk's cervical spine, there is only Dr. Pfeffer's conclusory notation, itself insufficient to establish that plaintiff's pain might be chronic and unrelated to the accident (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Linton v Nawaz***, 62 AD3d 434, 879 NYS2d 82 [1st Dept 2009]). Moreover, Dr. Pfeffer's MRI reports were not paired with a sufficient medical report of an orthopedist or neurologist who examined plaintiff Zakharyuk (*cf.* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Furthermore, Dr. Pfeffer did not even discuss plaintiff Zakharyuk's left knee injuries which were claimed in his bill of particulars.

On August 16, 2011, defendant's examining orthopedist, Dr. Rich, examined plaintiff Yakubovska using certain orthopedic and neurological tests, including Lhermitte's test, Lasegue test, and Babinski test. All the test results were negative or normal. Dr. Rich performed range of motion testing on plaintiff Yakubovska's cervical and lumbar spine using a goniometer. With respect to the plaintiff Yakubovska's cervical spine, Dr. Rich indicated that flexion was 45 degrees (normal 35-45 degrees); extension was 40 degrees (normal 35-45 degrees); right and left lateral bending were 30 degrees (normal 45 degrees); and right and left rotation were 45 degrees (normal 60-80 degrees). Regarding plaintiff Yakubovska's thoracic and lumbar spine, Dr. Rich indicated that extension was 30 degrees with pain (normal 30 degrees); right and left lateral bending were 35 degrees (normal 30-40 degrees); and right and left rotation were 30 degrees and 25 degrees with pain (normal 30-40 degrees). Dr. Rich indicated that, regarding thoracic and lumbar spine flexion, plaintiff Yakubovska's finger to floor distance was 12.5 inches (normal variable).

On October 5, 2012, the defendant's examining radiologist, Dr. Pfeffer, reviewed two X-rays of plaintiff Yakubovska's cervical and lumbar spine, performed on April 16, 2010, and an MRI examination of plaintiff Yakubovska's cervical spine, performed on May 13, 2010. Dr. Pfeffer also reviewed two MRI examinations of plaintiff Yakubovska's left knee, performed on January 2, 2008 and May 13, 2010, and X-rays of plaintiff Yakubovska's left knee, performed on April 20, 2010. Dr. Pfeffer stated that, with regard to plaintiff Yakubovska's left knee, "interval progression of medial meniscal posterior horn tearing is noted," and opined that although said injuries "may reflect

non-trauma-related interval progression" of pre-existing pathology, "orthopedic correlation is advised for further assessment." Dr. Pfeffer also opined that plaintiff Yakubovska's cervical and lumbar spine injuries were pre-existing degenerative disc disease.

Here, defendant failed to make a *prima facie* showing that plaintiff Yakubovska did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, *supra*). Dr. Rich's report is insufficient to sustain defendant's *prima facie* burden. Dr. Rich reported range of motion testing results for plaintiff Yakubovska's cervical and lumbar spine that were expressed in certain or definitive numerical degrees without providing the corresponding certain or definitive normal values, and instead gave ranges or spectrums of degrees up to 20 degrees for the normal standards of comparison, i.e. normal cervical rotation 60 to 80 degrees (*see* ***Lee v M & M Auto Coach, Ltd.***, *supra*). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown, and the Court is left to speculate (*see* ***Sainnoval v Sallick***, *supra*). Moreover, Dr. Rich failed to specify the degree of range of motion of plaintiff Yakubovska's knees (*see* ***Browdame v Candura***, *supra*). Furthermore, although plaintiff Yakubovska claimed in her bill of particulars that she sustained lumbar radiculopathy at L5 as a result of this accident, defendant has not submitted a report from a neurologist who examined the plaintiff ruling out the claimed neurological injury (*see* ***McFadden v Barry***, *supra*; ***Browdame v Candura***, *supra*; ***Lawyer v Albany OK Cab Co.***, *supra*). Dr. Pfeffer's report is also insufficient to sustain defendant's *prima facie* burden. As to an alleged preexisting condition of plaintiff Yakubovska's cervical and lumbar spine, there is only Dr. Pfeffer's conclusory notation, itself insufficient to establish that plaintiff's pain might be chronic and unrelated to the accident (*see* ***Pommells v Perez***, *supra*; ***Linton v Nawaz***, *supra*). Moreover, Dr. Pfeffer's MRI reports were not paired with a sufficient medical report of an orthopedist or neurologist who examined plaintiff Yakubovska (*cf.* ***Toure v Avis Rent A Car Sys.***, *supra*).

Inasmuch as defendant failed to meet his *prima facie* burden, it is unnecessary to consider whether the papers submitted by plaintiffs in opposition to defendant's motion for summary judgment were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Thus, defendant's motion for summary judgment is denied.

Plaintiffs cross-move for partial summary judgment in their favor on the issue of liability on the ground that the defendant's vehicle rear-ended their vehicle when it was stopped.

Here, plaintiffs' cross motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue on June 8, 2012 (*see* CPLR 3212 [a]). Instead, the affirmation of service of the cross motion is dated December 12, 2012, 67 days after the deadline to file the cross motion for summary judgment. Plaintiffs have provided no explanation or "good cause" for serving the cross motion 67 days late, and thus, the Court has no discretion to entertain it on the merits (*see* ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***Thompson v Leben Home for Adults***, 17 AD3d 347, 792 NYS2d 597 [2d Dept 2005]). Moreover,

while a cross motion for summary judgment made after the expiration of the statutory 120-days period, as here, may be considered by the court, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion, this Court finds that the relief sought by the defendant and plaintiffs' cross motion was not "nearly identical" (*see* ***Teitelbaum v Crown Hgts. Assn. for the Betterment***, 84 AD3d 935, 922 NYS2d 544 [2d Dept 2011]). Thus, plaintiffs' cross motion for summary judgment is denied.

In view of the foregoing, the motion by defendant for summary judgment on the issue of serious injury and the cross motion by plaintiffs for partial summary judgment on the issue of liability are denied.

Dated: 4/23/2013

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**