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SHORT FORM ORDER mg

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

RADA BISHENKEVICH, MATILDA ROJEVSKAIA and OLEG RYBALOV,

Plaintiffs,

-against-

JAMES C. BROTHERS,

Defendant.

Motion Sequence #2
Submitted December 7, 2009
XXX

INDEX NO: 20127/07

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....1-9
Affs in Opposition.....10-21
Affs in Reply.....22-25

Upon the foregoing papers it ordered that this motion by defendant, James C. Brothers (hereinafter referred to as "Brothers"), for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing plaintiffs' complaint on the grounds that their injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5104(a) and defined in Insurance Law §5102(d) is granted. The plaintiffs' complaint is herewith dismissed in its entirety.

This is an action to recover money damages for personal injuries allegedly sustained as the result of an accident that occurred on June 23, 2006, at approximately 7:45 pm on the Belt Parkway heading westbound between Exits 11 and 13 in Kings County, New York.

It appears that traffic was at a standstill on the Belt Parkway when the vehicle in which plaintiffs were traveling was hit in the rear end by defendant's vehicle which in turn caused plaintiffs vehicle to impact the vehicle in front of them.

At the examination before trial of plaintiff Rada Bishenkevich (hereinafter referred to as "Bishenkevich") she testified that she was operating the vehicle in which the other plaintiffs, her 89 year old grandmother, Matilda Rojevskaia (hereinafter referred to as "Rojevskaia") and her 64 year old father, Oleg Rybalov (hereinafter referred to as "Rybalov"), were traveling. Rojevskaia was seated in the front passenger seat and Rybalov was seated in the rear passenger seat with his wife who is not a party herein. Plaintiffs testified that they were on their way to a concert at the Millennium Theater in Brooklyn. The police were not summoned to the scene of the accident. Plaintiff, Bishenkevich, testified that the plaintiffs stayed at the accident scene for approximately fifteen minutes at which point she drove her parents to the theater and took her grandmother with her to her office.

Bishenkevich testified that as a result of the impact to the rear of her vehicle, she hit the driver's seat headrest, was thrown forward and back again before the second impact occurred. She stated that while she did not lose consciousness or sustain any cuts, abrasions or fractures as a result of this accident, her head, neck and upper back struck the back of her seat. She also claims that she injured her right elbow as a result of this accident.

At the time of the accident, the 38 year old plaintiff, Bishenkevich, was working at the YAI National Institute for People with Disabilities Network as a supervisor of the Brooklyn support and training program. She stated that although she first sought medical

attention on June 27, she felt dizzy and pain in her right elbow, neck and back later that same day. Bishenkevich claims that as a result of this accident, she is limited in her activities in that she needs "very good lumbar support and a neck support," including a pillow while driving, because she can not sit or type for more than certain period of time. She claims that she cannot walk for more than 10 minutes without feeling the pain in her lower back. Rada Bishenkevich also testified that she was not able to do any household activities for the first "month or two" including cooking or washing dishes and in her Bill of Particulars she alleges that she was confined to her bed for approximately four days and to her home for a period of approximately two weeks.

Bishenkevich alleges that as a result of the subject accident, she sustained: central disc herniation at C6-C7 indenting the dural sac; radiculopathy at the C6-C7 level bilaterally; straightening of the cervical lordosis; disc bulge at the L1-L2 level where disc material approximates the ventral thecal sac and is encroaching on the ventral subarachnoid space; disc bulge at the L5-S1 level where disc material approximate the ventral epidural fat; radiculopathy at the L4-L5-S1 levels on the left and peripheral polyneuropathy affecting the left lower extremity. She additionally alleges: causation, activation and/or aggravation of central disc herniation at C6-C7 indenting the thecal sac; and causation, activation and/or aggravation of herniated discs at L4-L5 and L5-S1 with clinical and diagnostic evidence of radiculopathy.

Plaintiff Rojevskaia was a passenger when, she alleges that, as a result of the subject accident, she hit the back of her head, neck, arm and shoulder against her seat. At her E.B.T., she testified that she had previously broken her right arm in 2003/2004 and so as a result of this impact, she re-injured her right arm. Rojevskaia stated that she did

not lose consciousness, was not bleeding and did not have any bruises. She alleges that she was confined to her bed for one week and to her home for three weeks. She was not employed at the time of the accident. She testified that she had used a cane and a walker for several years prior to the subject accident because she had problems with her bones and in her back, her spinal cord. With respect to the problems in her back that required the assistance of a walker, she stated that she has osteoporosis and that she always had pain in her back, and she had bad bones. She states that as a result of the accident and consequent re-injury to her right arm, she has learned to rely on her left hand and arm for her daily activities including brushing her teeth and feed herself. Rojevskaia further alleges that she sustained disc bulges at the C3-C4, C5-C6 and C6-C7 levels; and radiculopathy at the C5-C6-C7 on the right and axonal neuropathy affecting right median and right ulnar nerves.

Finally, plaintiff Rybalov testified at his E.B.T. that he was wearing his seat belt at the time of the accident so that as a result of the impact, he was kept from having any injury. He testified that he did not have any bleeding, was not bruised and did not lose consciousness at all in this accident. He stated that he first felt pain the next day and that pain was in the middle of his back and neck. Rybalov testified that he first sought medical attention a month after the accident and denied having sustained any previous injuries. He was not employed at the time of the accident. He testified that while he was not prevented from doing anything, as a result of this accident, there are some activities including making repairs around the house that he can only do with limitations like laying down and relaxing before continuing. He stated that as a result of the accident, he cannot carry too much weight, or cut vegetables. He said that he always had "constant noise" in his head which

made him very nervous but that as a result of the accident, that condition has gotten worse. He further claims that he sustained the following injuries: central disc herniation at C3-C4 deforming the dural sac; disc bulge at C6-C7 with diminished disc height, encroachment of both neural foramina, and deformity of the dural sac; and radiculopathy at the C6-C7 on the right and CTS on the right.

Plaintiffs have failed to identify the specific categories of the serious injury statute into which their injuries fall. Nevertheless, whether they can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v Warshaw Woolen Associates, Inc.*, 297 AD2d 519). Based upon a plain reading of the papers submitted herein, it is obvious that plaintiffs are not claiming that their injuries fall within the first five categories of "serious injury" as defined in Insurance Law § 5102(d), to wit: death, dismemberment, significant disfigurement, a fracture or loss of a fetus. Thus, this Court will restrict its analysis to the remaining four categories as it pertains to each plaintiff; to wit, 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 moving for summary judgment, the defendant must make a *prima facie* case showing that plaintiffs did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiffs to come forward with evidence

to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v Perez,* 4 NY3d 566; *Grossman v Wright,* 268 AD2d 79, 84).

"Permanent loss of use of a body organ, member, function or system"

A person bringing a claim for damages for personal injuries under the no-fault serious injury category of "permanent loss of use of a body organ, member, function or system" must prove that the permanent loss of use is a total loss of use (*Oberly v Bangs Ambulance, Inc.,* 96 NY2d 295).

"Permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system"

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law required that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v Eyler*, 79 NY2d 955; *Licari v Elliot*, 57 NY2d 230; *Scheer v Koubeck*, 70 NY2d 678). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v Elliot*, *supra*; *see also Grossman v Wright*, *supra*).

When a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v Avis Rent A Car Systems, Inc.,* 98 NY2d 345). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the

evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*id*).

90/180 days

To prevail under the "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 plaintiff must again provide competent, objective medical proof causing the alleged limitations on plaintiff's daily activities (*Monk v Dupuis*, 287 AD2d 187, 191). Furthermore, plaintiff must demonstrate that he has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari v Elliott*, *supra* at 236; *see also Sands v Stark*, 299 AD2d 642).

In support of his instant motion, with respect to each plaintiff's injuries, defendant submits, *inter alia*, the affirmed report of Dr. Naunihal Sachdev Singh, M.D., a board certified neurologist, who performed a medical examination of each plaintiff on behalf of defendant on January 15, 2009; and the affirmed report dated March 12, 2009 of Dr. Jessica F. Berkowitz, M.D., a radiologist, who reviewed the radiological examination of each plaintiff performed on July 14, 2006.

With these guidelines in mind, this Court will now turn to the merits of defendant's motion at hand, addressing each plaintiff's injuries separately and in turn.

Rada Bishenkevich

With respect to Bishenkevich's injuries, Dr. Berkowitz's report summarizes her findings upon reviewing an MRI of the plaintiff's cervical spine taken on July 14, 2006, approximately, less than one month after the subject accident. The radiologist found:

Diffuse disc bulge and associated spondylosis, C6-7. These findings are chronic and degenerative in origin. There is no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma. ***Evaluation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination.

In addition, Dr. Singh's neurological examination of Rada Bishenkevich, states, in pertinent part, as follows:

> CERVICAL SPINE: Ms. Bishenkevich was not using a cervical collar. Palpation of the cervical spine revealed no vertebral tenderness. There was no paravertebral muscle tenderness or spasm over the right or left side. There was no tenderness over the right or left trapezius muscles. Foraminal compression and Valsalva maneuver were negative.
>
> The range of neck movements using the goniometer showed flexion at 45 degrees (45 degrees normal), extension was 45 degrees (45 degrees normal), right and left lateral flexion was 45 degrees (45 degrees normal) and right and left lateral rotation was 80 degrees (80 degrees normal).
>
> THORACIC SPINE: There was no tenderness over the thoracic spine or thoracic paraspinal muscles. There was no spasm of the thoracic paraspinal muscles. Ms. Bishenkevich has scoliosis to the left in the thoracic spine.
>
> LUMBAR SPINE: Ms. Bishenkevich was not using a lumbosacral support. Palpation of the lumbar spine revealed no vertebral tenderness. There was no paraspinal muscle tenderness or spasm on the right and left side. There was no tenderness over the sciatic notch. Valsalva maneuver was negative.

The range of motion of the lumbar spine using the goniometer showed flexion at 90 degrees (90 degrees normal), extension was 25 degrees (25 degrees normal), right and left lateral flexion was 25 degrees (25 degrees normal) and right and left lateral rotation was 30 degrees (30 degrees normal). Supine straight left raising test was at 90 degrees on both sides (90 degrees normal). Sitting straight leg-raising test was at 90 degrees on both sides (90 degrees normal). ***

SHOULDER JOINTS: There was no tenderness over the right shoulder joint and the range of motion was full. Flexion was 180 degrees (180 degrees normal), extension was 50 degrees (50 degrees normal), abduction was 180 degrees (180 degrees normal), adduction was 30 degrees (30 degrees normal), internal rotation was 40 degrees (40 degrees normal) and external rotation was 90 degrees (90 degrees normal).

There was no tenderness over the left shoulder joint and the range of motion was full. Flexion was 180 degrees (180 degrees normal), extension was 50 degrees (50 degrees normal), abduction was 180 degrees (180 degrees normal), adduction was 30 degrees (30 degrees normal), internal rotation was 40 degrees (40 degrees normal) and external rotation was 90 degrees (90 degrees normal). ***
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FUNCTIONAL MUSCLE TESTING: Functional muscle testing revealed muscle strength to be 5/5 in all four extremities.
***

IMPRESSION AND DIAGNOSIS: The injuries diagnosed and documented in the clinical records are cervical, thoracic, and lumbar spine sprain and right elbow injury. Taking into consideration the history, a review of the medical records and the physical examination, it is my opinion that the injuries sustained on 06/23/06 are causally related to the accident.

My diagnoses of Ms. Bishenkevich's injuries are resolved cervical and lumbar spine sprain and post-traumatic headaches - by history. Ms. Bishenkevich's prognosis is good. She sustained no permanent neurological impairment as a result of the injuries sustained in the 06/23/06 accident. Ms. Bishenkevich is able to return to pre-loss activity levels, including occupational duties. Ms. Bishenkevich has scoliosis in the mid-thoracic spine and she has underlying degenerative disc disease of the spine.

Plaintiff, Bishenkevich's reliance upon the "permanent loss of use" category of serious injury law is rejected as her claims for various back and neck injuries are not supported by any evidence of the requisite "total loss of use" of a body organ, member, function or system (*Oberly v Bangs Ambulance, Inc.*, *supra*).

With respect to plaintiff's claims of serious injury under the 90/180 category of Insurance Law § 5102(d), this Court determines that plaintiff's claim is contradicted by plaintiff's own testimony wherein she stated that she was only confined to her bed for four days and to her home for a period of two weeks. She also reported at her physical examination by Dr. Singh that she returned to work within two weeks after the accident. Therefore plaintiff cannot sustain her claim (*Joseph v Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Defendant has also made a *prima facie* showing that said plaintiff has not sustained permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system. Both of defendants' physicians confirm that plaintiff, Bishenkevich, had an underlying degenerative disc disease predating the accident. Further, defendant's evidence does not reveal any evidence of post-traumatic injury to the disc structures other than the MRI which showed a "diffuse disc bulge and associated spondylosis, C6-7." In light of the fact that there is no other objective evidence of the extent of the alleged physical limitations resulting from the bulging disc and its duration, the mere existence of the "diffuse disc bulge" is not evidence of a serious injury in (*Perez v Hilarion*, 36 AD3d 536, 537).

In opposing defendant's motion, plaintiff, Bishenkevich submits the unsworn, unaffirmed medical records of plaintiff's physician, Dr. Ilya Smuglin with whom plaintiff first

sought treatment after her accident and the sworn affirmed reports dated November 21, 2009, of Dr. Leonard R. Harrison, Jr., an orthopaedic surgeon, who first examined the plaintiff on December 4, 2008 (approximately 2 and ½ years after the date of the accident) and again on November 3, 2009.

Initially, it is noted that Dr. Smuglin's medical records, being neither sworn nor affirmed, are clearly presented in inadmissible form and are devoid of any probative value when relied upon by the plaintiff herein in an attempt to defeat summary judgment (*Grasso v Angerami*, *supra*; *see also Pagano v Kingsbury*, 182 AD2d 268).

Dr. Harrison's November 21, 2009 affirmation, wherein he states that he examined the plaintiff on December 4, 2008 and again on November 3, 2009, is also of no probative value. First and foremost, it cannot be overlooked that Dr. Harrison improperly relies upon the unsworn/unaffirmed reports of Dr. Smuglin, Dr. Greenfield, Dr. Rothpearl and Dr. Mendelblatt. It is well settled that the plaintiff may not rely on an unsworn report in order to defeat defendant's *prima facie* showing (*Pagano v Kingsbury*, *supra*; *and Endzwieg-Morov v MV Transportation, Inc.*, 50 AD3d 946; *and Friedman v U-Haul Truck Rental*, 216 AD2d 266, 267).

In light of the foregoing, defendant, Brothers' motion for summary judgment dismissing plaintiff, Bishenkevich's complaint, is granted.

Matilda Rojevskaia

With respect to Matilda Rojevskaia's injuries, Dr. Berkowitz's report summarizes her findings upon reviewing an MRI of the plaintiff's cervical spine taken on July 14, 2006, approximately, less than one month after the subject accident. The radiologist found:

> Exaggeration of the normal cervical lordosis. This is likely related to the patient's age of 89. Minimal spondylosis, C3-4. The spondylosis is chronic and degenerative in origin. There is no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma.***Evaluation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination.

In addition, Dr. Singh's neurological examination of Matilda Rojevskaia states, in pertinent part, as follows:

> PAST MEDICAL AND PERSONAL HISTORY: Ms. Rojevskaia had fracture of the right humerus in 2004, but she had no surgery. She stated that she cannot use the right arm and she has difficulty in eating. She also suffers from osteoporosis. She has a past history of thyroid removal in 1979. She has heart disease and has a past history of thrombophlebitis.
>
> CERVICAL SPINE: Ms. Rojevskaia was not using a cervical collar. Palpation of the cervical spine revealed vertebral tenderness all along the spine. There was no paravertebral muscle tenderness or spasm over the right or left side. There was no tenderness over the right or left trapezius muscles. Foraminal compression and Valsalva maneuver were negative.
>
> The range of neck movements using the goniometer showed flexion at 30 degrees (45 degrees normal), extension was 45 degrees (45 degrees normal), right and left lateral flexion was 35 degrees (45 degrees normal) and right and left lateral rotation was 50 degrees (80 degrees normal).
>
> THORACIC SPINE: There was no tenderness over the thoracic spine or thoracic paraspinal muscles. There was no spasm of the thoracic paraspinal muscles. Ms. Rojevskaia has kyphoscoliosis of the thoracic spine with a hump.
>
> LUMBAR SPINE: Ms. Rojevskaia was not using a lumbosacral support. Palpation of the lumbar spine revealed no vertebral tenderness. There was no paraspinal muscle tenderness or spasm on the right and left side. There was no tenderness over the sciatic notch. Valsalva maneuver was negative.

> The range of motion of the lumbar spine using the goniometer showed flexion at 30 degrees (90 degrees normal), extension was 10 degrees (25 degrees normal), right and left lateral flexion was 10 degrees (25 degrees normal) and right and left lateral rotation was 10 degrees (30 degrees normal). Supine straight left raising test was not done as Ms. Rojevskaia did not lie on her back. Sitting straight leg-raising test was at 80 degrees on both sides (90 degrees normal).
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> SHOULDER JOINTS: There was tenderness over the right shoulder joint. Flexion was 80 degrees (180 degrees normal), extension was 10 degrees (50 degrees normal), abduction was 90 degrees (180 degrees normal), adduction was 30 degrees (30 degrees normal), internal rotation was 20 degrees (40 degrees normal) and external rotation was 60 degrees (90 degrees normal).
>
> There was no tenderness over the left shoulder joint. Flexion was 160 degrees (180 degrees normal), extension was 50 degrees (50 degrees normal), abduction was 150 degrees (180 degrees normal), adduction was 30 degrees (30 degrees normal), internal rotation was 20 degrees (40 degrees normal) and external rotation was 70 degrees (90 degrees normal).
> ***
> IMPRESSION AND DIAGNOSIS: The injuries diagnosed and documented in the clinical records are cervical, thoracic, and lumbar spine sprain and right shoulder and right elbow contusions. Taking into consideration the history, a review of the medical records and the physical examination, it is my opinion that the injuries sustained on 06/23/06 are causally related to the accident.
>
> My diagnoses of Ms. Rojevskaia's injuries are cervical and lumbar spondylosis - unrelated to the motor vehicle accident on 06/23/06. Ms. Rojevskaia's prognosis is good. She sustained no permanent neurological impairment as a result of the injuries sustained on 06/23/06. She is able to return to pre-loss activity levels. Ms. Rojevskaia is 92 year [sic] old and she has underlying osteoarthritis and degenerative disc disease of the spine. She was already using a cane and walker prior to the accident on 06/23/06.

Plaintiff, Rojevskaia's reliance upon the "permanent loss of use" category of serious injury law is rejected as her claims for various back and neck injuries are also not supported by any evidence of the requisite "total loss of use" of a body organ, member, function or system (*Oberly v Bangs Ambulance, Inc.*, *supra*).

With respect to plaintiff's claims of serious injury under the 90/180 category of Insurance Law 5102(d), this Court determines that plaintiff's claim is contradicted by plaintiff's own testimony wherein she stated that she was only confined to her bed for one week and to her home for three weeks. In addition, plaintiff testified that there were no medical restrictions placed on her activities during the relevant 180 day period. This Court finds that defendant has made a *prima facie* showing with respect to this category (*Moore v Gawel*, *supra*; *cf. Jocelyn v Singh Airport Service*, *supra*), which plaintiff Rojevskaia based, upon her own testimony, cannot refute.

Defendant has also made a *prima facie* showing that said plaintiff has not sustained permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system. Defendants' physicians confirm the plaintiff's own testimony that she had past medical history of a fractured right arm in 2004, osteoporosis, heart disease and degenerative disc disease of the spine. She was also noted to have a prior history of cervical lordosis and a thoracic spine hump. While defendant's doctors noted restricted range of motion in her spine and shoulders, they attributed those findings to the plaintiff's age.

In opposition, plaintiff submits the affirmed "Comprehensive Evaluation Report" dated September 29, 2009, of Dr. Bella Sandler, M.D., a physician associated with NY Medical & Health P.C.; the affirmed report of Dr. Alan Greenfield, M.D., dated July 23, 2009; the affirmed report of Dr. Harvey Lefkowitz, M.D., dated July 17, 2009; the unsworn, unaffirmed narrative report of Dr. Ilya Smuglin, M.D. together with attached office records; and the affidavit of the custodian of records of Dr. Ilya Smuglin.

As stated above, Dr. Smuglin's medical records, being neither sworn nor affirmed are clearly presented in inadmissible form and are devoid of any probative value when relied upon by the plaintiff herein in an attempt to defeat summary judgment (*Grasso v Angerami*, *supra*; *see also Pagano v Kingsbury*, *supra*). Accordingly, this Court cannot consider those records herein. Insofar as plaintiff attempts to submit these records under the cover of an custodian affidavit, such attempt also falls short of constituting admissible evidence herein. Obviously, in her affidavit, the custodian does not swear to the contents of the documents; simply that the documents therein are "accurate" version of Dr. Smuglin's documents (*Washington v Mendoza*, 57 AD3d 972).

With respect to Dr. Sandler's affirmation, it cannot be overlooked that she first examined the plaintiff on September 29, 2009, more than three years following the date of the accident, and that for consultation purposes only. Insofar as she has failed to tender any proof contemporaneous with the accident demonstrating that the plaintiff sustained limitations of motion to her cervical spines in the near aftermath of the accident, Dr. Sandler's report is of no probative value (*Li v Yun*, *supra*; *Ranzie v Abdul-Massih*, *supra*; *Bell v Rameau*, 29 AD3d 839). Dr. Sandler also fatally fails to conduct any objective testing using a goniometer or any other objective measurement device during the most recent examinations of the plaintiffs (*Exilus v Nicholas*, 26 AD3d 457; *Vasquez v Basso*, 27 AD3d 728). In the absence of objective proof of plaintiff's injuries, the physician's affirmation is insufficient to defeat a motion for summary judgment (*Pommels v Perez*, *supra*). Moreover, as stated above, Dr. Sandler's reliance upon the unsworn/unaffirmed reports of other physicians is also fatal to plaintiff's opposition (*Pagano v Kingsbury*, *supra*; *Endzwieg-Morov v MV Transportation, Inc.*, *supra*; *Friedman v U-Haul Truck Rental*, *supra*). With

respect to plaintiff's claims of serious injury under the 90/180 category of Insurance Law §5102(d), Dr. Sandler's comprehensive evaluation reports unequivocally fail to demonstrate that the plaintiffs sustained 90/180 day disabilities. It is obvious from a plain reading of Dr. Sandler's report that the physician had no personal knowledge of the plaintiff's medical condition after the accident, and he relied unsworn medical reports for such period (*see e.g., Uddin v Cooper*, 32 AD3d 270; *Jocelyn v Singh Airport Service*, *supra*). Finally, Dr. Sandler's failure to account for the fact that the plaintiff was suffering from pre-existing degenerative disc disease in the cervical spine and osteoporosis also renders her affirmation without probative value.

This Court does not find any objective basis for concluding that the present physical limitations and continuing pain are attributable to the subject accident rather than to the degenerative condition discovered in the MRI scan. In the absence of any objective evidence as to how these disabilities and pain were causally related to the accident, and for the reasons stated above, defendant's motion for summary judgment dismissal of plaintiff, Rojevskaia's, complaint is granted (*Kaplan v Vanderhans*, 26 AD3d 468; *Bennett v Genas*, 27 AD3d 601).

Oleg Rybalov

With respect to Oleg Rybalov's injuries, Dr. Berkowitz's report summarizes her findings upon reviewing an MRI of the plaintiff's cervical spine taken on July 14, 2006, approximately, less than one month after the subject accident. The radiologist found:

> Diffuse disc bulge, tiny central disc herniation and associated spondylosis, C3-4. The spondylosis confirms the chronic nature of the disc herniation. Disc bulges and spondylosis are chronic and degenerative in origin. Diffuse disc bulge and associated spondylosis, C6-7. There is no evidence of acute traumatic injury to the cervical

spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma. ***Evaluation of this MRI examination reveals no causal relationship between the claimant's alleged accident and the findings on the MRI examination.

In addition, Dr. Singh's neurological examination of the plaintiff, Oleg Rybalov, states, in pertinent part, as follows:

> PAST MEDICAL AND PERSONAL HISTORY: Mr. Rybalov denied any prior history of accidents or injuries. He has a past history of headaches and hears hissing noise in the left ear. He also suffers from hypertension. He has a past history of surgery for diapharynal hernia.
>
> CERVICAL SPINE: Mr. Rybalov was not using a cervical collar. Palpation of the cervical spine revealed no vertebral tenderness. There was no paravertebral muscle tenderness or spasm on the right or left side. There was no tenderness over the right or left trapezius muscles. Foraminal compression and Valsalva maneuver were negative.
>
> The range of motion of the cervical spine using the goniometer showed flexion at 45 degrees (45 degrees normal), extension was 45 degrees (45 degrees normal), right and left lateral flexion was 45 degrees (45 degrees normal) and right and left lateral rotation was 80 degrees (80 degrees normal).
>
> THORACIC SPINE: There was no tenderness over the thoracic spine or thoracic paraspinal muscles. There was no spasm of the thoracic paraspinal muscles.
>
> LUMBAR SPINE: Mr. Rybalov was not wearing a lumbosacral support. Palpation of the lumbar spine revealed no vertebral tenderness. There was no paraspinal muscle tenderness on the right and left side. There was no tenderness over the sciatic notch. Valsalva maneuver was negative.
>
> The range of motion of the lumbar spine using the goniometer showed flexion at 90 degrees (90 degrees normal), extension was 25 degrees (25 degrees normal), right and left lateral flexion was 25 degrees (25 degrees normal) and right and left lateral rotation was 30 degrees (30 degrees normal). Supine straight left raising test was at 90 degrees on both sides (90 degrees normal). Sitting straight leg-raising test was at 90 degrees on both sides (90 degrees normal).

SHOULDER JOINTS: There was no tenderness over the right shoulder joint and the range of motion was full. Flexion was 180 degrees (180 degrees normal), extension was 50 degrees (50 degrees normal), abduction was 180 degrees (180 degrees normal), adduction was 30 degrees (30 degrees normal), internal rotation was 40 degrees (40 degrees normal) and external rotation was 90 degrees (90 degrees normal).

There was no tenderness over the left shoulder joint and the range of motion was full. Flexion was 180 degrees (180 degrees normal), extension was 50 degrees (50 degrees normal), abduction was 180 degrees (180 degrees normal), adduction was 30 degrees (30 degrees normal), internal rotation was 40 degrees (40 degrees normal) and external rotation was 90 degrees (90 degrees normal). *** ***

FUNCTIONAL MUSCLE TESTING: Functional muscle testing revealed muscle strength to be 5/5 in all four extremities. ***

IMPRESSION AND DIAGNOSIS: The injuries diagnosed and documented in the clinical records are cervical and lumbar spine sprain. Taking into consideration the history, a review of the medical records and the physical examination, it is my opinion that the injuries sustained on 06/23/06 are causally related to the accident.

My diagnoses of Mr. Rybalov's injuries are resolved cervical and lumbar spine sprain and prior history of buzzing in the left ear. Mr. Rybalov sustained no permanent neurological impairment as a result of the injuries sustained on 06/26/06. Mr. Rybalov is able to return to pre-loss activity levels. Mr. Rybalov has underlying degenerative disc disease of the spine.

Plaintiff, Rybalov's reliance upon the "permanent loss of use" category of serious injury law is rejected as his claims for various back and neck injuries are also not supported by any evidence of the requisite "total loss of use" of a body organ, member, function or system (*Oberly v Bangs Ambulance, Inc., supra*).

With respect to plaintiff's claims of serious injury under the 90/180 category of Insurance Law 5102(d), this Court determines that plaintiff's claim is contradicted by plaintiff's own testimony wherein he stated that he was not immediately injured because he

was a restrained passenger, and that there is nothing that is completely prevented from doing. The 64 year old plaintiff was not working at the time of the accident. In addition, the plaintiff's deposition testimony that there were no medical restrictions placed on the plaintiff's activities during the relevant 180 day period, this Court finds that defendant has made a *prima facie* showing with respect to this category (*Moore v Gawel*, *supra*; *cf. Jocelyn v Singh Airport Service*, *supra*).

Defendant has also made a *prima facie* showing that said plaintiff has not sustained a permanent consequential limitation of use of a body organ or member; and significant limitation of use of a body function or system. Both of defendant's expert physicians only note the existence of a "diffuse disc bulge, tiny central disc herniation" and degenerative disc disease. Neither physician notes any restricted range of motion and the sprain/strain in plaintiff's cervical and lumbar spine are determined to be resolved by the defendant's examining physicians. Clearly, plaintiff's disc bulges and herniations, alone, do not establish a serious injury. Defendant has sufficiently established that there is no objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (*Mejia v Derose*, 35 AD3d 407; *Cerisier v Thibiu*, 29 AD3d 507). In light of the foregoing, the burden shifts to the plaintiff to produce evidence in admissible form raising an issue of fact as to plaintiff's serious injuries.

In opposition, plaintiff submits the affirmed "Comprehensive Evaluation Report" dated September 29, 2009, of Dr. Bella Sandler, M.D., a physician associated with NY Medical & Health P.C. and the unsworn, unaffirmed narrative report of Dr. Ilya Smuglin, M.D. together with attached office records; and the affidavit of the custodian of records of Dr. Ilya Smuglin.

Again, for the reasons stated above, the unsworn, unaffirmed narrative report of Dr. Ilya Smuglin, M.D., and the affidavit of the custodian of Dr. Smuglin's records do not constitute competent evidence herein and therefore will not be considered by this Court.

Further, Dr. Sander's affirmed report, which suffers from the same shortcomings as presented in her report of plaintiff, Rojevskaia, is insufficient to raise an issue of fact herein.

Accordingly, defendant's motion for summary judgment dismissal of plaintiff, Oleg Rybalov's complaint is also granted.

Settle Judgment on Notice.

Dated: February 9, 2010

UTE WOLFF LALLY, J.S.C.

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