SHORT FORM ORDER

INDEX No. 13-9209

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 7-31-14
ADJ. DATE 12-16-14
Mot. Seq. # 001 MD

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MICHAEL CAPOBIANCO, Plaintiff,	ROBERT M. CIPRIANO, ESQ. Attorney for Plaintiff 136 East Main Street East Islip, New York 11730
- against -	DAVID J. SOBEL, P.C. Attorney for Defendant Hubner 811 West Jericho Turnpike, Suite 105W Smithtown, New York 11787
JOHN HUBNER and MARC POGOSKY, Defendants.	KAREN LAWRENCE, ESQ. Attorney for Defendant Pogosky 878 Veterans Memorial Highway, Suite 100 Hauppauge, New York 11788

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 18 - 27; Replying Affidavits and supporting papers 28 - 29; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant John Hubner for an order granting summary judgment in his favor is denied.

Plaintiff Michael Capobianco commenced this action to recover damages for personal injuries he allegedly sustained in a motor vehicle accident that occurred on Route 231 in the Town of Babylon on August 30, 2012. The accident allegedly happened when a vehicle operated by defendant John Hubner collided with the rear of plaintiff's vehicle as it was stopped in a left turning lane on Route 231. By his bill of particulars, plaintiff alleges he suffered various injuries due to the collision, including aggravation or exacerbation of a prior lumbar disc herniation, cervical disc bulges at levels C4-C5 and C5-C6, and lumbar and cervical radiculopathy.

Defendant Hubner now moves for summary judgment dismissing the complaint, arguing plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). More particularly, defendant Hubner asserts that plaintiff does not suffer any disability as a direct result of the accident, and that plaintiff's "current treatment regimen is consistent with his prior history of spinal fusion." In support of the motion, defendant Hubner submits, among other things, copies of the pleadings and the bill of particulars, the transcript of plaintiff's deposition testimony, various medical records and reports, and a sworn medical report prepared by Dr. Marc Chernoff. At defendant's request, Dr. Chernoff, an orthopedic surgeon, conducted an independent medical examination of plaintiff on May 19, 2014, and reviewed numerous medical records relating to plaintiff's alleged injuries. Plaintiff opposes the motion, arguing that Dr. Chernoff's report is insufficient to meet defendant's burden on the motion. Alternatively, plaintiff asserts the evidence submitted in opposition, in particular an affirmation of Dr. Sebastian Lattuga, plaintiff's treating orthopedic surgeon, and his own affidavit, raises a triable issue as to whether he sustained a permanent and significant loss of joint function in his lumbar spine due to the subject accident.

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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."

A defendant moving for summary judgment on the ground that a plaintiff's negligence claim is barred by 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.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., 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 also may 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]; ***Torres v Micheletti***, 208

AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendant Hubner's submissions are insufficient to establish a prima facie case that plaintiff did not suffer a significant limitation of use in his lumbar spine as a result of the subject accident (*see* ***Sanclemente v MTA Bus Co.***, 116 AD3d 688, 983 NYS2d 280 [2d Dept 2014]; ***Little v Ajah***, 97 AD3d 801, 949 NYS2d 109 [2d Dept 2012]; ***Rogers v Duffy***, 95 AD3d 864, 944 NYS2d 175 [2d Dept 2012]; ***Edouazin v Champlain***, 89 AD3d 892, 933 NYS2d 85 [2d Dept 2011]). The report of Dr. Chernoff states plaintiff presented at the May 2014 examination with a complaint of lower back pain, and reported a past surgical history that includes a laminectomy, a multilevel spinal fusion involving levels L3-L4, L4-L5 and L5-S1, and a revision laminectomy fusion at level L2-L3, which was performed on June 26, 2012. The report states, in relevant part, that the examination revealed intact sensation, normal muscle strength and normal deep tendon reflexes in plaintiff's upper extremities. An examination of his lower extremities showed intact sensation and muscle strength, but no deep tendon reflexes at his left knee and only trace deep tendon reflexes in his ankles. It states that range of motion testing revealed normal flexion, extension and rotation in plaintiff's cervical spine, and restricted movement in his lumbar spine, with 45 degrees of flexion (90 degrees normal) and 15 degrees of extension (30 degrees normal). The report does not set forth range of motion measurements for lateral rotation and lateral flexion in plaintiff's lumbar region. Dr. Chernoff diagnoses plaintiff as having suffered cervical and lumbar sprains in the subject accident. He concludes that plaintiff has no permanent or residual injuries related to such accident, and that his current treatment is due to his prior spinal condition. Dr. Chernoff further opines the findings of restricted movement in plaintiff's lumbar spine and his asymmetric reflexes are "consistent with someone who had a surgery from L2 to the sacrum with pedicle screw instrumentation as well as anterior interbody fusion from L3 to the sacrum."

Contrary to the assertions by defense counsel, Dr. Chernoff's report demonstrates a triable issue as to whether plaintiff suffered an exacerbation or aggravation of the preexisting condition in his lumbar spine, resulting in an injury within the "limitation of use" categories. Although plaintiff has undergone various spinal surgeries, with the most recent surgery occurring just one month before the subject accident, Dr. Chernoff does not refer to any evidence in plaintiff's medical records showing that the fusion surgeries produced a significant loss of joint function as measured during the range of motion testing of plaintiff's lumbar spine conducted in May 2014 (*see* ***Giangrasso v Callahan***, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]). Dr. Chernoff also fails to explain the basis for his conclusion that the restricted movement in plaintiff's spine and the loss of reflexes in his lower extremities are attributable to the preexisting

spinal condition, rather than evidence supporting the allegation made in the bill of particulars that the subject accident exacerbated or aggravated such condition (*see* ***Little v Ajah***, 97 AD3d 801, 949 NYS2d 109; ***Edouazin v Champlain***, 89 AD3d 892, 933 NYS2d 85; ***McKenzie v Redl***, 47 AD3d 775, 850 NYS2d 545 [2d Dept 2008]; *see also* ***Ambroselli v Team Massapequa, Inc.***, 88 AD3d 927, 931 NYS2d 652 [2d Dept 2011]; ***Washington v Astodel Enters., Inc.***, 66 AD3d 880, 887 NYS2d 623 [2d Dept 2009]). A preexisting condition "does not foreclose a finding" that injuries are causally related to the subject accident (*see* ***Rodgers v Duffy***, 95 AD3d 864, 866, 944 NYS2d 175).

Accordingly, defendant Hubner's motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is denied.

Dated: July 8, 2015

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION