SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK**
**CIVIL TERM -PART 35- QUEENS COUNTY**
25-10 Court Square, Long Island City, N.Y. 11101

P R E S E N T : **Hon. Timothy J. Dufficy**
**Justice**

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SUNG J. KWON,
Plaintiff,

Index No.: 028101/10

- against -

Motion Seq. : 1

MARCO BAQUEDANO, CONSUELO BAQUEDANO
Defendant.
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The following papers numbered 1 to 7 read on this motion by the by the defendant's MARCO BAQUEDANO and CONSUELO BAQUEDANO, pursuant to CPLR§3212 granting them summary judgment and dismissing the complaint of SUNG J. KWON on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d):

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits | 1-4 |
| Affirmation in Opposition-Affidavits-Exhibits | 5-7 |

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

The instant motion was re-assigned to Part 35 on February 9, 2012 by the Administrative Judge of the Supreme Court, Queens County, pursuant to a request for re-assignment of the civil case from Justice Marguerite Grays and the papers were forwarded to Part 35 by the motion support office on February 23, 2012.

This is a personal injury action in which the plaintiff, SUNG J. KWON seeks to recover damages for injuries he alleges he sustained as the result of a motor vehicle accident that occurred on June 9, 2010 at approximately 9:28 p.m. on the Horace Harding Expressway at or near the intersection of 173rd Street, in the County of Queens, State of New York, when the plaintiff, SUNG J. KWON's vehicle and a vehicle owned by the defendant, CONSUELO BAQUDANO and operated by the defendant, MARCO BAQUADENO collided. The defendants, motion is denied for the reasons more fully set forth herein.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to a judgment as a matter of law, presenting the Court with sufficient evidence in admissible form to eliminate any material issues of fact from the case. Gaddy v. Eyler, 79 N.Y. 2d 955 (1992). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *see*, Short v. Meza, 17 AD 2d 664 (2d Dept. 2005); Boone v. New York City Transit Authority, 263 AD2d 463 (2d Dept. 1999).

In this motion, the burden is on the defendants to come forward with sufficient evidentiary proof in admissible form showing that the plaintiff has not sustained a serious injury pursuant to Insurance Law § 5102(d), i.e. a permanent loss of use of a body organ, function, or system, a significant limitation of use of a body function or system, a permanent consequential limitation of use of a body organ or member, or a medically determined injury or impairment which prevented the plaintiff from performing substantially all of the material acts which constituted the usual and customary daily activities for 90 out of 180 days immediately following an accident. *see*, Oberly v. Bangs Ambulance Inc. , 96 N.Y.2d 295 (2001); Gaddy v. Eyler, supra.. An injury outside of this stringent objective is incapable of supporting an action to recover for pain and suffering arising out of a motor vehicle accident. Licari v. Elliot, 57 N.Y.2d 230 (1982).

The defendant's moving papers present proof, in admissible form, to wit, the records and affirmed reports of Dr. Lisa Nason, Dr. Jean-Robert Desrouleaux, and Dr. Jessica Berkowitz, all of whom reviewed medical records

and/or performed examinations of the plaintiff.

Dr. Lisa Nason examined the plaintiff on August 25, 2011 and concluded that there was "no objective evidence of orthopedic disability or permanency... that the plaintiff's sprain and strain injuries have resolved. Prognosis is good". Dr. Nason also found that the plaintiff's range of motion was normal in all respects. (*see,* defendant's motion, Exhibit 5).More specifically, Dr. Nason's examination of the Plaintiff concluded that the Plaintiff's range of motion was normal in all areas, namely the cervical spine, bilateral shoulders, lumbar spine, muscle testing, and reflexes.

Dr. Jean-Robert Desrouleaux, a neurologist, also examined the plaintiff on August 25, 2011 and concluded that there was "no neurological disability or permanent impairment as it relates to the accident of June 9, 2010. Prognosis is good". Dr. Desrouleaux also found that the plaintiff's range of motion was normal in all areas as well. (*see*, defendant's motion, Exhibit 6).

Radiologist, Dr. Jessica Berkowitz, examined the MRI of the plaintiff's left shoulder taken on June 25, 2010 at the Kissena Diagnostic Imaging and Open MRI Center and found Dr. Berkowitz found "no evidence of acute traumatic injury to the shoulder such as a fracture, bone marrow edema, or musculotendinous tear". Dr. Berkowitz found there were "degenerative changes of the acromioclavicular joint" but in Dr. Berkowitz's opinion the examination of the MRI "revealed no causal relationship between the plaintiff's alleged accident and the findings on the MRI" (*see*, defendant's Exhibit 7).

Therefore, the court finds that the defendant's have provided proof demonstrating, *prima facie,* the absence of any condition in plaintiff which might arguably meet the serious injury threshold of Insurance Law § 5102(d). Hence, the defendant's have made out a *prima facie* case and the burden of proof shifts to the plaintiff to demonstrate the existence of a triable issue of fact. *see*, Gaddy v. Eyler, supra.

The Plaintiff, SUNG J. KWON, in opposition, submits a sworn affidavit from Plaintiff, KWON himself, as well as the affirmed reports of Dr. Ayoob Khodadadi, Dr. William Weiner, Dr. Steve Losik, and Dr. David Mun. In contrast, these doctors found the plaintiff's range of motion limitations were not normal and that the MRI results indicated much different findings than the defendants radiologist, Dr. Berkowitz had concluded.

Dr. Ayoob Khodadadi reviewed the same MRI of the plaintiff's left shoulder, as did Dr. Berkowitz, and affirmed in a report dated January 7, 2012 that the "focal tear of the subscapularis tendon" in the plaintiff's left shoulder is in fact "causally related" to the accident that occurred on June 9, 2010 and that it is "not due to degeneration". Dr. Khodadadi examined the plaintiff on June 25, 2010 and found that the plaintiff suffered from "joint effusion...possibly due to trauma. tendinitis of the biceps tendon" and a "focal tear involving the subscapularis tendon"(*see*, plaintiff's motion, Exhibit B).

Dr. William Weiner, a radiologist, reviewed the MRI films of the plaintiff's right shoulder taken on July 9,2010 at New Millenium Medical Imaging and concluded that there was "increased signal and irregularity at the undersurface of the infraspinatus tendon consistent with a tear" (*see*, plaintiff's motion, Exhibit C).

Dr. Steve Losik, a radiologist affirmed that he read the MRI's images taken of the plaintiff's cervical spine on July 24, 2010 and August 7, 2010 and found 1) straightening of lumbar lordosis suggestive of pain or muscle spasm; 2)posterior central broad-based L4-5 disc herniation with mild compression of anterior thecal sac and mild bilateral neural foraminal stenosis in combination with facet hypertrophic changes; and 3)severe loss of L5-S1 disc space height with a disc buldge which causes mild bilateral neural foraminal stenosis, in combination with endplate osteophytes and facet hypertrophic changes (*see*, plaintiffs motion, Exhibit D).

On July 13, 2012, Dr. David Mun examined the plaintiff, reviewing

among other things the MRI's taken of the plaintiff's shoulders and spine and Dr. Mun's impressions were 1) cervicalgia; 2)cervical derangement; 3) right shoulder supraspinatus tendon tear; 4) left shoulder subscapularis tendon tear; 5) low back pain; 6) lumbar disc herniation; and 7) left ankle pain. Dr. Mun concluded that these injuries occurred as a result of the motor vehicle accident that occurred on June 9th, 2010 (see, plaintiff's motion, Exhibit E).

The plaintiff also submitted the affirmation of Dr. David Mun who affirmed that immediately after the car accident on July 10,2010, Dr. Mun conducted a series of range of motion tests on the plaintiff and found range of motion losses in the plaintiff's cervical spine, lumbar spine, left shoulder, and right shoulder (see, plaintiff's motion, Exhibit F). Dr. Mun also affirmed that he treated the plaintiff for these injuries up until the time the plaintiff's no-fault insurance expired, and that the plaintiff is now "partially disabled permanently at 20% "(see, plaintiff's motion, Exhibit F).

Inasmuch as the Defendant's doctors and the Plaintiff's doctors clearly do not agree as to whether Plaintiff has suffered a serious injury, a material issue of fact exists, and summary judgment is therefore denied. Noble v. Ackerman, 252 AD2d 392 (1st Dept.1998). Greene v. Frontier Central District School District, 214 Ad2d 947 (4th Dept.1995).

This Court finds that the plaintiff has raised triable issues of fact by submitting the affirmed medical reports of plaintiff's doctors showing that the plaintiff had significant limitations in range of motion both contemporaneous to the accident, as well as in recent examination. Plaintiff's doctors also concluded that the plaintiff's limitations were significant and permanent and in fact resulted from trauma which was caused by the accident (*see*, Ortiz v. Zorbas, 62 AD3d 770 (2d Dept. 2009); Azor v. Torado, 59 AD3d 367 (2d Dept 2009). Therefore, the plaintiff has raised a triable issue of fact as to whether or not plaintiff has sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law §5102(d) as a result of the accident that occurred on June 9, 2010. *see*, Mahmmod v. Vicks, 81 AD3d 606 (2d Dept. 2011); Evans v. Pitt, 77 AD3d 611(2d Dept. 2010).

In addition, the court finds that the plaintiff has adequately explained the gap in treatment by submitting his own affirmation, as well as Dr. Mun's affirmation, stating that plaintiff's no-fault benefits had stopped, and plaintiff's affirmation attested to the fact that he did not have private health insurance to cover the costs for continued treatment. Domanas v. Delgado Travel Agency, Inc., 56 AD3d 717 (2d Dept. 2008).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion of the defendant's , MARCO BAQUEDANO and CONSUELO BAQUEDANO for an order granting summary judgment and dismissing plaintiff's complaint is denied in all respects.

Dated: March 27, 2012

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**Honorable Timothy J. Dufficy, JSC**