SHORT FORM ORDER

INDEX No. 09-19399

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 6-14-11
ADJ. DATE 10-11-11
Mot. Seq. # 001- MG
002 - XMG; CASEDISP

ANTHONY OLIVETO,

Plaintiff,

- against -

LENA SCHIFANO and ROBERT H. CLEMENS, JR.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Robert H. Clemens, Jr. , dated May 17, 2011, and supporting papers (including Memorandum of Law dated ___); (2) Notice of Cross Motion by the defendant Lena Schifano, dated May 25, 2011, supporting papers; (3) Affirmation in Opposition by the plaintiff, dated October 3, 2011, and supporting papers; (4) Reply Affirmation by the defendant Robert H.Clemens, Jr., dated October 7, 2011, and supporting papers; (5) Reply Affirmation by the defendant Lena Schifano, dated October 11, 2011, and supporting papers; (6) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); 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 Robert Clemens, Jr. seeking summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED the cross motion by defendant Lena Schifano seeking summary judgment dismissing the complaint is granted.

Plaintiff Anthony Oliveto commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Nicolls Road and Carll's Straight Path in the Town of Babylon on October 26, 2007. It is alleged that the vehicle operated by plaintiff, which was traveling west on Nicolls Road, was struck in the front passenger side by the vehicle operated by defendant Lena Schifano, which was traveling north on Carll's Straight Path. After the impact between plaintiff's vehicle and Schifano's vehicle, plaintiff's vehicle spun around and was struck in the rear by a vehicle operated by defendant Robert Clemens, Jr., which was traveling south on Carll's Straight Path. Plaintiff, by his bill of particulars, alleges, among other things, that he sustained various personal injuries in the subject collision, including disc herniations at levels T7 through T11, disc bulges at level L5-S1, and lumbar radiculopathy. Plaintiff alleges that he was confined to his bed for approximately one week and to his home for approximately one month following the subject accident. Plaintiff further alleges that he was unable to resume his position on the Deer Park High School track team as a result of the injuries he sustained in the accident.

Defendant Clemens now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident fail to meet the "serious injury" threshold requirement of the Insurance Law. In support of the motion, defendant Clemens submits copies of the pleadings, plaintiff's deposition transcript, unsworn copies of plaintiff's medical records, and the sworn medical reports of Richard Lechtenberg, M.D., and Isaac Cohen, M.D. At defendant Clemens's request, Dr. Lechtenberg conducted an independent neurological examination of plaintiff and Dr. Cohen conducted an independent orthopedic examination of plaintiff in February 2011. Defendant Schifano cross-moves for summary judgment on the basis that plaintiff's injuries failed to meet the serious injury threshold requirement of Insurance Law § 5102(d). Defendant Schifano relies on the same evidence as presented in defendant Clemens's motion for summary judgment.

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, defendants Clemens and Schifano have established their prima facie entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Defendants examining neurologist, Dr. Lechtenberg, states in his medical report that an examination of plaintiff reveals that he has full range of motion in his thoracolumbosacral spine, that the alleged injuries he sustained to his thoracic and lumbar spine have resolved, and that he currently has no objective, clinical, neurological deficits. Dr. Lechtenberg opines that plaintiff is not disabled and is capable of performing his normal daily living activities, and that there are no pre-existing conditions that would affect plaintiff's recovery. Similarly, Dr. Cohen in his medical report states that plaintiff has full range of motion in his thoracolumbosacral spine, that the straight leg raising test is negative, and that there are no sensory deficits in his spine. Dr. Cohen's report concludes that the low back strain that plaintiff sustained as a result of the accident has resolved, and that he has a completely functional capacity of the musculoskeletal system without any evidence of sequelae or permanency related to the subject accident. Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence based on objective findings, sufficient to raise a triable issue of fact that he sustained a serious injury (*see* ***Gaddy v Eyler***, *supra*).

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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***, 18 NY3d 208, __ NYS2d __ [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, __ AD3d __, 2012 NY Slip Op 00467 [1st Dept 2012]).

Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden and that he sustained injuries within the limitations of use categories of the Insurance Law as a result of the subject accident. In opposition to the motions, plaintiff submits his own deposition transcript and his unsworn medical records.

In opposition to defendants' prima facie showing, plaintiff has failed to raise a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law § 5102(d) (*see* ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Barry v Future Cab Corp.***, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]). Although, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see* ***Caulkins v Vicinanzo***, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]), plaintiff has proffered insufficient medical evidence to demonstrate that he sustained an injury within the "limitations of use" categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]). Here, the medical reports submitted by plaintiff are without probative value, since they are unaffirmed and, therefore, not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Scheker v Brown***, __ AD3d __; 2012 NY Slip Op 00355 [2d Dept 2012]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]). In any event, the medical report of Dr. William McCormick, which plaintiff relies upon in opposition, reveals that a physical examination of plaintiff shows he has no active spasm in his spine, that the straight leg raising test is negative, and that the intermittent pain in his thoracolumbosacral spine is primarily myofascial in nature. Evidence of complaints of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Young v Russell***, 19 AD3d 688, 798 NYS2d 101 [2d Dept 2005]).

Moreover, the medical reports of Dr. Robert Drazic and Dr. Melissa Sapan merely establishes that plaintiff sustained sprains to his thoracolumbar spine, and disc bulges and herniations. "The mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (***Stevens v Sampson***, 72 AD3d 793, 794, 898 NYS2d 657 [2d Dept 2010]; *see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Carabello v Kim***, 63 AD3d 976, 882 NYS2d 211 [2d Dept 2009]; ***Kilakos v Mascera***, 53 AD3d 527, 862 NYS2d 529 [2d Dept 2008]; ***Wright v Rodriguez***, 49 AD3d 532, 855 NYS2d 147 [2d Dept 2008]). Sprains and strains also are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 995 [2d Dept 2008]; ***Byam v Waltuch***, 50 AD3d 939, 857 NYS2d 605 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]).

Lastly, plaintiff failed to submit any competent medical evidence demonstrating that the injuries he allegedly sustained in the subject accident rendered him unable to perform substantially all of his daily living activities for not less than 90 days of the first 180 days subsequent to the accident (*see* ***Valera v Singh***, *supra*; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). Accordingly the motion and cross motion seeking to dismiss the complaint are granted.

Dated: 2/17/12

PETER H. MAYER, J.S.C.