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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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SHAUN ANTOINE and DIONNE ALVAREZ,

Plaintiff,

-against-

ANDRE E. BYGRAVE, ERROL J. BYGRAVE, KELVIN A. STERLING, DAMION C. MCKENZIE, RICHARD S. HILL JR. and THE SAFETY ZONE LLC,

Defendants.

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TRIAL/IAS PART 20
INDEX No.: 6971/10
Motion Date: 03/21/12
Motion Sequence: 002, 003, 004

DECISION & ORDER

Papers Numbered

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Notice of Motion 1
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Upon the foregoing papers, it is ordered that this motion is decided as follows:

By separate motions, defendants Kelvin A. Sterling and Damion C. McKenzie (Mot. Seq. 002), and defendants Richard S. Hill Jr. and The Safety Zone LLC (Mot. Seq. 004), each seek an Order, awarding them, *inter alia*, summary judgment dismissing the plaintiffs, Shaun Antoine and Dionne Alvarez's complaint on the grounds that neither plaintiff's injuries satisfy the "serious injury" threshold requirement of Insurance Law §5102(d), and as such, neither plaintiff has a cause of action. The separate motions are granted.

Inasmuch as counsel for the plaintiff in his affirmation in opposition to the instant motions, states in a footnote that the action against defendants Andre E. Bygrave and Errol Bygrave has been settled, the motion by defendants Andre E. Bygrave and Errol Bygrave (Mot. Seq. 003) for the identical relief is denied as moot.

Antoine v. Bygrave
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This action arises out of a three car accident that occurred on October 8, 2007 at approximately 1:30 p.m. near the intersection of Jerusalem Road and Clarendon Road, in Uniondale, Nassau County, New York.

As best as can be determined from the papers submitted herein, the accident occurred as the motor vehicle being operated by defendant Andre Bygrave and owned by defendant Errol J. Bygrave came into contact with the passenger side of the vehicle being operated by defendant Kelvin A. Sterling and owned by defendant Damion C. McKenzie when the Sterling vehicle made a left turn in front of the Bygrave vehicle which was traveling straight on Jerusalem Avenue. Apparently, in an effort to avoid the collision, Andre Bygrave steered his vehicle to the left but ultimately came into contact with the driver's side front bumper of the motor vehicle owned by defendant The Safety Zone, LLC and being operated by defendant Richard S. Hill Jr. The Safety Zone LLC vehicle was parked on Jerusalem Avenue at the time of this accident. Plaintiffs Shaun Antoine and Dionne Alvarez were passengers in the Bygrave vehicle at the time of this collision. Plaintiff Alvarez was seated in the front passenger seat and plaintiff Antione was seated in the rear passenger side of the Bygrave vehicle.

As a result of the accident, both plaintiffs claim that they each sustained serious injuries. Specifically, plaintiff Shaun Antoine claims that as a result of this collision, he sustained injuries to his left shoulder, neck and back. He alleges that he sustained, *inter alia*: supraspinatus impingement related to the acromioclavicular arch of the left shoulder; thoracic herniation of the nucleus pulposus; cervical, thoracic, and lumbar segmental dysfunction; left shoulder contusion, sprain/strain; traumatic musculo-ligamentous sprain/strain injuries to neck; and decreased range of motion of the cervical, lumbar and thoracic spine regions and left shoulder (Bill of Particulars, ¶9).

At his sworn examination before trial, plaintiff Shaun Antoine testified that following the accident, he left in an ambulance to Nassau County Medical Center with complaints of pain in his left shoulder, lower back and neck. X-rays were taken and he was discharged the same day with pain killers. Antoine stated that he had previously dislocated his left shoulder in 2005 for which he had received treatment. With respect to his employment, Antoine testified that at the time of the accident, he was working for the Nassau County Public Library system as a messenger delivering books (p. 37). He testified that he chose not go to work the day after the accident and it was not pursuant to the directive of a doctor (pp. 30-31). He stated that he returned to work two weeks after the accident, resuming his full time schedule and his normal duties (pp. 31, 38). As to his activities, plaintiff stated that he can no longer do laundry, go food shopping or lift heavy items as a result of this accident (pp. 35-36).

Similarly, as a result of the collision, Dionne Alvarez claims that he sustained injuries to his left shoulder and back. Specifically, Alvarez alleges that he sustained, *inter alia*: large herniation at L5-S1 slightly asymmetric toward the right side resulting in mass effect on the

ventral sac, impingement and displacement of the right S1 nerve root within the right anterolateral canal and bilateral foraminal narrowing; supraspinatus impingement related to the acromioclavicular arch of the left shoulder; right L5-S1 radiculopathy; thoracic and cervical segmental dysfunction; loss of the normal cervical lordosis; traumatic musculo-ligamentaous sprain/strain injuries to neck; and left shoulder sprain/strain (Bill of Particulars, ¶9).

At his sworn examination before trial, plaintiff Dionne Alvarez testified that at the time of the accident, he was working part-time at a temporary job as a "helper" for a trucking company involved in delivery service (pp. 9-10). He stated that he was employed for approximately one month prior to the accident (p. 9) and as a result of this accident, he was out of work for approximately one week (p. 37). He resumed employment again in March 2008 (*Id*). As to activities, Alvarez testified that there is nothing that he cannot do as a result of this accident. That is, while he is not completely impaired from performing his usual activities as a result of this accident, certain activities including getting up in the morning, twisting, and playing some sports take longer to do. He stated that he cannot sit or stand for long periods of time (pp. 29-30).

Both plaintiffs claim that their respective injuries fall within the following four categories of the serious injury statute: 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; and 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 (Bill of Particulars, ¶15). Whether they can demonstrate the existence of a compensable serious injury, however, depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 [1st Dept. 2002]).

In that regard, it is noted that since neither plaintiff alleges or claims that they have sustained a "total loss of use" of a body organ, member, function or system, it is plain that neither plaintiff's injuries satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]).

Similarly, any claims that plaintiff's injuries satisfy the 90/180 category of Insurance Law § 5102(d) is also contradicted by their own testimony. Plaintiff Shaun Antoine testified that he returned to work two weeks after the accident, resuming his full time schedule and his normal duties (pp. 31, 38). In addition, plaintiff Dionne Alvarez testified that he was out of work for only one week following this accident.

Moreover, neither plaintiff claims that as a result of their alleged injuries, they are now

"medically" impaired from performing any of their respective daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]), or that they are curtailed "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]; *see also Sands v. Stark*, 299 AD2d 642 [3rd Dept. 2002]). In light of these facts, this Court determines that both plaintiffs have effectively abandoned their 90/180 claim for purposes of defendants' initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

In light of the foregoing, this Court will restrict its analysis to the remaining two categories as it pertains to each plaintiff; to wit, permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.

Under the no-fault statute, to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires 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 (*Licari v. Elliot*, supra; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

Furthermore, when, as in this case, 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.*, supra). 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*).

Recently, the Court of Appeals in *Perl v. Meher*, 2011 NY Slip Op. 08452, held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v. Meher*, 2011 NY Slip Op. 08452 [2011]).

With these guidelines in mind, this Court will now turn to the merits of defendants' motions. It is noted at the outset that in support of their motion, counsel for defendants Richard S. Hill Jr. and The Safety Zone LLC (Mot. Seq. 004) adopt, incorporate and rely upon the proof submitted by defendants Kelvin A. Sterling and Damion C. McKenzie.[1] Thus, the motions will

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[1]As stated above, the action against the Bygrave defendants has settled. Accordingly, this Court will not address the Bygrave motion.

be addressed concurrently.

In support of their motion, defendants Sterling and McKenzie submit the following: the sworn report of Dr. John C. Killian, M.D., an orthopedic surgeon who performed an independent orthopedic examination of Shaun Antoine on June 16, 2011; the sworn report of Dr. Sheldon P. Feit, M.D., a radiologist who performed an independent radiology review of an MRI of Shaun Antoine's cervical and lumbosacral spine taken on December 11, 2007 and of his left shoulder taken on November 10, 2007; the sworn report of Dr. John C. Killian, M.D., an orthopedic surgeon who performed an independent orthopedic examination of Dionne Alvarez on June 16, 2011; and the sworn report of Dr. Sheldon P. Feit, M.D., a radiologist who performed an independent radiology review of an MRI of Dionne Alvarez's lumbosacral and cervical spine taken on December 11, 2007 and of his left shoulder taken on November 10, 2007.

Initially, it is noted that the reports of Dr. Sheldon P. Feit, although sworn, are nonetheless incompetent. It is plain from a simple reading of Dr. Feit's reports that he has merely "reviewed" Shaun Antoine and Dionne Alvarez's "MRIs." It is unclear to this Court as to whether the "MRIs" to which Dr. Feit refers are meant to indicate MRI films or MRI reports of other physicians. In either case, Dr. Feit's reports are incompetent and inadmissible.

In order to constitute competent medical evidence, a radiologist is required to have the MRI taken under his or her supervision and he or she also has to be the physician to read the MRI (*Fiorillo v. Arriaza,* 24 Misc.3d 1215(A) [Sup. Ct. Nassau 2007]; *Sayas v. Merrick Transportation*, 23 AD3d 367 [2nd Dept. 2005]). Under these circumstances, while the radiologist need not pair the findings of the MRI films with a physical examination, he or she must nevertheless also report an opinion as to the causality of the findings (*Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]).

MRI reports are also admissible if another radiologist, i.e., not the radiologist who performs the MRI scan, avers that he or she personally reviewed either the actual MRI films or the sworn MRI reports of the prescribing radiologist, rather than just the unsworn MRI reports of another physician (*Dioguardi v. Weiner*, 288 AD2d 253 [2nd Dept. 2001]; *Beyel v. Console*, 25 AD3d 636 [2nd Dept. 2006]; *Porto v. Blum*, 39 AD3d 614 [2nd Dept. 2007]).[2] However, if another physician avers that he or she personally reviewed the prescribing radiologist's sworn reports (not the MRI films), that physician must also pair up his or her findings with a recent physical examination in order to constitute competent medical evidence (*Silkowski v. Alvarez*, 19 AD3d

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[2]Of note, however, is that if the results of the unsworn MRI report are referred to in the affirmed medical reports of the defendant's examining doctor, the plaintiff is then permitted to submit and rely upon the same unsworn MRI report in opposing the motion (*Zarate v. McDonald*, 31 AD3d 632 [2nd Dept. 2006]).

476 [2nd Dept. 2005]).

Here, Dr. Feit does not proffer an opinion as to the causality of his findings (*Collins v. Stone*, supra; *Betheil-Spitz v. Linares*, supra). Additionally, Dr. Feit fails to pair up his findings with a recent physical examination of each/either plaintiff (*Silkowski v. Alvarez*, supra). Accordingly, Dr. Feit's reports fail to constitute objective medical evidence and fly in the face of the requirements spelled out by the Court of Appeals in *Toure v. Avis Rent A Car* Sys., supra.

Despite the incompetency of Dr. Feit's reports, the defendants have nonetheless established their prima facie entitlement to judgment as a matter of law.

The affirmed reports of Dr. John Killian who examined each plaintiff and performed quantified range of motion testing on their cervical and lumbosacral spine and left shoulder with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal, sufficiently demonstrates that neither plaintiff sustained a "serious injury" as a result of this accident. Dr. Killian also performed motor and sensory testing and found no deficits, and based on his clinical findings and medical records review, concluded that each plaintiff has recovered fully from all alleged injuries from the subject accident (*Staff v. Yshua*, 59 AD3d 614 [2nd Dept. 2009]; *Cantave v. Gelle*, 60 AD3d 988 [2nd Dept. 2009]).

Having made a prima facie showing that the neither plaintiff sustained a "serious injury" within the meaning of the statute, the burden shifts to the plaintiffs to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v. Perez,* 4 NY3d 566 [2005]; *see also Grossman v. Wright*, supra).

In opposition, counsel for plaintiff surprisingly fails to submit any medical proof to rebut defendants' prima facie showing. Accordingly, plaintiffs' opposition is wholly insufficient to present a triable issue of fact herein (*see Pommels v. Perez,* supra; *see also Grossman v. Wright,* supra; *Licari v. Elliot*, supra).

In the absence of any competent or admissible evidence supporting a claim for serious injury, defendants, Kelvin A. Sterling and Damion C. McKenzie's motion (Mot. Seq. 002) and defendants Richard S. Hill Jr. and The Safety Zone LLC's motion (Mot. Seq. 004) each seeking an Order, awarding them summary judgment dismissing the plaintiffs, Shaun Antoine and Dionne Alvarez's complaint on the grounds that neither plaintiff's injuries satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is granted.

The complaint is dismissed as against said defendants.

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All matters not decided herein are DENIED.

This constitutes the Decision and Order of this Court.

Settle Judgment on Notice.

Dated: April 30, 2012
Mineola, New York

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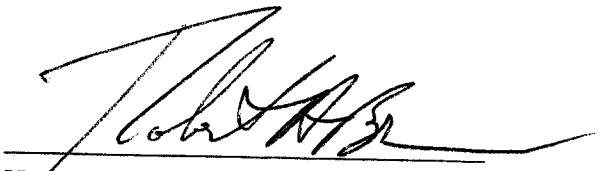

Hon. Robert A. Bruno, J.S.C.

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