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SHORT FORM ORDER

INDEX No. 10-31668
CAL No. 11-01750MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 10-21-11 (#001)
MOTION DATE 1-18-12 (#002)
ADJ. DATE 2-8-12
Mot. Seq. # 001 - MD
002 - MG

---X

ONEIL HOWE,

Plaintiff,

- against -

ROBERT WAGNER, GEORGE H. WAGNER, DANIELLE, L. HIMELFARB and AIMEE I. HIMELFARB,

Defendants.

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Upon the following papers numbered 1 to 35 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 20; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 21 - 28; 29 - 30; Replying Affidavits and supporting papers 31 - 33; 34 - 35; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendants Robert Wagner and George Wagner seeking summary judgment dismissing the complaint and the motion (#002) by plaintiff seeking summary judgment in his favor on the issue of liability hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendants Robert Wagner and George Wagner seeking summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the motion by plaintiff seeking summary judgment in his favor on the issue of liability is granted.

Plaintiff Oneil Howe 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 Park Avenue and Prairie Road in the Town of Huntington on June 1, 2010. The accident allegedly occurred when the vehicle operated by defendant Robert Wagner and owned by defendant George Wagner struck the rear of the vehicle operated by defendant Danielle Himelfarb and owned by defendant Aimee Himelfarb. As a result of the initial collision between the Wagner and Himelfarb vehicles, the Himelfarb vehicle struck the rear of plaintiff's vehicle. Plaintiff, by his bill of particulars, alleges that he sustained various personal injuries, including disc bulges at levels C2 through C5 and T12 through L4; anterior disc extension at levels C3 through C7; diffuse reversal of the cervical and lumbar lordosis; and disc herniations at levels C5 through C7 and levels L3 through L5. Plaintiff further alleges that he was confined to his home for approximately four days and that he was incapacitated from his employment for approximately four months as a result of the injuries he sustained in the subject collision.

Defendants now move for summary judgment on the basis that the injuries plaintiff alleges to have sustained fail to meet the "serious injury" threshold requirement of the Insurance Law. In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, and the sworn medical report of Jeffrey Guttman, M.D. At defendants' request, Dr. Guttman conducted an independent orthopedic examination of plaintiff on April 29, 2011. Plaintiff opposes the motion on the ground that there are material questions of fact as to whether his injuries meet the serious injury threshold requirement of § 5102(d) of the Insurance Law. In opposition to the motion, plaintiff submits uncertified copies of his medical records, the sworn medical reports of Dr. Steven Winter and Dr. Timothy Mosomillo, and his own affidavit and deposition transcript.

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*).

Based upon the adduced evidence, defendants established, prima facie, their entitlement to judgment as a matter of law that the injuries alleged to have been sustained by plaintiff as a result of the subject collision failed to meet the serious injury threshold requirement of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Al-Khilwei v Truman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). Defendants' orthopedist, Dr. Guttman, states in his medical report that an examination of plaintiff revealed that he has full range of motion in his spine, that the normal lordoctic curve of his cervical and thoracolumbar spine is maintained, and that there is no paravertebral tenderness or muscle spasm upon palpation of plaintiff's spine. Dr. Guttman states that the straight leg raising test is negative and that plaintiff has good muscle strength and no atrophy. Dr. Guttman opines that the cervical and lumbar strains that plaintiff sustained as a result of the subject accident have resolved, and that there is no evidence of an orthopedic disability as a result of any injuries sustained by plaintiff in the subject collision.

Therefore, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether they sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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, 936 NYS2d 655 [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***, 57 NY2d 230, 455 NYS2d 570 [1982]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to defendants' prima facie showing, plaintiff has raised a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Belliard v Leader Limousine Corp.***, __ AD3d __, 2012 NY Slip Op 02826 [2d Dept 2012]; ***Johnson v Cristino***, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]; ***Young Chool Yoo v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]). In his affirmation, Dr. Winter states that plaintiff's cervical and lumbar magnetic resonance imaging ("MRI") examinations revealed that he had bulging discs and herniations in his cervical and thoracolumbosacral spine, and diffuse reversal of his cervical and lumbar lordosis. Although disc bulges and herniations, standing alone are not evidence of a "serious injury" under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [1st Dept 2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Plaintiff's treating physician, Dr. Mosomillo, concludes in his affirmation, based upon his contemporaneous and recent examinations of plaintiff that revealed significant range of motion limitations in the cervical and thoracolumbar regions of his spine, that plaintiff's injuries are permanent and are causally related to the subject accident. Dr. Mosomillo further states that plaintiff's prognosis for a full recovery is unlikely and that future treatment is required to maintain "the level of pain free limitation in [his] range of motion, because without regular treatment, his symptomatology will worsen and his range of pain free motion will decrease." Thus, Dr. Mosomillo's findings concerning plaintiff conflict with those of defendants' expert (*see* ***Noble v Ackerman***, 252 AD2d 392, 675 NYS2d 86 [1st Dept 1998]), and are sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury to the cervical and thoracolumbar regions of his spine under the "limitations of use" categories of the Insurance Law as a result of the subject collision (*see* ***Perl v Meher***, *supra*; ***Orgel v Kathleen Cab Corp.***, __ AD3d __, 2012 NY Slip Op 02652 [2d Dept 2012]; ***Livia v Atkins***, 93 AD3d 766, 940 NYS2d 318 [2d Dept 2012]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Plaintiff moves for summary judgment on the issue of liability, arguing that Robert Wagner's negligent operation of the Wagner vehicle was the sole proximate cause of the subject accident. In support of the motion, plaintiff submits copies of the pleadings, his own affidavit, an uncertified copy of the police accident report, and the deposition transcript of Robert Wagner. Defendants oppose the cross motion on the ground that there are material issues of fact as to whether Robert Wagner's conduct fell below the permissible standard of care.

It is well settled that a driver approaching a vehicle from the rear is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* ***Zweeres v Materi***, __ AD3d __, 2012 NY Slip Op 03184 [2d Dept 2012]; ***Nsiah-Ababio v Hunter***, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]; *see also* Vehicle and Traffic Law § 1129[a]). "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation " (***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 975, 898 NYS2d 173 [2d Dept 2010], *quoting* ***Klopchin v Masri***, 45 AD3d 737, 846 NYS2d 311 [2007]; *see* ***Volpe v Limoncelli***, 74 AD3d 795, [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, [2d Dept 2010]; ***Harrington v Kern***, 52 AD3d 473, 859 NYS2d 480 [2d Dept 2008]). However, the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (***Chepel v Meyers***, 306 AD2d 235, 237, 762 NYS2d 95 [2d Dept 2003]; *see* ***Gleason v Villegas***, 81 AD3d 889, 917 NYS2d 890 [2d Dept 2011]; ***Tutrani v County of Suffolk***, 64 AD3d 53, 878 NYS2d 412 [2d Dept 2009]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; *see also* Vehicle and Traffic Law § 1163). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead is sufficient to overcome the inference of negligence and preclude an award of summary judgment (*see* ***Abbott v Picture Cars East, Inc.***, 78 AD3d 869, 911 NYS2d 449 [2d Dept 2010]; ***Costa v Eramo***, 76 AD3d 942, 907 NYS2d 510 [2d Dept 2010]; ***Franco v Breceus***, 70 AD3d 767, 895 NYS2d 152 [2d Dept 2010]).

Here, plaintiff established, prima facie, his entitlement to judgment as a matter of law by submitting evidence demonstrating that his vehicle was struck in the rear by the Himelfarb vehicle after it had been struck in the rear by the Wagner vehicle (*see* ***Carman v Arthur J. Edwards Mason Contr. Co., Inc.***, 71 AD3d 813, 897 NYS2d 191 [2d Dept 2010]; ***Smith v Seskin***, 49 AD3d 628, 854 NYS2d 420 [2d Dept 2008]; ***Hughes v Cai***, 55 AD3d 675, 866 nYS2d 253 [2d Dept 2008]). Plaintiff submitted Robert Wagner's deposition testimony, wherein he testified that he struck the rear of the Himelfarb vehicle traveling in front of him, and once he exited his vehicle he realized that the Himelfarb vehicle had been propelled forward into plaintiff's vehicle. He further testified that just before the accident occurred he looked down to retrieve a tissue to wipe his glasses and that by the time he returned his eyes to the road, he was directly behind the Himelfarb vehicle and unable to prevent the impact from occurring. In opposition to plaintiff's prima facie showing, defendants failed to rebut the inference of negligence by providing a non-negligent explanation for the subject collision's occurrence (*see* ***Hauser v Adamov***, 74 AD3d 1024, 904 NYS2d 102 [2d Dept 2010]; ***Arias v Rosario***, 52 AD3d 551, 860 NYS2d 168 [2d Dept 2007]; ***Ahmad v Grimaldi***, 40 AD3d 786, 834 NYS2d 480 [2d Dept 2007]; ***Campbell v City of Yonkers***, 37 AD3d 750, 833 NYS2d 101 [2d Dept 2007]). Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted.

Dated: MAY 09 2012

J.S.C.

HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION