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SHORT FORM ORDER

INDEX No. 10-3636
CAL. No. 11-01918MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 2-9-12
ADJ. DATE 5-31-12
Mot. Seq. # 001 - MG;CASEDISP
002 - XMD

MICHAEL KRUITHOFF,

Plaintiff,

- against -

DONALD J. BRADY, ARI FLEET LT and JEFFREY B. WEBB,

Defendants.

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Upon the following papers numbered 1 to 45 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 27 ; Answering Affidavits and supporting papers 28 - 41; 42 -43 ; Replying Affidavits and supporting papers 44 - 45; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Jeffrey Webb for an order granting summary judgment in his favor on the complaint is granted; and it is

ORDERED that the Court, sua sponte, dismisses the complaint and the cross claim against defendants Donald Brady and Ari Fleet LT; and it is further

ORDERED that the cross motion by defendants Donald Brady and Ari Fleet L.T. for an order granting summary judgment in their favor on the complaint and the cross claim is denied, as moot.

Plaintiff Michael Kruithoff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on the Long Island Expressway, near exit 53, in the Town of Islip on April 7, 2009. The accident allegedly happened when a vehicle driven by defendant Jeffrey Webb struck the rear of a vehicle owned by defendant Ari Fleet L.T. and driven by defendant

Donald Brady as it was stopped on the roadway due to heavy traffic. The force of the collision allegedly propelled Brady's vehicle into the rear of plaintiff's vehicle, which was stopped in front of Brady's vehicle due to traffic. By his bill of particulars, plaintiff alleges he suffered various injuries as a result of the collision, including an acetabular labrum tear, cervical and lumbar strains, cervical and lumbar radiculopathy, and a bulging disc at level L3-L4. Plaintiff, who is employed as an electrician, further alleges he was unable to work for approximately two months due to his injuries. In his answer to the complaint, Webb interposes a cross claim for contribution against Ari Fleet and Brady.

Webb now moves for summary judgment in his favor on the ground that plaintiff is precluded by Insurance Law §5104 from recovering for non-economic loss, as he did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d). Webb's submissions in support of the motion include copies of the pleadings and the bill of particulars, a transcript of plaintiff's deposition testimony, magnetic resonance imaging (MRI) reports prepared in April 2009 concerning plaintiff's cervical spine and left hip, and a sworn medical report prepared by Dr. Michael Katz. At Webb's request, Dr. Katz, an orthopedic surgeon, conducted an independent examination of plaintiff in May 2011 and reviewed various medical reports and records relating to plaintiff's alleged injuries. Also submitted in support of the motion are copies of records related to plaintiff's treatment at the emergency department of Good Samaritan Hospital on the date of the accident, as well as records related to medical treatment provided to plaintiff by the emergency department of Huntington Hospital following a work-related accident in January 2011.

Ari Fleet and Brady cross-move for summary judgment dismissing the complaint and the cross claim against them. In addition to alleging that plaintiff executed a stipulation discontinuing the action against them, Ari Fleet and Brady (hereinafter collectively referred to as the Brady defendants) argue that they are entitled to summary judgment in their favor on the cross claim, as the deposition testimony shows Webb's negligence was the sole proximate cause of the subject motor vehicle accident. In support of the cross motion, the Brady defendants submit, among other things, copies of the pleadings; transcripts of the deposition testimony of plaintiff, Brady and Webb; and a stipulation, dated August 28, 2011, discontinuing plaintiff's claim against the Brady defendants.

Although he does not dispute the allegation that he executed a stipulation discontinuing his claims against Ari Fleet and Brady, plaintiff opposes both motions, arguing that defendants' submissions are insufficient to demonstrate entitlement to summary judgment against him as a matter of law. Alternatively, plaintiff asserts the evidence submitted in opposition raises triable issues as to whether he suffered injury within the limitation of use category or the 90/180 category of Insurance Law § 5102 (d). Plaintiff's submissions in opposition to the motions include his own affidavit, the sworn report of Dr. Gregory Lieberman, and sworn MRI reports concerning his left hip and lumbar spine.

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 seeking 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). 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]).

Webb's submissions established a prima facie case that plaintiff did not suffer "serious injury" to his lumbar spine or left hip within the "significant limitation of use" category (*see* ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Frederique v Krapf***, 86 AD3d 533, 926 NYS2d 170 [2d Dept 2011]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***Rodriguez v Huerfano***, 46 AD3d 794, 849 NYS2d 275 [2d Dept 2007]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). The medical report of Dr. Katz states that plaintiff presented at the May 2011 examination with the complaint of soreness in his left hip when he stands. It states, in relevant part, that plaintiff exhibited full movement in his cervical and lumbar regions, as well as in his left hip, and provides the measurements taken during range of motion testing and the normative values for such joint functions. It states that plaintiff's gait was normal, that there was no evidence of paravertebral muscle spasm, that his motor strength and reflexes were normal, and that various clinical tests to assess spine pathologies were negative. It also states that there was no evidence of hip contractures or crepitation, and no evidence of inflammation of the trochanteric bursa. Dr. Katz concludes that plaintiff suffered cervical and lumbosacral strains and a left hip contusion as a result of the accident, and that such conditions have resolved. He further concludes that plaintiff is not disabled and is capable of performing his work as an electrician on a full-time basis and without any restrictions. Relying on plaintiff's own deposition testimony that he missed less than two months of work following the accident, Webb also established, prima facie, that plaintiff did not suffer injury within the 90/180 category through plaintiff's deposition testimony (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Candia v Omonia Cab Corp.***, 6 AD3d 641, 775 NYS2d 546 [2d Dept 2004]; *cf.* ***Aujour v Singh***, 90 AD3d 686, 934 NYS2d 240 [2d Dept 2011]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). Plaintiff's submissions in opposition to the motions are insufficient to defeat summary judgment. Significantly, Dr. Lieberman's report states that at the initial examination on April 29, 2009, plaintiff reported pain in the lumbar spine and in the hip and groin areas, and that he had muscle

spasms and "diminished" movement in the lumbar region. It states, in relevant part, that at the first follow-up examination conducted in May 2009, plaintiff walked with a normal gait, exhibited normal range of motion in his lumbar spine and hips, and had no radicular symptoms. It states that at the second follow-up examination, conducted on May 29, 2009, plaintiff again complained of pain in the groin area and had "diminished" rotation and lateral bending in his lumbar region, and that he diagnosed plaintiff as suffering from a hip contusion, groin strain, and a bulging disc. Furthermore, the report states that plaintiff suffered a lower back and hip injury as a result of a work-related accident, and that a labral tear and disc bulges revealed by subsequent MRI examination show a labral tear and disc bulges caused by such accident. It states that an examination of plaintiff conducted in February 2012 revealed "diminished rotation and diminished lateral bending" in the lumbar region, and normal radicular symptoms. However, in the conclusion portion of the report, Dr. Lieberman states that plaintiff suffers from a "moderate to severe partial disability," and that the disc bulges and labral tear to his hip were caused by the subject accident, not a degenerative condition.

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement 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]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or 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; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]).

Thus, Dr. Lieberman's report, which contains neither a quantitative nor a qualitative assessment of plaintiff's limitations in his lumbar spine and hip, is insufficient to raise a triable question as to whether plaintiff suffered an injury within the "limitation of use" category (*see* ***Tinyanoff v Kuna***, __ AD3d __, 949 NYS2d 203 [2d Dept 2012]; ***Travis v Batchi***, 75 AD3d 411, 905 NYS2d 66 [1st Dept 2010], *affd* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655; ***Simanovskiy v Barbaro***, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; ***Taylor v Flaherty***, 65 AD3d 1328, 887 NYS2d 144 [2d Dept 2009]; *cf.* ***Johnson v Cristino***, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]). The report also fails to explain the inconsistencies of Dr. Lieberman's own findings (*see* ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]). Further, the MRI reports submitted by plaintiff are insufficient to raise a triable issue, as the existence of bulging discs and torn tendons, ligaments or cartilage is not evidence of a serious injury absent objective evidence of the extent of the alleged physical limitation caused by such injury and its duration (*see* ***Solis v Silvagni***, 82 AD3d 1349, 918 NYS2d 260 [3d Dept], *lv denied* 17 NY3d 715, 933 NYS2d 655 [2011]; ***Lozusko v Miller***, 72 AD3d 908, 899 NYS2d 358 [2d Dept 2010]; ***Magrid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]). Finally, plaintiff failed to submit competent medical evidence that the injuries he allegedly sustained due to the accident rendered him unable to perform substantially all of his normal daily activities for at least 90 days of the 180 days immediately following the accident (*see* ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2d Dept 2009]; ***Hemsley v Ventura***, 50 AD3d 1097, 857 NYS2d 642 [2d Dept 2008]), and his affidavit failed to raise a triable issue as

to whether he suffered a serious injury (*see* ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Accordingly, Webb's motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted. Further, having determined that plaintiff's injuries do not meet the serious injury threshold, the Court, sua sponte, grants summary judgment dismissing the complaint and the cross claim against the Brady defendants (CPLR 3212[b]).

Dated: 9/11/12

A.J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**