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SHORT FORM ORDER

INDEX No. 10-43637
CAL No. 12-01178MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 11-13-12
ADJ. DATE 12-12-12
Mot. Seq. # 002 - MG; CASEDISP

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LEONARD ZIELINSKI, JR. and MARY ANN ZIELINSKI, his wife,

Plaintiffs,

- against -

THOMAS J. CUSAMANO, JOANNE CUSAMANO, THOMAS E. PETTIGREW, and MARIA A. PETTIGREW,

Defendants.

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 -25 ; Replying Affidavits and supporting papers 26 - 27 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Thomas Pettigrew and Maria Pettigrew seeking summary judgment dismissing the complaint is granted.

AH

Plaintiff Leonard Zielinski, Jr. commenced this action to recover damages for injuries he allegedly sustained in a motor vehicle accident that occurred at the intersection of Route 25 and Old Willets Path on November 5, 2008. Plaintiff's wife, Mary Ann Zielinski, instituted a derivative claim for loss of services. It is alleged that the accident occurred when the vehicle operated by defendant Thomas Cusamano and owned by defendant Joanne Cusamano struck the rear of the vehicle operated by defendant Thomas Pettigrew and owned by defendant Maria Pettigrew while it was stopped at a red traffic light on eastbound Route 25. As a result of the collision between the Cusamano and Pettigrew vehicles, the Pettigrew vehicle was propelled forward into the vehicle operated by plaintiff. By his bill of particulars, plaintiff alleges, among other things, that he sustained numerous personal injuries, including disc herniations at levels C3 through T1, cervical radiculopathy, and thoracic facet syndrome. Plaintiff further alleges that he has been and remains partially disabled since the date of the accident.

By order, dated October 9, 2011, this Court (Tanenbaum, J.) granted defendants Thomas Cusamano and Joanne Cusamano's motion for summary judgment dismissing the complaint and all cross claims against them. The order also awarded summary judgment in favor of plaintiffs and against defendants Thomas Pettigrew and Maria Pettigrew on the issue of liability.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries fail to meet the "serious injury" threshold requirement of § 5102 (d) of the Insurance Law as a result of the subject accident. In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical records, and the sworn medical reports of Dr. Michael Katz and Dr. Melissa Sapan Cohn. At defendants' request, Dr. Katz conducted an independent orthopedic examination of plaintiff on April 17, 2009. Also, at defendants' request, Dr. Sapan Cohn performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's thoracic spine performed on January 1, 2009.

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 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [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, by submitting competent medical evidence and plaintiff's deposition transcript, have established, prima facie, that plaintiff did not sustain an injury within the meaning of the serious injury threshold requirement of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Estrella v Geico Ins. Co.***, __ AD3d __, 2013 NY Slip Op 00173 [2d Dept 2013]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Belliard v Leader Limousine Corp.***, 94 AD3d 931, 942 NYS2d 591 [2d Dept 2012]). Defendants' examining orthopedist, Dr. Katz, states in his medical report that an examination of plaintiff revealed he has full range of motion in his spine, right elbow and left hand, that there was no evidence of tenderness or paravertebral muscle spasm upon palpation of the paraspinal muscles, that his gait was normal, and that the straight leg raising test was normal. Dr. Katz states that a sensory examination of plaintiff reveals full sensation to light touch, that the Tinsel sign is negative, and that the Finkelstein's test is negative. Dr. Katz's used a goniometer to test plaintiff's ranges of motion in his spine, right elbow, and left hand, set forth his specific findings, and compared those findings to the normal ranges (*see* ***Martin v Portexit Corp.***, 98 AD3d 63, 948 NYS2d 21 [1st Dept 2012]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; ***DeSulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Moreover, Dr. Katz opines that the spinal strains and the contusion to the right elbow sustained by plaintiff as a result of the subject collision have resolved, that his prognosis is excellent, and that he does not exhibit any signs or symptoms of "permanence relative to the musculoskeletal system [or] relative to [the subject accident]." Dr. Katz further states that plaintiff currently is not disabled, and that he is capable of his gainful employment in a demanding capacity as a head of security and his activities of daily living.

Furthermore, defendant's examining radiologist, Dr. Sapan Cohn, states in her medical report that the MRI examination of plaintiff's thoracic spine reveals diffuse multilevel degenerative disc disease, anterior osteophytes and disc dessication throughout plaintiff's spine. Dr. Sapan Cohn explains that disc dessication occurs when the disc has dried out and lost its normal water content, and is the commencement of degenerative disc disease. Dr. Sapan Cohn further explains that anterior osteophytes are bony spurs that extend off of the vertebral bodies, which represent actual bone formation, and is

consistent with chronic and long-standing disease. Dr. Sapan Cohn opines that there is no evidence of an acute traumatic-related injury and that plaintiff has multilevel degenerative disc disease throughout his thoracic spine.

In addition, plaintiff's own medical records demonstrate the lack of merit to plaintiff's claim of a causally related serious injury to the spine as result of the subject accident (*see* ***Licari v Elliott***, *supra*; ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; ***Michaelides v Martone***, 186 AD2d 544, 588 NYS2d 366 [2d Dept 1992]; ***Covington v Cinnirella***, 146 AD2d 565, 536 NYS2d 514 [2d Dept 1989]). Defendants have submitted the unsworn medical reports of Dr. Timothy Groth, which demonstrate that plaintiff previously sustained injuries, as well as received treatment, to the areas that he is claiming were injured in the subject accident. Dr. Groth's medical reports also show that plaintiff sustained additional injuries to the same areas as a result of a motor vehicle accident that occurred on May 25, 2011. A defendant may rely on the unsworn medical reports of a plaintiff's physician to demonstrate that a plaintiff did not sustain a serious injury, since the serious injury threshold is a "threshold imposed solely on plaintiff" (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 682 [2d Dept 1992], *quoting* ***Licari v Elliot***, *supra* at 230, *see* ***Elsahaaraway v U-Haul Co. of Miss.***, 72 AD2d 878, 900 NYS2d 321 [2d Dept 2010]; ***Hernandez v Taub*** 19 AD3d 368, 796 NYS2d 169 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]).

Furthermore, reference to plaintiff's own deposition testimony shows that he did not sustain an injury within the "90/180" category of serious injury (*see e.g.* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]; ***Kolodziej v Savarese***. 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Lewars v Transit Facility Mgt. Corp.***, 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]). 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, 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***, *supra*). 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]).

Plaintiff opposes the motion on the ground that the evidence in opposition shows that he sustained injuries within the "limitations of use" categories and the 90/180 category of the Insurance Law as a consequence of the subject collision. In opposition to the motion, plaintiff submits his own affidavit, the unsworn medical report of Dr. Samuel Mayfield, and the affidavit of Dr. Timothy Groth.

In opposition, plaintiff has failed to raise a triable issue of fact as to whether he sustained a serious injury within the limitations of use categories or the 90/180 category of the Insurance Law (***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]). Although a plaintiff may rely upon his or her examining physicians' unsworn medical reports once the defendant has proffered such evidence to establish his or her prima facie case (*see* ***Dietrich v Puff Cab Corp.***, 63 AD3d 778, 881 NYS2d 463 [2d Dept 2009]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]), in this instance, defendants did not submit the uncertified medical report of Dr. Mayfield that plaintiff relies upon in an attempt to raise a triable issue of fact as to whether he sustained an injury within the serious injury threshold requirement of § 5102 (d) of the Insurance Law (*see* ***Khan v Finchler***, 33 AD3d 966, 824 NYS2d 340 [2d Dept 2006]). In any event, Dr. Mayfield states, among other things, in his medical report that plaintiff has disc bulges and disc herniations in his thoracic spine. However, Dr. Mayfield did not opine as to causation regarding his radiological findings, nor did he address the findings of pre-existing degenerative disc disease by defendants' expert and, as such, his report is insufficient to rebut defendants' prima facie case (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2d Dept 2009]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]). Further, a herniated or bulging disc, by itself, is insufficient to constitute a serious injury; rather, to constitute an injury, a herniated or bulging disc must be accompanied by objective evidence of the extent of the alleged physical limitations resulting from the herniated or bulging disc (*see* ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]).

Moreover, although plaintiff is not required to proffer proof of a quantitative assessment contemporaneous with the accident (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Ortiz v Salahuddin***, __ AD3d __, 2013 NY Slip Op 00544 [1st Dept 2013]), he is required to offer competent objective medical evidence based upon a recent examination showing significant or consequential limitations in the range of motion in his spine, right elbow, and left hand (*see* ***Vega v MTA Bus Co.***, 96 AD3d 506, 946 NYS2d 162 [1st Dept 2012]; ***Castaldo v Migliore***, 291 AD2d 526, 737 NYS2d 862 [2d Dept 2002]). Plaintiff failed to proffer such evidence in opposition to the motion (*see* ***Jean v Labin-Natochenny***, 77 AD3d 623, 909 NYS2d 103 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]). The findings and opinions in Dr. Groth's affidavit are not based upon a recent examination of plaintiff. Absent findings from a recent examination, Dr. Groth cannot offer an opinion as to the extent or duration of any limitations and, therefore, his affidavit is insufficient to raise a triable issue of fact as to whether plaintiff's alleged injuries existed for a sufficient period of time to constituted a serious injury under the limitations of use categories of the Insurance Law (*see* ***Estrella v Geico Ins. Co.***, 102 AD3d 730, __ NYS2d __, 2013 NY Slip Op 00173

[2d Dept 2013]; ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). Additionally, Dr. Groth's affidavit, in which he states that, in his opinion, to a reasonable degree of medical certainty, plaintiff's pre-existing lumbar discomfort and cervical pain were exacerbated as a result of the subject accident, that he is in a "large amount of discomfort" since the accident, and that he is unable to engage in his normal daily living activities as a result of his injuries, is insufficient to defeat defendants' prima facie showing (*see* ***Licari v Elliot***, *supra*). 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]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Furthermore, the self-serving affidavit of plaintiff was insufficient to raise a triable issue of fact (*see* ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]; ***Luizzi-Schwenk v Singh***, 58 AD3d 811, 872 NYS2d 176 [2d Dept 2009]).

Finally, plaintiff failed to demonstrate that he was rendered unable to perform substantially all of his normal daily living activities for at least 90 days of the 180 days immediately following the accident (*see* ***Parise v New York City Tr. Auth.***, 94 AD3d 839, 941 NYS2d 868 [2d Dept 2012]; ***Lanzarone v Goldman***, 80 AD3d 667, 915 NYS2d 144 [2d Dept 2011]; ***Hemsley v Ventura***, 50 AD3d 1097, 857 NYS2d 642 [2d Dept 2008]). Accordingly, defendants Thomas Pettigrew and Maria Pettigrew's motion for summary judgment dismissing plaintiff's complaint on the basis that he failed to sustain a serious injury within the meaning of the Insurance Law is granted.

Dated: March 11, 2013

J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION