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SHORT FORM ORDER

INDEX No. 11-1374
CAL. No. 12-01662MV

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 1-24-13 (#001)
MOTION DATE 5-9-13 (#002)
ADJ. DATE 5-9-13
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD

---X

JOHN MURRAY,

Plaintiff,

- against -

JEWEL NASH,

Defendant.

---X

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Upon the following papers numbered 1 to 25 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers 13 - 20 ; Answering Affidavits and supporting papers 21 - 23 ; Replying Affidavits and supporting papers 24 - 25 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Jewel Nash seeking summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that the cross motion by plaintiff John Murray seeking summary judgment in his favor on the issue of liability is denied, as moot.

Plaintiff John Murray 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 Great Neck Road and Scudder Avenue in the Town of Babylon on November 30, 2009. It is alleged that the accident occurred when the vehicle owned and operated by defendant Jewel Nash struck the rear of plaintiff's vehicle while it was stopped at a red traffic light. By his bill of particulars, plaintiff alleges, among other things, that he sustained various personal injuries as a result of the subject collision, including cervical radiculopathy, cervicalgia, and disc herniations at levels C2 through C6.

Defendant now moves for summary judgment on the basis that plaintiff did not sustain injuries within the meaning of the "serious injury" threshold requirement of § 5102 (d) of the Insurance Law as a

result of the subject accident. In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the medical reports of Dr. Michael Katz and Dr. Stephen Peyser. Dr. Katz, at defendant's request, conducted an independent orthopedic examination of plaintiff on May 22, 2012. Also at defendant's request, Dr. Peyser performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's cervical spine performed on December 23, 2009.

Plaintiff opposes the motion on the grounds that defendant failed to demonstrate her prima facie entitlement to judgment as a matter of law that he did not sustain serious injuries within the meaning of the Insurance Law as a result of the subject accident, and that his evidence in opposition raises triable issues of fact as to whether he sustained injuries within the "limitations of use" categories and the 90/180" category of the Insurance Law. In opposition to the motion, plaintiff submits a copy of defendant's deposition transcript and a copy of the New York State's Workers' Compensation Board's notice of decision, dated July 13, 2011. In addition, plaintiff cross-moves for summary judgment in his favor on the issue of liability, arguing that his vehicle was stopped in traffic when it was struck in the rear by defendant's vehicle, and that defendant's negligent operation of her vehicle was the sole proximate cause of the subject accident.

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], *affd* 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, defendant established her 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 as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Torres v Ozel***, 92 AD3d 770, 938 NYS2d 469 [2d Dept 2012]; ***Wunderlich v Bhuiyan***, 99 AD3d 795, 951 NYS2d 885 [2d Dept 2007]). Defendants' examining orthopedist, Dr. Katz, used a goniometer to test plaintiff's ranges of motion in his spine and left shoulder, 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]). Dr. Katz states in his medical report that an examination of plaintiff reveals he has full range of motion in his spine and left shoulder, and that there was no tenderness or muscle spasms upon palpation of the paraspinal muscles of plaintiff's spine. Dr. Katz states that the straight leg raising test was negative, that plaintiff's gait was normal without antalgic or Trendelenburg component, and that a sensory examination of plaintiff revealed full sensation to light touch. Dr. Katz states that there was no evidence of swelling, erythema or induration in plaintiff's left shoulder, and that there was no tenderness along the joint line of plaintiff's left shoulder or deformity of his clavicle. Dr. Katz opines that the left shoulder contusion, thoracolumbosacral strain and cervical radiculopathy that plaintiff sustained as a result of the subject collision have resolved, and that he is not disabled. Dr. Katz concludes that plaintiff does not show any signs or symptoms of permanence relative to his neck, back or left shoulder, and that he is capable of full time, full duty work in a demanding capacity as an alarm technician without restrictions.

Additionally, defendant's examining radiologist, Dr. Peyser, states in his report that the findings of spondylitic changes, posterior central disc herniations and disc bulges on plaintiff's cervical MRI study are consistent with degenerative disc disease and multilevel disc herniation and bulging, and are not evidence of a post traumatic-type etiology causally related to the subject accident. In any event, 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]).

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]). In fact, plaintiff testified at an examination before trial that he went to work right after the accident and worked the entire day, and that he did not miss any time from

his employment as an alarm technician as a result of the injuries he allegedly sustained. 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). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). 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 Sys.***, *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]). 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, in opposition to defendant's prima facie showing, has failed to raise a triable issue of fact as to whether the alleged injuries to his spine and left shoulder constitute a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950; 944 NYS2d 236 [2d Dept 2012]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]; ***Lea v Cucuzza***, 43 AD3d 882, 842 NYS2d 468 [2d Dept 2007]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In fact, plaintiff failed to submit any objective medical evidence by his treating physicians or any medical records in admissible form to demonstrate that he sustained any injury to his spine or left shoulder (*see e.g.* ***Capriglione v Rivera***, 83 AD3d 639, 919 NYS2d 882 [2d Dept 2011]). "Any subjective complaints of pain and limitation of motion must be substantiated by verified objective medical findings based upon a recent examination" (***Rovelo v Volcy***, 83 AD3d 1034, 1035, 921 NYS2d 322 [2d Dept 2011], *quoting* ***Young v Russell***, 19 AD3d 688, 689, 798 NYS2d 101 [2d Dept 2005]; *see* ***Sham v B&P Chimney Cleaning & Repair, Co., Inc.***, 71 AD3d 979, 979, 900 NYS2d 72 [2d Dept 2010]; ***Ambos v New York Tr. Auth.***, 71 AD3d 801, 895 NYS2d 879 [2d Dept 2010]; ***Dantini v Cuffie***, 59 AD3d 490, 873 NYS2d 189, *lv denied* 13 NY3d 702, 886 NYS2d 93 [2009]; *see also* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]).

Moreover, plaintiff's submission of the Workers' Compensation Board's notice of decision, which concluded that he sustained a 25% loss of use of the left arm, is without probative value, because plaintiff did not allege any claims of injury to his left arm in his bill of particulars. More importantly,

the Workers' Compensation Board's decision awarding plaintiff a 25% loss of the use of his left arm, and its use of the word "permanent" in describing his condition are insufficient to raise a question of fact as to whether he sustained an injury within the limitations of use category of the Insurance Law absent objective medical evidence of a serious injury (*see e.g.* ***Jockimo v Abess***, 304 AD2d 999, 759 NYS2d [3d Dept 2003]).

Having determined that plaintiff did not sustain a serious injury within the meaning of §5102 (d) of the Insurance Law, plaintiff's cross motion for summary judgment in his favor on the issue of liability is denied, as moot.

Dated: 10/25/13

A.J.S.C.

_X_ FINAL DISPOSITION _____ NON-FINAL DISPOSITION