Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JAY HIRSCH,

Plaintiff,

-against-

PETER A. PRICE, K.G. VATCHINSKY and GOTHAM AREA LIMOUSINE CORP.,

Defendants.

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INDEX NO.: 11750/14
CALENDAR NO.: 201601288MV
MOTION DATE: 3/9/17
MOTION NO.: 003 CASEDISP; 004 MD

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 32 read on this motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-16; 17-24 ; Notice of Cross Motion and supporting papers __ ; Answering Affidavits and supporting papers 25-30 ; Replying Affidavits and supporting papers 31-32 ; Other__; it is,

ORDERED that the motion (motion sequence no. 003) of defendants K.G. Vatchinsky and Gotham Area Limousine Corp. and the motion (motion sequence no. 004) of defendant Peter Price hereby are consolidated for the purposes of this determination, and it is

ORDERED that the motion of defendants K.G. Vatchinsky and Gotham Area Limousine Corp. for summary judgment dismissing the complaint against them is granted; and it is further

ORDERED that the motion of defendant Peter Price, improperly denominated as a cross motion, for summary judgment dismissing the complaint against him is denied, as moot.

Plaintiff Jay Hirsch commenced this action to recover damages for injuries he allegedly sustained as a result of a multi-vehicle accident that occurred on the westbound Long Island Expressway ("LIE"), near its exit with Cross Island Parkway, in Queens County, New York, on June 26, 2013. It is alleged that the accident occurred when the vehicle operated by defendant K.G. Vatchinsky and owned by defendant Gotham Area Limousine Corp. struck the rear of the vehicle owned and operated by defendant Peter Price, propelling the Price vehicle forward into the rear of the vehicle owned and operated by plaintiff while it was stopped in traffic in the exit lane of the westbound LIE. By his bill of particulars, the plaintiff alleges, among other things, that he sustained various personal injuries as a result of the subject collision, including disc herniations at levels L2 through L6 and C3 through C7; disc bulges at levels C4-5 and L1 through S1; an annular tear at C2-3; and lumbar radiculopathy.

Defendants K.G. Vatchinsky and Gotham Area Limousine Corp. (hereinafter referred to collectively as "the Gotham Area defendants") now move for summary judgment on the basis that the injuries alleged to have been sustained by the plaintiff do not come within the meaning of section 5102(d) of the Insurance Law. In support of the motion, the Gotham Area defendants submit copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical records regarding the injuries at issue, and the sworn medical reports of Dr. Robert Letchenberg and Dr. P. Leo Varriale. At the Gotham Area defendants' request, Dr. Letchenberg conducted an independent neurological examination of the plaintiff on March 14, 2016. Also at the Gotham Area defendants' request, Dr. Varriale conducted an independent orthopedic examination of the plaintiff on March 29, 2016. Defendant Peter Price also moves for summary judgment on the same basis as the Gotham Area defendants, and relies upon the same evidence as the Gotham Area defendants in his cross motion. Plaintiff opposes the motions on the grounds that the defendants failed to make a *prima facie* showing that he did not sustain a serious injury as a result of the subject collision, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, the plaintiff submits his own affidavit, the affidavit of Dr. Frank Favazza, and uncertified copies of his diagnostic test results regarding the injuries at issue.

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, the Gotham Area defendants, by submitting competent medical evidence and plaintiff's deposition transcript, have demonstrated, *prima facie*, that the plaintiff did not sustain a serious injury within the meaning of section 5102(d) of the Insurance Law (*see Toure v Avis Rent A Car Sys.*, *supra*; *Gaddy v Eyler*, *supra; Green v Canada Dry Bottling Co. of N.Y., L.P.*, 133 AD3d 566, 20 NYS3d 94 [2d Dept 2015]). The Gotham Area defendants' examining orthopedist, Dr. Varriale, used a goniometer to test plaintiff's ranges of motion in his spine, shoulders, wrists, knees, hips, and ankles, 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. Varriale states in his medical report that an examination of the plaintiff reveals he has full range of motion in his spine, shoulders, knees, wrists, hips, elbows and ankles, that there is no paravertebral muscle spasm or tenderness upon palpation of the paraspinal muscles, that the straight leg raising test is negative, bilaterally, and that there is no atrophy in his muscles or evidence of instability in his shoulders or knees. Dr. Varriale states that there is no erythema, atrophy or sign of impingement in the plaintiffs' shoulders, and that there is no tenderness "about the shoulders including the AC joint anteriorly, laterally and posteriorly." Dr. Varriale opines that the sprains to the plaintiff's spine and left shoulder that were sustained as a result of the subject accident have resolved. Dr. Varriale further states that there is no medical necessity for any further physical therapy or orthopedic treatment, and that the plaintiff does not have an orthopedic disability and he is capable of performing his activities of daily living and employment without restrictions.

Likewise, the Gotham Area defendants' examining neurologist, Dr. Lechtenberg, states in his medical report that an examination of plaintiff reveals full range of motion in his spine, knees, wrists, hips, elbows, ankles, and shoulders; that there is no tenderness or muscle spasm upon palpation of the paraspinal muscles; that the straight leg raising test is negative; that plaintiff walks with a normal gait; that there is no signs of cerebellar dysfunction; that the motor examination is normal; and that the strength in his upper and lower extremities is normal. Dr. Lechtenberg states that plaintiff's examination did not reveal any objective, clinical, or neurological deficits, that his complaints of vertigo were subjective, and that there was no deficit of strength or sensation in plaintiff's hands. Dr. Lechtenberg further states that plaintiff is not disabled and is able to work any job for which he is qualified, and that his prognosis is good.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the "limitations of use" categories (*see Colon v Tavares*, 60 AD3d 419, 873 NYS2d 637 [1st Dept 2009]; *Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]) and the "90/180" category under Insurance Law §5102(d) (*see Jack v Acapulco Car*

Serv., Inc., 63 AD3d 1526, 897 NYS2d 648 [4th Dept 2010]; *Bleszcz v Hiscock*, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; *Nguyen v Abdel-Hamed*, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]; *Kuchero v Tabachnikov*, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]).

The Gotham Area defendants, having made a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained by plaintiff (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). 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 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]).

In opposition to the motion, plaintiff has failed to raise a triable issue of fact as to whether he sustained a serious injury within the meaning of §5102(d) of the Insurance Law as a result of the subject collision (*see Licari v Elliott*, *supra*; *Frisch v Harris*, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; *Mack v Valfort*, 61 AD3d 831, 876 NYS2d 887 [2d Dept 2009]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law §5102(d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). The medical evidence proffered by the plaintiff was insufficient to establish a serious injury or to defeat the Gotham Area defendants' *prima facie* showing. Moreover, plaintiff's affidavit is insufficient to raise a triable issue of fact as to whether he sustained a serious injury under the No-Fault statute (*see Strenk v Rodas*, 111 AD3d 920, 976 NYS3d 151 [2d Dept 2013]; *Ferber v Madorran*, 60 AD3d 725, 875 NYS2d 518 [2d Dept 2008]; *Leeber v Ward*, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]; *Shvartsman v Vildman*, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]). While plaintiff has submitted the affirmed medical report of Dr. Frank Favazza, dated February 14, 2017, showing that he sustained range of motion

limitations in his spine as a result of the accident, he failed to submit any objective admissible medical proof demonstrating the existence of such limitations based upon a contemporaneous examination (*see Estrella v GEICO Ins. Co.*, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; *Nesci v Romanelli*, 74 AD3d 765, 902 NYS2d 172 [2d Dept 2010]). "The absence of a contemporaneous medical report invites speculation as to causation" (*Griffiths v Munoz*, 98 AD3d 997, 999, 950 NYS2d 787 [2d Dept 2012]). In addition, Dr. Favazza is unable to substantiate the extent or degree of the limitation to plaintiff's spine caused by the alleged injuries and the duration (see *Caliendo v Ellington*, 104 AD3d 635, 960 NYS2d 471 [2d Dept 2013]; *Bacon v Bostany*, 104 AD3d 625, 960 NYS2d 190 [2d Dept 2013]; *Calabro v Petersen*, 82 AD3d 1030, 918 NYS2d 900 [2d Dept 2011]).

Moreover, the magnetic resonance imagining ("MRI") reports of the plaintiff's cervical, thoracic and lumbar regions of his spine merely established that the plaintiff had disc bulges and herniations in his spine, and a small annular tear at level C2-3 as of September 12, 2013 and September 19, 2013. The mere existence of a herniated or bulging disc or tear is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (*Bravo v Rehman*, 28 AD3d 694, 695, 814 NYS2d 225 [2d Dept 2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 50, 789 NYS2d 281 [2d Dept 2005]). Additionally, it should be noted that Dr. Daniel Schlusselberg, the radiologist who interpreted the MRI examinations of the plaintiff's cervical, thoracic and lumbar spine, failed to offer any opinion as to the cause of the bulging and herniated discs, or the annular tear at level C2-3 he noted therein (*see Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]).

Lastly, the plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited his usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (*see Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; *Haber v Ullah*, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). Accordingly, the Gotham Area defendants' motion for summary judgment dismissing the complaint based upon the plaintiff's failure to meet the serious injury threshold is granted. In view of this determination, the defendant Price's motion for the same relief is denied as moot.

Dated: August 29, 2017

HON. PAUL J. BAISLEY, JR.
J.S.C.