| **Gersbeck v Cheema** |
| --- |
| 2017 NY Slip Op 31916(U) |
| September 5, 2017 |
| Supreme Court, Suffolk County |
| Docket Number: 15-17284 |
| Judge: David T. Reilly |
|  |
|  |

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 15-17284
CAL. No. 17-00347MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

***PRESENT:***

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 3-29-17 (001)
MOTION DATE 5-24-17 (002)
ADJ. DATE 6-14-17
Mot. Seq. # 001 - MG; CASEDISP
# 002 - XMD

----------X

LENNY GERSBECK,

Plaintiff,

- against -

TEJ Ps CHEEMA,

Defendant.

----------X

HAROLD SOLOMON, ESQ.
Attorney for Plaintiff
430 Sunrise Highway
PO Box 1100
Rockville Center, New York 11571

MARTYN TOHER MARTYN & ROSSI
Attorney for Defendant
330 Old Country Road, Suite 211
Mineola, New York 11501

Upon the following papers read on these e-filed motion and cross motion for summary judgment; Notice of Motions/Order to Show Cause and supporting papers dated March 2, 2017 ; Notice of Cross-Motion and supporting papers dated March 17, 2017 ; Answering Affidavits and supporting papers _; Replying Affidavits and supporting papers dated May 25, 2017 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion by defendant for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

***ORDERED*** that the cross-motion by plaintiff for an order granting summary judgment in his favor on the issue of liability is denied, as moot.

This is an action to recover damages for personal injuries sustained by plaintiff when his vehicle was rear-ended by a vehicle owned and operated by defendant. The accident allegedly occurred on October 16, 2014 on the eastbound portion of Belt Parkway, near the Flatbush Avenue exit, in the County of Kings, New York. By the bill of particulars, plaintiff alleges that, as a result of the accident, he sustained various serious injuries and conditions, including bulging discs at levels L4-L5 and L5-S1, radiculopathy at level L5-S1, and left ankle dorsiflexors.

Defendant moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On such a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of defendant's examining physician (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On November 16, 2016, approximately two years after the subject accident, defendant's examining orthopedist, Dr. Matthew Skolnick, examined plaintiff and performed certain orthopedic and neurological tests, including Spurling's test and the straight leg raising test. Dr. Skolnick found that all the test results were negative or normal, and that there was no spasm or tenderness in plaintiff's cervical and lumbar regions. Dr. Skolnick also performed range of motion testing on plaintiff's cervical and lumbar regions and ankles, using a goniometer to measure his joint movement.

Dr. Skolnick found that plaintiff exhibited normal joint function in his cervical and lumbar regions and ankles. Dr. Skolnick opined that plaintiff had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at his deposition, plaintiff testified that following the accident he did not miss any time from work. He testified that two weeks after the accident he first saw a chiropractor and has received physical therapy and chiropractic treatment for over approximately two years. He also testified that since the accident, he cannot jog, stand or sit for long periods of time, and pick up his kids who weigh approximately 60 pounds. He has difficulty bending and picking up objects, vacuuming and sweeping. Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendant met his initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law §5102 (d) (*see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). 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***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***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*; ***Cebron v Tuncoglu***, *supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Plaintiff opposes the motion, arguing defendant's expert's report is insufficient to meet his burden on the motion. Plaintiff also argues that the medical reports prepared by his treating physicians and chiropractors raise a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the sworn MRI report of Dr. Edmond Knopp, the sworn affidavit of his chiropractor, Dr. James Rogers, the sworn

affidavit of his chiropractor, Dr. Carla Danielson, and the sworn affirmation of his physician, Dr. Joseph Cardinale.

Dr. Rogers's affidavit sets forth plaintiff's complaints and the significant limitations in his cervical and lumbar spinal function due to the accident, measured during range of motion testing performed at his initial consultation on November 7, 2014. During his initial consultation, Dr. Rogers examined plaintiff and performed certain orthopedic and neurological tests, including Kemp's test, Braggard's test, and a straight leg raising test, which were all positive. When Dr. Rogers re-examined plaintiff on December 20, 2014, he also performed range of motion testing on plaintiff's cervical and lumbar regions, and found that he continued to exhibit range of motion restrictions. However, Dr. Rogers failed to state how he measured the joint function in plaintiff's cervical and lumbar regions at his initial examination and re-examination. The Court can only assume that Dr. Rogers's tests were visually observed with the input of plaintiff. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Harney v Tombstone Pizza Corp.***, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; ***Herman v Church***, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]).

In his affidavit, Dr. Danielson stated that she performed electrodiagnostic testing on plaintiff on December 30, 2014, which revealed that there was a radiculopathy at left L5-S1. However, the mere existence of a herniated disc, a bulging disc, or radiculopathy is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*). Dr. Danielson offered no range of motion testing results in her reports (*see* ***Barrett v Jeannot***, 18 AD3d 679, 795 NYS2d 727 [2d Dept 2005]).

Dr. Cardinale's affirmation set forth plaintiff's complaints and the findings, including the positive results of the straight leg raising test performed at his initial consultation on August 6, 2015, approximately 10 months after the subject accident. Although Dr. Cardinale stated that plaintiff exhibited diminished range of motion in his thoracic and lumbar regions, he offered no range of motion testing results (see *id.*). Thus, plaintiff failed to provide any medical evidence concerning his condition contemporaneous to the accident (*see* ***Perl v Meher***, *supra*; ***Camilo v Villa Livery Corp.***, 118 AD3d 586, 987 NYS2d 164 [1st Dept 2014]).

The MRI report, dated November 18, 2014, of Dr. Knopp indicated that plaintiff had bulging discs at levels L4-L5 and L5-S1. The mere existence of a herniated disc, a bulging disc, or radiculopathy is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Keith v Duval***, *supra*; ***Casimir v Bailey***, *supra*; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*). Moreover, Dr. Knopp opined that said bulging discs were degenerative. Plaintiff's evidence is insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury.

Finally, plaintiff failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform his normal daily activities for at least 90 of the 180 days immediately following the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Il Chung***

***Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*).

Thus, defendant's motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted, and the complaint is dismissed. Accordingly, plaintiff's cross motion for summary judgment in his favor on the issue of liability is denied, as moot.

Dated: September 5, 2017

J.S.C.
**HON. DAVID T. REILLY**

**__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION**