SHORT FORM ORDER

INDEX No. 17-605249
CAL. No. 18-00922MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 7-26-18 (001)
MOTION DATE 2-7-19 (002)
ADJ. DATE 2-7-19
Mot. Seq. # 001 - MG; CASEDISP
Mot. Seq. # 002 - MD

---X

JAMES GONZALEZ,

Plaintiff,

-against-

MARGARET KRUMHOLZ,

Defendant.

---X

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated June 11, 2018 ; Notice of Cross Motion and supporting papers by plaintiff, dated December 31, 2018 ; Answering Affidavits and supporting papers by plaintiff, dated December 31, 2018 ; Answering Affidavits and supporting papers by defendant, dated January 25, 2018 ; Replying Affidavits and supporting papers by defendant, dated February 1, 2019 ; Replying Affidavits and supporting papers by plaintiff, dated February 6, 2019 ; Other ___; it is,

ORDERED that the motion by defendant Margaret Krumholz seeking summary judgment dismissing the complaint on the grounds that plaintiff James Gonzalez did not sustain an injury within the meaning of the serious injury threshold requirement of Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the cross motion by plaintiff for summary judgment in his favor on the issue of serious injury is denied, as moot.

Plaintiff James Gonzalez 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 Montauk Highway and Berard Boulevard in the Town of Islip on December 13, 2016. By his complaint, plaintiff alleges

that he was struck by the vehicle owned and operated by defendant Margaret Krumholz when it made a left turn from Berard Boulevard onto Montauk Highway. At the time of the accident, plaintiff was traveling on a skateboard through the subject intersection. Plaintiff, in his bill of particulars, alleges, among other things, that he sustained various personal injuries as a result of the subject collision, including disc herniations at levels C3 through C7, and disc bulges at levels T10 through S1. Plaintiff further alleges that he was incapacitated from his employment for approximately six months, and that he remains partially disabled until today as a result of the injuries he sustained in the accident.

Defendant now moves for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as result of the subject accident failed to meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Edward Toriello and Dr. James Greenfield. At defendant's request, Dr. Toriello conducted an independent orthopedic examination of plaintiff on April 23, 2018. Also at defendant's request, Dr. Greenfield performed an independent radiological review of the magnetic resonance imaging ("MRI") films of plaintiff's knees, and spine taken on January 8, 2017, February 14, 2017, February 7, 2017, and February 24, 2017, respectively. Plaintiff opposes the motion on the grounds that defendant has failed to meet his prima facie burden, 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 as a result of the subject accident. In opposition to the motion, plaintiff submits his own affidavit, and the sworn medical reports of Dr. Timothy Mosomillo, Dr. Chris Moros. Plaintiff also submits the sworn medical reports of Dr. Robert Diamond, Dr. Steven Winter, Dr. Cono Gallo, and Dr. Alan Greenfield.

Plaintiff also cross-moves for summary judgment in his favor on the complaint on the basis that the injuries he sustained as a result of the subject accident come within the meaning of the serious injury threshold requirement of Insurance Law § 5102 (d). Plaintiff relies on the same evidence as submitted in opposition to defendant's motion to establish his prima facie burden.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

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***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendant, by submitting competent medical evidence and plaintiff's deposition transcript, has established a prima facie case that plaintiff did not sustain a serious injury within the meaning of Section 5102 (d) of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Kaplan v Margolis***, 167 AD3d 727, 87 NYS3d 502 [2d Dept 2018]; ***Lambropoulos v Gomez***, 166 AD3d 952, 86 NYS3d 737 [2d Dept 2018]). Defendant's examining orthopedist, Dr. Toriello, states in his report that an examination of plaintiff revealed he has full range of motion in his spine and knees, that there was no paraspinal muscle spasm or atrophy, that there was no motor or sensory deficits in the upper or lower extremities, and that there was no erythema, ecchymosis, swelling or tenderness of the left or right knee. Dr. Toriello states that the straight leg raising test was bilaterally full and pain free, that ambulation was independent and normal, and that there was normal heel and toe gait. Dr. Toriello opines that the strains plaintiff sustained to his throacolumbar spine and knees in the accident have resolved, that there is no objective evidence of an orthopedic disability or permanency, and that he is capable of performing his normal daily activities of living without restriction.

In addition, defendant's examining radiologist, Dr. Greenfield, opines that a review of plaintiff's MRI studies for his knees shows no evidence of recent fractures or mensical or ligament tears, but there is evidence of Osgood-Schlatter disease, which is a residual finding of an old childhood disease and predates the subject accident's occurrence. Dr. Greenfield states that a review of the MRI films of plaintiff's cervical, thoracic and lumbar spine reveals evidence of longstanding multilevel degenerative disc disease, which existed prior to the happening of the instant accident. Dr. Greenfield further states that there are no findings on any of the MRI studies taken of plaintiff's knees and spine that can be attributed to the subject accident with any reasonable degree of medical certainty.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that he sustained injuries within 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* ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 897 NYS2d 648 [4th 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]). At an examination before trial, plaintiff testified that he did not return to his employment following the subject accident, although he was never advised by any doctor that he could not return to work. However, he did testify that his orthopedist informed him that restrictions, such as not performing flips or handstands at his employment as a gymnastics instructor for small children or lifting more than 40 pounds. Plaintiff further testified that the last time he received medical treatment for any injuries associated with the subject accident was in January 2017, and that, although he plans to schedule additional appointments with his care providers, he currently does not have any appointments scheduled.

Therefore, the defendant has shifted the burden to the plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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]).

In opposition to defendant's prima facie showing, plaintiff failed to raise a triable issue of fact. 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 plaintiff was insufficient to establish a serious injury or to defeat defendant's prima facie showing. While plaintiff has submitted the sworn medical reports of Dr. Chris Moros, who documented his examination of plaintiff approximately one week after the subject accident and states that he continued to treat plaintiff until June 2017, each report failed to quantify the limitations in plaintiff's cervical, thoracic or lumbar regions, as well as his knees, bilaterally, based upon objective medical testing (*see* ***Ortiz v Ianina Taxi Servs., Inc.***, 73 AD3d 721, 900 NYS2d 391 [2d Dept 2010]; ***Rodriguez v Cesar***, 40 AD3d 731, 835 NYS2d 438 [2d Dept 2007]), or to provide a qualitative assessment of those regions of plaintiff's body in his medical report despite stating that the medical records, notes, and treatment assessments were attached to his report (*see* ***Robinson-Lewis v Grisafi***, 74 AD3d 774, [2d Dept 2010]; ***Acosta v Alexandre***, 70 AD3d 735, 894 NYS2d 136 [2d Dept 2010]; ***Barnett v Smith***, 64 AD3d 669, 883 NYS2d 573 [2d Dept 2009]). Instead, the reports perfunctorily state that plaintiff was completely disabled from performing his duties at work, and that the disc herniations and bulges and the bilateral knee injuries were causally related to the subject accident.

Furthermore, despite the fact that the medical report of Dr. Mosomillo states that plaintiff sustained significant range of motion limitations to his spine and to his left and right knees, and that such limitations are permanent and directly related to the subject accident, Dr. Mosomillo initially examined plaintiff in August 2018, almost three years after the subject accident. Thus, plaintiff has failed to submit any admissible report of any examination contemporaneous with the accident to substantiate his claim that he suffered significant limitations at the time of the accident's happening (*see* ***Leeber v Ward***, 55 AD3d 563, 865 NYS2d 614 [2d Dept 2008]; ***Budhram lv Ogunmoyin***, 53 AD3d 640, 863 NYS2d 224 [2d Dept 2008]; ***Manning v Tejeda***, 38 AD3d 622, 831 NYS2d 553 [2d Dept 2007]). Without contemporaneous findings of motion limitations, plaintiff is unable to establish the duration of the injuries he alleges to have sustained as a result of the subject accident (*see* ***Heumann v JACO Transp., Inc.***, 82 AD3d 1046, 919 NYS2d 198 [2d Dept 2011]; ***Villante v Miterko***, 73 AD3d 757, 901 NYS2d 311 [2d Dept 2010]; ***Nieves v Michael***, 73 AD3d 716, 901 NYS2d 100 [2d Dept 2010]).

The medical reports of plaintiff's examining radiologists merely revealed that plaintiff sustained disc herniations and bulges in his spine, and joint effusion in his knees, bilaterally. Significantly, plaintiff's radiologists failed to offer any opinion on the cause of the herniations and bulges in plaintiff's spine, or

the joint effusion in his knees (*see* ***Byam v Waltuch***, 50 AD3d 939, 857 NYS2d 605 [2d Dept 2008]; ***Vishnevsky v Glassberg***, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]). In addition, plaintiff's self-serving 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 NYS2d 151 [2d Dept 2013]; ***Fisher v Williams***, 289 AD2d 288, 734 NYS2d 497 [2d Dept 2001]).

Finally, 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, defendant's motion seeking summary judgment dismissing the complaint is granted.

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

Dated: April 15, 2019
Riverhead, New York

WILLIAM G. FORD J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION