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SHORT FORM ORDER

INDEX No. 09-28475
CAL. No. 10-01601MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 9-28-10 (#002)
MOTION DATE 10-28-10 (#003)
ADJ. DATE 10-28-10
Mot. Seq. # 002 - MG
003 - MG

ROBERT ZACCHEO and ANGELO BERMUDEZ, Plaintiffs, - against - JOHN R. FINELLI, KIMBERLY L. DAVIS and DOUGLAS MACKLIN, Defendants.	JOHN F. KUHN, ESQ. Attorney for Plaintiffs 22 Oakwood Road Huntington, New York 11743 PICCIANO & SCAHILL, P.C. Attorney for Defendant Finelli 900 Merchants Concourse, Suite 310 Westbury, New York 11590 RICHARD T. LAU & ASSOCIATES Attorney for Defendants Davis & Macklin P.O. Box 9040 Jericho, New York 11753

Upon the following papers numbered 1 to 44 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10; 21-40; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 19 - 20; 43 - 44; Other ___; it is,

ORDERED that the motion by defendant John Finelli seeking summary judgment dismissing plaintiff Angelo Bermudez's complaint and the motion by defendants Kimberly Davis and Douglas Macklin seeking summary judgment dismissing plaintiffs' complaint are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant John Finelli seeking summary judgment dismissing plaintiff Angelo Bermudez's complaint on the basis that he did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion by defendants Kimberly Davis and Douglas Macklin seeking summary judgment dismissing plaintiffs' complaint against them on the basis that no liability for the happening of the subject accident can be attributed to any negligence on their behalf is granted.

Plaintiffs Robert Zaccheo and Angelo Bermudez commenced this action to recover damages for injuries they allegedly sustained as a result of a three-car accident that occurred on westbound Southern

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State Parkway, near the Eagle Avenue overpass in the Town of Hempstead, State of New York, on September 3, 2008. The accident allegedly occurred when the vehicle operated by defendant John Finelli struck the rear of the vehicle operated by defendant Kimberly Davis and owned by defendant Douglas Macklin, thereby causing that vehicle to strike the rear of the vehicle operated by plaintiff Zaccheo. Plaintiff Bermudez was a front seat passenger in the vehicle operated by plaintiff Zaccheo at the time of the accident. Plaintiff Bermudez, by his bill of particulars, alleges that he sustained various personal injuries as a result of the accident, including disc herniations at levels C4 through C6; reversal of the normal cervical lordotic curve at level C2-C3; diminished sensory perception at levels C5 through C7 together with restriction of motion throughout the cervical spine; cervical radiculopathy; cervical acceleration/ deceleration syndrome; hypo-mobility at level C3-C4; cervical facet syndrome; and headaches.

Defendant Finelli now moves to dismiss plaintiff Bermudez's complaint on the basis that the injuries allegedly sustained by this plaintiff do not come within the "serious injury" threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant Finelli submits a copy of the pleadings, a copy of plaintiff's deposition transcript, and the sworn medical reports of Dr. Mark Zuckerman, Dr. Jay Nathan, and Dr. Stephen Lastig. Dr. Zuckerman, at defendant's request, conducted an independent neurological examination of plaintiff on May 4, 2010. Dr. Nathan, at defendant's request, conducted an independent orthopedic examination of plaintiff on May 10, 2010. Dr. Lastig, at defendant's request, performed an independent radiological review of the magnetic resonance images ("MRI") film of plaintiff's cervical spine on May 5, 2010. Defendants Davis and Macklin also move to dismiss plaintiff Bermudez's complaint on the basis that his injuries do not constitute a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendants Davis and Macklin, who rely on the same evidence as defendant Finelli in his motion for summary judgment, also seek summary judgment in their favor on the issue of liability. Plaintiff Bermudez opposes the motions on the ground that defendants have failed to establish that the injuries he sustained as a result of the subject accident do not meet the "serious injury" threshold requirement of Insurance Law § 5102 (d). Alternatively, plaintiff Bermudez asserts that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" categories, and the "90/180 days" category. In opposition to the motion, plaintiff Bermudez submits excerpts of his deposition transcript, his own affidavit, and the final narrative report of Dr. Mary DiDio.

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, 622 NYS2d 900 [1995]; *see also* ***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 [1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 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 [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 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden, 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 [2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [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 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Dr. Nathan states in his report, in pertinent part, that examination of plaintiff Bermudez's cervical spine reveals that he exhibits flexion of 45 degrees (normal is 45 degrees), extension of 45 degrees (normal is 45 degrees), right and left lateral flexion of 45 degrees (normal is 45 degrees), and right and left rotation of 80 degrees (normal is 80 degrees). The report states that an examination of plaintiff Bermudez's lumbar spine reveals that he exhibits flexion of 90 degrees (normal is 90 degrees), extension, right and left lateral bending of 30 degrees (normal is 30 degrees), and right and left rotation of 80 degrees (normal is 80 degrees). It states that there is no tenderness or paravertebral spasm noted in plaintiff Bermudez's cervical or thoracolumbar spine, and that his straight leg raising test is negative. The report states that an examination of plaintiff Bermudez's right shoulder reveals forward elevation of 150 degrees (normal is 150 degrees), external rotation of 90 degrees (normal is 90 degrees), internal rotation of 40 degrees (normal is 40 degrees), abduction of 150 degrees (normal is 150 degrees), adduction of 30 degrees (normal is 30 degrees), and full posterior extension of 40 degrees (normal is 40 degrees). It states that there is no weakness in his rotator cuff and that there is no trapezial tenderness or spasm present in his right shoulder. The report concludes that the sprains that plaintiff Bermudez sustained to his cervical and thoracolumbar regions as a result of the subject accident were pre-existing, and the sprain to his right shoulder has resolved.

Likewise, Dr. Zuckerman states in his report, in relevant part, that an examination of plaintiff Bermudez's lumbar spine reveals flexion beyond the normal 90 degrees, right and left lateral flexion of 30 degrees (normal is 30 degrees), and bilateral extension of 30 degrees (normal is 30 degrees). The report states that an examination of his cervical spine shows that his "cervical range of motion is performed to 70 degrees with expected 80 [degrees]," flexion of 45 degrees (normal is 45 degrees), and extension of 40

degrees (normal is 40 degrees). It states that there is mild right trapezius spasm, but no tenderness or spasm in the cervical or lumbar regions. The report states that a detailed manual muscle motor examination of plaintiff Bermudez reveals that his thumb abduction, wrist and finger flexion and extension, and pronation and supination are all intact. Dr. Zuckerman's opines that the sprains that plaintiff Bermudez sustained to his cervical and lumbar spines as a result of the accident have resolved, and that there is no neurological injury as a result of the accident. It states that plaintiff Bermudez suffers from pre-existing degenerative disc disease of the cervical spine, which are age-related changes, and that these changes may be causing mild limitation of plaintiff Bermudez's cervical range of motion. The report concludes that plaintiff Bermudez's prognosis is excellent and that he is able to return to his usual daily living activities, without restrictions.

The Court finds that defendant Finelli has met his *prima facie* burden that plaintiff Bermudez did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Thomas v Weeks***, 61 AD3d 961, 878 NYS2d 182 [2009]). Dr. Zuckerman and Dr. Nathan were unequivocal in their medical reports in stating that plaintiff Bermudez has full range of motion in his cervical spine, and his right shoulder, that he does not have any orthopedic or neurological disabilities, and that he is capable of returning to his normal daily living activities. Additionally, Dr. Zuckerman and Dr. Nathan state plaintiff Bermudez suffers from pre-existing degenerative disc disease in his cervical and lumbar regions that are unrelated to the subject accident. Similarly, Dr. Lastig clearly states, after reviewing the MRI of plaintiff Bermudez's cervical spine, that "the marginal end-plate osteophytes and uncinate osteophytes indicate the presence of a long standing degenerative hypertrophic bony process which, definitely pre-exist the accident of 9/3/2008." Moreover, reference to plaintiff Bermudez's own deposition testimony sufficiently refuted the "limitation of use" categories of injury under Insurance Law § 5102 (d) (*see* ***Colon v Tavares***, 60 AD3d 419, 873 NYS2d 637 [2009]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2008]), and the "90/180 days" category (*see* ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 897 NYS2d 648 [2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]).

Therefore, the burden shifted to plaintiff Bermudez 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*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]; ***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]). A plaintiff must demonstrate a total loss of use of a body organ, member, function or system to recover under the "permanent loss of use" category (*see* ***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * 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; *see* ***Toure v Avis Rent A Car Sys.***, *supra*). Therefore, in order for a plaintiff to prove the extent or degree of physical limitation under the "permanent consequential limitation of use of a body organ or member" or the "significant limitation of use of a body function or system" category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2005]). 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 may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Dufel v Green***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

In opposition to defendant Finelli's *prima facie* showing, plaintiff Bermudez has failed to raise a triable issue of fact demonstrating that he did sustain an injury within the "limitation of uses" category or the "90/180 days" category of serious injury (*see* ***Licari v Elliott***, *supra*; ***Jack v Acapulco Car Serv., Inc.***, *supra*; ***Bleszcz v Hiscock***, *supra*; ***Nguyen v Abdel-Hamed***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]). Plaintiff Bermudez, in opposition, primarily relies upon the final narrative report of his treating chiropractor, Dr. DiDio, which states that plaintiff Bermudez has sustained a permanent consequential limitation of a body function or system as a result of the subject accident. However, Dr. DiDio's report is without probative value since it was not presented in affidavit form or otherwise subscribed by a notary (*see* CPLR 2106; ***Casco v Cocchiola***, 62 AD3d 640, 878 NYS2d 409 [2009]; ***Kunz v Gleeson***, 9 AD3d 480, 781 NYS2d 50 [2004]; ***Santoro v Daniel***, 276 AD2d 478, 713 NYS2d 699 [2006]). Moreover, plaintiff Bermudez failed to address defendant Finelli's showing that he suffers from pre-existing degenerative disc disease in the areas where he alleges his injuries occurred. Where a defendant presents evidence of a pre-existing condition, it is incumbent upon the plaintiff to present proof to address the defendant's lack of causation (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Sky v Tabs***, 57 AD3d 235, 868 NYS2d 648 [2008]; ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Carter v Full Serv., Inc.***, 29 AD3d 342, 815 NYS2d 41 [2006]; ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [2006]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). Further, any subjective complaints of pain and limitation of motion must be substantiated by verified objective medical findings (*see* ***Sham v B&P Chimney Cleaning & Repair Co., Inc.***, 71 AD3d 978, 900 NYS2d 72 [2010]; ***Dantini v Cuffie***, 59 AD3d 490, 873 NYS2d 189 [2009]; ***Villeda v Cassas***, 56 AD3d 762, 871 NYS2d 167 [2008]), based upon a recent examination of the plaintiff (*see* ***Johnson v Berger***, 56 AD3d 725, 867 NYS2d 919 [2008]; ***D'Alba v Young-Ae Choi***, 33 AD3d 650, 823 NYS2d 423 [2006]; ***Olivia v Gross***, 29 AD3d 551, 816 NYS2d 110 [2006]). Contrary to plaintiff Bermudez's assertion, his self-serving affidavit fails to raise a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law § 5102 (d) since there was no objective medical evidence to support it (*see* ***Laguerre v Chavarria***, 41 AD3d 437, 837 NYS2d 716 [2007]; ***Davis v New York City Trans. Auth.***, 294 AD2d 531, 742 NYS2d 658 [2002]). Accordingly, defendant Finelli's motion for summary judgment dismissing plaintiff Bermudez's claim is granted.

Defendants Davis and Macklin also move for summary judgment on the basis that they bare no liability for subject accident's occurrence, as their vehicle was struck in the rear by defendant Finelli's vehicle and pushed forward into plaintiff Zaccheo's vehicle. In support of the motion, defendants submit a copy of the pleadings and copies of the parties' deposition transcripts. Defendant Finelli opposes the motion on the ground that there are material issues of fact as to the subject accident's occurrence. Plaintiffs do not oppose the instant motion.

As a general rule, a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle and requires that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see* ***DeLouise v S.K.I.***

Wholesale Beer Corp., 75 AD3d 489, 904 NYS2d 761 [2010]; ***Smith v Seskin***, 49 AD3d 628, 854 NYS2d 420 [2008]; ***Klopchin v Masri***, 45 AD3d 737, 846 NYS2d 311 [2007]; ***Niyazov v Bradford***, 13 AD3d 501, 786 NYS2d 582 [2004]). "One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle" (***Chepel v Meyers***, 306 AD2d 235, 237, 762 NYS2d 95 [2003]; *see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2010]; ***Carhuayano v J&R Hacking***, 28 AD3d 413, 812 NYS2d 162 [2006]). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff is entitled to judgment as a matter of law (*see* ***Leal v Wolff***, 224 AD2d 392, 638 NYS2d 110 [1996]). However, the operator of the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (*see* ***Purcell v Axelsen***, 286 AD2d 379, 729 NYS2d 495 [2001]).

In the instant matter, defendants Davis and Macklin have met their *prima facie* burden that they were not negligent and did not contribute to the happening of the subject accident (*see* ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]; ***Savarese v Cerrachio***, __ AD3d __, 2010 NY Slip Op 9118 [2d Dept 2010]; ***Arias v Rosario***, 52 AD3d 551, 860 NYS2d 168 [2008]). Defendant Davis testified at an examination before trial that she merged into the middle lane of the Southern State Parkway due to construction and that, after bringing her vehicle to a complete stop, it was struck in the rear by defendant Finelli's vehicle. She testified that the impact of the collision pushed her vehicle forward, causing it to collide with plaintiff Zaccheo's vehicle. Plaintiffs Zaccheo and Bermudez also testified that their vehicle was impacted by defendant Davis's vehicle after it was struck in the rear and pushed forward. Therefore, defendant Davis has demonstrated that her vehicle was impacted from the rear after it had been brought to a lawful stop in traffic (*see* ***Smith v Seskin***, *supra*; ***Elezovic v Harrison***, 292 AD2d 416, 739 NYS2d 410 [2002]; ***Bournazos v Malfitano***, 275 AD2d 437, 713 NYS2d 75 [2000]). In opposition to defendant Davis and Macklin's *prima facie* showing, defendant Finelli has failed to rebut the inference of negligence by providing a non-negligent explanation for the collision or as to whether any negligence on the part of defendant Davis contributed to the collision (*see* ***Ramirez v Konstanzer***, 61 AD3d 837, 878 NYS2d 381 [2009]; ***Jumandeo v Franks***, 56 AD3d 614, 867 NYS2d 541 [2008]; ***Lundy v Llatin***, 51 AD3d 877, 858 NYS2d 341 [2008]; ***Campbell v City of Yonkers***, 37 AD3d 750, 833 NYS2d 101 [2007]; ***Belitsis v Airborne Express Frgt. Corp.***, 306 AD2d 507, 761 NYS2d 320 [2003]). Defendant Finelli testified at an examination before trial that the accident occurred after he became distracted by something falling in his vehicle, and that defendant Davis's vehicle was completely stopped when he struck it from the rear. Accordingly, the motion for summary judgment in favor of defendants Davis and Macklin is granted. The action is severed and continued as to plaintiff Zaccheo's claim against defendants Finelli, Davis, and Macklin.

Dated: January 31, 2011

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION