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SHORT FORM ORDER



INDEX No. 09-348
CAL. No. 10-01448MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

***PRESENT:***

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-29-10
ADJ. DATE 4-8-11
Mot. Seq. # 001 - MD

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| ANTHONY J. MOSCHITTA, Plaintiff, - against - JAMES A. ROSELLO, Defendant. | DAVIS & FERBER, LLP<br>Attorney for Plaintiff<br>1345 Motor Parkway, Suite 201<br>Islandia, New York 11749<br><br>RICHARD T. LAU & ASSOCIATES<br>Attorney for Defendant<br>300 Jericho Quadrangle, P.O. Box 9040<br>Jericho, New York 11753 |

Upon the following papers numbered 1 to 28 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13 - 25 ; Replying Affidavits and supporting papers 27 - 28 ; Other plaintiff's memorandum of law - 26 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that this motion by defendant James Rosello seeking summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Anthony Moschitta as a result of a motor vehicle accident that occurred on the eastbound Long Island Expressway ("LIE"), near Exit 36, in the Town of Hempstead, New York on January 19, 2006. The accident allegedly occurred when the vehicle operated by defendant James Rosello struck the rear of the vehicle operated by plaintiff while it was coming to a stop in traffic in the middle lane of the LIE. As a result of the impact between the vehicles, plaintiff's vehicle allegedly was propelled into the vehicle in front of it. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject accident, including lumbar radiculopathy; lumbosacral and cervical sprains/strains; cervical stenosis; mild left shoulder impingement syndrome; disc herniations at levels C2 through C7, levels T11 through L1, and level L4-L5; and disc bulges at level T10-T11 and levels L2 through S1. Plaintiff alleges that following the accident, he was confined to his home and bed from March 27, 2006 through May 12, 2006, and intermittently thereafter. Plaintiff further alleges that he was terminated from his employment with Kone Incorporated as a result of his excessive absences due to the injuries he sustained from the accident. Plaintiff currently is unemployed and seeks lost wages.

Defendant now moves for summary judgment on the basis that plaintiff's injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, a copy of plaintiff's deposition transcript, and the sworn medical reports of Dr. Michael Katz and Dr. Sondra Pfeffer. At defendant's request, Dr. Katz conducted an independent orthopedic examination of plaintiff on June 22, 2010. At defendant's requests, Dr. Pfeffer performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's cervical and lumbar spines on March 11, 2010.

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 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 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 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."

In order to recover under the "limitations of use" categories, a plaintiff must present 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 [2d Dept 2009];***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];***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 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.***, *supra*; ***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]).

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 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 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*). 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 has established his prima facie burden that plaintiff 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*; ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [1st Dept 2010]; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Dr. Katz's report states, in relevant part, that testing of plaintiff's ranges of motion using a goniometer revealed that plaintiff has full range of motion in his spine and left shoulder. It states that plaintiff does not exhibit any evidence of paravertebral muscle spasm in either his lumbar or cervical regions, or in his left shoulder, and that plaintiff's cervical and thoracolumbosacral strains and left shoulder contusion are resolved. Dr. Katz's report further states that plaintiff exhibits no signs or symptoms of permanent loss of use of his neck, back, or left shoulder, that he is not disabled, and that he is capable of gainful employment and the activities of daily living. Dr. Katz's report concludes that the MRIs of plaintiff's cervical and lumbar spines indicate that plaintiff has preexisting degenerative disc disease. Similarly, Dr. Pfeffer states, after reviewing the MRIs of plaintiff's cervical and lumbar spines, that plaintiff suffers from multi-level disc desiccation, which is indicative of preexisting degenerative disc disease, and is unrelated to the subject accident. Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the "limitation of uses" categories of serious injury (*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 days" 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 burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*).

In opposition, plaintiff asserts that he sustained an injury within the "limitations of use" categories of Insurance Law § 5102(d). Plaintiff also contends that defendant failed to make a prima facie showing that his injuries did not come within the meaning of the serious injury threshold of Insurance Law § 5102(d). In opposition to the motion, plaintiff submits the affidavit of Dr. John Rinaldi and the affirmed medical reports of Dr. Craig Shalmi, Dr. Robert Diamond and Dr. Eric Shapiro. Plaintiff also submits the affirmed medical reports of Dr. Harvey Goldberg and Dr. Harvey Orenstein. At the request of his No-Fault insurance carrier, plaintiff was examined by Dr. Goldberg and Dr. Orenstein in May 2006 and October 2006, respectively. Dr. Goldberg and Dr. Orenstein, in their medical reports, each concluded

that plaintiff's injuries were causally related to the subject accident and recommended home exercises. Dr. Goldberg opined that plaintiff has a mild partial disability and that there possibly was an exacerbation of plaintiff's degenerative cervical and lumbar spondylosis. Dr. Orenstein, in his medical report, found significant range of motion limitations in plaintiff's cervical and lumbar regions, that plaintiff had an elevation of the right ilium and left scapula, and that plaintiff should continue chiropractic therapy. Plaintiff further submits his own affidavit, a copy of the police motor vehicle accident report and photographs of the alleged damage to his vehicle as a result of the accident.

Plaintiff, in opposition to defendant's prima facie showing, has raised a triable issue of fact as to whether he sustained a serious injury as a result of the subject accident (*see* ***Evans v Pitt***, 77 AD3d 611, 908 NYS2d 729 [2d Dept 2010], *lv denied* 16 NY3d 736, 917 NYS2d 100 [2011]; ***Lee v McQueens***, 60 AD3d 914, 876 NYS2d 114 [2d Dept 2009]; ***Williams v Clark***, 54 AD3d 942, 864 NYS2d 493 [2d Dept 2008]). Although disc bulges and herniations, standing alone are not evidence of a serious injury under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [1st Dept 2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). The submission of the affidavit of Dr. Rinaldi, plaintiff's treating chiropractor, demonstrates that plaintiff had significant range of motion limitations in his cervical and thoracolumbosacral regions of his spine contemporaneous with the accident, and that those same limitations were present when he was examined on January 3, 2011. Dr. Rinaldi opines that plaintiff range of motion in his spine is restricted, and that he sustained lumbar and thoracic herniations and bulges, and cervical herniations as a result of the subject accident. Dr. Rinaldi further opines that plaintiff's condition is chronic and permanent in nature, and that he will continue to have chronic localized pain that will progressively become worse over time. As a consequence, Dr. Rinaldi's affidavit is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury to his cervical and thoracolumbosacral regions of his spine under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102(d) as a result of the accident (*see* ***Yeong Hee Kwak v Villamar***, 71 AD3d 762, 894 NYS2d 916 [2d Dept 2010]; ***Parker v Singh***, 71 AD3d 750, 896 NYS2d 437 [2d Dept 2010]; ***Azor v Torado***, 59 AD3d 367, 873 NYS2d 655 [2d Dept 2008]).

Moreover, where a defendant in an action seeking damages for a serious injury presents evidence that a plaintiff's alleged pain and injuries are related to a preexisting condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation (***Pommells v Perez***, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; *see* ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2d Dept 2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]). Dr. Rinaldi states that he previously treated plaintiff for a motor vehicle accident in October 1998, in which he sustained injuries to his lower back. Dr. Rinaldi explains that plaintiff received treatment for approximately six weeks for the injuries he sustained in 1998, that plaintiff was symptom free when his treatment ceased, and that he was capable of performing his daily living activities without restriction. Dr. Rinaldi also explained that he briefly treated plaintiff for a subsequent re-aggravation of injuries to his neck, and that after his treatment, plaintiff's symptoms were back to the "state they were in prior to [the] re-aggravation." Furthermore, Dr. Rinaldi explains

that plaintiff's cervical, thoracic and lumbar regions are not functioning normally for a person of plaintiff's age, and that these limitations are causally related to the subject accident.

Finally, contrary to defendant's contention, plaintiff's cessation of treatment for his injuries was adequately explained by plaintiff and Dr. Rinaldi (*see* ***Pommells v Perez***, *supra*; ***Walker v Esses***, 72 AD3d 938, 899 NYS2d 321 [2d Dept 2010]; ***Eusebio v Yannetti***,68 AD3d 919, 892 NYS2d 217 [2d Dept 2009]). Plaintiff explained in his affidavit that he was unable to continue his treatment after his No-Fault benefits were terminated and his insurance carrier refused to cover his treatment, because it was the result of a motor vehicle accident. Plaintiff also noted that he attempted to continue treatment by paying out of pocket, but that after a few visits he was unable to continue to do so. In addition, plaintiff submitted his letters of termination by his No-Fault insurance carrier. Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is denied.

Dated: June 15, 2011

J. Gerard Asher
J.S.C.

**__ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**