[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 22
Justice

HERMAN ARNOLD,
Plaintiff,

- v -

GIFTY BOAKYE-AMEYAW, EBENEZER K. OPOKUACHEAMPU,
Defendants.

INDEX NO. 113660-06
MOTION DATE 002
MOTION SEQ. NO.
MOTION CAL. NO. 7

The following papers, numbered 1 to 3, were read on this motion by defendants for summary judgment on the threshold "serious injury" issue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ☐ No

This is an action to recover damages for personal injuries suffered by the plaintiff Herman Arnold (plaintiff), on July 21, 2006, while riding his bicycle, he was struck by the defendants' vehicle. The vehicle was owned by defendant Gifty Boakye-Ameyaw and operated by defendant Ebenezer K. Opokuacheampu. The plaintiff was transported to Harlem Hospital where he was treated and released. Plaintiff commenced this action on September 25, 2006, to recover damages for alleged personal injuries suffered as a result of the subject motor vehicle accident. The defendants filed their answer, thus, issue was joined. The parties have completed discovery and the Note of Issue was filed on December 25, 2007. The defendants Gifty Boakye-Ameyaw and Ebenezer K. Opokuacheampu (defendants) move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing the complaint. In support of their motion for summary

judgment, the defendants argue that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102 (d).

A "serious injury" is defined in the New York State Insurance Law 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" (New York Insurance Law § 5102(d); *Raffellini v State Farm Mutual Automobile Insurance Company*, 848 NY2d 1 [2007]).

SUMMARY JUDGEMENT STANDARD

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 795 NY2d 502 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 751 NY2d 433, 434 [1 Dept 2002]; *Silverman v. Perlbinder*, 762 NY2d 386 [1 Dept 2003]). The motion must be supported "by affidavit [from a person

having knowledge of the facts], by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York*; *Prudential Securities Inc. v Rovello*, 692 NYS2d 67 [1 Dept 1999]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden then shifts to the opposing party to demonstrate by admissible evidence the existence of a triable issue of fact, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind*, 765 NYS2d 326 [1 Dept 2003]).

In order to weed out frivolous claims, and limit recovery to significant injuries (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]), the No-Fault Law precludes recovery for pain and suffering, and other non-economic loss, between covered persons, unless the plaintiff pleads and proves a "serious injury" (Insurance Law § 5104 [a]). The burden of proof on the threshold issue of whether a serious injury has been sustained is on the plaintiff (CPLR 3016 [g], 3043 [a] [6]). However, on a defendants' motion for summary judgment, the motion papers must establish a prima case through evidence in admissible form that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) (*Baez v Rahamatali*, 6 NY3d 868 [2006]).

DISCUSSION

In support of their motion for summary judgment, defendants proffer the pleadings, plaintiff Arnold's deposition testimony, the affirmed medical reports of the examination of the plaintiff conducted by Dr. Ravi Tikoo, a board certified neurologist, Dr. Carl Austin Weiss, a board certified orthopedic surgeon, by defendants physicians, Dr. Andrew Dowd and Dr. Mark C. Honomoff, and by Robert Richmond, a chiropractor. The Court notes that the Robert Richmond, the chiropractor's, report is affirmed and not sworn. The defendants also offer a certified copy of plaintiff's employment record and photographs of the plaintiff's leg injury (scar).

In opposition to the motion, the plaintiff submits the affirmation of Dr. Goldenberg, alleging that as a result of the collision, the plaintiff suffers from a disc bulge, a disc herniation and a tear of the left knee meniscus. Limited range of motion is alleged in the knee, ankle, lumbar spine, cervical spine, and shoulder. There is a scar on the right shin.

The defendants fail to establish their prima facie entitlement to summary judgment on the threshold issue of serious injury. The defendants' conducted two independent medical examinations (IMEs) of the plaintiff. The IMEs resulted in an affirmed report from their orthopedist, Dr. Weiss, and an affirmed report from their neurologist, Dr. Tikoo (misidentified at paragraph 17 in counsel's moving affirmation as Dr. Weiland). Contrary to defendants' assertion, their orthopedist, Dr. Weiss, found a limited range of motion in the plaintiff's back of "3/4 the normal range" (exhibit D, second page). The defendants' neurologist, Dr. Tikoo, (and physicians Dr. Andrew Dowd, and Dr. Mark C. Honomoff and) fail to set forth any objective tests performed

during their examination. In a range of motion case, the defendant's medical experts must set forth the objective tests performed that led the expert to conclude that the plaintiff did not suffer a serious injury (*Kennedy v Brown*, 23 AD3d 625 [2d Dept 2005]). Dr. Tikoo's failure to set forth the objective tests performed is fatal (*Hernandez v Stanley*, 34 AD3d 428 [2d Dept 2006]).

In *Nix v Yang Gao Xiang* (19 AD3d 227 [1st Dept 2005]), the Court determined that a defendant's expert's report was insufficient to demonstrate that the plaintiff did not sustain a "serious injury" because the "report was conclusory, failed to indicate what, if any, objective tests were relied upon, and failed to address the objective findings of plaintiff's MRI and CT scan, which showed disc herniations and bulges." Here, defendants' experts' reports suffer from numerous similar infirmities. They are conclusory, fail to address not only MRI reports indicating a bulging disc and a herniated disc, but other evidence of serious injury, such as scarring. Therefore, they fail to demonstrate the absence of "serious injury" (*Onishi v N & B Taxi, Inc.*, 51 AD3d 594 [1st Dept 2008]; *Patterson v Rivera*, 49 AD3d 337 [1st Dept 2008]; *Wadford v Gruz*, 35 AD3d 258 [1st Dept 2006]).

Additionally, in support of their motion for summary judgment dismissing the complaint, the defendants rely upon a magnetic imaging report (MRI) which found the existence of a bulging disc at C4-5, and a herniated disc at L5-S1, in the plaintiff's spine. Although a herniated disc, by itself, is insufficient to constitute a "serious injury", such an injury, accompanied by objective evidence of the extent of alleged physical limitations resulting from the herniated disc may be considered a serious injury

(*Pommells v Perez*, 4 NY3d 566, 574 [2005]). In the face of Dr. Weiss's finding of a limited range of motion, the defendants fail to show that the bulge and herniation are not related to the subject collision (*Kearse v New York City Transit Authority* , 16 AD3d 45 [2d Dept 2005]).

The defendants having failed to establish their prima facie entitlement to summary judgment, the burden does not shift to the plaintiff to offer proof in admissible form sufficient to create a material issue of fact necessitating a trial *(Franchini v Palmieri*, 1 NY3d 536 [2003]).

Nevertheless, the plaintiff raises a triable issue of fact as to whether or not he sustained a serious injury to his spine, under the permanent, consequential and/or significant limitation of use categories of Insurance Law § 5102 (d). The MRI report is sufficient to establish the existence of a disc bulge and a herniation (*Toure v Avis Rent* A Car Sys., 98 NY2d 345 [*supra*]). Based on a recent examination, as well as a review of the MRI, the plaintiff's physician Dr. Goldenberg, opines that the plaintiff's spinal injuries, and range of motion limitations, are significant and permanent, and are causally related to the collision. Dr. Goldenberg recorded her range of motion findings and compared her findings to normal ranges of motion. Dr. Goldenberg, based on the recent examination, also opines that the plaintiff's torn knee meniscus, torn ankle ligament, and limited range of motion, is significant and permanent, and causally related to the collision.

Furthermore, the evidence submitted by defendants fails to establish as a matter

of law that the leg scar caused by the collision does not constitute "significant disfigurement." In an attempt to finesse the issue, the defendants submit a fuzzy photocopy of a photograph, taken from a distance, showing a body shot of the plaintiff raising his right leg pant. The plaintiff, on the other hand, submits a close-up photograph of the right shin, showing a scar extending over half of the way up the plaintiff's shin, and covering most of the front of the shin.

There are cases supporting the proposition that a leg scar does not meet the threshold requirement of serious injury. In *Edwards v De Haven* (155 AD2d 757 [3d Dept 1989]), involving a scar near the left knee, a 3/4-inch indentation on the left calf and a four-inch jagged scar just above the right knee, and in *Loiseau v Maxwell* (256 AD2d 450 [2d Dept 1998]), involving a scar five centimeters in length and one centimeter in width on the lower part of the right leg, the Courts held that as a matter of law, a reasonable person viewing the plaintiffs' legs, would not regard the scars as unattractive, objectionable, or as the subject of pity or scorn.

However, in *Savage v Delacruz* (100 AD2d 707 [3d Dept 1984]), the plaintiff sustained scars in the area of the right knee, with plaintiff's doctor reporting the scars to be one-quarter inch and one and one-quarter inch in size. The Court held that the presence of scars raises the question of whether a reasonable person viewing plaintiff's body in its altered state would regard the condition as unattractive, objectionable or as the subject of pity or scorn.

Similarly, in *Lewis v General Electric Co.* (145 AD2d 728 [3d Dept 1988]), the Court held that a 1 1/2- inch noticeable scar on the plaintiff's left knee, could be sufficiently unattractive or objectionable so as to subject plaintiff to pity or scorn, thus

constituting a significant disfigurement.

Here, viewing the plaintiff's photograph, the degree to which the plaintiff's extensive leg scarring would be regarded as "unattractive, objectionable or as the subject of pity or scorn" is for the jury to decide (Insurance Law § 5102 [d]; *Matula v Clement*, 132 AD2d 739 [3d Dept], *lv denied* 70 NY2d 610 [1987]).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is denied.

ORDERED that plaintiff shall serve a copy of this order, with notice of entry, upon defendants.

This constitutes the Decision and Order of the Court.

Enter:

Dated: September 29, 2008

SEP 29 2008

Paul Wooten J.S.C.

Paul Wooten J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

FILED
OCT 02 2008
COUNTY CLERK'S OFFICE
NEW YORK