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SHORT FORM ORDER

INDEX No. 07-6971
CAL. No. 09-01048-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 10-16-09
Mot. Seq. # 001 - MG; CASEDISP

JERROLD A. SMITH and DEANNA SMITH, Plaintiffs, - against - ROMA FOOD ENTERPRISES, INC. and ROBERTO TIRADO, Defendants.	SOMER & HELLER, LLP Attorneys for Plaintiffs 2171 Jericho Turnpike, Suite 350 Commack, New York 11725 LOCCISANO & LARKIN Attorneys for Defendants 150 Motor Parkway, Suite 405 Hauppauge, New York 11788-5108

Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9 - 22 ; Replying Affidavits and supporting papers 23 - 24 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Roma Food Enterprises, Inc., and Roberto Tirado seeking summary judgment dismissing plaintiffs' complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Jerrold Smith as a result of a motor vehicle accident that occurred on April 25, 2005. The accident allegedly occurred when the vehicle operated by defendant Robert Tirado and owned by defendant Roma Foods Enterprises, Inc., struck the rear of plaintiff's vehicle, when it stopped to allow an emergency vehicle to pass. Plaintiff's wife, Deanna Smith, asserts a cause of action for loss of services. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the accident, including compression deformity in the central portion of the T8 vertebral body; a diffuse annular bulge at level L3-L4 with mild left sided neural foraminal narrowing; a disc bulge at level T11-T12; mild cervical spondylosis, a cervical disc herniation at level C6-C7; and nerve root impingement at level C7.

Defendant now moves for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). Defendant, in support of the motion, submits a copy of the pleadings, a copy of plaintiff's deposition transcript, and the sworn medical report of Dr. Robert Israel. Dr. Israel conducted an independent orthopedic examination of plaintiff at defendant's request on March 27, 2009. Plaintiff opposes the instant motion on the ground that defendant has failed to establish that he did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). Plaintiff, in opposition to the motion, submits his affidavit and the sworn medical report of Dr. Thomas Dowling.

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]).

Here, defendants have established their prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) (*see* ***Gaddy v Eyler***, *supra*; ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). Dr. Israel's report states that an examination of plaintiff's cervical and lumbar spines revealed normal lordosis, with no tenderness or muscle spasm upon palpation. It states that plaintiff has full range of motion in his cervical and lumbar regions, and no symptoms of radiating pain or paresthesias. Dr. Israel's report also indicates that plaintiff suffers from pre-existing arthritis of the neck and back. Dr. Israel opines that plaintiff is not disabled, that he suffered cervical and lumbar sprains as a result of the accident, and that such injuries have resolved. Dr. Israel's report concludes that plaintiff does not require any further orthopedic treatment and that he is capable of performing his daily living activities.

Moreover, plaintiff testified at an examination before trial that at the time of the accident he was retired from his employment with Arrow Art Finishes. Plaintiff testified that on the day of the accident he and his wife were on their way to the movies and were traveling southbound on Wellwood Avenue and Conklin Street. He testified that the traffic light for his direction of travel was green, but that he brought his vehicle to a stop to allow the fire truck that was coming towards him from the opposite direction to make a left turn. He testified that the fire truck had on its sirens and lights as it was traveling north on Wellwood Avenue, and that as it approached the intersection, it turned on its left directional signal. Plaintiff testified that a moment after he stopped his vehicle to allow the fire truck to pass he was struck in the rear by defendant's tractor-trailer. Plaintiff testified that the impact between the two vehicles was heavy and caused his vehicle to move approximately 30 feet across the intersection. Plaintiff testified that immediately upon impact he felt pain in his back and neck and that he was taken from the accident scene by ambulance to the hospital. He testified that he was treated and released the same day from the hospital, but that a "couple of days" later he sought treatment from his own family physician. He testified that his family physician referred him to the orthopedist, and that he was then referred to physical therapy. Plaintiff further testified that he continues to have pain in his neck whenever he looks up to the left and that he is only able to play golf in a limited capacity, because his "back goes out" whenever he turns too far back to swing the golf club.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). 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]). The plaintiff must also present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement based on a recent examination (*see* ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]). 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*). For a bulging disc or radiculopathy to constitute a serious injury, there must also be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see* ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2006]; ***Foley v Karvelis***, 276 AD2d 666, 714 NYS2d 337 [2000]). 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]). Moreover, a plaintiff alleging injury within the "limitation of use" categories who ceases treatment after the accident must provide a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Ferebee v Sheika***, 58 AD3d 675, 873 NYS2d 93 [2009]; ***Besso v DeMaggio***, 56 AD3d 596, 868 NYS2d 681 [2008])

Furthermore, when 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 pre-existing 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* ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]).

In opposition to defendants' motion, plaintiff primarily relies upon the affidavit of his treating physician, Dr. Dowling, which failed to raise a triable issue of fact as to whether he suffered a "serious injury" as a result of the subject accident (*see* ***Colvin v Maille***, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]; *see generally* ***Zuckerman v City of New York***, *supra*). Dr. Dowling's report indicates that plaintiff suffers from cervical and lumbo-sacral disc herniations. However, the mere existence of a bulging or herniated disc is not sufficient, standing alone, as proof of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (*see* ***Shvartsman v Vildman***, 47 AD3d 849 NYS2d 600 [2008]; ***Patterson v NY Alarm Response Corp.***, 45 AD3d 656, 850 NYS2d 114 [2007]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2006]). In addition, Dr. Dowling's report fails to explain his findings of "obvious degenerative changes consistent with age" that were observed in plaintiff's lumbar and cervical spines during his examinations of plaintiff (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2009]; ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2008]; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2007]). Moreover, Dr. Dowling's report lacks probative value because he relies upon the unaffirmed medical reports of Dr. Joseph Sanelli in coming to his conclusions (*see* ***Uribe-Zapata v Cappallan***, 54 AD3d 936, 864 NYS2d 118 [2008];

Malave v Basikov, 45 AD3d 539, 845 NYS2d 415 [2007]; ***Furrs v Griffith***, 43 AD3d 389, 841 NYS2d 594 [2007]). Furthermore, contrary to plaintiff's assertion, neither plaintiff nor Dr. Dowling reasonably explained the extensive gap in treatment between the time plaintiff stopped treatment on December 27, 2006 and his most recent examination on September 21, 2009 (*see* ***Pommells v Perez***, *supra*; ***Knuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]; ***Cornelius v Cintas Corp.***, 50 AD3d 1085, 857 NYS2d 637 [2008]; ***Mullings v Huntwork***, 26 AD3d 214, 810 NYS2d 443 [2006]). Consequently, Dr. Dowling's conclusions that "[plaintiff] continues to suffer greatly from the symptoms caused by the cervical and lumbar herniations and injuries he suffered on April 25, 2005 and that his injuries are permanent in nature" are speculative and merely tailored to meet the statutory requirements (*see* ***Marrache v Akron Taxi Corp.***, 50 AD3d 973, 856 NYS2d 239 [2008]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2007]; ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2006]; ***Allyn v Hanley***, 2 AD3d 470, 767 NYS2d [2003]). Finally, plaintiff failed to raise a triable issue as to whether he was substantially curtailed from all of his usual and customary activities for 90 of the first 180 days following the accident (*see* ***Rennell v Horan***, 225 AD2d 939, 639 NYS2d 171 [1996] ***Balshan v Bouck***, 206 AD2d 747, 614 NYS2d 487 [1994]; ***Kimball v Baker***, 174 AD2d 925, 571 NYS2d [1991]). Accordingly, defendant's motion for summary judgment is granted.

Dated: 3-19-2010

Hon Denise F. Molia
J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION