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SHORT FORM ORDER

INDEX No. 08-29370
CAL. No. 09-01569-MV

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 11-2-09
ADJ. DATE 2-18-10
Mot. Seq. # 003 - MG; CASEDISP

MARIO D. REYES,

Plaintiff,

- against -

SANJAY SAHAY and EVA SAHAY,

Defendants.

DONALD LEO & ASSOCIATES, P.C.
Attorneys for Plaintiff
100-1 Patco Court
Islandia, New York 11749

RICHARD T. LAU & ASSOCIATES
Attorneys for Defendants
P.O. Box 9040
Jericho, New York 11753-9040

Upon the following papers numbered 1 to 30 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 - 29 ; Replying Affidavits and supporting papers 29 - 30 ; Other plaintiff's memorandum of law - 27 - 28 ; it is,

ORDERED that this motion by defendants Sanjay Sahay and Eva Sahay seeking summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Mario Reyes as a result of a motor vehicle accident that occurred at the intersection of Colonial Springs Road and Pinelawn Road on May 13, 2007. The accident allegedly occurred when the vehicle owned by defendant Eva Sahay and operated by defendant Sanjay Sahay ran a red light and struck the right passenger side of the vehicle operated by plaintiff. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject accident, including headaches; carpal tunnel syndrome; right wrist sprain/strain; herniated discs at levels C4-C5 through C5-C6; cervical, thoracic, and lumbar sprains/strains; cervical, thoracic, and lumbar radiculopathy; cervical, thoracic, and lumbar myofascial pain syndrome; and post traumatic stress syndrome. Plaintiff also alleges that he was confined to his bed for approximately four days and confined to his home for approximately two weeks. Plaintiff further alleges that he missed approximately one week from his employment as a cook at a pizzeria.

Defendants now move for summary judgment on the basis that plaintiff's injuries do not come within the "serious injury" threshold required by Insurance Law § 5102 (d). Defendants, in support of the motion, submit a copy of the pleadings, a copy of plaintiff's deposition transcript, the magnetic resonance imaging ("MRI") report of Dr. Ron Mark, and the sworn medical reports of Dr. Michael Katz and Dr. Jessica Berkowitz. Dr. Katz conducted an independent orthopedic examination of plaintiff at defendants' request on April 28, 2009. Dr. Berkowitz performed an independent radiological review of the MRI films of plaintiff's cervical spine at defendants' request on August 12, 2009. Plaintiff opposes the instant motion on the ground that defendants failed to meet their *prima facie* burden that he did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d). In the alternative, plaintiff asserts that the evidence submitted in opposition raises material issues of fact as to whether he sustained a "serious injury" under the "limitation of use" categories and the "90/180" category. Plaintiff, in opposition to the motion, submits his affidavit, the sworn medical reports of Dr. Alan Greenfield and Dr. Frantz Jasmin, and the affidavit of Dr. Steven Klein. Plaintiff also submits a copy of his deposition transcript and a copy of the police motor vehicle accident report.

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]; ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). 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***, *supra*; ***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 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 [2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [1991]). "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***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]). A plaintiff claiming injury under either of the "limitation of use" categories also must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Hackett v***

444 *Expedited Freight Sys.*, 54 AD3d 721, 865 NYS2d 101 [2008]; ***Ferraro v Ridge Car Serv.***, *supra*; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2007]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2008]; ***Laruffa v Yui Ming Lau***, *supra*; ***John v Engel***, 2 AD3d 1027, 768 NYS2d 527 [2003]; ***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*). 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]). Furthermore, 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]).

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]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, defendants established, *prima facie*, through the affirmed medical reports of their expert orthopedist and radiologist and plaintiff's deposition transcript, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Noh v Duffe***, 70 AD3d 1017, 894 NYS2d 765 [2010]; ***Richards v Tyson***, 64 AD3d 760, 883 NYS2d 575 [2009]; ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2009]; ***Staff v Yshua***, 59 AD3d 614, 874

NYS2d 180 [2009]; ***Ranzie v Abdul-Massih***, 28 AD3d 447, 813 NYS2d 473 [2006]). The Court initially notes that sprains and strains and contusions are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see* ***Rabolt v Park***, 50 AD3d 995 [2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [1991]). Defendant's orthopedist, Dr. Katz, tested the ranges of motion in plaintiff's cervical and lumbar spines using a goniometer and set forth his specific measurements, as well as compared plaintiff's ranges of motion to the normal ranges (*see* ***Staff v Yshua***, *supra*). Dr. Katz's report states, in relevant part, that an examination of plaintiff's cervical spine reveals no tenderness or paravertebral muscle spasm. It states that the measurement of motion in plaintiff's cervical spine shows flexion of 50 degrees (normal 50 degrees); extension of 60 degrees (normal 60 degrees); right and left lateral flexion of 45 degrees (normal 45 degrees); and right and left rotation of 80 degrees (normal 80 degrees). The report also states that an examination of plaintiff's thoracolumbar spine reveals no muscle spasm, a negative straight leg raising test, and a normal gait. It states that the measurement of motion in plaintiff's thoracolumbar spine shows forward flexion of 90 degrees (normal 90 degrees); full extension of 30 degrees (normal 30 degrees). The report states an examination of plaintiff's right and left shoulders, right and left knees, and right wrist reveals that plaintiff has full ranges of motion in these regions, and that there is no swelling present Dr. Katz opines that plaintiff's cervical and thoracolumbar strains with radiculitis, and right wrist contusion are resolved. The report concludes that plaintiff's prognosis is excellent, that he exhibits no signs of permanence, and that he is capable of gainful employment as a cook and his daily living activities.

Furthermore, the affirmed radiological report of Dr. Berkowitz states that the MRI examination of plaintiff's cervical spine revealed no disc bulges or herniations, and that there was no evidence of acute traumatic injury to the cervical spine. Dr. Berkowitz opines that there is no causal relationship between the subject accident and plaintiff's alleged injuries. In addition, the medical report of plaintiff's doctor, who performed a CT scan of plaintiff's cervical spine on June 18, 2007, approximately one month after the subject accident, states that no acute fractures were identified and that the straightening of plaintiff's cervical lordosis may be due to muscle spasm.

Once defendants met their *prima facie* burden, the burden then shifted to plaintiff to raise a triable issue of fact that he sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Dantini v Cuffie***, 59 AD3d 490, 873 NYS2d 189 [2009]). Plaintiff, however, failed to raise an issue of fact in opposition to defendants' showing (*see* ***Garcia v Lopez***, 59 AD3d 593, 872 NYS2d 719 [2009]; ***Joseph v A and H Livery***, 58 AD3d 688, 871 NYS2d 663 [2009]; ***Sealy v Riteway-1, Inc.***, 54 AD3d 1018, 865 NYS2d 129 [2008]). Plaintiff submitted the affirmed report of Dr. Greenfield, which states that an MRI examination of plaintiff's cervical spine was performed on June 11, 2007 revealed, among other things, that plaintiff had central disc herniations at levels C4-C5 through C5-C6. However, the mere existence of a herniated or bulging disc is not evidence 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* ***Chanda v Varughese***, 67 AD3d 947, 890 NYS2d 88 [2009]; ***Sealy v Riteway-1, Inc.***, *supra*; ***Kilakos v Mascera***, 53 AD3d 527, 862 NYS2d 529 [2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]).

In addition, plaintiff submitted the affirmed medical reports of Dr. Jasmin and Dr. Klein, attesting to the fact that plaintiff has restricted ranges of motion in his cervical and lumbar spines, that his prognosis is poor, and that his injuries are permanent and causally related to the subject accident. However, neither doctor's findings of significant limitations in plaintiff's ranges of motion were contemporaneous with the subject accident (*see* ***Taylor v Flaherty***, 65 AD3d 1328, 887 NYS2d 144 [2009]; ***Kurin v Zyuz***, 54 AD3d 902, 864 NYS2d 151 [2008]; ***Morris v Edmond***, 48 AD3d 432, 850 NYS2d 641 [2008]; ***D'Onofrio v Floton, Inc.***, 45 AD3d 525, 845 NYS2d 421 [2007]). Without admissible evidence of roughly contemporaneous range of motion limitations, plaintiff is unable to establish the duration of the injuries that is required to raise a triable issue of fact as to whether he sustained a serious injury under the permanent consequential limitation or significant limitation of use categories of the No-Fault statute (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2008]; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2007]). Moreover, both of plaintiff's medical experts only examined plaintiff on only one occasion, almost three years after the accident. Additionally, the affirmations of Dr. Jasmin and Dr. Klein lacked probative value, since both doctors relied upon unsworn medical reports of other doctors in reaching their conclusions (*see* ***Choi Ping Wong v Innocent***, 54 AD3d 384, 864 NYS2d 435 [2008]; ***Malave v Basikov***, 45 AD3d 539, 845 NYS2d 415 [2007]; ***Furrs v Griffith***, 43 AD3d 389, 841 NYS2d 594 [2007]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2007]).

Finally, plaintiff failed to proffer competent medical evidence that he sustained a medically-determined injury of a nonpermanent nature that prevented him for 90 out of180 days immediately following the accident from performing all of his usual and customary activities (*see* ***Jack v Acapulco Car Serv., Inc.***, __ AD3d __, 897 NYS2d 648 [2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2010]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2000]). Plaintiff admitted in his own deposition testimony that he returned to work full-time, with no restrictions on his duties, the week following the accident. Accordingly, defendants' motion for summary judgment is granted.

Dated: May 17, 2010

Hon. Joseph Farneti
Acting Justice Supreme Court

__X___ FINAL DISPOSITION _____ NON-FINAL DISPOSITION