Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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ROBERT GIANNETTA,

Plaintiff,

Index No.: 30504/07
Motion Date: 10/14/09
Motion Cal. No: 3
Motion Seq. No: 2

-against-

FELLAH MOHAMMED and FINNIGAN CAB CORP,

Defendants.

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The following papers numbered 1 to 11 read on this motion by defendants Fellah Mohammed and Finnigan Cab Corp., for an order granting summary judgment defendants, pursuant to CPLR §3212, dismissing the complaint, in as much as plaintiff cannot met the serious injury threshold requirement mandated by Insurance Law 5104(a).

	PAPERS NUMBERED
Notice of Motion-Affidavits--Exhibits-Memorandum of Law.....	1 - 5
Affirmation in Opposition-Exhibits.....	6 - 9
Reply Affirmation-Exhibits.....	10 - 11

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action for personal injury in which plaintiff Robert Giannetta ("plaintiff") alleges that he sustained a serious personal injury on September 4, 2007, as a result of a motor vehicle accident that occurred at or near 225 East 35th Street between Second Avenue and the Tunnel Street exit, New York, New York, when the vehicle owned by defendant Finnigan Cab Corp. and operated by defendant Fellah Mohammed ("defendants") struck plaintiff's vehicle in the rear. Plaintiff claims that, as a result of the accident, he sustained, inter alia, injuries, including disc herniations at T6-7 through T9-10; limitations of range of motion in the thoracic and Lumbar spine; back pain; muscle spasms in Lumbar spine; and radiculopathy. Defendants move for summary judgment on the ground that plaintiff failed to meet the "serious injury" threshold requirement of section 5102(d) of the Insurance Law, which, in pertinent part, defines a "serious injury" as:

> a personal injury which results in ...significant disfigurement; ...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 party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. See Licari v. Elliott, 57 N.Y.2d 230 (1982). The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 (2002). By submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her prima facie burden. See Margarin v. Krop, 24 A.D.3d 733 (2nd Dept. 2005); Karabchievsky v. Crowder, 24 AD3d 614 (2nd Dept. 2005). The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendants, as the movants, make a prima facie showing that plaintiff did not sustain a serious injury. Toure v Avis Rent A Car Sys., 98 N.Y.2d 345 (2002).

In support of their motion, defendants submitted the affirmed medical report of Dr. David L. Milbauer ("Milbauer"), a radiologist who reviewed the October 16, 2007 MRI of plaintiff's thoracic spine; the affirmed medical report of Dr. Sarasavani Jayaram ("Jayaram"), a board certified neurologist who examined plaintiff on January 22, 2009; and plaintiff's deposition testimony. Dr. Milbauer, in his December 16, 2008 report, found, upon review of the MRI, "scoliosis and diffuse degenerative changes of the thoracic intervertebral discs . . . associated with small posterior disc protrusions to the right of the midline at T6-T7 and T0-T10 and to the left at T11-T12," and concluded:

> The small posterior disc protrusions present are of uncertain age and etiology and may be degenerative in nature, irrespective of etiology,

> there is no associated compromise of the canal or neural foramina or compression of the thoracic spinal cord or exiting nerve roots and, as such, the findings would not be expected to result in a neurologic deficit clinically.

Dr. Jayaram, who conducted a physical examination of plaintiff on January 22, 2009, used a hand held goniometer to measure plaintiff's ranges of motion and found a normal range of motion in all spheres, including the thoracic and lumbar spine. In her diagnosis, Dr. Jayaram determined:

> Normal Neurological evaluation
> No focal deficits
> Neurologically intact

Aside from her quantification assessment, Dr. Jayaram also made a qualitative assessment, finding, upon observation, that plaintiff was "able to get on and off the bed, and turn to his sides unassisted. He can boot, unboot, dress and undress without assistance. He can move his head, neck and body freely during unguarded conversation." She further found no neurological disability, no restrictions on activities of daily living and no permanency or residuals.

Defendants also pointed to plaintiff's deposition testimony in which he testified that he is self-employed as an owner of a security guard company, and is required to supervise his staff and to travel to three different locations during the day. He further testified that he stayed home "three or four days . . . after the accident "and "probably [missed] three weeks" from work following the accident; that, as before the accident, he works about six hours a day, five to six days a week. He further testified that the only physical or athletic activity that he engaged in before the accident was weight training, which he continues to engage in to a lesser degree.

Through the submission of the affirmed medical reports of their experts, who reviewed the MRI film of plaintiff's lower back or conducted a physical examination of plaintiff and found no abnormalities causally related to the accident, defendants' evidence was sufficient to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). See, Pommells v. Perez, 4 N.Y.3d 566 (2005); Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Zhang v. Wang, 24 A.D.3d 611 (2005); Burgos v Vargas, 33 A.D.3d 579 (2nd Dept. 2006); Batista v Olivo, 17 A.D.3d 494 (2nd Dept. 2005); Sainte-Aime v Ho, 274 A.D.2d 569 (2nd Dept. 2000). They established, prima facie, that plaintiff suffered no limitation of motion as a result of the accident, and no medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his customary daily activities for not less than ninety days during the one hundred eighty days immediately following his alleged injury or impairment. Defendants thus established their entitlement to summary judgment dismissing the complaint insofar as asserted by plaintiff on the threshold issue. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Licari v. Elliott, 57 N.Y.2d 230 (1982); Djetoumani v. Transit, Inc., 50 A.D.3d 944 (2nd Dept. 2008). The

burden then shifts to plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury. See Gaddy v. Eyler, 79 N.Y.2d 955 (1992).

In opposition, plaintiff initially seeks to discredit defendants' experts. First, he argues that Dr. Jayaram's failure to review any of plaintiff's medical records and her reliance solely on her one-time physical examination of plaintiff undercut her conclusion that plaintiff did not sustain a serious injury. Second, he argues that Dr. Milbauer's conclusion, after reviewing the MRI film, that the "small posterior disc protrusions" were the result of degenerative changes, not trauma, is irrelevant, and thus "defendants failed to demonstrate that the disc bulges, herniated discs, limitation of flexion, extension and rotation of plaintiff's thoracic spine, as found by their own examining physicians, did not evince a serious injury pursuant to §5102(d)." In support of this conclusion, plaintiff relies upon Landman v. Sarcona, 63 A.D.3d 690 (2nd Dept. 2009), in which the Appellate Division, Second Department stated [id., at 690-691]:

> The defendant failed to meet her prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (citations omitted). In support of her motion, the defendant relied, inter alia, upon the affirmed medical reports of Dr. Mathew Chacko and Dr. Vartkes Khachadurian. Dr. Chacko, the defendant's examining neurologist, who noted significant limitations in the plaintiff's cervical and lumbar spine ranges of motion when he examined her on May 2, 2007, some 2 ½ years after the accident (citations omitted). Moreover, the medical report of Dr. Khachadurian, the defendant's examining orthopedic surgeon, noted a significant limitation in the plaintiff's cervical spine range of motion when he examined her on March 21, 2007. Dr. Khachadurian opined that such limitation was due to the plaintiff's age and evidence of degenerative disease in her cervical spine. However, such opinion was conclusory (citations omitted).

They also rely upon, Powell v. Prego, 59 A.D.3d 417 (2nd Dept. 2009), in which the Appellate Division, Second Department, held [id., at 418-419]:

> The defendant failed to establish, prima facie, that the injured plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), as a result of the subject accident (citations omitted). The papers submitted by the defendant in support of the motion included the affirmed medical report of his examining orthopedist which showed the existence of limitations in the range of motion of the injured plaintiff's cervical spine (citation omitted). The bare conclusory opinion of the defendant's orthopedist that the '[d]ecreased range of motion is due to degenerative changes that are

pre-existing' was without probative value (citations omitted).

See, also, Loor v. Lozado, 66 A.D.3d 847 (2nd Dept. 2009)[defendant failed to meet his prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident because his examining physician noted significant range-of-motion limitations to the plaintiff's lumbar spine]; Buono v. Sarnes, 66 A.D.3d 809 (2nd Dept. 2009)[defendant's examining physicians noting of a significant limitation in plaintiff's lumbar spine range of motion and a significant limitation in her cervical spine range of motion sufficient to deny defendant's motion to dismiss based upon absence of serious injury]; Alvarez v. Dematas, 65 A.D.3d 598 (2nd Dept. 2009)[defendant failed to meet her prima facie burden of showing that the plaintiff did not sustain a serious injury, in part, due to defendant's examining doctor clearly setting forth significant limitations in the range of motion of the plaintiff's cervical spine]; Hurtte v. Budget Roadside Care, 54 A.D.3d 362 (2nd Dept. 2008)[defendant failed to meet his prima facie burden of showing that the plaintiff did not sustain a serious injury; medical report of the defendant's examining orthopedist noted findings of significant range-of-motion limitations]; Bagot v. Singh, 59 A.D.3d 368(2nd Dept. 2009)[defendants failed to meet their prima facie burden of establishing that the plaintiff did not sustain a serious injury; the affirmed medical report of their examining orthopedic surgeon noted the existence of a significant limitation in the plaintiff's left knee range of motion].

Landman v. Sarcona, and its progeney relied upon by plaintiff, however, are inapposite, as in each instance, the defendant's examining doctors found limitations in the plaintiff's range of motion. Here, Dr. Jayaram found no limitation of motion and Dr. Milbauer, the radiologist, reported what he saw on the film, and merely raised the possibility that the disc protrusions may be degenerative in nature. The significance of his opinion was that whether the disc protrusions were the result of degeneration or trauma, "tjhere is no associated compromise of the canal or neural foramina or compression of the thoracic spinal cord or exiting nerve roots and, as such, the findings would not be expected to result in a neurologic deficit clinically."

In support of his claim that he did indeed sustain a serious injury, plaintiff submitted the affidavit of Dr. Ali E. Guy ("Guy"), a Diplomate of the American Board of Physical Medicine and Rehabilitation, who began treating plaintiff on September 10, 2007, immediately after his September 4, 2007 accident, and most recently saw plaintiff on July 6, 2009. In his affidavit, Dr. Guy stated:

> After reviewing: (i) October 16, 2007 MRI of the thoracic spine; (ii) the report and records from NYU Medical Center; and (iii) numerous examinations [of] Mr. Giannetta, I have determined that Mr. Giannetta suffers from disc herniations at the level of T6-T7 (right paracentral) and T9-T10, an exacerbation of the normal natural aging spinal spondylosis and traumatic myofascial pain syndrome as a result of the September 4, 2007 accident.

> After performing Range of Motion Testing, Mr. Giannetta's specific restrictions and limitations are as follows: Back - diffuse moderate tenderness, moderate spasm, and multiple trigger points; extension was 15 degrees/30 degrees; flection was 45 degrees/90 degrees with straight leg-60 degrees/90 degrees with bilateral back pain.
>
> It is my opinion that based upon history obtained, multiple clinical examination findings, response to the physical therapy regimen, results of MRIs which I personally reviewed and agree with the report, response to trigger point injections, and the range of motion deficits which were evaluated more than one year from the time of the accident clearly confirms that Mr. Giannetta's injuries are permanent.

Dr. Guy concludes that it is his opinion "with a reasonable degree of medical certainty that Mr. Giannetta has sustained a permanent partial disability casually related to the auto accident on September 4, 2007." Inexplicably, he also opines the necessity of "possible evaluation by spinal surgeon if neck and lower back pain continue to worsen," which appears to be the only reference to the cervical spine in the record.

Although Dr. Guy's affidavit alludes to tests being administered that revealed limited ranges of motion, he neither outlined the objective tests performed nor quantified the alleged limitations. Nor did Dr. Guy specify in the instances in which he did quantify limitations, the portion of the spine being measured. The failure of plaintiff's expert to quantify the limitations in plaintiff's range of motion or to indicate the objective tests conducted to arrive at the results is fatal; medical opinions based on subjective complaints of pain or headaches are insufficient to establish "serious injury." See, Budhram v. Ogunmoyin, 53 A.D.3d 640 (2nd Dept. 2008); Malloy v. Brisco, 183 A.D.2d 704 (1992); see also Zoldas v. Louise Cab Corp., 108 A.D.2d 378 (1985). Moreover, much of his diagnosis appears to have been based upon his review of unsworn medical report and MRI reports prepared by other doctors and unsworn hospital records, none of which was attached to the opposition papers, and upon which plaintiff cannot rely. Malave v. Basikov, 45 A.D.3d 539 (2nd Dept. 2007); Puerto v. Omholt, 17 A.D.3d 650 (2005). Moreover, even assuming the undisclosed MRI results revealed disc bulges and herniations; 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, Pommells v. Perez, 4 N.Y.3d 566, 574 (2005); Byam v. Waltuch, 50 A.D.3d 939 (2nd Dept. 2008); Endzweig-Morov v. MV Transp., Inc., 50 A.D.3d 946 (2nd Dept. 2008); Wright v. Rodriguez, 49 A.D.3d 532 (2nd Dept. 2008); Patterson v. N.Y. Alarm Response Corp., 45 A.D.3d 656 (2nd Dept. 2007); Waring v. Guirguis, 39 A.D.3d 741 (2nd Dept. 2007); Iusmen v. Konopka, 38 A.D.3d 608 (2nd Dept. 2007). Consequently, Dr. Guy's affidavit is insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury without "objective evidence of the extent of alleged physical limitations resulting from the disc injury." Meely v 4 G's Truck Renting Co., 16 A.D.3d 26 (2nd Dept. 2005). 2007). Thus, plaintiff submitted no competent admissible medical evidence contemporaneous with the accident showing that he suffered from a loss of range of motion. See

Ranzie v Abdul-Massih, 28 A.D.3d 447 (2nd Dept. 2006); Yeung v Rojas, 18 A.D.3d 863 (2nd Dept. 2005); Nemchyonok v Ying, 2 A.D.3d 421 (2nd Dept. 2003). Accordingly, the motion by defendants Fellah Mohammed and Finnigan Cab Corp., for summary judgment on the threshold issue is granted and the complaint hereby is dismissed.

Dated: January 7, 2010

J.S.C.