SHORT FORM ORDER

INDEX No. 09-1791
CAL. No. 10-00330-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-5-10 (#002)
MOTION DATE 3-19-10 (#003)
ADJ. DATE 5-20-10
Mot. Seq. # 002 - MD
003 - MG; CASEDISP

JAMES G. DIVILIO and DIANA DIVILIO,	:	GRUENBERG & KELLY, PC
	:	Attorney for Plaintiffs
Plaintiffs,	:	3275 Veterans Memorial Highway, Suite B-9
- against -	:	Ronkonkoma, New York 11779
	:	
SIOBAN CULLINGTON, TOWN OF ISLIP PUBLIC SAFETY and TOWN OF ISLIP,	:	DEVITT SPELLMAN BARRETT, LLP
	:	Attorney for Defendants
	:	50 Route 111
Defendants.	:	Smithtown, New York 11787

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiffs, dated February 11, 2010, and supporting papers (including Memorandum of Law dated ___); (2) Notice of Cross Motion by the defendants, dated March 8, 2010, supporting papers; (3) Affirmation in Opposition by the plaintiffs, dated April 29, 2010, and supporting papers; (4) Reply Affirmation by the defendants, dated May 19, 2010, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by plaintiffs James Divilio and Diana Divilio seeking summary judgment on the issue of liability is denied, as moot; and it is further

ORDERED that this cross motion by defendants Sioban Cullington, Town of Islip Public Safety, and Town of Islip seeking summary judgment dismissing plaintiffs' complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff James Divilio as a result of a motor vehicle accident at the intersection of Smithtown Avenue and Church Street on October 17, 2007. The accident allegedly occurred when the vehicle operated by defendant Sioban Cullington and owned by defendants Town of Islip Public Safety and Town of Islip ("Town of Islip") struck the rear of the vehicle operated by plaintiff while it was stopped at red light. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as result of the subject accident, including, herniated discs at levels C5 through C7, levels L5/S1, and T5/T6; a disc bulge at level C4/C5; and straightening of the cervical spine. Plaintiff also alleges that he was confined to his bed for approximately four days and

confined to his home for approximately six days following the subject accident. Plaintiff Diana Divilio interposed a claim for loss of services of her husband as result of the subject accident.

Defendants now cross-move for summary judgment on the basis that plaintiff Divilio failed to sustain a "serious injury" within the meaning of Insurance Law § 5102(d). In support of the motion, defendants submit a copy of the pleadings, a copy of the parties' deposition transcripts, copies of plaintiff's medical records, and the sworn medical report of Dr. Noah Finkel. Dr. Finkel conducted an independent orthopedic examination of plaintiff at defendants' request on June 24, 2009. Defendants also submit a copy of plaintiff's 50-H hearing transcript; an affidavit by the Town of Islip's Deputy Commissioner, Warren Goercke; a copy of the Town of Islip accident report; and copies of the photographs of plaintiff's vehicle following the subject accident. Plaintiffs oppose the instant cross motion on the ground that defendants have failed to establish that James Divilio did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). Alternatively, plaintiffs assert that the evidence submitted in opposition demonstrates that James Divilio sustained an injury within the "limitation of use" category and the "90/180" category. In opposition, plaintiffs submit copies of James Divilio's medical reports, the affidavit of Dr. Hargovind Dewal, and unsworn copies of the medical reports of Dr. David Panasci. Plaintiffs also submit the independent medical reports of Dr. Joseph Stubel and Dr. Raghava Polavarapu, orthopedists who examined plaintiff on January 20, 2009 and November 24, 2009, respectively, at the requests of his insurance provider. In addition, plaintiffs submit the independent medical report of Dr. Eric Roth, who performed a physiatric medical examination of plaintiff on December 8, 2009 at the request of his insurance provider.

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]).

Dr. Finkel, in his affirmed medical report, states that an examination of plaintiff's cervical spine reveals that he exhibits bilateral rotation of 15 degrees (normal is 80 degrees), forward flexion of 15 degrees (normal is 60 degrees), and extension of 10 degrees (normal is 35 degrees). The report states that plaintiff "inhibits any further active or passive range of motion of the cervical spine during the testing process." It states that there is no radicular pain or spasm upon palpation of the periscapular musculature, and that plaintiff has full active and passive range of motion in both shoulders, elbows, forearms, and wrists. The report also states that an examination of plaintiff's lumbar spine reveals that he exhibits extension of 30 degrees (normal is 35 degrees), lateral flexion of 30 degrees (normal is 35 degrees), and forward flexion of 30 degrees (normal is 60 degrees). It states that plaintiff's straight leg rasing test is negative, bilaterally, and that there is no evidence of sensory or motor deficit in either of his lower extremities. Dr. Finkel opines that the cervical, thoracic, and lumbosacral sprains that plaintiff allegedly sustained as a result of the subject accident have resolved, and that there is evidence of degenerative disc disease in plaintiff's cervical spine. The report concludes that plaintiff does not have any causally related dysfunction or disability that is related to the subject accident.

Defendants, despite the fact that Dr. Finkel's medical report is deficient in that he fails to state what objective tests were used to determine that plaintiff does not have any range of motion restrictions (*see* ***Giammalva v Winters***, 59 AD3d 595, 873 NYS2d 227 [2009]; ***Perez v Fugon***, 52 AD3d 668, 861 NYS2d 86 [2008]; ***Tolstocheev v Bajrovic***, 28 AD3d 473, 811 NYS2d 785 [2006]), have established their prima facie entitlement to judgment as a matter of law (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Defendants, through the submission of plaintiff's deposition testimony and the reports of plaintiff's doctors, have demonstrated that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5104(d) as a result of the subject accident (*see* ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [2010]; ***Lopez v Adul-Wahab***, 67 AD3d 598, 889 NYS2d 178 [2009]; ***DeJesus v Paullino***, 61 AD3d 605, 878 NYS2d 20 [2009]). Defendants, in support of their motion, submitted the medical reports of three medical doctors that examined plaintiff and concluded that, although there were positive findings in plaintiff's MRI reports, plaintiff had pre-existing degenerative disc disease in his cervical and lumbar regions prior to the subject accident (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2009], *lv denied* 13 NY3d 706, 887 NYS2d 4 [2009]; ***Jean v Kabaya***, 63 AD3d 509, 881 NYS2d 891 [2009]; ***Houston v Gajdos***, 11 AD3d 514, 728 NYS2d 839 [2004]). Therefore, the burden has shifted

to plaintiff to raise a triable issue of fact as to whether he sustained a serious injury (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005];***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]).

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 AAA 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]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether he sustained a "serious injury" within the meaning of Insurance Law § 5102(d) (*see* ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]). While plaintiff is allowed to rely on unsworn medical reports where they have been relied upon by the defendant in support of his or her motion (*see* ***Perry v Pagano***, 267 AD2d 290, 699 NYS2d 882 [1999]), positive MRI findings alone are insufficient to raise a triable issue of fact (*see* ***Noble v Ackerman***, 252 AD2d 392, 675 NYS2d 86 [1998]). Similarly, the mere existence of a herniated or bulging disc, and even radiculopathy, 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" (***Sharma v Diaz***, 48 AD3d 442, 443, 850 NYS2d 634 [2008]; *see* ***Mejia v De Rose***, 35 AD3d 407, 825 NYS2d 722 [2006]; ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]). Moreover, plaintiff failed to address defendants' showing that he suffers from pre-existing degenerative disc disease in the areas where he alleges his injuries occurred. Where a defendant presents evidence of a pre-existing condition, it is incumbent upon the plaintiff to present proof to address the defendant's lack of causation (*see* ***Pommells v***

Perez, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Sky v Tabs***, 57 AD3d 235, 868 NYS2d 648 [2008]; ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Carter v Full Serv., Inc.***, 29 AD3d 342, 815 NYS2d 41 [2006]; ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [2006]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the "serious injury" threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [2009]). Plaintiff's failure to submit evidence that provides an objective basis to conclude that his present physical limitations and continuing pain are attributable to the subject accident, rather than to the degenerative condition in his cervical and lumbar regions, is a significant flaw in his opposition (*see* ***Seck v Minigreen Hacking Corp.***, 53 AD3d 608, 863 NYS2d 218 [2008]).

Furthermore, plaintiff has proffered insufficient medical evidence to demonstrate that he sustained an injury within the "limitation of use" categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]) or in the "90/180" category (*see* ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 897 NYS2d 648 [2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2000]). The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [1988]). Although plaintiff has submitted the reports of Dr. Dewal and three independent medical examinations performed at the request of his insurance company almost two years after the accident, which state that he has decreased ranges of motion in his cervical and lumbar regions, plaintiff has failed to proffer any competent medical evidence that revealed the existence of significant limitations in his cervical and lumbar spines contemporaneous with the subject accident (*see* ***Nieves v Michael***, 73 AD3d 716, 901 NYS2d [2010]; ***Fung v Uddin***, 60 AD3d 992, 876 NYS2d 469 [2009]; ***Garcia v Lopez***, 59 AD3d 593, 872 NYS2d 719 [2009]).

Finally, plaintiff failed to submit competent medical evidence to demonstrate that the injuries he sustained prevented him from performing substantially all of his usual or customary activities for not less than 90 days of the first 180 days following the subject accident (*see* ***Rabolt v Park***, *supra*; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2007]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2006]; ***Sainte-Aime v Ho***, *supra*). Accordingly, defendants' cross-motion for summary judgment is granted. Having determined that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d), plaintiffs' motion for partial summary judgment is denied, as moot.

Dated: 9/30/10

Peter H. Mayer
PETER H. MAYER, J.S.C.