Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Stephen C. Sorahan,

Plaintiff,

-against-

Suffolk County Department of Public Works, Eddy Guerrier and County of Suffolk

Defendants.

Index No.: 41656/2009

Motion Sequence No.: 002; MG
Motion Date: 1/18/11
Submitted: 5/12/11

Motion Sequence No.: 003; MD
Motion Date: 1/18/11
Submitted: 5/12/11

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Attorney for Defendants:

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Clerk of the Court

Upon the following papers numbered 1 to 46 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 10; 33 - 42; Answering Affidavits and supporting papers, 11 - 30; 43 - 44; Replying Affidavits and supporting papers, 31 - 32; 46 - 46.

Plaintiff Stephen Sorahan commenced this action against defendants Suffolk County Department of Public Works, Eddy Guerrier and County of Suffolk (hereinafter collectively referred to as the "County") to recover damages for injuries that he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Route 110 and Michael Avenue in Farmingdale,

New York on March 27, 2009. By his complaint, plaintiff alleges, among other things, that his vehicle was struck in the rear by a vehicle operated by defendant Eddy Guerrier and owned by defendants County of Suffolk Department of Public Works and County of Suffolk. As a result of the collision between his vehicle and the County's vehicle, plaintiff's vehicle, which was stopped for a red traffic light, was pushed forward into the vehicle operated by Michael Montefusco, who is not a party to this action. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject accident, including a central posterior disc herniation at level C5-C6; cervical radiculopathy; cervicalgia; cervical sprain/strain; right shoulder impingement syndrome; and restricted range of motion of the cervical spine and right shoulder. He alleges that as a result of the injuries he sustained in the accident he was confined to his bed for approximately two weeks and to his home for approximately six months. Plaintiff further alleges that he was incapacitated from his employment as a combo driver with the United Parcel Service ("UPS") for approximately six months following the accident.

The County now moves for summary judgment on the basis that the injuries plaintiff allegedly sustained as a result of the subject accident do no meet the "serious injury" threshold requirement of Insurance Law §5102(d). In support of the motion, the County submits copies of the pleadings, plaintiff's 50-h hearing transcript, plaintiff's deposition transcript and the medical report of Dr. Robert Israel. Dr. Israel conducted an independent orthopedic examination of plaintiff at the County's request on July 23, 2010. Plaintiff opposes the County's motion on the ground that the County failed to meet its *prima facie* burden of showing that he did not sustain an injury within the meaning of Insurance Law §5102(d); alternatively, plaintiff contends that he sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law. In opposition to the motion, plaintiff submits his own affidavit, a copy of the police accident report, a copy of the East Farmingdale Fire Department's 911 call and his certified medical reports from New Island Hospital's emergency room and Orlin & Cohen Orthopedic Associates. Plaintiff also submits his certified medical reports from Allied Medical and Rehabilitation, PC, the medical report of Nicholas Bavaro, D.C., copies of plaintiff's uncertified medical reports and a letter dated September 23, 2009 from plaintiff's union's fund manager stating the amount the union has paid for plaintiff's medical expenses.

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 [1995]; see also Toure v. Avis Rent A Car Sys., 98 NY2d 345 [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 [1982]; Porcano v. Lehman, 255 AD2d 430 [2nd Dept., 1998]; Nolan v. Ford, 100 AD2d 579 [2nd Dept., 1984], aff'd 64 NY2d 681 [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."

In order to recover under the "limitations of use" categories, a plaintiff must present 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 [2nd Dept., 2009]; Laruffa v. Yui Ming Lau, 32 AD3d 996 [2nd Dept., 2006]; Cerisier v. Thibiu, 29 AD3d 507 [2nd Dept., 2006]; Meyers v. Bobower Yeshiva Bnei Zion, 20 AD3d 456 [2nd Dept., 2005]). 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 [2002]; Dufel v. Green, 84 NY2d 795, 798 [1995]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see, Licari v. Elliott, 57 NY2d 230 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (see, Scheer v. Koubek, 70 NY2d 678 [1987]). Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (see, Grasso v. Angerami, 79 NY2d 813 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (see, Caulkins v. Vicinanzo, 71 AD3d 1224 [3rd Dept., 2010]; Ayzen v. Melendez, 299 AD2d 381 [2nd Dept., 2002]).

Further, to meet the criteria for a "medically determined injury or impairment of a non-permanent nature"which prevents the injured person from performing substantially all of his or her customary daily activities, objective medical evidence must be presented of plaintiff's curtailment, and it must be demonstrated that plaintiff's activities were significantly curtailed for at least 90 of the 180 days immediately following the accident (see, Licari v. Elliot, 57 NY2d 230 [1982]; Nesci v. Romanelli, 74 AD3d 765 [2nd Dept., 2010]; Amato v. Fast Repair, Inc., 42 AD3d 477 [2nd Dept., 2007]). Additionally, a plaintiff must demonstrate through the use of competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (see, Penaloza v. Chavez, 48 AD3d 654 [2nd Dept., 2008]; Hamilton v. Rouse, 46 AD3d 514 [2nd Dept., 2007]; Roman v. Fast Lane Car Serv., Inc., 46 AD3d 535 [2nd Dept., 2007]; Sainte-Aime v. Ho, 274 AD2d 569 [2nd Dept., 2000]).

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., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [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" (Pagano v. Kingsbury, 182 AD2d 268, 270 [2nd Dept., 1992]) to demonstrate entitlement to judgment as a matter of law. 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 [2nd Dept., 2001]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Vignola v. Varrichio, 243 AD2d 464 [2nd Dept., 1997]; Torres v. Micheletti, 208 AD2d 519

[2nd Dept., 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, 84 NY2d 795, 798 [1995]; Tornabene v. Pawlewski, 305 AD2d 1025 [4th Dept., 2003]; Pagano v. Kingsbury, 182 AD2d 268, 270 [2nd Dept., 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 [2nd Dept., 2006]; Rich-Wing v. Baboolal, 18 AD3d 726 [2nd Dept., 2005]; see generally, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Here, the County established *prima facie* their entitlement to judgment as a matter of law on the ground that plaintiff did not sustain an injury within the limitations of use categories of Insurance Law §5102(d) as a result of the subject accident (see, Charley v. Goss, 12 NY3d 750 [2009]; Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Lively v. Fernandez, 85 AD3d 981 [2nd Dept., 2011]; McLoud v. Reyes, 82 AD3d 848 [2nd Dept., 2011]). The affirmed medical report of Dr. Israel states that an examination of plaintiff's cervical spine, right shoulder, elbows and wrists reveals he has full range of motion in those areas. The report states that there is no atrophy, tenderness or muscle spasm upon palpation present in plaintiff's cervical spine or right shoulder and that there is no swelling or synovitis in plaintiff's hands or wrists. It states that there is no tenderness in plaintiff's elbows and that testing of his muscle strength is 5/5. Dr. Israel opines that the sprains plaintiff sustained to his cervical spine, right shoulder, elbows, wrists and hands as a result of the subject accident have resolved, and that plaintiff does not have any orthopedic disability. Dr. Israel's report concludes that plaintiff is capable of performing his activities of daily living and his work activities.

However, the County failed to adequately address plaintiff's claim that he sustained an injury within the 90/180 category of §5102(d) of the Insurance Law as a result of the accident (see, Takaroff v. A.M. USA, Inc., 63 AD3d 1142 [2nd Dept., 2009]; Scinto v. Hoyte, 57 AD3d 646 [2nd Dept., 2008]; Colacino v. Andrews, 50 AD3d 615 [2nd Dept., 2008]; Daddio v. Shapiro, 44 AD3d 699 [2nd Dept., 2007]). The County's orthopedic expert, Dr. Israel, examined plaintiff approximately 16 months after the subject accident occurred. Although, Dr. Israel concluded that plaintiff has full range of motion in his cervical spine, right shoulder, elbows, wrists and hands and that the sustained injuries have resolved, Dr. Israel failed to relate any of his findings to the category of serious injury for the period immediately following the accident (see, Ballard v. Cunneen, 76 AD3d 1037 [2nd Dept., 2010]; Torres v. Performance Auto. Group, Inc., 36 AD3d 894, 894 [2nd Dept., 2007]; Nakanishi v. Sadaqat, 35 AD3d 416 [2nd Dept., 2006]; Faun Thai v. Butt, 34 AD3d 447 [2nd Dept., 2006]). Dr. Israel failed to offer an opinion as to whether plaintiff suffered an injury that limited his usual daily activities for at least 90 of the 180 days immediately after the accident (see, Lopez v. Geraldino, 35 AD3d 398 [2nd Dept., 2006]; Nakanishi v. Sadaqat, 35 AD3d 416 [2nd Dept., 2006]; Faun Thai v. Butt, 34 AD3d 447 [2nd Dept., 2006]).

Although a defendant is permitted to use a plaintiff's deposition testimony to establish that he or she did not sustain a nonpermanent injury that prevented him from performing substantially all of his material daily activities for at least 90 of the 180 days immediately following the accident (see e.g., Neuburger v. Sidoruk, 60 AD3d 650 [2nd Dept., 2009]; Shaw v. Jalloh, 57 AD3d 647 [2nd

Dept., 2008]; Sanchez v. Williamsburg Volunteer of Hatzolah, Inc., 48 AD3d 664 [2nd Dept., 2008]), here the County's reliance on plaintiff's testimony is insufficient to meet their burden on the motion (see, Neuburger v. Sidoruk, 60 AD3d 650 [2nd Dept., 2009]; Tinsley v. Bah, 50 AD3d 1019 [2nd Dept., 2008]; Torres v. Performance Auto. Group, Inc., 36 AD3d 894, 894 [2nd Dept., 2007]; cf. Geliga v. Karibian, 56 AD3d 518 [2nd Dept., 2008]). At his 50-h hearing and again at his deposition, plaintiff testified that he missed approximately six months from his employment with UPS and that immediately following the accident he was confined to his bed for approximately two weeks and to his home for approximately one and an half months. Plaintiff further testified that prior to the accident he would accrue overtime on his job almost every day and that once he returned to work he was unable to accept overtime with the same frequency because of the injuries he sustained in the accident. Inasmuch as the County failed to establish their *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (see Pfeiffer v. New York Cent. Mutual Fire Ins. Co., 71 AD3d 971 [2nd Dept., 2010]; Nembhard v. Delatorre, 16 AD3d 390 [2nd Dept., 2005]; Coscia v. 938 Trading Corp., 283 AD2d 538 [2nd Dept., 2001]). Accordingly, the County's motion for summary judgment is denied.

Lastly, plaintiff moves for summary judgment in his favor on the issue of liability, arguing that the negligent operation of the County's vehicle by Eddy Guerrier was the sole proximate cause of the accident's occurrence. In particular, plaintiff asserts that Eddy Guerrier's failure to maintain a safe distance between his vehicle and plaintiff's vehicle and his inattention to the traffic conditions resulted in the accident's happening. Plaintiff also contends that defendant cannot offer a non-negligent explanation for the cause of the accident. In support of the motion, plaintiff submits a copy of the pleadings, a copy of the police accident report, the plaintiff's 50-h hearing transcript and the parties' deposition transcripts. The County opposes the plaintiff's motion on the ground that there are material issues of fact as to the cause of the subject accident.

A rear-end collision with a stopped vehicle creates a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (see Cortes v. Whelan, 83 AD3d 763 [2nd Dept., 2011]; Ramirez v. Konstanzer, 61 AD3d 837 [2nd Dept., 2009]; Hakakian v. McCabe, 38 AD3d 493 [2nd Dept., 2007]). However, the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (see, Chepel v. Meyers, 306 AD2d 235, 237 [2nd Dept., 2003]; see Carhuayano v. J&R Hacking, 28 AD3d 413 [2nd Dept., 2006]; Gaeta v. Carter, 6 AD3d 576 [2nd Dept., 2004]; Purcell v. Axelsen, 286 AD2d 379 [2nd Dept., 2001]; Colonna v. Suarez, 278 AD2d 355 [2nd Dept., 2000]; see also Vehicle and Traffic Law §1163). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead, is sufficient to overcome the inference of negligence and preclude an award of summary judgment (see, Danner v. Campbell, 302 AD2d 859, 859 [4th Dept., 2003]; see, Davidoff v. Mullokandov, 74 AD3d 862 [2nd Dept., 2010]; Carhuayano v. J&R Hacking, 28 AD3d 413 [2nd Dept., 2006]); Rodriguez-Johnson v. Hunt, 279 AD2d 781 [3rd Dept., 2001]).

Here, plaintiff's testimony at the 50-h hearing and his deposition demonstrate that prior to being struck in the rear by the vehicle operated by Eddy Guerrier, his vehicle was stopped in traffic

at a red light. Based on this evidence, plaintiff established *prima facie* that he was not the proximate cause of the subject accident (see, Cortes v. Whelan, 83 AD3d 763 [2nd Dept., 2011]; Hauser v. Adamov, 74 AD3d 1024 [2nd Dept., 2010]; Hyeon Hee Park v. Hi Taek Kim, 37 AD3d 416 [2nd Dept., 2007]; Bournazos v. Malfitano, 275 AD2d 437 [2nd Dept., 2000]; Smith v. Cafiero, 203 AD2d 355 [2nd Dept., 1994]). In opposition to plaintiff's *prima facie* showing, the County failed to come forward with a non-negligent explanation for the collision to overcome the inference of negligence and preclude an award of summary judgment (see, Blasso v. Parente, 79 AD3d 923 [2nd Dept., 2010]; Franco v. Breceus, 70 AD3d 767 [2nd Dept., 2010]; Vespe v. Kazi, 62 AD3d 408 [1st Dept., 2009]), or to show that any negligence on the part of plaintiff contributed to the accident's happening (see, Kastritsios v. Marcello, 84 AD3d 1174 [2nd Dept., 2011]; Ramirez v. Konstanzer, 61 AD3d 837 [2nd Dept., 2009]; Smith v. Seskin, 49 AD3d 628 [2nd Dept., 2008]). At his deposition, Eddy Guerrier admitted that he struck the rear of plaintiff's stopped vehicle and that the hit caused plaintiff's vehicle to strike the vehicle ahead of it. Eddy Guerrier also acknowledged that he did not see plaintiff's vehicle prior to striking it. Under these circumstances, the sole proximate cause of the accident was Eddy Guerrier's failure to see that which he should have seen, to drive at a safe speed, and to maintain a safe distance behind plaintiff's vehicle (see, Blasso v. Parente, 79 AD3d 923 [2nd Dept., 2010]; Mandel v. Benn, 67 AD3d 746 [2nd Dept., 2009]; Cuccio v. Ciotkosz, 43 AD3d 850 [2nd Dept., 2007]; Mankiewicz v. Excellent, 25 AD3d 591 [2nd Dept., 2006]; Rodriguez v. City of New York, 259 AD2d 280 [1st Dept., 1999]).

Based on the foregoing, it is

ORDERED that the motion (#002) by plaintiff Stephen Sorahan seeking summary judgment in his favor on the issue of liability and the motion (#003) by defendants Suffolk County Department of Public Works, Eddy Guerrier and County of Suffolk seeking summary judgment dismissing plaintiff's complaint hereby are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by plaintiff Stephen Sorahan seeking summary judgment in his favor on the issue of liability is granted; and it is further

ORDERED that the motion by defendants Suffolk County Department of Public Works, Eddy Guerrier and County of Suffolk seeking summary judgment dismissing plaintiff's complaint is denied.

Dated: September 7, 2011

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**