SHORT FORM ORDER

INDEX No. 09-44022

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-20-11 (#004)
MOTION DATE 6-23-11 (#005)
ADJ. DATE 6-23-11
Mot. Seq. # 004 - MD
005 - XMG

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JUAN FERNANDEZ-VELEZ and MARIA C. GACIA,

Plaintiffs,

- against -

KRISTEN JOY O'HARA and ARTHUR P. O'HARA,

Defendants.

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Upon the following papers numbered 1 to 37 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers 13 - 30 ; Answering Affidavits and supporting papers 31 - 32 ; Replying Affidavits and supporting papers 33 - 34; 35 - 37 ; Other ___; it is,

ORDERED that this motion by defendants Kristen Joy O'Hara and Arthur O'Hara seeking summary judgment dismissing plaintiff Juan Fernandez-Velez's cause of action on the ground that he did not sustain an injury within the meaning of Insurance Law § 5102(d) is denied; and it is further

ORDERED that this cross motion by plaintiff Juan Fernandez-Velez seeking summary judgment in his favor on the issue of liability is granted.

Plaintiff Juan Fernandez-Velez commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Park Avenue and Route 25A in Huntington, New York on August 20, 2007. Plaintiff, by his complaint, alleges, among other things, that his vehicle was struck in the rear while it was stopped at a red light by

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the vehicle operated by defendant Kristen Joy O'Hara and owned by defendant Arthur O'Hara. As a result of the impact between the Fernandez-Velez and O'Hara vehicles, the Fernandez-Velez vehicle was pushed forward into the preceding vehicle, which was operated by Albert Ambros, who is not a party to the action. Plaintiff, by his bill of particulars, alleges that he sustained various personal injuries as a result of the subject accident, including a concussion; a herniated and bulging disc at level C5-C6; cervical disc disease at level C2 through T1; hemangioma at level T2; cervical radiculitis; cervical myofascitis; and straightening of the normal cervical lordotic curve. Plaintiff further alleges that as a result of the injuries that he sustained due to the accident, he was confined to his bed for approximately two days and to his home for approximately three months. Plaintiff's wife, Maria Garcia, instituted a claim for loss of consortium.

Defendants now move for summary judgment on the basis that the injuries plaintiff allegedly sustained as a result of the subject accident do not come within the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Robert Israel, Dr. Marie Audrie DeJesus, and Dr. Melissa Sapan-Cohn. Dr. Israel conducted an independent orthopedic medical examination of plaintiff at defendants' request on December 4, 2009. Dr. DeJesus conducted an independent neurological examination of plaintiff at defendants' request on January 19, 2010. Dr. Sapan-Cohn performed an independent radiological review of the magnetic resonance imaging ("MRI") films of plaintiff's cervical spine at defendants' request on January 27, 2010.

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]). 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 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 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 [2d Dept 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 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the 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 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*). 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 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants established, prima facie, their entitlement to judgment as a matter of law that the injuries plaintiff allegedly sustained as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102(d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [1st Dept 2010]; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Defendants' examining orthopedist, Dr. Israel, in his medical report states that an examination of plaintiff revealed that he has full ranges of motion in his cervical, thoracic and lumbar regions, his left shoulder, and his knees. Dr. Israel states there was no evidence of tenderness or spasm on palpation of plaintiff's cervical or thoracolumbosacral spines or his left shoulder, and that there was no evidence of effusion in his knees. Dr. Israel opines that the alleged sprains to plaintiff's spine, left shoulder and knees have resolved, and that he is not disabled as a result of any injuries he allegedly sustained due to the subject accident. Similarly, defendants' examining neurologist, Dr. DeJesus, in her medical report states an examination of plaintiff revealed that he has full range of motion in his spine, and that he has 5/5 power in his upper and lower extremities with no evidence of atrophy or weakness. Dr. DeJesus's report concludes that plaintiff had a normal neurological examination, that plaintiff has no evidence of a neurologic disability, and that plaintiff is capable of performing his normal daily living activities without any restrictions or neurologic limitations as a result of the accident.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the "90/180" category under Insurance Law § 5102(d) (*see* ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 897 NYS2d 648 [4th Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Lopez v Abdul -Wahab***, 67 AD3d 598, 889 NYS2d 178 [2d Dept 2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]).

Therefore, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez.***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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, 877 NYS2d 127 [2d Dept 2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d 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.***, *supra*; ***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]). 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, 518 NYS2d 788 [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, 580 NYS2d 178 [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, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

Plaintiff opposes the motion on the grounds that he sustained injuries within the "limitations of use" categories and the 90/180 category of the Insurance Law as a result of the subject accident, and that defendants failed to meet their prima facie burden on the motion. In opposition, plaintiff submits his own affidavit, the affidavit of Dr. Lawrence Opisso, and the affirmed medical reports of Dr. Andres Gonzales, Dr. Edouard Kamhi, and Dr. Seth Steinman. Plaintiff also submits his deposition transcript, a copy of the police accident report, and uncertified copies of his medical records from Huntington Hospital.

Plaintiff has come forward with admissible evidence that raises a triable issue of fact as to whether he sustained an injury within the limitations of use categories of Insurance Law § 5102(d) (*see* ***Pommells v Perez.***, *supra*, ***Licari v Elliott***, *supra*; ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). In opposition, plaintiff primarily relies upon the affidavit of Dr. Opisso, his treating chiropractor. In his affidavit, Dr. Opisso states that plaintiff presented for treatment with complaints of frequent headaches, and pain in his spine and shoulders. Dr. Opisso, who began treating plaintiff on August 24, 2007, explains that an examination of plaintiff revealed significant decreases in the ranges of motion in his spine, and that he diagnosed plaintiff as suffering from a displaced lumbar disc, myalgia, myositis, cervicocranial syndrome, and cervicalgia. Dr. Opisso states that he continues to treat plaintiff, and that an examination on February 28, 2011 revealed that plaintiff continues to have decreased ranges of motion in his cervical and lumbar spines. Dr. Opisso states that his review of the MRI examinations of plaintiff's cervical and thoracic spines showed a paracentral herniated disc at level C5-C6, hemangioma at level T2, straightening of the normal cervical lordotic curve, and scoliosis of the thoracic spine convexity to the right. Dr. Opisso opines that plaintiff's injuries are chronic and permanent in nature, and are the direct result of the subject accident. Likewise, Dr. Gonzalez, plaintiff's treating neurologist, states in his medical report that the symptoms plaintiff is experiencing in the cervical, thoracic and lumbar regions of his spine, which include radiating pain, bilateral lumbar paraspinal spasms, tenderness, and stiffness, are causally related to the subject accident. Thus, plaintiff has submitted objective medical proof, based upon contemporaneous and recent examinations, demonstrating that he sustained significant range of motion limitations in his cervical and

thoracolumbosacral regions of his spine as a result of the subject accident (*see* ***Kanarad v Setter***, 87 AD3d 714, __ NYS2d __, 2011 NY Slip Op 06367 [2d Dept 2011]; ***Khavosov v Castillo***, 81 AD2d 903, 917 NYS2d 312 [2d Dept 2011]; ***Dixon v Fuller***, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing plaintiff's cause of action for failure to sustain an injury within the meaning of Insurance Law § 5102 (d) is denied.

Plaintiff cross-moves for summary judgment in his favor on the issue of liability, arguing that Kristen Joy O'Hara's negligent operation of the O'Hara vehicle was the sole proximate cause of the subject accident and that defendants are unable to provide a non-negligent excuse for the subject collision. In support of the cross motion, plaintiff submits his own deposition transcript and a copy of the police accident report. Defendants have not submitted any evidence in opposition to plaintiff's cross motion for summary judgment on the issue of liability.

It is well settled that "where a vehicle is lawfully stopped, there is a duty imposed upon the operators of vehicles traveling behind it in the same direction to come to a timely halt" (***Edney v Metropolitan Suburban Bus Authority***, 178 AD2d 398, 398, 577 NYS2d 102 [2d Dept 1991]; *see* ***Napolitano v Galletta***, 85 AD3d 881, 925 NYS2d 163 [2d Dept 2011]; ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]). Moreover, a driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle (*see* ***Kastritsios v Marcello***, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]; ***Plummer v Nourddine***, 82 AD3d 1069, 919 NYS2d 187 [2d Dept 2011]; ***Nsiah-Ababio v Hunter***, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). Therefore, a rear-end collision establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Tutrani v County of Suffolk***, 10 NY3d 906, 861 NYS2d 610 [2008]; ***Scheker v Brown***, 85 AD3d 1007, 925 NYS2d 528 [2d Dept 2011]; ***Klopchin v Masri***, 45 AD3d 737, 846 NYS2d 311 [2d Dept 2007]). A non-negligent explanation may include evidence of mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause (*see* ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Lampkin v Chan***, 68 AD3d 727, 891 NYS2d 113 [2d Dept 2009]; ***Leal v Wolff***, 224 AD2d 392, [2d Dept 1996]).

Based upon the totality of the evidence submitted, plaintiff has established his prima facie entitlement to judgment as a matter of law that he was not a proximate cause of the subject accident's occurrence (*see* ***Volpe v Limoncelli***, 74 AD3d 795, 902 NYS2d 152 [2d Dept 2010]; ***Campbell v City of Yonkers***, 37 AD3d 750, 833 NYS2d 101 [2d Dept 2007]). Plaintiff's evidence demonstrates that his vehicle was struck in the rear by the O'Hara vehicle while he was stopped at a red light, and that the force of the impact propelled his vehicle into the rear of the preceding vehicle (*see* ***Francis v Pinkhasov***, 71 AD3d 630, 896 NYS2d 393 [2d Dept 2010]; ***Franco v Breceus***, 70 AD3d 767, 895 NYS2d 152 [2d Dept 2010]; ***Bernier v Torres***, 79 AD3d 776, 913 NYS2d 299 [2d Dept 2010]; *see also* ***Katz v Masads II Car & Limo Serv.***, 43 AD3d 877, 841 NYS2d 370 [2d Dept 2007]). In opposition, defendants have failed to submit any evidence to establish that plaintiff was negligent (*see* ***Kastritsios v Marcello***, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]; ***Costa v Eramo***, 76 AD3d 942, 907 NYS2d 510 [2d Dept

2011]; ***Smith v Seskin***, 49 AD3d 628, 854 NYS2d 420 [2d Dept 2008]), or to provide a non-negligent explanation for the subject accident's occurrence (*see* ***Hill v Ackall***, 71 AD3d 829, 895 NYS2d 837 [2d Dept 2010]; ***Johnson v First Student, Inc.***, 54 AD3d 492, 863 NYS2d 303 [3d Dept 2008]; ***Faul v Reilly***, 29 AD3d 626, 816 NYS2d 502 [2d Dept 2006]). Therefore, defendants have failed to raise a triable issue of fact (*see* ***Eybers v Silverman***, 37 AD3d 403, 830 NYS2d 240 [2d Dept 2007]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). According, plaintiff's cross-motion for summary judgment in his favor on the issue of liability is granted.

Dated: 10/4/2011

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**