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SHORT FORM ORDER

INDEX No. 09-19657

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 12-03-10 (#005 & #006)
MOTION DATE 1-18-11 (#007 & #008)
MOTION DATE 4-6-11 (#009 & #010)
MOTION DATE 5-11-11 (#011)
ADJ. DATE 10-26-11
Mot. Seq. # 005 - MD
006 - XMD
007 - XMD
008 - XMD
009 - XMG
010 - XMG
011 - XMG; CASEDISP

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DERRICK TOLLIVER,

Plaintiff,

- against -

COUNTY OF SUFFOLK, PAUL E. BRESSLER, JUAN O. ARIAS, LISSETTE ARIAS, GLADYS A. LOUIS, JACQUES A. LOUIS and ERICA J. BROWN,

Defendants.

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Upon the following papers numbered 1 to 98 read on this motion and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers 19-30; 31-46; 47-57; 66-76; 77-80; 81-87 ; Answering Affidavits and supporting papers 58-59; 95-96 ; Replying Affidavits and supporting papers 60-61; 62-63; 64-65; 88-92; 93-94; 97-98 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Jacques Louis and Gladys Louis seeking summary judgment dismissing the complaint is denied; and it is

ORDERED that the cross motion by plaintiff Derrick Tolliver seeking summary judgment in his favor on the issue of liability is denied; and it is

ORDERED that the cross motion by defendant Erica Brown seeking summary judgment dismissing the complaint and all cross claims against her is denied; and it is

ORDERED that the cross motion by defendants Juan Arias and Lissette Arias seeking summary judgment dismissing the complaint and all cross claims against them is denied; and it is

ORDERED that the cross motion by defendants County of Suffolk and Paul Bressler seeking summary judgment dismissing the complaint on the basis that plaintiff failed to sustain an injury within the meaning of the Insurance Law is granted; and it is

ORDERED that the cross motion by defendant Erica Brown seeking summary judgment on the basis that plaintiff failed to sustain an injury within the meaning of the Insurance Law is granted; and it is further

ORDERED that the cross motion by defendants Juan Arias and Lissette Arias seeking summary judgment on the basis that plaintiff failed to sustain an injury within the meaning of the Insurance Law is granted.

Plaintiff Derrick Tolliver 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 Brentwood Road and First Avenue in the Town of Islip on September 9, 2008. It is alleged that the accident occurred when the bus operated by defendant Paul Bressler and owned by defendant Suffolk Transportation (hereinafter collectively referred to as the "County") struck the rear of the vehicle operated by defendant Lissette Arias and owned by defendant Juan Arias while it was stopped at a red traffic light. As a result of the impact, the Arias vehicle allegedly was propelled forward into the rear of the vehicle operated by defendant Jacques Louis and owned by defendant Gladys Louis. As a result of the second collision, the Louis vehicle allegedly was pushed forward into the vehicle operated and owned by defendant Erica Brown. Plaintiff, who was riding as a passenger on the bus when the accident occurred, allegedly fell to the floor due to the force of the impact.

Plaintiff, by his bill of particulars, alleges, among other things, that he sustained various personal injuries as a result of the subject accident, including a herniated disc at level L4/L5; lumbar and cervical radiculopathy, aggravation of scoliosis of the thoracolumbosacral spine, and thoracic and cervical

myofascitis. Plaintiff alleges that due to the injuries he sustained in the accident he has been confined to his bed and home since the date of the incident. Plaintiff further alleges that he was terminated from his employment because of the injuries he sustained in the subject accident.

Defendants Jacques Louis and Gladys Louis now move for summary judgment in their favor on the issue of liability, arguing that the Louis vehicle was completely stopped in traffic when it was struck in the rear by the Arias vehicle, pushing it forward into the preceding vehicle, and that Jacques Louis's operation of the Louis vehicle was not a proximate cause of the accident. Defendant Erica Brown cross-moves for summary judgment on the basis that her operation of her vehicle was not a proximate cause of the subject accident, because her vehicle was stopped at a red light when it was struck in the rear by the Louis vehicle. Defendants Juan Arias and Lissette Arias also cross-move for summary judgment in their favor on the issue of liability, arguing that Paul Bressler's negligent operation of the bus was the sole proximate cause of the subject accident. In addition, plaintiff cross-moves for summary judgment in his favor on the issue of liability on the grounds that he was a passenger on the bus when the accident occurred; that Paul Bressler admitted that he struck the rear of the Arias vehicle while it was stopped in traffic; and that Paul Bressler is unable to offer a nonnegligent excuse for the subject accident's occurrence. The parties in support of the motions primarily rely on their deposition transcripts and the police accident report.

The County cross-moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the accident do not come within the meaning of 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, Paul Bressler's deposition transcript, an uncertified copy of the police accident report, and an uncertified copy of Barbara Moriarty's magnetic resonance images ("MRI") report of plaintiff's lumbosacral spine performed on September 11, 2008. The County also submits the medical reports of Dinesha Shukla, M.D., Isaac Cohen, M.D., and Mark Zuckerman, M.D. At the County's request, Dr. Shukla conducted an independent neurological examination of plaintiff on September 9, 2010, and Dr. Zuckerman conducted an independent neurological examination of plaintiff on August 17, 2010. Also, at the County's request, Dr. Cohen conducted an independent orthopedic examination of plaintiff on August 5, 2010. Defendants Juan Arias and Lissette Arias also cross-move for summary judgment in their favor on the ground that plaintiff did not sustain an injury within the meaning of the Insurance Law as a result of the subject accident, as does defendant Erica Brown. In support of their cross motions, the Arias and Brown defendants rely on the same evidence submitted by the County on its cross motion for summary judgment.

Plaintiff opposes the cross motions on the ground that defendants have failed to establish that he did not sustain an injury within the "limitation of use" categories or the "90/180" category of § 5102(d) of the Insurance Law as a result of the subject accident. In opposition to the cross motions, plaintiff submits his own affidavit and deposition transcript; the sworn medical reports of Scott Roteman, M.D., and Stephen Fromm, M.D.; and uncertified copies of his medical records.

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 [2d Dept 1988]; **Nolan v Ford**, 100 AD2d 579 [1984], *aff'd* 64 NYS2d 681 [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 [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 [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 [2d Dept 2001]; **Grossman v Wright**, 268 AD2d 79 [2d Dept 2000]; **Vignola v Varrichio**, 243 AD2d 464 [2d Dept 1997]; **Torres v Micheletti**, 208 AD2d 519 [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 [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 [2d Dept 2006]; **Rich-Wing v Baboolal**, 18 AD3d 726 [2d Dept 2005]; *see generally* **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851 [1985]).

Initially, the Court notes that the medical report of Dr. Shukla, one of the County's examining neurologists, is unaffirmed and, therefore, inadmissible (*see* **Grasso v Angerami**, 79 NY2d 813 [1991]; **Kolodziej v Savarese**, 88 AD3d 851 [2d Dept 2011]; **Kearse v New York City Tr. Auth.**, 16 AD3d 45 [2d Dept 2005]). Nevertheless, defendants established, prima facie, their entitlement to judgment as a matter of law on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see* **Toure v Avis Rent A Car Sys.**, *supra*; **Gaddy v Eyler**, *supra*). The County's examining orthopedist, Dr. Cohen, states in his medical report that an examination of plaintiff reveals that he has full range of motion in his cervical and thoracolumbosacral spines, that there is no tenderness upon palpation to paravertebral cervical and thoracolumbosacral muscles, and that there is no evidence of muscle spasms in those regions. Dr. Cohen states that plaintiff's muscle strength is 5/5, bilaterally, and that the straight leg raising test is negative, bilaterally. Dr. Cohen opines that the cervical and

thoracolumbosacral strains that plaintiff sustained in the subject accident have resolved, and that he has a fully functioning musculoskeletal system without evidence of sequelae or permanency related to the subject accident. Dr. Cohen concludes his report by stating that plaintiff has pre-existing thoracic scoliosis, that he does not exhibit any evidence of a disability, and that he is capable of working and performing his normal daily living activities without restriction.

Likewise, the County's examining neurologist, Dr. Zuckerman, states in his report that there is no tenderness upon palpation of plaintiff's cervical, thoracolumbar and paraspinal muscles, and that the straight leg raising test is negative and did not produce any evidence of radicular back symptoms. Dr. Zuckerman does note some limitations in plaintiff's cervical and lumbar spine, but states that those limitations are due to plaintiff's scoliosis and habitus, which are pre-existing (*see e.g.* **Soho v Konate**, 85 AD3d 522 [1st Dept 2011]). Moreover, the limitations in plaintiff's cervical and lumbar regions observed by Dr. Zuckerman are insignificant within the meaning of the Insurance Law (*see* **Licari v Elliott**, 57 NY2d 230 [1982]; **Mercado-Arif v Garcia**, 74 AD3d 446 [1st Dept 2010]; **Vilomar v Castillo**, 73 AD3d 758 [2d Dept 2010]). Dr. Zuckerman opines that the cervical and thoracolumbacral sprain that plaintiff sustained in the accident have resolved, and that plaintiff's neurological examination was normal, without any evidence of cervical or lumbosacral radiculopathy, or central peripheral nervous system dysfunction. Dr. Zuckerman concludes that plaintiff does not have any causally related neurologic disability or impairment due to the accident.

Therefore, the burden shifted 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 [2005]; *see generally* **Zuckerman v City of New York**, 49 NY2d 557 [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 [2d Dept 2009]; **Laruffa v Yui Ming Lau**, 32 AD3d 996 [2d Dept 2006]; **Cerisier v Thibiu**, 29 AD3d 507 [2d Dept 2006]; **Meyers v Bobower Yeshiva Bnei Zion**, 20 AD3d 456 [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**, *supra*). 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**, *supra*). 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 [3d Dept 2010]; **Ayzen v Melendez**, 299 AD2d 381 [2d Dept 2002]).

Plaintiff failed to raise a triable issue of fact in opposition to defendants' prima facie showing as to whether he sustained a serious injury within the meaning of Insurance Law § 5102 as a result of the subject accident (*see* **Rissew v Smith**, __ AD3d __, 2011 NY Slip Op 07950 [4th Dept 2011]; **Barry v Future Cab Corp.**, 71 AD3d 710 [2d Dept 2010]; *compare* **MacMillan v Cleveland**, 82 AD3d 1388

[3d Dept 2011]; *see generally* **Zuckerman v City of New York**, 49 NY2d 557 [1980]). Plaintiff, in opposition, relies upon the medical reports of Dr. Roteman, his treating physician, and Dr. Fromm, his treating neurologist. However, neither doctor's report is sufficient to defeat defendants' prima facie showing. Dr. Roteman's report is without probative value, since he clearly relied upon unsworn reports of others in reaching his conclusions (*see* **Ferber v Madorran**, 60 AD3d 725 [2d Dept 2009]; **Sorto v Morales**, 55 AD3d 718 [2d Dept 2008]; **Hargrove v New York City Tr. Auth.**, 49 AD3d 692 [2d Dept 2008]). In fact, Dr. Roteman states in his report that his conclusion that plaintiff has sustained a serious injury as a result of the subject accident is based upon "our examination of [plaintiff]," and does not state that he personally performed plaintiff's examination. In addition, Dr. Roteman's report, dated December 8, 2008, states that plaintiff presented to "our office on July 29, 2003 for evaluation for injuries sustained in a motor vehicle accident on September 9, 2008."

Similarly, the report of Dr. Fromm merely establishes that plaintiff sustained sprains to the thoracolumbar and cervical regions of his spine, and a "probable" right foraminal disc herniation at level L4/L5. "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* **Stevens v Sampson**, 72 AD3d 793 [2d Dept 2010];**Catalano v Kopmann**, 73 AD3d 963 [2d Dept 2010]; **Carabello v Kim**, 63 AD3d 976 [2d Dept 2009]; **Kilakos v Mascera**, 53 AD3d 527 [2d Dept 2008]; **Sealy v Riteaway-1, Inc.**, 54 AD3d 1018 [2008]; **Wright v Rodriguez**, 49 AD3d 532 [2d Dept 2008]). Sprains and strains also are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* **Rabolt v Park**, 50 AD3d 995 [2d Dept 2008]; **Byam v Waltuch**, 50 AD3d 939 [2d Dept 2008]; **Washington v Cross**, 48 AD3d 457 [2d Dept 2008]). In any event, Dr. Fromm failed to offer any opinion on the cause of the "probable" herniation he noted in plaintiff's lumbar spine or the noted limitations he observed in plaintiff's cervical and lumbosacral regions (*see* **Shaji v City of New Rochelle**, 66 AD3d 760 [2d Dept 2009]; **Scotto v Suh**, 50 AD3d 1012 [2d Dept 2008]; **Morris v Edmond**, 48 AD3d 432 [2d Dept 2008]). Rather, Dr. Fromm states in his report that plaintiff has a positive history for motor vehicle accidents; that a chest X-ray revealed scoliosis of the spine in the thoracic area to the right apex at the thoracolumbar region; that there is a question of a congenital fusion of at least two vertebral bodies; and that other congenital abnormalities of the lumbar spine are suspected.

Furthermore, plaintiff's affidavit was insufficient to raise a triable issue of fact as to whether he sustained an injury within the meaning of Insurance Law § 5102(d) (*see* **Villante v Miterko**, 73 AD3d 757 [2d Dept 2010]; **Singh v City of New York**, 71 AD3d 1121 [2d dept 2010]; **Luna v Mann**, 58 AD3d 699 [2d Dept 2009]).

Lastly, plaintiff failed to raise a triable issue of fact as to whether he sustained an injury under the 90/180 category of the Insurance Law (*see* **Haber v Ullah**, 69 AD3d 796 [2d Dept 2010]; **Mora v Riddick**, 69 AD3d 591 [2d Dept 2010]; **Collado v Abouzeid**, 68 AD3d 912 [2d Dept 2009]; **Vickers v Francis**, 63 AD3d 1150 [2d Dept 2009]). Although, at his 50-h hearing, plaintiff testified that due to the injuries he sustained in the accident he has been unable to return to work, he also testified that he was not informed by any doctor that he was unable to work as a result of any injuries that he sustained in the subject accident. Accordingly, the cross motions for summary judgment dismissing plaintiff's complaint on the basis that his injuries fail to meet the serious injury threshold requirement of Insurance Law §

5102(d) hereby are granted. Having determined that plaintiff did not sustain an injury within the meaning of the Insurance Law, the remaining motions on the issue of liability hereby are denied, as moot.

Dated: January 3, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION