SHORT FORM ORDER

INDEX No. 08-40393

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 12-9-11
ADJ. DATE 11-1-12
Mot. Seq. # 001 - MG
002 - XMG; CASEDISP

JOSEF KIERNAN,

Plaintiff,

- against -

DEBORAH VOTTO and ROBERT O'ROURKE,

Defendants.

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Upon the following papers numbered 1 to 23 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers 11 - 12 ; Answering Affidavits and supporting papers 13 - 21 ; Replying Affidavits and supporting papers 22 - 23 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Robert O'Rourke seeking summary judgment dismissing plaintiff's complaint against him is granted; and it is further

ORDERED that the cross motion by defendant Deborah Votto seeking summary judgment dismissing plaintiff's complaint against her is granted.

Plaintiff Josef Kiernan commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred in the right lane of the westbound Belt Parkway, near its exit with Merrick Boulevard, in Queens County, New York, on November 16, 2005. It

is alleged that the accident occurred when the vehicle operated by defendant Deborah Votto struck the rear of the vehicle operated by plaintiff while it was stopped in traffic. As a result of the impact between the Votto and Kiernan vehicles, the Kiernan vehicle was propelled forward into the vehicle operated by defendant Robert O'Rourke. Plaintiff, by his bill of particulars, alleges, among other things, that as a result of the subject accident he sustained various personal injuries, including herniations at levels C3 through C7, level L5-S1 and level T9-T10; disc bulges at level C7-T1 and levels L1 through L5; and cervical and lumbar radiculopathy.

Defendant O'Rourke now moves for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident fail to meet the "serious injury" threshold requirement of § 5102 (d) of the Insurance Law. In support of the motion, defendant O'Rourke submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical reports of Dr. Michael Katz and Dr. Richard Lechtenberg. At defendant's request, Dr. Katz conducted an independent orthopedic examination of plaintiff on May 3, 2011. Also, at defendant's request, Dr. Lechtenberg conducted an independent neurological examination of plaintiff on March 6, 2011. Defendant Votto cross-moves for summary judgment on the basis that plaintiff did not sustain an injury within the meaning of the serious injury threshold requirement of the Insurance Law as a result of the subject accident. Defendant Votto relies on the same evidence that was submitted in support of defendant O'Rourke's summary judgment motion.

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* ***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 [2d Dept 1984], *aff'd* 64 NY2d 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

[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*).

Here, defendants O'Rourke and Votto have established their prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff did not sustain a serious injury within the meaning of the Insurance Law as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Belliard v Leader Limousine Corp.***, 94 AD3d 931, 942 NYS2d 591 [2d Dept 2012]). Defendants' examining orthopedist, Dr. Katz, found during an examination of plaintiff that he had full range of motion in his spine, left knee and left leg, that his gait was normal, and that the straight leg raising test was normal. Dr. Katz states that upon palpation of plaintiff's paraspinal muscles there is no evidence of muscle spasm or tenderness, and that there is no swelling, effusion, erythema or induration in the left knee. Dr. Katz states that a sensory examination of plaintiff reveals he has full sensation to light touch, that his motor strength is 5/5, and that the Lachman's test is negative. Dr. Katz states that an examination of plaintiff's reflexes reveals there was no demonstrable clonus and that the Babinski test is negative. Dr. Katz opines that the spinal strains with radiculitis and the left leg contusion that plaintiff sustained as a result of the subject accident have resolved, and he does not show any signs or symptoms of permanence relative to the musculosketeal system or to the subject accident. That Dr. Katz further states that plaintiff currently is not disabled and is capable of working full time in his capacity as a communications inspector for Verizon without any restrictions, and is capable of performing his daily living activities.

Similarly, defendants' examining neurologist, Dr. Lechtenberg, states that an examination of plaintiff reveals he has full range of motion in his cervical spine, knees, hips, wrists, and shoulders. Dr. Lechtenberg states that plaintiff's gait, muscle tone, and strength are normal, that there is no limb drift, and that there is no atrophy or fasciculation. Although Dr. Lechtenberg's examination of plaintiff's lumbar spine revealed limitations in his range of motion, the observed limitations were not significant within the meaning of the Insurance Law (*see* ***Licari v Elliot***, *supra*; ***Brand v Evangelista***, __ AD3d __, 2013 NY Slip Op 01172 [1st Dept 2013]). Further, Dr. Lechtenberg states that "incidental movements" revealed a normal range of motion of the lumbar spine and that plaintiff voluntarily restricted his range of motion. Dr. Lechtenberg opines that plaintiff does not have any objective, clinical or neurological deficits, and that he is not disabled and is capable of working at his usual occupation.

Furthermore, defendants O'Rourke and Votto established, prima facie, that plaintiff did not sustain a serious injury under the 90/180 category of the Insurance Law by submitting plaintiff's deposition testimony, which revealed that he did not miss any time from work in the first 180 days immediately following the subject accident (*see* ***Frisch v Harris***, 101 AD3d 941, 957 NYS2d 235 [2d Dept 2012]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Lewars v***

Transit Facility Mgt. Corp., 84 AD3d 1176, 923 NYS2d 701 [2d Dept 2011]).

Defendant O'Rourke and defendant Votto, having made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of the statute, shifted the burden to plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). 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 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). "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***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

Plaintiff opposes the motions on the ground that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" categories and the "90/180" category of Insurance Law § 5102(d). In opposition to the motions, plaintiff submits his own deposition transcript, the sworn medical reports of Dr. Robert Diamond and Dr. Samuel Mayfield, and the affidavit of his treating chiropractor, Dr. Mary Didio.

In opposition to defendants' prima facie showing, plaintiff has failed to raise a triable issue of fact as to whether he sustained an injury within the limitation of uses categories or the 90/180 category of the Insurance Law as a result of the subject accident (*see* ***Acosta v Alexandre***, 70 AD3d 735, 894 NYS2d 136 [2d Dept 2010]). "[W]hile a significant limitation of use of a body function or member need not be permanent in order to constitute a serious injury, '....any assessment of the significance' of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well, notwithstanding the fact that Insurance Law § 5102 (d) does not expressly set forth any temporal requirement for a significant limitation"(***Lively v Fernandez***, 85 AD3d 981, 982, 925 NYS2d 650 [2d Dept 2011], *quoting* ***Partlow v Meehan***, 155 AD2d 647, 648, 548 NYS2d 239 [2d Dept 1998]). Here, while Dr. Didio's qualitative analysis, which was based upon an examination that occurred contemporaneously with the accident, revealed significant limitations in plaintiff's spine, neither she nor plaintiff proffered any competent medical evidence showing significant or consequential

limitations in the range of motion in his spine based upon a recent examination of the injured plaintiff (*see* ***Griffiths v Munoz***, 98 AD3d 997, 950 NYS2d 787 [2d Dept 2012]; ***Perez v Santiago***, 59 AD3d 692, 873 NYS2d 734 [2d Dept 2009]; ***Frier v Teague***, 288 AD2d 177, 732 NYS2d 428 [2d Dept 2001]). Moreover, the reports that were attached to Dr. Didio's affidavit were without probative value, because they were not in admissible form (*see* ***DiLernia v Khan***, 62 AD3d 644, 878 NYS2d 405 [2d Dept 2009]; ***Shamsoodeen v Kibong***, 41 AD3d 577, 839 NYS2d 765 [2d Dept 2007]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Evans v Mohammad***, 243 AD2d 604, 663 NYS2d 273 [2d Dept 1997]).

In addition, plaintiff failed to come forward with competent medical evidence refuting the lack of causal connection between the claimed injuries and the subject accident (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). The medical reports of Dr. Diamond and Dr. Mayfield merely note that the existence of disc herniations and disc bulges in plaintiff's cervical spine and lumbar spine. However, neither Dr. Diamond nor Dr. Mayfield opine as to causation in their radiological findings. The mere existence of a herniated or bulging disc, by itself, is insufficient to constitute a serious injury; rather, to constitute an injury, a herniated or bulging disc must be accompanied by objective evidence of the extent of the alleged physical limitations resulting from the herniated or bulging disc (*see* ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Caraballo v Kim***, 63 AD3d 976, 882 NYS2d 211 [2d Dept 2009]). Thus, plaintiff's medical evidence fails to demonstrate that he sustained an injury within the meaning of the Insurance Law as a result of the subject collision (*see* ***Larrabee v Bradshaw***, 96 AD3d 1257, 947 NYS2d 659 [3d Dept 2012]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]).

Lastly, in view of plaintiff's deposition testimony that he did not miss any days from work as a result of the subject accident, he failed to raise a triable issue of fact under the 90/180 category of § 5102 (d) of the Insurance Law (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Dunbar v Prahovo Taxi, Inc.***, 84 AD3d 862, 921 NYS2d 911 [2d Dept 2011]; ***Jack v Acapulco Car Serv., Inc.***, 72 AD3d 646, 897 NYS2d 648 [2d Dept 2010]). Accordingly, defendant Robert O'Rourke's motion for summary judgment and defendant Deborah Votto's cross motion for summary judgment dismissing plaintiff's complaint are granted.

Dated: 3/21/13

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION