SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

DANIEL LEBRON,

Plaintiff,

DECISION/ORDER

-against-

Index No.: 307666/09

RACHEL HERMAN, KERRY TOMLINSON, GOOD TRIP CAB CORP. and MICHAEL LEE,

Defendants.

The following papers numbered 1 to 11 read on this motion and cross motion for summary judgment noticed on October 23, 2012 and September 9, 2013 and duly transferred on April 7, 2014.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Memorandum of Law	**4**
Notice of Cross-motion, Affirmation & Exhibits	**5, 6, 7**
Affirmation in Opposition & Exhibits	**8, 9**
Reply Affirmation	**10**
Reply Affirmation	**11**

Upon the foregoing papers, and after reassignment of this matter from Justice Sharon A.M. Aarons on April 7, 2014, Defendants, Good Trip Cab Corp. and Michael Lee, seek an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d). By cross-motion, Defendants Rachel Herman and Kerry Tomlinson seek an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d).

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on October 3, 2007, on Henry Hudson Parkway, approximately 1/4 of a mile north of 158th Street, in the County, City and State of New York.

On July 16, 2010, the Plaintiff appeared for an orthopedic examination conducted by

Defendants' appointed physician Dr. Gregory Montalbano. Upon examination and review of Plaintiff's medical records, Dr. Montalbano determined that Plaintiff did not sustain any injury to his left knee as a result of the subject accident and that the MRI and surgical findings represented a degenerative knee condition which was unrelated to the accident of October 3, 2007. Dr. Montalbano further opines that the diminished range of motion found in Plaintiff's left knee is related to this preexisting condition and that findings of degenerative medial meniscus tearing are common during a routine arthroscopy. With respect to the cervical and lumbar spines, Dr. Montalbano determined that Plaintiff sustained a cervical spine sprain and lumbar spine strain as a result of the subject accident which has slowly resolved with no evidence of permanent injury or disability.

Defendants also offer the affirmed reports of Dr. David A. Fisher, a radiologist appointed by Defendants to review the MRI films of Plaintiff's cervical spine, lumbar spine and left knee. Dr. Fisher's review of Plaintiff's multiple MRI films reveals a normal and unremarkable examination. Dr. Fisher determines that there is no radiographic evidence of recent traumatic or causally related injury to Plaintiff's cervical spine, lumbar spine or left knee.

Plaintiff submits the Affirmed narrative report of Dr. Robert D. Haar, various records of Dr. James R. McGee and the lumbar spine and cervical spine MRI reports of Dr. David R. Payne. The Court notes that Dr. McGee fails to provide any sworn affidavit and that Dr. Payne fails to provide a sworn affirmation or affirmed reports. The Court further notes that Dr. Haar first examined Plaintiff on May 21, 2008, more than seven months following the accident in question and approximately three years from his last date of treatment. In addition, Dr. Haar fails to adequately address or explain the gap of over three years from January 26, 2010 to his February 11, 2013 examination of Plaintiff. See *Pommels v. Perez*, 4 N.Y.3d 566 (2005).

Any reports, Affirmations or medical records not submitted in admissible form were not considered for the purpose of this Decision and Order. See: *Barry v. Arias*, 94 A.D.3d 499 (1st Dept. 2012).

Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230 (1982). The proponent of a motion for summary judgment must tender sufficient evidence to the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on Defendants to establish, by submission of evidentiary proof in admissible form, that Plaintiff has not suffered a "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728 (1st Dept. 1986) *aff'd* 69 N.Y.2d 701 (1986). Where a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden then shifts and it is incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *Licari,* supra; *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). Further, it is the presentation of objective proof of the nature and degree of a plaintiff's injury which is required to satisfy the statutory threshold for "serious injury". Therefore, simple strains and even disc bulges and herniated disc alone do not automatically fulfil the requirements of Insurance Law §5102(d). See: *Cortez v. Manhattan Bible Church,* 14 A.D.3d 466 (1st Dept. 2004). Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

In the instant case Plaintiff has not demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact

for determination by a jury. Further, he has not demonstrated by admissible evidence the extent and duration of his physical limitations sufficient to allow this action to be presented to a trier of facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility. *Knepka v. Tallman,* 278 A.D.2d 811 (4th Dept. 2000). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable issues of fact to present to a jury. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320 (1986). Based upon the exhibits and deposition testimony submitted, the Court finds that Defendants have met that burden.

Therefore it is

ORDERED, that Defendants, Good Trip Cab Corp. and Michael Lee's motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted**; and it is further

ORDERED, that Defendants Rachel Herman and Kerry Tomlinson's cross-motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is likewise **granted**.

Dated: September 10, 2014

Hon. Ben R. Barbato, A.J.S.C.