SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

CLEPHANE B. BURGESS, and LAVERN BURGESS,

Plaintiffs,

-against-

AVIGNON TAXI, LLC, MOHAMMED S. HOSSAIN, DT MEDIA GROUP and HAROLD A. DOW,

Defendants.

DECISION/ORDER

Index No.: 308376/12

The following papers numbered 1 to 9 read on these motions for summary judgment noticed on January 30, 2015 and duly transferred on September 8, 2015.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits (Torto)	**1, 2, 3**
Notice of Motion, Affirmation & Exhibits (Wilton)	**4, 5, 6**
Affirmation in Opposition & Exhibits	**7, 8**
Reply Affirmation	**9**

The above motions have been consolidated for the purpose of this Decision and Order.

Upon the foregoing papers, and after reassignment of this matter from Justice Kenneth Thompson on September 8, 2015, Defendants, Avignon Taxi, LLC and Mohammed S. Hossain, seek an Order granting summary judgment dismissing Plaintiffs' Complaint on the grounds that Clephane B. Burgess failed to satisfy the serious injury threshold under Insurance Law §5102(d). Defendant, Harold A. Dow, also seeks an Order granting summary judgment and dismissing Plaintiffs' Complaint on the same grounds.

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on October 11, 2011, on Brooklyn Queens Expressway at or near its intersection with Laurel Hill Boulevard, County of Queens, City and State of New York.

On December 2, 2013, the Plaintiff Clephane B. Burgess appeared for a neurological examination conducted by Defendants' appointed physician Dr. Edward M. Weiland. Upon examination and review of Plaintiff's medical records, Dr. Weiland determined that Plaintiff suffered cervical and lumbosacral spine sprains and strains, which at the time of the examination had resolved. Dr. Weiland finds full range of motion in Plaintiff's cervical spine, thoracic spine and lumbar spine and opines that Plaintiff presented a normal neurologic examination. Dr. Weiland notes that he finds no reason why Plaintiff should not be able to perform activities of daily living and continue gainful employment activities without restrictions. Dr. Weiland further finds no neurologic residual, permanency or disability causally related to the accident of October 11, 2011.

Plaintiff offers medical records from Continental Medical, P.C. and Quality Care Physical Therapy, including a report of Glen Colodny, D.C., a chiropractor who examined Plaintiff on February 25, 2015 for injuries sustained as a result of the motor vehicle accident of October 11, 2011. The Court notes that the medical records are not in admissible form. The Court further notes that Dr. Colodny's report is not in admissible form either as it was not sworn to before a notary or other authorized official and therefore cannot be considered by this court. Chiropractors do not come within the scope of statute allowing affirmations by certain persons to be given the same force and effect as an affidavit; to make a competent, admissible affirmation, a chiropractor, like most other persons, must first appear before a notary or other such official and formally declare the truth of the contents of the document. McKinney's CPLR 2106. The only competent medical evidence Plaintiff has submitted is the affirmation of Dr. Robert D. Solomon, the radiologist who performed and reviewed the MRI films of Plaintiff's cervical and lumbar spine; however, the court notes that Dr. Solomon did not causally relate his MRI findings to the

accident in question.

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 Defendant to establish, by submission of evidentiary proof in admissible form, that the 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 Avignon Taxi, LLC and Mohammed S. Hossain's motion for an Order granting summary judgment dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted**; and it is further

ORDERED, that Defendant Harold A. Dow's motion for an Order granting summary judgment dismissing Plaintiffs' Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is likewise **granted**.

The above constitutes the Decision and Order of this Court.

Dated: October 26, 2015

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