ORIGINAL

SHORT FORM ORDER

INDEX No. 14-69953
CAL. No. 16-02156MV

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

***PRESENT:***

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-24-17
ADJ. DATE 6-29-17
Mot. Seq. # 001 - MD

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JUAN FERNANDEZ,

Plaintiff,

- against -

JOHN NOSCHESE and BRENTWOOD UNION FREE SCHOOL DISTRICT,

Defendants.

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-21 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 22-28 ; Replying Affidavits and supporting papers 29-30 ; Other ____; it is,

***ORDERED*** that the motion by defendants John Noschese and Brentwood Union Free School District for summary judgment dismissing the complaint is denied.

Plaintiff Juan Fernandez 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 Clay Drive and Oriole Place in the Town of Islip on June 9, 2014. It is alleged that the accident occurred when the vehicle operated by defendant John Noschese and owned by defendant Brentwood Union Free School District failed to stop at a stop sign controlling its direction of traffic, causing it to strike the passenger side of the vehicle owned and operated by plaintiff Juan Fernandez. By his bill of particulars, plaintiff alleges that, as a result of the subject collision, he sustained various personal injuries, including disc herniations at levels L3 through S1; rupture of the interspinous ligaments in the lumbar region; occult

fracture of the lateral tibial condyle left knee; patella alta of the right and left knees; patellar plicae of the left and right knees; supraspinatus impingement syndrome of the left shoulder; and exacerbation/ aggravation of prior conditions.

Defendants now move for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff fail to meet the serious injury threshold requirement of Insurance Law § 5102 (d). Specifically, defendants assert that plaintiff's alleged injuries arose from a prior motor vehicle accident in 2012, wherein he sustained a fractured skull, and sustained injuries to his cervical and lumbar spines. In support of the motion, defendant submits copies of the pleadings, plaintiff's 50-h hearing transcript, the parties' deposition transcripts, uncertified copies of plaintiff's medical records pertaining to the subject accident and the prior accident, a certified copy of the police accident report with witness statement, and photographs of the situs of the accident. Defendants also submit the sworn medical reports of Dr. David Weissberg and Dr. Howard Reiser. At defendants' request, Dr. Weissberg conducted an independent orthopedic examination of plaintiff on August 2, 2016. Additionally at defendants' request, Dr. Reiser conducted an independent neurological examination of plaintiff on May 11, 2016. Plaintiff opposes the motion on the grounds that defendants failed to meet their *prima facie* burden showing that he did not sustain a serious injury as a result of the subject accident, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law. In opposition to the motion, plaintiff submits unsworn hospital reports concerning his injuries at issue, photographs of his vehicle following the subject accident and the affirmed medical reports of Dr. Christopher Durant and Dr. Michele Rubin.

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 [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*).

Based upon the adduced evidence, defendants established, *prima facie*, their entitlement to judgment as a matter of law on the ground that the injuries allegedly sustained by plaintiff as a result of the subject collision failed to meet the serious injury threshold requirement of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Al-Khilwei v Truman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). Defendants' examining orthopedist, Dr. Weissburg, states in his medical report that an examination of plaintiff reveals he has full range of motion in his spine, shoulders, and knees. Dr. Weissberg states that there are no spasms or tenderness upon palpation of plaintiff's paraspinal muscles, that there are no motor, sensory or reflex deficiencies, that his muscle strength is 5/5, that he has a nonantalgic gait, and that he ambulates without any ambulatory aids or braces. Dr. Weissberg states that the impingement sign and apprehension sign are negative, that there is no evidence of joint line tenderness or swelling or warmth in the knees bilaterally, and that the Lachman and McMurray exams are negative. Dr. Weissberg opines that plaintiff's orthopedic examination is normal and that there is no objective evidence of an ongoing orthopedic disability. Dr. Weissberg further states that the numbness to plaintiff's leg is a pre-existing condition, which is not causally related to the subject accident.

Similarly, defendants' examining neurologist, Dr. Reiser, states in his medical report that an examination of plaintiff reveals that plaintiff's neurological examination did not reveal any objective deficits, that the straight leg raising test is normal, bilaterally, and that there are no ongoing symptoms that would suggest that plaintiff is suffering from a neurological disorder causally related to the subject accident. Dr. Reiser further states that the left scalp deformity, associated localized sensory findings in the left scalp region and slight dysarthria are pre-existing conditions.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the allegations that he sustained injuries within the "limitations of use" categories (*see* ***Colon v Tavares***, 60 AD3d 419, 873 NYS2d 637 [1st Dept 2009]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]) and 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]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]).

Defendants, 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 come forward with evidence to overcome defendants' submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained (*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]).

In opposition to defendants' *prima facie* showing, plaintiff has raised a triable issue of fact as to whether he sustained an injury within the limitations of use category of the Insurance Law as a result of the subject collision (*see* ***Garafano v Alvarado***, 112 AD3d 783, 977 NYS2d 316 [2d Dept 2013]; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 990 [2d Dept 2012]; ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Compass v GAE Transp., Inc.***, 79 AD3d 1091, 914 NYS2d 255 [2d Dept 2010]). Plaintiff has submitted the affirmed medical report of Dr. Christopher Durant, his treating orthopedist. Dr. Durant, in his medical report, states, based upon his contemporaneous and recent examinations of plaintiff, that plaintiff sustained a sprain to his cervical spine, left knee patellar tendonitis, left shoulder tendonitis, and lumbar derangement. Dr. Durant opines that such injuries are permanent, and that the observed range of motion deficits in plaintiff's spine, left knee, and left shoulder are significant (*see* ***Vaughan-Ware v Darcy***, 103 AD3d 621, 959 NYS2d 698 [2d Dept 2013]; ***Bykova v Sisters Trans, Inc.***, 99 AD3d 654, 952 NYS2d 95 [2d Dept 2012]; ***Kanard v Setter***, 87 AD3d 714, 928 NYS2d 782 [2d Dept 2011]; ***Dixon v Fuller***, 79 AD3d 1094, 913 NYS2d 776 [2d Dept 2010]). Dr. Durant further states that the injuries to plaintiff's spine, left knee, and left shoulder, and the lumbar derangement are causally related to the subject accident (*see* ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). Additionally, Dr. Durant states that plaintiff had a prior existing lumbar

spine condition, which was asymptomatic prior to the subject accident, but that the subject accident exacerbated an otherwise asymptomatic condition.

Furthermore, Dr. Durant and plaintiff, during his examination before trial, provided a reasonable explanation for the cessation of plaintiff's medical treatment (*see* ***Pommells v Perez***, *supra*; ***David v Caceres***, *supra*). Dr. Durant explained that despite plaintiff still being symptomatic when he discontinued treatment, once plaintiff's No-Fault benefits were terminated he was unable to continue treatment, because he was unemployed and did not have any other health insurance benefits available to him. Consequently, Dr. Durant's affirmation is sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury to his spine, left shoulder and left knee within the limitations of use categories of the Insurance Law as a result of the subject accident (*see* ***Young Chool Yoi v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]; ***Gussack v McCoy***, 72 AD3d 644, 897 NYS2d 513 [2d Dept 2010]).

Thus, plaintiff has presented medical evidence that conflicts with that of defendants' experts, who found that the injuries sustained by plaintiff were either pre-existing or resolved. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see* ***Johnson v Garcia***, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Moreover, "where [a] plaintiff establishes that at least some of his injuries meet the 'no-fault' threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand [defendants'] motion for summary judgment" (***Linton v Nawaz***, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see* ***Rubin v SMS Taxi Corp.***, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: December 4, 2017

Hon. Joseph Farneti
Acting Justice Supreme Court

**_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**

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