SHORT FORM ORDER

INDEX 15-603053
CAL. No. 18-01210MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 8-30-18
ADJ. DATE _____
Mot. Seq. # 001 - MG; CASEDISP
 # 002 - MD

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ANDREW PEDREIRA,

Plaintiff,

- against -

CONOR J. BAIRD and PETER J. BAIRD,

Defendants.

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Attorney for Plaintiff:
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Attorney for Defendants:
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Upon the following papers read on these e-filed motions for summary judgment: Notice of Motions/Order to Show Cause and supporting papers dated June 21, 2018 and June 26, 2018 ; Notice of Cross-Motion and supporting papers _; Answering Affidavits and supporting papers dated August 22, 2018 ; Replying Affidavits and supporting papers dated September 10, 2018 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants for an order granting summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion by defendants for an order granting summary judgment dismissing the complaint on the issue of liability is denied, as moot.

This is an action to recover damages for personal injuries sustained by plaintiff when his vehicle collided with a vehicle owned by defendant Peter Baird and operated by defendant Conor Baird. The accident allegedly occurred on April 12, 2012, at the intersection of Berkshire Drive and Ridgewood

Avenue, in Farmingville, New York. By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries and conditions, including lumbar radiculopathy, sprain/strain in the cervical and lumbar regions and right ankle, and "left knee re-aggravation of prior arthroscopic intervention."

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

Insurance Law § 5102 (d) defines "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of their examining physician (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On September

26, 2017, approximately five years and five months after the subject accident, moving defendants' examining orthopedist, Dr. Lester Lieberman, examined plaintiff and performed certain orthopedic and neurological tests, including the cervical compression test, the straight leg raising test, the McMurray test, the Lachman test, the anterior drawer test, the posterior drawer test, and the pivot shift test. Dr. Lieberman found that all the test results were negative or normal, and that there was no tenderness in plaintiff's spine, knees and ankles. Dr. Lieberman also performed range of motion testing on plaintiff's spine, knees and ankles, using a goniometer to measure his joint movement. Dr. Lieberman found that plaintiff exhibited normal joint function. Dr. Lieberman opined that plaintiff had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at his deposition, plaintiff testified that he was injured at work in 2011, and that he underwent arthroscopic surgery on his left knee in June 2011 prior to the subject accident. Plaintiff testified that at the time of the subject accident, he was receiving worker's compensation benefit related to the 2011 knee injury. He testified that following the subject accident, he was confined to his bed and home for approximately one week. He further testified that he neither saw any physician nor received any medical treatment for the injuries allegedly sustained by the subject accident. Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendants met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement 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]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or 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***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***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*; ***Cebron v Tuncoglu***, *supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***,

73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Plaintiff opposes the motion, arguing moving defendants' expert report is insufficient to meet their burden on the motion. Plaintiff also argues that the medical reports prepared by his treating physician raise a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits, *inter alia*, the uncertified records of Orthopedic Associates of Long Island and the unsworn MRI report of Dr. Steven Mendelsohn. The uncertified records and unsworn physician's report, submitted by plaintiff, are insufficient to raise a triable issue of fact, as they are not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]). In any event, even assuming that plaintiff was entitled to rely on the uncertified records of Orthopedic Associates of Long Island and the unsworn MRI report of Dr. Mendelsohn, such reports are insufficient to warrant denial of defendants' motion for summary judgment. Dr. Mendelsohn's MRI report revealed herniated discs in plaintiff's thoracic region. The mere existence of a herniated or bulging disc, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see* ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***Byrd v J.R.R. Limo***, 61 AD3d 801, 878 NYS2d 95 [2d Dept 2009]). Moreover, Orthopedic Associates of Long Island's May 16, 2012 record stated that plaintiff had "pain with forced full extension" and "full flexion," and its June 1, 2012 record stated that plaintiff had normal range of motion in his thoracic region. The May 16, 2012 record stated that although plaintiff complained of joint pain in his knees and back, he denied stiffness, swelling and bone pain. Furthermore, plaintiff failed to submit any medical evidence of significant restrictions in the joint function of cervical and lumbar regions, right ankle, and left knee based on a recent examination (*see* ***Santos v Perez***, 107 AD3d 572, 574, 968 NYS2d 43 [1st Dept 2013]; ***Vega v MTA Bus Co.***, 96 AD3d 506, 946 NYS2d 162 [1st Dept 2012]; ***Sham v B&P Chimney Cleaning & Repair Co.***, 71 AD3d 978, 900 NYS2d 72 [2d Dept 2010]).

Finally, in his affidavit, plaintiff avers that following the subject accident, he was limited in performing his normal daily activities, such as walking long distance, sitting for long periods of time, going to the gym, cleaning, and picking up something heavy. However, plaintiff failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform substantially all of his normal daily activities for at least 90 of the 180 days immediately following the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Rivera v Bushwick Ridgewood Props., Inc.***, *supra*).

Thus, defendants' motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted, and the complaint is dismissed. Accordingly, defendants' motion for an order granting summary judgment dismissing the complaint on the issue of liability is denied, as moot.

Dated: January 9, 2019
Riverhead, New York

HON. WILLIAM G. FORD J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION