

Mohammad v Hunter
2025 NY Slip Op 35638(U)
January 16, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 609707/2022
Judge: Paul E. Hennings
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SHORT FORM ORDER

INDEX No. 609707/2022CAL. No. 202400249MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 75 - SUFFOLK COUNTY**PRESENT:**Hon. PAUL E. HENNINGS
Justice of the Supreme CourtMOTION DATE 4/18/24
ADJ. DATE 7/16/24
Mot. Seq. # 001 MG; CASEDISP-----X
IHSAN MOHAMMAD,

Plaintiff,

- against -

TAYLOR S. HUNTER and CYNTHIA
DARDEN,Defendants.
-----XTHE ODIERNO LAW FIRM
Attorney for Plaintiff
145 Pinelawn Road, Suite 130 North
Melville, NY 11747LAW OFFICE OF PATRICK NEGLIA
Attorney for Defendants
200 Broadhollow Road, Suite 207
Melville, NY 11747

Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/Order to Show Cause and supporting papers by defendants, dated March 18, 2024 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers by plaintiff, dated July 8, 2024 ; Replying Affidavits and supporting papers by defendants, dated August 5, 2024 ; Other ; it is

ORDERED that the motion by defendants Taylor Hunter and Cynthia Darden for summary judgment dismissing the complaint is granted.

Plaintiff Ihsan Mohammad commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred on the westbound Southern State Parkway, near its exit with Wantagh State Parkway, Exit 27S, in the Town of Hempstead, County of Nassau, New York, on November 29, 2020. Plaintiff alleges that as he attempted to changed lanes from the westbound left lane of the Southern Parkway to the middle lane of the parkway due to an accident that occurred in his lane of travel, his vehicle was struck by the vehicle operated by Taylor Hunter and owned by Cynthia Darden. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject collision, including disc herniations at levels C4 through C7 and level L4-S1, disc bulges at level L1 through L4, and cervical and lumbar radiculopathy.

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Defendants now move for summary judgment in their favor on the basis that the injuries alleged to have been sustained by plaintiff as a result of the subject accident do not meet the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendants submit copies of the pleadings, plaintiff's deposition transcript, copies of plaintiff's work records, and the sworn medical report of Dr. Eric Freeman. At defendants' request, Dr. Freeman conducted an orthopedic examination of plaintiff on October 16, 2023. Plaintiff opposes the motion on the grounds that defendants failed to meet their prima facie burden, and that there are triable issues as to whether plaintiff sustained injuries within the limitations of use and the 90/180 days categories of the Insurance Law. In opposition, plaintiff submits his own affirmation, and certified and uncertified copies of medical reports concerning the injuries sustained in the accident.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (see *Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (see *Licari v Elliott*, *supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (see Insurance Law § 5104 [a]; *Martin v Schwartz*, 308 AD2d 318, 766 NYS2d 13 [1st Dept 2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (see *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]).

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.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990). 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 *Scala v Benitez*, 216 AD3d 1190, 190 NYS3d 428 [2d Dept 2023]; *John v Linden*, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; *Marin v Ieni*, 108 AD3d 656, 968 NYS2d 165 [2d Dept 2013]; *Wuuderlich v Bhuuiyan*, 99 AD3d 79, 951 NYS2d 885 [2d Dept 2012]).

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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*, 84 NY2d 795, 622 NYS2d 900; *Irizarry v Lindo*, 110 AD3d 846, 973 NYS3d 846 [2d Dept 2013]). However, if a defendant does not establish a prima facie case that the plaintiff’s injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff’s opposition papers (*see Xin Fang Xia v Saft*, 177 AD3d 823, 113 NYS3d 249 [2d Dept 2019]; *Rosenblum v Schloss*, 175 AD3d 1339, 105 NYS3d 894 [2d Dept 2019]; *see generally, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Here, defendants, by submitting competent medical evidence and plaintiff’s deposition transcript, have demonstrated, prima facie, that plaintiff did not sustain a serious injury within the meaning of section 5102(d) of the Insurance Law (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990; *Green v Canada Dry Bottling Co. of N.Y., L.P.*, 133 AD3d 566, 20 NYS3d 94 [2d Dept 2015]). Defendants’ examining orthopedist, Dr. Freeman, used a goniometer to test the ranges of motion in plaintiff’s spine and left knee, and compared his respective findings to the normal range of motion values for each region (*see e.g. Cantave v Gelle*, 60 AD3d 988, 877 NYS2d 129 [2d Dept 2009]; *Staff v Yshua*, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]; *Desulme v Stanya*, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Dr. Freeman in his medical report states that an examination of plaintiff reveals he has full range of motion in his spine and left knee, that there was no evidence of muscle spasms or tenderness upon palpation of paraspinal muscles, that the straight leg raising test was negative, bilaterally, and that there was no evidence soft tissue swelling in plaintiff’s left knee. Dr. Freeman further states that the examination did not reveal any evidence of radiculopathy or neurovascular compromise, that plaintiff does not need any further orthopedic treatment or care, that he is able to perform his activities of daily living and working full time without any restrictions.

Moreover, reference to plaintiff’s deposition testimony sufficiently refutes the allegations that plaintiff sustained injuries within the limitations of use categories or within the 90/180 category of the Insurance Law (*see Scala v Benitez*, 216 AD3d 1190, 190 NYS3d 428 [2d Dept 2023]; *Wettstein v Tucker*, 178 AD3d 1121, 112 NYS3d 1121 [2d Dept 2019]; *Marin v Ieni*, 108 AD3d 656, 969 NYS2d 165 [2d Dept 2013]).

Therefore, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether they sustained an injury within the meaning of the Insurance Law (*see Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). 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 Rumford v Singh*, 130 AD3d 1002, 14 NYS3d 462 [2d Dept 2015]; *Mahmood v Vicks*, 81 AD3d 606, 915 NYS2d 637 [2d Dept 2011]; *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

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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*, 84 NY2d 795, 798, 622 NYS2d 900 [1985]). 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.*, 98 NY2d 345, 350, 746 NYS2d 865; 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*, 57 NY2d 230, 455 NYS2d 570 [1982]; see also *Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788 [1987]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (see *Perl v Meher*, 18 NY3d 208, 936 NYS2d 655; *Paulino v Rodriguez*, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, plaintiff has failed to raise a triable issue of fact as to whether he sustained a serious injury within the limitations of use categories or the 90/180 category of the Insurance Law (see *Boettcher v Ryder Truck Rental, Inc.*, 133 AD3d 625, 19 NYS3d 86 [2d Dept 2015]; *Posa v Guerrero*, 77 AD3d 898, 911 NYS2d 82 [2d Dept 2010]; *Wallace v Adam Rental Transp., Inc.*, 68 AD3d 857, 891 NYS2d 432 [2d Dept 2009]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the serious injury threshold of Insurance Law § 5102 (d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (see *Valentin v Pomilla*, 59 AD3d 184, 873 NYS2d 537 [1st Dept 2009]). The medical evidence proffered by plaintiff was insufficient to establish a serious injury or to defeat defendants’ prima facie showing. Plaintiff has submitted numerous medical reports by his treating doctors to establish he sustained a serious injury; however, the medical reports are without probative value, since they are unaffirmed and inadmissible (see CPLR 2106; *Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]; *Castro v DADS Natl. Enters., Inc.*, 165 AD3d 601, 87 NYS3d 18 [1st Dept 2018]; *Damas v Valdes*, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]). Moreover, the reports of Dr. Daniel Picard, plaintiff’s treating chiropractor, fail to raise a triable issue of fact as to whether plaintiff sustained a serious injury to his spine, since Dr. Picard failed to provide any specific range of motion testing results for plaintiff’s spine (see *Sentino v Valerio*, 72 AD3d 1063, 902 NYS2d 106 [2d Dept 2010]; *Barrera v MTA Long Island Bus*, 52 AD3d 446, 859 NYS2d 483 [2d Dept 2008]), and the one report by Dr. Picard that sets out ranges of motion testing is unaffirmed and without probative value.

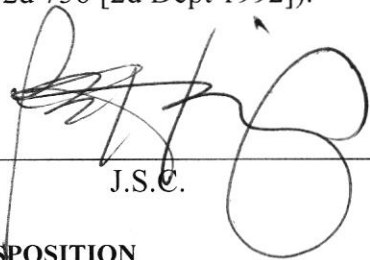
Additionally, the certified medical records of Branch Orthopedics, Picard Chiropractic, Motion Medical Diagnostic PC Records, and Spine Care Long Island are inadmissible, since the records custodians’ certification of the medical reports for the plaintiff’s treating doctors are insufficient to properly place the medical conclusions and opinions contained in those reports before the Court (see *Irizarry v Lindor*, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]). The opinions and conclusions in

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the doctors' reports were required to be sworn to or affirmed under the penalties of perjury, and since this was not done, the various opinions and conclusions of these doctors have not been submitted in a form necessary to refute defendants' prima facie showing (see *Balducci v Velasquez*, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]). More importantly, plaintiff has not offered an "excuse for his failure to meet the strict requirement of tender in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]; see *Merriman v Integrated Bldg. Controls, Inc.*, 84 AD3d 897, 922 NYS2d 562 [2d Dept 2011]).

Finally, plaintiff failed to produce any objective medical evidence to substantiate the existence of an injury which limited his usual and customary daily activities for at least 90 of the first 180 days immediately following the subject accident (see *Catalano v Kopmann*, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; *Haber v Ullah*, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]). The fact that plaintiff was unable to perform a few enumerated tasks for a lengthy period without pain does not constitute a curtailment from performing substantially all of his usual activities to a great extent (see *Lanzarone v Goldman*, 80 AD3d 667, 915 NYS2d 144 [2d Dept 2011]; *Rodriguez v Virga*, 24 AD3d 650, 808 NYS2d 373 [2d Dept 2005]; *Crane v Richard*, 180 AD2d 706, 579 NYS2d 736 [2d Dept 1992]). Accordingly, the defendants' motion for summary judgment is granted.

Dated: January 16, 2025



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION