

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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PAUL BLOUIN,

Plaintiff,

-against-

NICHOLAS RUSSIAN, JR.,

Defendant.

Index No.: 6241/05

Motion Dated:
January 30, 2007

Cal. No.: 5

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The following papers numbered 1 to 9 read on this motion by defendant for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Answering Affidavits - Exhibits	5 - 7
Replying Affidavits	8 - 9

Upon the foregoing papers it is ordered that this motion by defendant for summary judgment is decided as follows:

Plaintiff allegedly sustained serious injuries on June 13, 2004 when he was hit by a motor vehicle while riding a bicycle at the intersection of Rockaway Beach Boulevard and Beach 95th Street in Queens County. The vehicle which struck plaintiff was owned and operated by defendant. Defendant now moves for summary judgment on the ground that plaintiff has not sustained a serious injury pursuant to Insurance Law § 5102(d).

The issue of whether plaintiff has made a prima facie showing of serious injury is a matter of law, to be determined in the first instance by the court. (Licari v Elliott, 57 NY2d 230, 237 [1982]; Charles v U.S. Fleet Leasing, 140 AD2d 481, 481 [1988].) A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who

examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. (see Grossman v Wright, 268 AD2d 79, 84 [2000]; Turchuk v Town of Wallkill, 255 AD2d 576, 576 [1998].) With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact as to whether a serious injury was sustained within the meaning of the Insurance Law. (see Gaddy v Eyler, 79 NY2d 955, 957 [1992].)

In the case at bar, defendant fails to make a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). In support of his motion, defendant submits, inter alia, the pleadings, plaintiff's Bill of Particulars, an affirmed medical report from defendant's examining neurologist, Dr. Daniel J. Feuer, an affirmed medical report from defendant's examining orthopedist, Dr. Alan R. Miller and an affirmed magnetic resonance imaging report of plaintiff's cervical spine. Following a neurological examination, Dr. Feuer found that plaintiff had normal range of motion in the cervical spine and lumbosacral spine. He quantified the range of motion and compared it to the normal range of motion. (Cf. Hernandez v Stanley, 34 AD3d 428 [2006]; Sullivan v Dawes, 28 AD3d 472, 472 [2006].) However, Dr. Feuer does not set forth the objective tests he performed in reaching his conclusions. (Thai v Butt, 34 AD3d 447 [2006].) Similarly, Dr. Miller noted some moderate limitations in the range of motion of plaintiff's cervical spine, right shoulder, right elbow, lumbar spine and right hip, but he, too, does not state the objective tests he performed to support his findings. (Tolstocheev v Bajrovic, 28 AD3d 473, 473 [2006]; Sequeira v W & E Auto Repair, Inc., 17 AD3d 442, 443 [2005].) The court further notes that Dr. Miller avers in his affirmation that plaintiff's injury is "causally related" to the subject accident. Thus, the issue of causation was not contested by defendant's examining orthopedist. (see Black v Robinson, 305 AD2d 438, 439 [2003]; see also Short v Meza, 17 AD3d 664, 664 [2005].)

Under these circumstances, it is not necessary to consider whether plaintiff's papers submitted in opposition to the defendant's motion are sufficient to raise a triable issue of fact. (Coscia v 938 Trading Corp., 283 AD2d 538, 538 [2001].)

Accordingly, this motion by defendant for summary judgment is denied.

Date: February 5, 2007

AUGUSTUS C. AGATE, J.S.C.

