

Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - PART TT-34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T :

HON. ROBERT J. McDONALD,
Justice

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HEUNG BUM KIM,

Plaintiff(s),

- against -

JAMES W. GOLDMAN and JOHN BARON,

Defendant(s).

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: Index No.: 25972 / 2008
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: Motion Cal. No. 14
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: Motion: 1/7/10
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: Motion Seq. No. 3
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The following papers numbered 1 to 15 read on this motion by the defendant James W. Goldman for summary judgment based on the allegation that the plaintiff did not sustain a “serious injury” pursuant to Insurance Law 5102(d). There is also a cross-motion for identical relief from John Barton which relies on the papers submitted.

	<u>Papers Numbered</u>
Notice of Motion, Affirm. and Exhibits	1 - 4
Notice of Cross-Motion [Barton] Affirm	5 - 6
Affirmation in Opposition.....	7 - 10
Affirmation in Reply.....	11 - 12
Reply Affirmation.....	13 - 15

Upon the foregoing papers this motion is determined as follows:

This is a negligence action in which the plaintiff sues for compensation for injury he sustained on October 5, 2008 on the FDR Drive while involved in a motor vehicle accident.

The moving defendants assert that the plaintiff has not sustained a “serious injury” as a result of the accident.

In order to maintain an action for personal injury in an automobile case a plaintiff must

establish, after the defendant has properly demonstrated that it is an issue, that the plaintiff has sustained a “serious injury” which is defined as follows:

“Serious Injury” Insurance Law §5102(d) states as follows:

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that he has sustained a “serious injury” which is defined as follows:

Serious injury means a personal injury which result in ... 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 constitutes 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott*, 57 NY2d 230). Initially it is defendant’s obligation to demonstrate that the plaintiff has not sustained a “serious injury” by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff’s claim (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Grossman v Wright*, 268 AD2d 79). If the defendant ‘s motion raises the issue as to whether the plaintiff has sustained a “serious injury” the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a “serious injury” in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyley*, 79 NY2d 955; *Bryan v Brancato*, 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to “weed out frivolous claims and limit recovery to serious injuries” (*Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350).

The defendant submits an affirmation dated July 15, 2009 by Dr. Alan J. Zimmerman, M.D., a Board Certified Orthopedic Surgeon. Dr. Zimmerman found that plaintiff’s cervical sprain, right and left shoulder sprain, and lumbar sprain were all resolved; that the plaintiff does not need further treatment from an orthopedic perspective. “The multiplicity of levels involved in the cervical and lumbar MRI studies indicate that these findings are degenerative, preexisting and not causally related. There is no clinical correlation or support for any of those diagnosis. There is no indication of a shoulder injury beyond that of a simple sprain assuming that history and complaints are valid.”

The defendant submits an affirmation dated June 26, 2009 by Dr. Sondra J. Pfeffer, M.D., a Board Certified Radiologist. Dr. Pfeffer reviewed a CD-ROM of the cervical MRI of the plaintiff performed at All County Diagnostic Radiology, in Flushing taken November 19, 2008. Dr. Pfeffer found that while the plaintiff had “mild” disc bulging “[n]one of these findings are attributable to the subject accident. There is no evidence for recently sustained (i.e. trauma-related) discal or vertebral injury at any cervical or (visualized) upper thoracic level. There is not even loss of cervical

lordosis to suggest the likelihood of post-traumatic muscle spasm.”

Dr. Pfeffer also reviewed the CD-ROM of the lumbar MRI of the plaintiff taken on November 19, 2008, as she affirmed in her affirmation dated June 26, 2009. She found that the plaintiff had a pre-existing spondylosis manifested by mild disc desiccation, mild disc desiccation, and bulging. While she found that such existed at L2-3, L3-4, L4-5 and L5-S1 “None of the aforesaid findings are ascribable to the subject accident. There is no evidence, whatsoever, for recently sustained (i.e. trauma-related) discal or vertebral injury at any lumbar or (visualized) lower thoracic level.”

The plaintiff submits an affirmation dated November 23, 2009 from Dr. Sung J. Pahng, M.D. who first saw plaintiff on October 8, 2008 and affirms that the plaintiff who was involved in a motor vehicle accident on October 5, 2008. . The plaintiff complained of pain, weakness, stiffness in his hands, lower back, left leg, and shoulders. Dr. Pahng’s conducted a subjective examination of the plaintiff’s cervical spine, and found that he had sustained a cervical radiculopathy, posterior disc herniations at C4-C5, and at C6-7 impinging on the anterior spinal cord, which is indicative of herniations in the cervical spine. Because of injury to his lumbosacral spine the plaintiff’s movement was severely restricted and tests revealed lumbosacral radiculopathy. The plaintiff had sustained sciatic nerve injury which resulted in posterior herniations at L3-L4, L4-L5 and at L5-S1 impinging on the anterior aspect of the spinal cord and on the nerve roots bilaterally at L4-5 and at L5-S1. Plaintiff. The plaintiff had “decreased pinprick to left C7 and left L5 nerve root distribution”. Dr. Pahng found that these disabilities were causally related to the accident. He saw the plaintiff again on October 15, 2009 and found the plaintiff’s “cervical spine has muscle spasm and multiple trigger point tenderness in trapezius and paraspinal muscles. He had reduced movement of his lumbosacral spine and thoracic spine in the paraspinal muscles. It was Dr. Pahng’s opinion that he had sustained a definite permanent partial disability, and such injuries as previously noted were permanent in nature. Dr. Pahng had personally reviewed the MRI files taken by Dr. Rizzuti, the radiologist, and the plaintiff had “Posterior disc herniations at C4-C5, C5-6, and at C6-7 impinging on the anterior aspect of the spinal cord; posterior disc herniations at L3-3-4, L4-5, L5-S1 impinging on the anterior aspect of the spinal canal and on the nerve roots bilaterally at L4-5 and L5-S1.”

Plaintiff also submits affirmations dated October 29, 2009 by Dr. Richard J. Rizzuti, M.D., the radiologist, of the plaintiff’s MRIs taken November 19, 2008 of his Cervical Spine, and on November 20, 2008 of the plaintiff’s Lumbosacral Spine. The MRIs indicated that the plaintiff has “[p]osterior disc herniations at C4-5, C5-6 and C6-7 impinging on the anterior aspect of the spinal cord.” and “[p]osterior disc herniations at L3-4, L4-5 and at L5-S1 impinging on the anterior aspect of the spinal cord and on the nerve roots bilaterally at L4-5 and L5-S1.”

Because the plaintiff did not submit the medical records from the plaintiff’s Acupuncture treatments from April 24, 2009 to September 12, 2009, it can not be considered, however, it is apparent that he sought such treatment.

The pre-trial deposition of the plaintiff dated June 24, 2009 indicates that he did not miss any time from work as a result of the accident [10]. He claimed that he could no longer lift heavy things

[11]. He claimed to have experienced back pain after the accident at the scene .[27] He drove home after the accident and did not go to the hospital [28, 47]. One week after the accident he sought treatment at a pain clinic run by Seung Jong Pahng a name he obtained at the place he had his car repaired. [30] He complained about his back, elbow, shoulder, and neck [31]. He was given “painkillers”, told to rest, and return for physical therapy. [31] He stopped after two/three months for financial reasons [33]. He was sent for MRIs [33] He also saw Dr. Newman [34]. He has since been treated herbally by Dr. Moon Hee, an acupuncturist. [35]. He still has pain in his neck and shoulder. [40] Usually in the mornings. [41] He also has pain in his left-elbow [41]. He also claimed that he never took prescription medication as a result of this accident [47].

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a “serious injury”, however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

Here the defendant has come forward with sufficient evidence to oblige the plaintiff to respond to his claim that the plaintiff has not sustained a “serious injury” (*Gaddy v Eyler*, 79 NY2d 955).

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than “a mild, minor or slight limitation of use” and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller*, 258 AD2d 783; *Burnett v Miller*, 255 AD2d 541). Resolution of the issue of whether “serious injury” has been sustained 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). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has raised triable factual issue as to whether the plaintiff has “permanent consequential” and “significant limitation” categories.

The question presented as to the difference between the measurements of the plaintiff and defendant create an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.*, 48 AD3d 306).

Generally, an unexplained cessation of medical treatment may be fatal to the plaintiff’s claim of a significant or permanent consequential limitation (*Baez v Rahamatali*, 24 AD3d 256 *aff’d* 6 NY2d 868) Here, the plaintiff stopped his treatment because, according to his affidavit, he could no longer afford to pay for such treatment. A diagnosis of permanency having been sustained by the plaintiff obviates the need for further treatment and, therefore, there is no “gap” in treatment (*Pommells v Perez*, 4 NY3d 566). Also, a finding by the treating physician that continued treatment would be merely palliative can be considered a sufficient explanation for cessation of treatment (*Toure v Avis Rent A Car Systems*, 98 NY2d 345; *Turner-Brewster v Arce*, 17 AD3d 189).

The plaintiff has failed to demonstrate that he has a “medically determined” injury or

impairment which has prevented his from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio*, 81 NY2d 1062; *Johnson v Berger*, 56 AD3d 725; *Roman v Fast Lane Car Service, Inc.*, 46 AD3d 535).

Regarding the “permanent loss of use” of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff’s life (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295). The finding of “Permanency” is established by submission of a recent examination (*Melino v Lauster*, 195 AD2d 653 *aff’d* 82 NY2d 828). The mere existence of a herniated disc even a tear in a tendon is not evidence of serious physical injury without other objective evidence (*Sapienza v Ruggiero*, 57 AD3d 643; *Piperis v Wan*, 49 AD3d 840). Here, according to the affirmation submitted the plaintiff had other symptoms of injury to support his claim of permanent loss of use.

Regarding “permanent limitation” of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang*, 237 AD2d 495). The word “permanent” is by itself insufficient, and it can be sustained only with proof that the limitation is not “minor mild, or slight” but rather “consequential” (*Gaddy v Eyler*, 79 NY2d 955).

The “significant limitation of use of a body function or system” requires proof of the significance of the limitation, as well as its duration (*Dufel v Green*, 84 NY2d 795; *Fung v Uddin*, 60 AD3d 992; *Hoxha v McEachern*, 42 AD3d 433; *Barrett v Howland*, 202 AD2d 383). The plaintiff has demonstrated that he has sustained his burden of demonstrating that he has sustained such limitation.

Summary Judgment is appropriate only where through admissible evidence, which eliminates all material issues of fact, the proponent establishes her cause of action (*Alvarez v Prospect Hospital*, 68 NY2d 320). Upon demonstrating entitlement the burden shifts to the opponent to rebut the proffered evidence (*Bethlehem Steel Corp v Solow*, 51 NY2d 870). Such facts offered in opposition must be in evidentiary form and naked allegations are therefore insufficient (*Zuckerman v City of New York*, 49 NY2d 557). Summary Judgment is not available when the evidence submitted is subject to argument or debate (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY3d 395; *Stone v Goodson*, 8 NY2d 8 *rehearing den* 8 NY2d 934).

Accordingly, the defendants’ motion for summary judgment as to whether the plaintiff has sustained “serious injury” is granted as to the extent that the plaintiff has failed to demonstrate a cause of action based on disability for 90 of the first 180 days following the accident, however, the defendants’ motion is denied is all other aspects.

So Ordered.

Dated: January 7, 2010

Robert J. McDonald, J.S.C.