

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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DANNY REYES,

Plaintiff,

-against-

Index No.: 7743/07
Motion Date: 6/4/08
Motion Cal. No: 27
Motion Seq. No: 1

LINDA M. DAGOSTINO and JORGE E. BARRIA,

Defendants.

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The following papers numbered 1 to 10 read on this motion for an order granting defendants Linda M. Dagostino and Jorge E. Barria granting summary judgment, pursuant to CPLR § 3212, dismissing the complaint against them on the basis that plaintiff did not sustain a “serious injury” under Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Memorandum of Law-Exhibits.....	1 - 5
Affirmations in Opposition-Exhibits.....	6 - 8
Reply Affirmation.....	9 - 10

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff Danny A. Reyes (“plaintiff”) commenced this action against defendants Linda M. Dagostino (“Dagostino”) and Jorge E. Barria (“Barria”) to recover damages for serious injuries he allegedly sustained on October 27, 2006, as a result of his vehicle being struck in the rear by the vehicle owned by defendant Dagostino and operated by defendant Barria, while his vehicle was stopped at or near the intersection of Shore Road and Bayside Avenue, North Hempstead, New York. Plaintiff claims, inter alia, that as a result of the accident, he sustained injuries to his cervical and lumbar spines, and to his left ankle, knee and left elbow. Defendants move for summary judgment on the ground that plaintiff failed to meet the “serious injury” threshold requirement of section 5102(d) of the Insurance Law. The aforementioned statute states, in pertinent part, that a “serious injury” is defined as:

a personal injury which results in ...significant disfigurement; ...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 party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

The issue of whether the injuries allegedly sustained by plaintiff fall within the definition of a “serious injury,” in the first instance, must be decided by the court. See, Licari v. Elliot, 57 N.Y.2d 230, 238 (1982). In order for a summary judgment motion to be granted by the court, the defendant must establish that there are no triable issues of facts in dispute. Inherent in the court’s consideration of a motion for summary judgment for lack of serious injury is the requisite determination that there are no issues of fact with regard to the injuries sustained by a plaintiff. Thus, the threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendants make a prima facie showing that plaintiff did not sustain a serious injury.

Defendants met their initial burden of establishing that plaintiff did not sustain a serious injury by proffering plaintiff’s deposition testimony; the affirmed medical reports of Dr. Raz Winiarsky, an orthopedic surgeon, and Dr. Wendy Cohen, a neurologist, both of whom examined plaintiff on October 10, 2007. Plaintiff, at his deposition, testified that although an ambulance arrived on the scene of the accident, the treatment rendered consisted of the attendant giving him a neck brace, which plaintiff placed in his pocket and later used for two days; that he went home after the accident, went to the police station the following morning to obtain a copy of the police report, and then went to the hospital where x-rays were taken of this neck and back; that he did not seek any further medical treatment for three weeks, did not use a cane, a wheelchair or crutches, and returned to his employment as a painter two and a half weeks after the accident, which lasted for one to two months because there was no work at the time.

Dr. Winiarsky found, after examination and objective testing, that plaintiff had a full range of motion in his cervical spine, lumbar spine and left knee, and rendered the diagnosis of “Status post cervical spine strain/sprain resolved. Status post thoracic strain/sprain, resolved. Status post lumbar spine strain/sprain, resolved. Status post left knee strain/sprain, resolved.” Dr. Winiarsky further opined that plaintiff is “able to perform all activities of daily living and can continue with his working duties without restriction or limitations.” Dr. Wendy Cohen, a neurologist, also performed an independent medical examination of plaintiff, and also found after examination and objective testing, that he had a full range of motion in his cervical spine and lumbar spine. Dr. Cohen similarly opined that plaintiff’s neurological examination was normal, that his cervical and lumbar strain/sprains were resolved, and that he is “capable of working and performing his normal activities of daily living without restrictions or limitations.”

Defendants' proffered evidence was sufficient to establish their prima facie entitlement to summary judgment in their favor. See, Toure v Avis Rent A Car Sys., 98 N.Y.2d 345 (2002); Casas v Montero, 48 A.D.3d 728 (2nd Dept. 2008). Once a defendant submits evidence establishing that plaintiff did not sustain a serious injury within the meaning of section 5102(d) of the Insurance Law, the burden shifts to plaintiff to produce evidentiary proof in admissible form demonstrating the existence of a triable issue of fact. See, Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Browne v M&P Distrib. Corp., 52 A.D.3d 638 (2nd Dept 2008).

In opposition, plaintiff submitted his deposition testimony and his affidavit, uncertified hospital records of Flushing Hospital, uncertified records of Brian Campo, an apparent Acupuncturist, photocopies of an affirmation of Dr. Jerinder S. Bakshi, who allegedly examined plaintiff on November 7 and December 12, 2006, and again on January 25 and February 1, 2007, an affirmation of Richard A. Heiden, a Radiologist, who purported reviewed MRI films of plaintiff's cervical and lumbar spine, to which were annexed his MRI reports,¹ and an affirmation of Panagiotis Zenetos, M.D., who first examined plaintiff on June 29, 2007, and performed transforaminal epidural steroid injections on March 27, 2008. The self-serving affidavit of plaintiff and his deposition testimony, are insufficient to raise a triable issue of fact as to whether he sustained a serious injury. Silla v. Mohammad, 52 A.D.3d 681 (2nd Dept. 2008); Hargrove v. New York City Transit Authority, 49 A.D.3d 692 (2nd Dept. 2008); Verette v. Zia, 44 A.D.3d 747 (2nd Dept. 2007); Iusmen v.

¹By undated, photocopied affirmation, Dr. Heiden purports to affirm the results of his review of the MRI films, stating:

- “2. I interpreted the actual MRI films of Danny Reyes, which shows his Cervical Lumbar Spine and have photographically inscribed upon it his name and the dates of the taking of said MRIs; December 14, 2006 and January 22, 2007. I attest that the information that is photographically inscribed on the MRI is true and correct.
3. If called as a witness in this action, I would testify to all matters relating to the MRIs in the same manner as set forth in the MRI typewritten reports, annexed hereto.
4. I affirm the foregoing pursuant to C.P.L.R. 2106.”

This affirmation, however, was neither sworn to nor affirmed to be true under penalty of perjury and thus does not constitute competent evidence. See, CPLR 2106; Cwiekala v. Siddon, 267 A.D.2d 193 (2nd Dept. 1999) Moore v. Tappen, 242 A.D.2d 526 (2nd Dept. 1997); see, also, Offman v. Singh, 27 A.D.3d 284 (1st Dept. 2006)[ruled that a physician's statement that does not contain the language “affirmed ... to be true under the penalties of perjury” fails to comply with CPLR 2106.

Konopka, 38 A.D.3d 608 (2nd Dept. 2007); Mejia v. DeRose, 35 A.D.3d 407 (2nd Dept. 2006). The uncertified hospital records and unaffirmed magnetic resonance imaging reports also are without probative value. Browne v M&P Distrib. Corp., *supra*; Nociforo v. Penna, 42 A.D.3d 514 (2nd Dept. 2007); Iusmen v. Konopka, *supra*;

Moreover, the affirmed medical report of Dr. Bakshi, plaintiff's apparent treating physician, also is without probative value. First, he relied on the unsworn reports of others in reaching his conclusions about plaintiff's injuries, including the unsworn or unaffirmed report of the radiologist that referenced disc herniations. See, Malave v. Basikov, 45 A.D.3d 539 (2nd Dept. 2007)[“affirmation of the plaintiff's treating physician also lacked any probative value since he relied on unaffirmed reports of others”]; Landicho v. Rincon, __ A.D.3d __, __ N.Y.S.2d __, 2008 N.Y. Slip Op. 06287 (2nd Dept. 2008)[“magnetic resonance imaging reports. . . as well as the physical therapy reports concerning the plaintiff, were without any probative value since they were unaffirmed”]; Matra v. Raza, __ A.D.3d __, __ N.Y.S.2d __, 2008 WL 2747170 (2nd Dept. 2008)[“magnetic resonance imaging reports . . . concerning the plaintiff were not competent evidence since they were unaffirmed”]; Benavides v. Peralta, 52 A.D.3d 755 (2nd Dept. 2008)[“affirmation of the plaintiff's treating physician was without any probative value since it is clear that in concluding that the plaintiff sustained a herniated disc at L5-S1, he relied on the unsworn magnetic resonance imaging (hereinafter MRI) reports of another physician.”]. However, those reports, even if admissible, which they are not, merely found that as of December 14, 2006, plaintiff had disc bulges at C2-3 and C4-5, central herniations at C3-4 and C6-7; and a central, focal herniation at C5-6. In any event, it is well recognized that the mere existence of a herniated or bulging disc, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration. Smeja v. Fuentes, __ A.D.3d __, __ N.Y.S.2d __, 2008 WL 3057702 (2nd Dept. 2008); Browne v. M&P Distrib. Corp., *supra*; Patterson v. N.Y. Alarm Response Corp., 45 A.D.3d 656 (2nd Dept. 2007); Iusmen v. Konopka, 38 A.D.3d 608 (2nd Dept. 2007). No such evidence was presented even though Dr. Bakshi allegedly performed objective examinations, he failed to describe the objective tests performed or to include, authenticate or even identify who performed the computerized range of motion test upon which he relied in reaching his conclusions. See, Fiorillo v. Arriaza, 52 A.D.3d 465 (2nd Dept. 2008)[“while the plaintiff's treating physician concluded that the plaintiff sustained significant limitation of use of his left shoulder, the physician failed to set forth what objective tests he performed to arrive at that conclusion”]; Park v. Orellana, 49 A.D.3d 721 (2nd Dept. 2008)[same]; Murray v. Hartford, 23 A.D.3d 629 (2nd Dept. 2005)[“physician failed to set forth the objective tests used in finding limitations in motion”].

Moreover, while Dr. Bakshi set forth limitations in the plaintiff's cervical and lumbar spine range in subsequent examinations in 2007, again based upon computerized range of motion tests, his medical conclusions lack probative value as neither he nor plaintiff proffered competent medical evidence showing range of motion limitations in plaintiff's spine that were contemporaneous with the subject accident. See, Iusmen v. Konopka, 38 A.D.3d 608 (2nd Dept. 2007). Furthermore, inasmuch as the mere existence of bulging or herniated discs is not evidence of serious injury, the affirmation of plaintiff's radiologist, Dr. Heiden, even if admissible, would be inadequate to establish serious

injury, since it failed to establish any physical limitations that resulted from these conditions Shamsodeen v. Kibong, 41 A.D.3d 577, 578-579 (2nd Dept. 2007). Accordingly, no competent, admissible proof was submitted to establish any loss of range of motion contemporaneous with the happening of the accident.

Nor is the affirmation of Dr. Zenetos, who first saw plaintiff on June 29, 2007, and most recently saw him on April 23, 2008, well after the instant motion was filed, of any probative value, as his conclusions too were based upon the unsworn MRI reports of December 14, 2006 and January 22, 2007, and upon alleged limitations in range of motion that are not based upon any disclosed objective tests. These deficiencies render speculative any conclusion that the injuries or limitations he noted with respect to plaintiff's cervical or lumbar spine were the result of the subject accident. See, Byam v. Waltuch, 50 A.D.3d 939 (2nd Dept. 2008); Laurent v. McIntosh, 49 A.D.3d 820 (2nd Dept. 2008); Moore v. Sarwar, 29 A.D.3d 752 (2nd Dept. 2006); Tudisco v. James, 28 A.D.3d 536 (2nd Dept. 2006).

Lastly, plaintiff's submissions were insufficient to establish that he sustained a medically determined injury of a nonpermanent nature which prevented him from performing his usual and customary activities for 90 of the 180 days following the subject accident. See, Casas v. Montero, 48 A.D.3d 728 (2nd Dept. 2008); Singh v. DiSalvo, 48 A.D.3d 788 (2nd Dept. 2008); Hargrove v. New York City Transit Authority, *supra*; Verette v. Zia, 44 A.D.3d 747 (2nd Dept. 2007); Nociforo v. Penna, 42 A.D.3d 514 (2nd Dept. 2007). Indeed, his own testimony established the contrary, as he returned to work as a painter within a brief period of time following the accident. Based upon the foregoing, defendants' motion for summary judgment in their favor is granted and the complaint hereby is dismissed.

Dated: August 14, 2008

J.S.C.