

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

-----X		
FRANKLYN RODRIGUEZ,	:	Index. No.: 20374 / 2007
	:	
Plaintiff(s),	:	Motion: 02.11.10
- against -	:	
	:	Cal: 3
LANIECE A.. JARRELS and TERRELL L. SCOTT,	:	
	:	Sequence No. 2
Defendant(s).	:	
-----X		

The following papers numbered 1 to 10 read on this motion by defendants to dismiss the complaint pursuant to CPLR 3212 on the ground that the plaintiff has not sustained a “serious injury” as defined in Insurance Law 5102.

	Papers Numbered
Defendant’s motion, Affirm., Exhibits.....	1 - 4
Plaintiff’s, Affirm., Exhibits.....	5 - 7
Reply affirmation.....	8 - 9
Supplemental Affirmation in Opposition and Exhibit..	10

Based upon the foregoing papers it is Ordered that this motion is determined as follows:

The underlying action arises from a personal injury claim as a result of an automobile accident at the intersection of 65th Place and Queens Boulevard, on October 7, 2006.

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)

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 Eyler*, 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 defendants rely on an affirmation dated June 11, 2009 by Dr. Alan J. Zimmerman, M.D., a Board Certified Orthopedic Surgeon who conducted an evaluation of the plaintiff. In his affirmation there is no positive declaration that the tests he performed were subjective. The evaluation of plaintiff’s cervical spine was normal, but the plaintiff’s “Extension” of his cervical spin was low normal. Dr. Zimmerman examined the Thoracic Spine, Thoraco-Lumbar Spine, which were negative, the Lumbar Spine results were normal, the knees were normal. With regard to the plaintiff’s range of motion in his right knee flexion was 125° while the normal reading is 135°. The plaintiff had normal results for the other tests performed. It was Dr. Zimmerman’s “Diagnosis” that the plaintiff had “Resolved cervical, thoracic and lumbar sprain/strain [and] Resolved right knee contusion.” He noted that the right knee “discoid lateral meniscus is developmental, pre-existing and not causally related.” In his conclusion he writes “The mechanism of injury, the claimant’s right knee striking the dashboard, precludes the medical meniscal tear from being causally related. The radiologist report, the right knee MRI, is grossly inadequate. The films should be reviewed. There is no clinical correlation of a cervical or lumbar HNP.”

There are three affirmation of Dr. Sheldon Feit, M.D., a Radiologist, all dated September 22, 2009 of the MRI’s plaintiff’s cervical spine, lumbar spine, and right knee. Dr. Feit found that there were pre-existing degenerative changes in plaintiff’s lumbar spine, and that the disc bulges are not related to the injury. With regard to the lumbar spine Dr. Feit found that there were bulges identified

at the L5-S1 level, Degenerative spondylosis, and no evidence of focal herniation. Dr. Feit's conclusion was that these bulges are not posttraumatic but are degenerative. The MRI of plaintiff's right knee showed "miniscal degeneration within the posterior horn of the medial meniscus. Joint effusion. Mild sprain of the anterior cruciate ligament." It was Dr. Feit's conclusion that the plaintiff had failed to demonstrate evidence of a meniscal tear or fracture. There is a mild sprain of the anterior cruciate ligament."

The plaintiff submits the affirmation dated January 11, 2010 of Dr. Harold James, M.D.. Dr. James first saw the plaintiff October 12, 2006 in connection with injuries he had sustained in the accident on October 7, 2006. The plaintiff told Dr. James of his prior accident in 2001 when he injured his back and right knee which required surgery. The plaintiff told Dr. James that "he was asymptomatic regarding the injuries to his back, neck, and right knee. As such, it is my expert medical opinion that the injuries as diagnosed were a direct result of the accident of October 7, 2006." He found that with regard to the plaintiff's cervical spine his flexion was limited to 30 degrees with the normal being 60 degrees, extension was limited to 10 degrees with the normal being 60 degrees, left lateral flexion was limited to 10 degrees with the normal being 50 degrees, the left rotation was limited to 30 degrees the normal being 80 degrees, and right rotation limited to 15 degrees with the normal being 80 degrees. The examination of the plaintiff's lumbar spine revealed flexion limited to 40 degrees with a normal being 90 degrees, extension limited to 10 degrees with the normal being 25 degrees, as was the plaintiff's left lateral flexion, and right lateral flexion.

Dr. James refers to three MRIs taken of the plaintiff. The MRI taken on November 25, 2006 of the plaintiff's right knee indicates that the plaintiff had sustained a "tear of the posterior horn of the medial miniscus; discoid lateral miniscus; joint effusion." On the MRI taken on November 24, 2006 of the plaintiff's lumbar spine he noted a "loss of height and signal and central herniation at L5-S1." Also on November 24, 2006 a second MRI of plaintiff's cervical spine was conducted which revealed "right paracentral herniation at C6-7."

Subsequent to the MRI Dr. James conducted his own examination and found "tear of the posterior horn of the medical meniscus; herniation at C6-7; exacerbation of herniation at L5-S1; cervical derangement; lumbar derangement; right knee internal deranagment."

Dr. James found that the injuries sustained "are causally related to the motor vehicle accident on October 7, 2006 and that the patient is permanently partially disabled due to those injuries". That the findings in the MRIs are consistent with his clinical findings that injuries are "of a permanent nature" and would inhibit the plaintiff "from the normal activities of daily living".

On November 4, 2009 the plaintiff was again seen by Dr. James and presented complaints relating to his neck, back, and right knee. Consequently, Dr. James conducted a cervical range of motion noting that the plaintiff's cervical flexion was limited to 50 degrees with the normal being 60 degrees, as was his cervical extension. Plaintiff's cervical left lateral flexion was 40 degrees with the normal being 45 degrees. His cervical left rotation was 70 degrees with the normal being 80 degrees and the plaintiff had similar reading with regard to his cervical right rotation. Dr. James conducted a lumbar range of motion study and noted that the plaintiff had a lumbar flexion of 40

degrees with a normal reading being 90 degrees, his lumbar extension was 20 degrees with the normal being 30 degrees.

It was Dr. James' expert medical opinion that such injuries are "not degenerative but rather traumatically induced and are causally related to the accident" on October 7, 2006. He found that the plaintiff was "permanently partially disabled" and his injuries are "permanent in nature" and will "inhibit the patient's ability to carry out his normal activities of daily living."

Dr. James noted that although he was "advised" on the plaintiff's previous accident in 2001 that the plaintiff was "asymptomatic" at the time of the accident of October 7, 2004, and that the plaintiff's injuries are "significant in nature and will inhibit his ability to carry out his normal activities of daily living."

The plaintiff submits three affirmations by Dr. Mark Shapiro, M.D. of United Diagnostic Imaging each dated November 12, 2009 with regard to three MRIs. One MRI of plaintiff's right knee was done November 25, 2006 and two done November 24, 2006 one of the plaintiff's lumbar spine and the second of the plaintiff's cervical spine.

The plaintiff was deposed on May 7, 2009. He testified that after the accident on October 7, 2006 he has back pain [17]. He can not walk up stairs [17]. He is unable to work as a plumber [19]. He has missed three weeks of work because of the accident on October 7, 2006 [20]. As a result of a heavy impact his car rolled over [37]. He lost consciousness for a few seconds [38]. The airbags in his vehicle deployed [40]. He was bleeding from the nose [42]. He was not taken to a hospital [46]. Subsequently he was suffering back pain and sought treatment at Health Makers [48-50]. He had MRI's of his back, neck, and knee at United Diagnostic Imaging [52]. He saw a neurologist and took acupuncture treatment [53, 54]. The pain from his neck moved down his body [54]. He wore a knee brace for three months [55]. Knee surgery was recommended but his insurance did not cover such surgery [56]. He had a prior motor vehicle injury in May 2001 for which he had knee surgery [59]. In that earlier accident his knees and eye were injured [60]. He testified that "I was fine" before the instant accident [64]. He was able to travel to Disneyland two years prior to the date of his deposition [70].

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 support their claim that the plaintiff has not sustained a "serious injury" requiring the plaintiff to demonstrate that he had sustained such "serious injury" (*Gaddy v Eycler*, 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 conflicting measurements of plaintiff’s ability to move creates 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) 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). The plaintiff alleges that he stopped treatment because his “no fault benefits ran out and he could not afford to pay for the treatment himself.”

With regard to the 90/180 rule, the defendant’s medical expert must relate specifically to the 90/180 claim made by the plaintiff before dismissal is appropriate and they failed to do so (*See, Scinto v Hoyte*, 57 AD3d 646; *Faun Thau v Butt*, 34 AD3d 447; *Lowell v Peters*, 3 AD3d 778). In fact, the report of the defendants’ physician is nearly three years after the date of accident.

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 plaintiff relies on the affirmation of Dr. James which was affirmed January 11, 2010.

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 Eycler, supra*). Once the question has been raised, in order for the plaintiff to sustain proof of permanency, he must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (*Gobas v Dowigiallo*, 287 AD2d 690). The plaintiff has done so through the affirmation of Dr. James.

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). So too, the

plaintiff has met his burden through the affirmation of Dr. James.

Accordingly, the defendants' motion to dismiss pursuant to Insurance Law 5102 on the ground that the plaintiff has not sustained "serious injury" because of his previous accident in 2001 is denied.

So Ordered.

Dated: February 11, 2010
Long Island City, N.Y.

Robert J. McDonald, J.S.C.