Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present : HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

JAMIE ESTRADA, Plaintiff,	Index Number 1300 2006
- against -	Motion Date October 24, 2007
MARIO TEJADA, Defendant.	Motions Cal. Number 14
	Motion Seq. No. 1

The following papers numbered 1 to 8 read on this motion by defendant to dismiss the complaint on the ground that plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102[d].

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-6
Reply Affidavits.....	7-8

Upon the foregoing papers it is ordered that the motion is denied.

Plaintiff in this negligence action seeks damages for personal injuries sustained in an automobile accident on November 12, 2004, when his stopped vehicle was struck in the rear by a vehicle operated by defendant. In the verified bill of particulars, plaintiff alleges that he sustained injuries which include the following: posterior disc herniation at C3-4 abutting the anterior aspect of the spinal cord; posterior disc herniation at L4-5 and L5-S1 which impinge on the anterior aspect of the spinal canal, the left nerve root at L4-5 and right nerve root at L5-S1; and cervical and lumbar radiculopathy. Defendant contends that these injuries are not serious and causally-related to the subject accident. Plaintiff opposes the motion.

It is well settled that the proponent of a motion for summary judgment, where the issue is whether a plaintiff has sustained a serious injury as defined by Insurance Law § 5102[d], has the

initial burden of establishing, by competent evidence, that a plaintiff did not sustain a serious injury causally related to the subject accident (Franchini v Palmieri, 1 NY3d 536 [2003]). Once a defendant meets this initial threshold, the burden shifts to plaintiff to offer proof, in admissible form, which creates a material issue of fact requiring a trial (id.). Defendant met his initial burden with the affirmed reports of doctors Cohen and Brown.

After examining plaintiff on December 27, 2006, neurologist Wendy Cohen notes that "there was no palpable muscle spasm in the cervical paraspinal musculature; full and painless range of motion was noted; flexion was normal at 50 degrees, extension was normal at 60 degrees, rotation was normal bilaterally at 80 degrees and right and left lateral flexion was normal at 45 degrees; there was no muscle spasm upon palpation of the lumbar paraspinal muscles; there was full range of motion of the lumbar spine including flexion (normal) at 90 degrees, extension normal at 25 degrees, rotation normal bilaterally at 80 degrees, and right and left lateral flexion was normal at 45 degrees." Based upon this examination, Dr. Cohen concludes that "(plaintiff) is not disabled at this time from a neurological point of view."

Dr. Marc Brown reviewed plaintiff's cervical magnetic resonance imaging (MRI) film dated November 30, 2004, and notes the following:

> "alignment is within normal limits. The vertebral body heights are maintained. The disc heights are maintained. The marrow signal appears normal. The visualized segment of the spinal cord appears normal. The paravertebral soft tissues are within normal limits. There is no evidence of disc herniation or of significant canal or foraminal narrowing. There is mild age-appropriate degenerative disc disease. This includes disc desiccation at every level, greatest at L4-L5 and L5-S1; the formation of tiny vertebral marginal osteophytes at every level; and minimal circumferential disc bulging at L3-L4 through L5-S1."

Overall, Dr. Brown found "mild age-appropriate degenerative disc disease...(with) no finding...due to an accident."

Plaintiff's submissions in opposition are sufficient to raise

a triable issue of fact as to whether he sustained a serious injury in the subject accident. In opposition, plaintiff submitted the affidavit of Dr. Deborah Turner, the chiropractor who initially treated defendant on November 12, 2004. According to Dr, Turner, an initial examination of plaintiff's cervical spine revealed spastic and tender deep paraspinal musculature overlying the upper and middle range; articular fixation was noted in the upper, middle and lower extremities; and malposition of the C1, C4 and C5 motor units were apparent. A thoracic spine examination revealed spasm and tenderness overlying the right upper and lower range; spasms of the right and tenderness of the left overlying the middle range; articular fixation in the upper, middle and lower range; malposition of the T1, T3, T7 and T12 motor units were apparent; Nachlas test was positive on the right with mild low back pain and Yeoman's test was positive on the right with mild low back pain.

Dr. Turner's initial examination of plaintiff's lumbar spine revealed the following: spasm and tenderness overlying the right upper and lower range; spasm overlying the right middle range; spasms overlying the right sacroiliac joint and tenderness overlying the right sacroiliac joint; articular fixation was noted; and there was malposition of the L1 and L5 motor units and the right sacroiliac joint. Dr. Turner notes that plaintiff treated with her office three times per week for the period of November 23, 2004 through April 2, 2005, when he stopped treating because his no-fault benefits had run out. Dr. Turner causally relates these findings to the subject accident.

Plaintiff was referred to Dr. Noel Fleischer for a neurological examination on December 16, 2004. Dr. Fleischer found cervical and lumbar radiculopathy, specifically, right C7 nerve root injury.

An examination of plaintiff by Dr. Turner on September 18, 2007, revealed, inter alia, bilateral extensor hallicus 4/5, right tibialis anterior 4/5; cervical spine spasm and tenderness; a 46% range of motion limitation of the extension; malposition of the lumbar motor units; flexion limited to 47 degrees the norm being 60 degrees; a 21% left lateral bending limitation; a 47% thoracic spine (flexion) range of motion limitation; and a 24% left rotation range of motion limitation of the thoracic spine. Also, shoulder depressor test was positive on the right. Dr. Turner concludes that, based on the recent examination, that plaintiff suffers from, inter alia, cervical segmental dysfunction, spasm paraspinal musculature, cervical space occupying lesion, spasm-trapezius, C5 nerve root deficit, shoulder dysfunction, thoracic segmental dysfunction, and spasm -paralumbar musculature. As relevant, Dr. Turner also concluded that plaintiff's injuries are causally

related to the November 12, 2004 accident, and that the positive findings and range of motion limitations are permanent in nature.

It is well settled that the conflicting opinions of experts may not be resolved on a motion for summary judgment (see Garcia v Long Island MTA, 2 AD3d 675 [2003]; Kraemer v Henning, 237 AD2d 492 [1997]). Moreover, in view of the objective evidence of serious injury under the no-fault law adduced by plaintiff (Gaddy v Eyler, 79 NY2d 955 [1992]; Kim v Cohen, 208 AD2d 807 [1994]; see Risbrook v Coronamos Cab Corp., 244 AD2d 397 [1997]), he has sufficiently demonstrated the existence of triable issues of fact as to the seriousness of his injuries to avoid summary judgment.

Accordingly, the motion to dismiss the complaint on the ground that plaintiff did not sustain a serious injury causally related to the subject accident, is denied.

Dated: December 7, 2007 .....
J.S.C.