SHORT FORM ORDER

INDEX No. 04-18254
CAL. No. 06-00402-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6/29/06
ADJ. DATE 8/11/06
Mot. Seq. # 001 - MG; CASEDISP

PAUL A. CAMPBELL, Plaintiff, - against - GREGORY DiSANTO, Defendant.	SANDERS, SANDERS, BLOCK, WOYCIK, VIENER & GROSSMAN, P.C. Attorneys for Plaintiff 100 Herricks Road Mineola, New York 11501
	JAMES P. NUNEMAKER, JR. & ASSOC. Attorneys for Defendant P.O. Box 9347 Uniondale, New York 11553-9347

Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 15 - 22; Replying Affidavits and supporting papers 23 - 25; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred at Ruland Road at or near its intersection with Pinelawn Road, Melville, County of Suffolk, New York, on July 25, 2002. The accident allegedly occurred when the vehicle owned and operated by defendant, Gregory DiSanto, rear-ended the vehicle operated by the plaintiff, which was stopped at the time of impact. Defendant now moves for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff opposes this motion, and defendant has filed a reply.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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 constitute 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of the motion defendant submits, inter alia, the pleadings; the plaintiff's verified bill and supplemental bill of particulars; the transcript of the deposition testimony given by plaintiff on November 10, 2005; plaintiff's Mercy Medical Center emergency room records dated July 25, 2002; the unaffirmed report dated July 29, 2002 of plaintiff's treating radiologist, Dr. Alan Kopp; the affirmed report dated January 6, 2006 of defendant's examining orthopedist, Dr. S. Farkas, M.D.; the affirmed report dated January 10, 2006 of defendant's examining neurologist, Richard A. Pearl, M.D.; the affirmed reports dated November 6, 2004 and September 17, 2005 of defendant's examining radiologist, Dr. Sheldon P. Feit, M.D.

Plaintiff claims in his bill of particulars that he sustained, among other things, a right knee injury; a loss of cervical lordosis; a cervical spine sprain/strain; a lumbar spine sprain/strain; and a restriction of motion of the left shoulder. He also claims that he was confined to his bed and home intermittently for portions of the day for approximately 180 days following the occurrence. In addition, he claims that he sustained economic loss in excess of basic economic loss as set forth in Insurance Law § 5102 (a). Moreover, plaintiff claims the serious injury categories of a fracture; a permanent loss of use; a permanent consequential limitation; a significant limitation; and a non-permanent injury. Plaintiff

claims in his supplemental bill of particulars that he was confined to his bed for about two weeks and to his home for about two and one-half months. He further claims that he is partially disabled; that he was disabled from July 26, 2002 until September 20, 2002, at which time he returned to "light duty"; and that he returned to "regular duty" on September 27, 2002.

Plaintiff's Mercy Medical Center emergency room records on the date of the accident show that he complained only of mild neck and back pains. The attending physician at the hospital diagnosed plaintiff's injuries as a neck and lumbosacral sprain and reported that plaintiff's neurological systems were stable, and that there were no joint deformities or fracture. He also noted that plaintiff had a painless range of motion and that his neck was non-tender. Plaintiff was released that day after being examined.

Plaintiff testified that after the accident he returned to work delivering packages on his regular Federal Express route. After he completed a full day of work, he then went to the emergency room of Mercy Medical Center, complaining of neck, back and right knee pain. He was given Motrin by the attending physician and sent home without any prescriptions, medical devices or bandages. He sought treatment five days later with Dr. Salvatore, a chiropractor, with respect to his neck, back and right knee pain. He was treated at Dr. Salvatore's office, in fifteen to twenty-minute sessions, for over two months, with chiropractic adjustments to his neck and back. He was also treated by Dr. Principle, an orthopedist, on two occasions, and he received treatment for his knee at Advanced Physical Therapy for less than two months. He did not seek any other treatment for his injuries, and he stopped his physical therapy sessions more than two years prior to his deposition testimony. Plaintiff further testified that he had injured his neck, back and right knee in a prior automobile accident on August 27, 1999. In connection with the 1999 accident, he was treated at the emergency room of Mary Immaculate Hospital and received two months of chiropractic treatments and physical therapy.

Dr. Kopp states that he performed x-rays of plaintiff's cervical spine, lumbar spine and right knee on July 29, 2002. X-rays of plaintiff's lumbosacral spine and right knee were negative and showed no fractures or degenerative changes. While he observed that there was slight straightening of the normal cervical lordosis, he also noted that vertebral bodies maintained their height throughout and that the neural foramina were patent bilaterally.

Dr. Farkas states that he performed an independent orthopedic examination of the plaintiff on January 3, 2006, and his findings include a full range of motion of the lumbar and cervical spine with no spasm or crepitus to palpation; a normal range of motion of the right knee; intact quad and patella tendons; a motor exam that was "5+"; and a negative straight leg raising test. He opined that plaintiff had sustained sprains of the right knee and of the cervical and lumbar spine, which had resolved.

Dr. Pearl states that he performed an independent neurological examination of the plaintiff on January 10, 2006, and his findings include motor strength that was "5/5" in all extremities with normal tone; DTR's that were "2+" and symmetrical; normal gait; no atrophy or fasciculations; a full range of motion of the cervical and lumbar spine; and no paravertebral tenderness or spasm in the cervical, dorsal or lumbosacral spine. Dr. Pearl opines that plaintiff had sustained cervical and lumbosacral spine sprains but that there were no objective findings to indicate a neurological injury or disability. He also

opined that plaintiff had a preexisting history of an injury to the cervical and lumbosacral spine, based upon his report of a prior motor vehicle accident.

Dr. Feit states in one of his reports that he performed an independent radiological review of the MRI studies dated November 23, 2002 of the plaintiff's right knee on November 6, 2004, and his findings include intact cruciate and collateral ligaments; intact cartilage; small joint effusion; and a linear oblique band of abnormal increased signal within the posterior horn of the medial meniscus. He opined that these studies indicated a tear of the posterior horn of the medial meniscus. Dr. Feit states in his other report that he performed an independent radiological review MRI studies dated September 27, 1999 of the plaintiff's right knee on September 17, 2005. He opined from a review of his findings that these studies also showed a tear within the posterior horn of the medial meniscus and small joint effusion. After comparing these studies to the later scan of November 23, 2002, Dr. Pearl concluded that the medial meniscal tear and small effusion predated and was unrelated to the accident of July 25, 2002.

Defendant made a prima facie showing that plaintiff did not sustain a serious injury by his submission of plaintiff's bill of particulars, the transcript of the plaintiff's deposition testimony, the plaintiff's hospital records, the reports of plaintiff's treating radiologist, and the reports of defendants' examining orthopedist, neurologist, and radiologist (*see*, ***Oberly v Bangs Ambulance Inc.***, *supra*; ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Hernandez v DIVA Cab Corp.***, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; ***Teodoru v Conway Transp. Svc.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Batista v Olivio***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]). Plaintiff's hospital x-rays, which were taken the same day as the accident, show that his neck was non-tender and that he had a painless range of cervical motion. Further, x-rays performed by Dr. Kopp four days after the accident show that there were no fractures of the plaintiff's lumbosacral spine or right knee (*see*, ***I Mei Chou v Welsh***, 15 AD3d 622, 791 NYS2d 579 [2d Dept 2005]; *cf.*, ***Smolyar v Krongauz***, 2 AD3d 518, 767 NYS2d 873 [2d Dept 2003]) and that there was only slight straightening of the normal cervical lordosis. Further, Dr. Farkas found that plaintiff had a full range of motion of the right knee, and Drs. Farkas and Pearl both observed that plaintiff had a full range of motion of the cervical and lumbar spine with no detectable spasm (*see*, ***Willis v New York City Transit Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Additionally, Dr. Feit opined that plaintiff's right knee meniscal tear preexisted and was not related to the subject accident (*see*, ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [1st Dept 2006]). As defendant has met his burden as to all categories of serious injury alleged by the plaintiff, the Court turns to plaintiff's proffer (*see*, ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Dongelewic v Marcus***, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion plaintiff submits, inter alia, the affirmed report dated July 7, 2006 of plaintiff's treating radiologist, Ronald Waxman, M.D.; the affirmed report dated April 24, 2006 of plaintiff's treating orthopedic surgeon, Donald I. Goldman; the affirmation dated July 13, 2006 of plaintiff's treating orthopedist, Gregory Perrier, M.D.; and the affidavit of the plaintiff sworn to on July 20, 2006. Initially, the Court notes that the reports and affirmation of plaintiff's treating physicians are deficient to the extent that they have not submitted copies of the MRI and other diagnostic reports upon which they were relying (*see, **Shay v Jerkins***, 263 AD2d 475, 692 NYS2d 730 [2d Dept 1999]; ***Merisca v Alford***, 243 AD2d 613, 663 NYS2d 853 [2d Dept 1997]). To the extent, however, that plaintiff's physicians relied upon their own observations of the plaintiff, and to the extent that the reports referred

to by them were submitted by the defendant in support of the motion, their opinions were considered.

Dr. Waxman states that he performed MRI studies of plaintiff's right knee on November 23, 2002, and his findings include an ACL tear and quadraceps tendinitis. Dr. Goldman states that he performed an orthopedic surgical examination of the plaintiff on March 29, 2006, and his findings include a normal lordotic curve of the lumbar spine with no spasm; and a normal gait pattern. He also noted that the condition of plaintiff's cervical spine had improved and that his neck was no longer a concern. Additionally, he noted that plaintiff's medical history included a prior knee injury. While Dr. Goldman observed a slight laxity of the anterior drawer of the right knee, he also noted that lateral motion was stable. He opined that plaintiff had sustained a tear of the anterior cruciate right knee with internal derangement. Dr. Goldman further opined that plaintiff's right knee injury was causally related to the accident of July 25, 2002 and that it was permanent.

Dr. Perrier states that he performed an initial orthopedic examination of the plaintiff on August 1, 2002, and subsequent re-examinations on September 5, and 19, 2002, January 16, 2003, and most recently on June 29, 2006. He noted that plaintiff's right knee flexion, internal rotation and external rotation were 110, 8, and 8 degrees, compared with the normal ranges of 135, 10, and 10 degrees. Dr. Perrier opined that plaintiff exhibited showed a right knee internal derangement during his exam on September 5, 2002 and an ACL tear and quadriceps tendinitis of the right knee during his other exam on January 13, 2003. On June 29, 2006, he found that plaintiff had right knee stiffness and that his knee flexion was restricted to 95 degrees. Dr. Perrier opines that plaintiff sustained, among other things, a causally-related permanent injury of his right knee with restrictions of knee mobility.

Plaintiff states in his affidavit that he attended physical therapy at Advance Physical Therapy for approximately two months, two to three times per week beginning August, 2002, and that he went back to physical therapy in January, 2003 for an additional two months. He alleges that his workers' compensation benefits were stopped after about six months and that he continued to treat sporadically using his private health insurance. He also alleges that his private insurance will no longer cover his medical costs and that he cannot afford to pay these expenses. In addition, plaintiff alleges that he cannot sit or stand for long periods of time and that he cannot lift heavy items as required by his employment.

At the outset, the Court notes that plaintiff has entirely failed to address his prior automobile accident in 1999 (*see*, ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Plaintiff has also failed to address the pre-existing injury to his neck, back and right knee as his treating physicians did not provide any foundation or objective medical basis supporting the conclusions which they reached, namely, that the alleged conditions were causally related to the accident (*see*, ***Knoll v Seafood Express***, 5 NY3d 817, 803 NYS2d 25 [2005]; ***Franchini v Palmieri***, *supra*; ***Gomez v Epstein***, 29 AD2d 950, 818 NYS2d 101 [2d Dept, 2006]; ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [1st Dept 2006]). Instead, the affirmation of Dr. Perrier and the report of Dr. Goldman largely consist of unsubstantiated speculation concerning the causal relationship between the accident and plaintiff's condition several years after the accident (*see*, ***Damstetter v Martin***, 247 AD2d 893, 668 NYS2d 863 [4th Dept 1998]), and conclusory assertions tailored to meet the statutory requirements (*see*, ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Furthermore, Dr. Perrier has not provided a sufficient explanation for

the end of his treatments in January, 2003 prior to his recent re-examination on June 26, 2006 shortly after the filing of this motion (*see*, ***Nixon v Muntaz***, 1 AD3d 329, 766 NYS2d 593 [2d Dept 2003]; ***Pierre v Nanton***, 279 AD2d 621, 719 NYS2d 706 [2d Dept 2001]; ***Davis v Brightside Fire Protection Inc.***, 275 AD2d 298, 712 NYS2d 567 [2d Dept 2000]; ***Williams v Ciaramella***, 250 AD2d 763, 673 NYS2d 186 [2d Dept 1998]). Plaintiff's gap in treatment was, in essence, a cessation of treatment, which he has failed to adequately address (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; ***Pimentel v Mesa***, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]). While plaintiff has submitted an affidavit listing various physical ailments and limitations, his subjective complaints of pain do not constitute a significant injury within the meaning of the statute (*see*, ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; ***Iglesias v Inland Freightways, Inc.***, 209 AD2d 479, 619 NYS2d 59 [2d Dept 1994]). Additionally, the proof submitted by plaintiff is insufficient to raise a triable issue of fact that he sustained a medically determined injury or impairment rendering him unable to substantially perform all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see*, ***Batista v Olivio***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). While plaintiff claims that he has been partially disabled to date, he merely alleges that he is limited in lifting heavy objects and that he cannot sit or stand for long periods of time. Moreover, according to plaintiff's deposition testimony, he missed approximately fifty-five days from work. Thus, plaintiff has provided insufficient medical proof to raise an issue of fact with respect to any category of serious injury alleged (*see*, ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Bruce v New York City Trans. Auth.***, 16 AD3d 608, 792 NYS2d 193 [2d Dept 2005]; ***Tirado v Craig***, 241 AD2d 449, 663 NYS2d 831 [2d Dept 1997]; ***Fitzmaurice v Chase***, 288 AD2d 651, 732 NYS2d 690 [3d Dept 2001]).

Since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, his claim for economic loss in excess of basic economic loss must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, defendant's motion for summary judgment is granted and the complaint is dismissed in its entirety.

Dated: OCT 18 2006

J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION