SHORT FORM ORDER

INDEX No. 03-30640
CAL. No. 06-00370-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 (004,005,008)
7/7/06 (006,007)
ADJ. DATE 8/29/06
Mot. Seq. # 004 - MG; CASEDISP
005 - XMG
006 - MD
007 - XMG
008 - XMG

ALLEN GABRIELSON, Plaintiff, - against - FELIX ROMERO, YANAYRA ROMERO, SAUNDRA M. BLACK, JAMES R. BLACK, VOLVO FINANCE NORTH AMERICA, INC., MARIA R. MARZANO and JILL RAZZANO, Defendants.	FERRO KUBA MANGANO SKLYAR, et al. Attorneys for Plaintiff 350 Motor Parkway, Suite 200 Hauppauge, New York 11788 ROBERT P. TUSA, ESQ. Attorney for Defts. Romero 898 Veterans Memorial Hwy., Suite 320 Hauppauge, New York 11788 BREEN & CLANCY Attorneys for Defts. Black & Volvo 50 Route 111, Suite 200 Smithtown, New York 11787 LOCCISANO & LARKIN Attorneys for Deft. Marzano 150 Motor Parkway, Suite 405 Hauppauge, New York 11788-5108 RUSSO & APOZNANSKI Attorneys for Deft. Razzano 875 Merrick Avenue Westbury, New York 11590

Upon the following papers numbered 1 to 68 read on these motions and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-8; 30-41; 24-33 ; Notice of Cross Motion and supporting papers 17-21; 45-47; 58-60 ; Answering Affidavits and supporting papers 9-16; 22-29; 42-44; 48-55; 61-68 ; Replying Affidavits and supporting papers 56 - 57 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by defendants James B. Black, Saundra M. Black, and Volvo Finance North America, Inc. for summary judgment and the motion (#006) by plaintiff for summary judgment are consolidated and determined together with the cross motions (#005, 007, 008) by defendant Jill Razzano, defendants Felix Romero and Yanayra Romero, and defendant Maria R. Marzano, respectively, for summary judgment; and it is further

ORDERED that the motion (#004) by defendants James B. Black, Saundra M. Black, and Volvo Finance North America, Inc. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint and any cross claims or counterclaims as against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the cross motion (#005) by defendant Jill Razzano for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint and any cross claims as against her on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion (#006) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability is denied as moot; and it is further

ORDERED that the cross motion (#007) by defendants Felix Romero and Yanayra Romero for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint and all cross claims as against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the cross motion (#008) by defendant Maria R. Marzano for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint as against her on the grounds 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 on March 18, 2003 at approximately 8:45 a.m. as a result of a five-car motor vehicle accident that occurred on northbound Sagtikos Parkway at or near the Crooked Hill Road exit in Islip, New York. By his bill of particulars, plaintiff alleges that as a result of said accident he sustained serious injuries, including post-traumatic headaches and cervicalgia; cervical derangement with radiculopathy and spasms; cervical radiculopathy; C5-C6 centrally herniated disc which attenuates the ventral subarachnoid space; C6-C7 central disc herniation that flattens the ventral cord; central spinal stenosis at C5-6 and C6-7; decreased range of motion of the cervical spine; thoracic sprain and derangement; left shoulder contusion; and decreased range of motion of the lumbar spine. In addition, plaintiff alleges that following the accident, he was not treated at a hospital but that he was confined to bed and to home for approximately two days. Plaintiff also seeks to recover economic loss in excess of basic economic loss as defined in Insurance Law 5102 (a).

Defendants James B. Black, Saundra M. Black (Black), and Volvo Finance North America, Inc. (Volvo) now move for summary judgment in their favor dismissing the complaint and any cross claims

or counterclaims as against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of their motion, defendants Black and Volvo submit the supplemental summons and amended complaint; their answer to the amended complaint with a cross claim against their co-defendants for contribution or indemnification; plaintiff's verified bill of particulars; the report dated July 1, 2004 of A. Robert Tantleff, M.D. based on an independent radiology review of an MRI of plaintiff's cervical spine taken on May 7, 2003; plaintiff's deposition transcript; the affirmed report dated June 2, 2005 of defendants' examining neurologist, Sarasavani Jayaram, M.D. (Dr. Jayaram) based on an examination of plaintiff on that date; and the affirmed report dated June 2, 2005 of defendants' examining orthopedic surgeon, Wayne Kerness, M.D. (Dr. Kerness) based on an examination of plaintiff on said date.

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 (*see*, ***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 non-moving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

Here, defendants Black and Volvo submitted the affirmed medical reports of a neurologist and orthopedist, who examined the plaintiff and determined that he did not suffer from any disabilities, impairments, or limitations in functioning, as well as the affirmed medical report of a radiologist, who

indicated that the plaintiff's magnetic resonance imaging reports of the cervical spine revealed only degenerative changes unrelated to the accident. This evidence sufficed to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Brown v Tairi Hacking Corp.***, 23 AD3d 325, 804 NYS2d 756 [2d Dept 2005]). Dr. Jayaram's neurological findings indicated that plaintiff had range of motion test results all within normal range limits for the cervical spine, elbows, wrists, hips and lumbar spine and negative test results for various cervical tests, including spasm, triggers, tenderness, Cervical Distraction test and Soto-Hall test. In addition, Dr. Jayaram found negative test results for various lumbar tests, including spasm, triggers, tenderness and straight leg raising. Dr. Jayaram also noted that plaintiff's cranial nerves I-XII were grossly intact and that plaintiff's test results for higher cortical function were normal. Dr. Jayaram's diagnosis was that plaintiff had a normal neurological evaluation and that plaintiff was neurologically intact with no deficits and opined that plaintiff could work.

Similarly, Dr. Kerness found upon his orthopedic examination that plaintiff's range of motion test results were within normal range limits for plaintiff's cervical spine, shoulder, elbows, wrists, thumbs and fingers and lumbar spine. Dr. Kerness also found that plaintiff had negative results with respect to cervical paraspinal tenderness, suprascapular tenderness and spasm and negative shoulder test results with respect to tenderness, impingement sign and the supraspinatus test. Dr. Kerness noted that plaintiff's right wrist showed no tenderness and that Finkelstein and Tinel's test results were negative and that plaintiff's lumbar test results indicated no tenderness and negative results for Lasegue, spasm and straight leg raising. In conclusion, Dr. Kerness diagnosed resolved, status-post cervical, right shoulder, right arm, right elbow, hand, and right finger injuries and that plaintiff was not in any need of orthopedic treatment including physical therapy and could work. Dr. Tantleff opined in his report that the MRI film of plaintiff's cervical spine revealed diffuse cervical/thoracic spondylosis and longstanding chronic degenerative discogenic disc disease, which were not causally related to the subject accident but were instead consistent with the wear-and-tear of the normal aging process.

Plaintiff testified at his deposition that he saw his family physician, Dr. Seka, on the date of the accident for neck pain and received an anti-inflammatory sample, then one week later went to Dr. Perez, a general practitioner, on recommendation of his attorneys and received treatment, including physical therapy two to three times per week at his office approximately twenty-five times until July 2003. In addition, plaintiff testified that after no-fault stopped payments, plaintiff saw another family physician, Dr. Savino, twice in August 2003 for neck, shoulder, back and right arm pain. Dr. Savino referred plaintiff to a neurosurgeon who explained only one available option, surgery, which plaintiff declined. Plaintiff did not treat with any other healthcare providers. At the time of the accident, plaintiff had recently started working in a temporary position in the purchasing department of a company and returned to work with the same job duties and seven-hour work day on the Monday after the accident. According to plaintiff, he worked one week after the accident, then missed three days for treatment and missed another three days, then was fired from his job. Between March 2003 and June 2003 plaintiff looked for work and in June 2003 found temporary employment at a medical office doing filing work five days a week for about twenty-five hours a week, where he worked for about one month or a month and a half. Plaintiff testified that he currently works as a purchasing inventory control manager for five days a week, forty hours a week. Plaintiff also testified that he was involved in a prior motor vehicle accident in which a driver ran through a stop sign on January 12, 2003 in Virginia but that plaintiff was not injured in said accident. Defendants' submissions demonstrate that plaintiff, at most, suffered minor

injuries, missed one week of work and, after a short course of physical therapy, sought no further treatment until the underlying summary judgment motion was filed (*see*, ***Williams v Burkett***, 11 Misc3d 134(A), 816 NYS2d 702 [App Term, 1st Dept 2006]; *see also*, ***Thompson v Abbasi***, 15 AD3d 95, 788 NYS2d 48 [1st Dept 2005]).

Plaintiff is thus required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion (*see*, ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]). Moreover, any significant lapse in time between the conclusion of plaintiff's medical treatment and the physical examination conducted by his physician must be adequately explained (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Ali v Vasquez***, *supra*; ***Batista v Olivo***, *supra*).

In opposition to the motion of defendants Black and Volvo, plaintiff contends that he did sustain a "serious injury" as defined in Insurance Law § 5102 (d) and that his medical submissions raise triable issues of fact as to whether he sustained injuries under the categories "significant limitation of use of a body function or system" and/or "permanent consequential limitation of use of a body organ or member" of Insurance Law § 5102 (d). In support of his opposition, plaintiff submits the affirmed reports of Dr. Perez and of Dr. Socorro Vicente; the MRI report dated May 9, 2003 of plaintiff's cervical spine and the affirmation of Michele Rubin, M.D. who rendered said report; the MRI report dated November 12, 2003 of plaintiff's cervical spine and the affirmation of Michael Benanti, M.D. who rendered said report; the EMG/NCV report of Sima Anand, M.D. and Dr. Anand's affirmation; and plaintiff's deposition transcript.

The Court initially notes that plaintiff's MRI report dated May 9, 2003 indicates disc herniations at C5-6 and at C6-7 whereas his subsequent MRI report dated November 12, 2003 indicates a disc protrusion at C5-6 and a disc bulge at C6-7. In addition, plaintiff's EMG/NCV report reveals right cervical radiculopathy. Said reports in and of themselves are not probative since they contain no opinion with respect to causation (*see*, ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]). The mere fact that a plaintiff suffers from bulging or herniated discs or radiculopathy is insufficient to establish "serious injury" for purposes of Insurance Law § 5102 (d). Instead, for such injuries to constitute a "serious injury" within the contemplation of the Insurance Law, it is incumbent upon a plaintiff to provide objective medical evidence of the degree of the alleged physical limitation resulting from the injuries and their duration (***Toure v Avis Rent A Car Sys.***, *supra*; ***Foley v Karvelis***, 276 AD2d 666, 714 NYS2d 337 [2d Dept 2000]).

Here, the medical evidence submitted by plaintiff in opposition to the motion fails to provide objective evidence of the extent or degree of the limitations in his ranges of motion and their duration (*see*, ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). Notably, none of Dr. Perez's reports quantify the decreased ranges of motion that he observed of plaintiff's cervical spine, thoracic spine and lumbar spine; from the first visit on March 26, 2003 to the last visit on July 28, 2003 plaintiff had "moderate" pain on cervical range of motion; and by the last visit on July 28, 2003, plaintiff had "mild" pain on range of motion of the shoulder and no decrease on range of motion of the cervical spine despite cervical paraspinal muscle tenderness upon palpation consistent with spasm, especially on the right. In his July 28, 2003 report, Dr. Perez diagnosed cervical radiculopathy with spasm, secondary to the subject accident, two cervical herniated discs and cervicalgia and noted

that plaintiff had a "mild" disability and had returned to work.

Plaintiff submits a final medical evaluation report from Dr. Perez dated June 2, 2006 indicating that plaintiff saw a neurosurgeon who recommended surgery and providing range of motion test results in terms of impairment percentages, cervical 12 percent, thoracic 8 percent for a total spine impairment of 19 [sic] percent. Although Dr. Perez provides cumulative impairment results for the entire spine, these minor restrictions of 12 percent and 8 percent are not of sufficient magnitude to establish either a significant or a consequential injury (*see*, ***Trotter v Hart***, 285 AD2d 772, 728 NYS2d 561 [3d Dept 2001]; *see also*, ***Mendes v Codiani***, 8 AD3d 636, 778 NYS2d 908 [2d Dept 2004]; ***Ibragimov v Hutchins***, 8 AD3d 235, 777 NYS2d 663 [2d Dept 2004]). Nor does the final report explain the gap of almost three years from the time of the last report (*see*, ***Joseph v Layne***, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]). In addition, even though the final report was based on a recent examination of plaintiff and noted limitations in the range of motion in his cervical spine, plaintiff lacked any medical proof that was contemporaneous with the subject accident which showed range of motion limitations in his spine (*see*, ***Ramirez v Parache***, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]). In that final report dated June 2, 2006, Dr. Perez indicates diagnoses of cervical radiculopathy; cervical herniated disc with mass effect on ventral thecal sac and spinal cord; and cervical muscular spasm and opines that plaintiff has a "moderate permanent" disability. Merely using the word "permanent" in describing plaintiff's condition is insufficient to raise a question of fact as to whether plaintiff sustained a permanent consequential or significant limitation in relation to the accident (*see*, ***Trotter v Hart***, *supra*; ***Uhl v Sofia***, 245AD2d 988, 667 NYS2d 92 [3d Dept 1997]). Also, inasmuch as Dr. Perez and the other treating physicians failed to acknowledge or account for a prior motor vehicle accident that plaintiff testified occurred in January of 2003 in Virginia, their conclusions that plaintiff's cervical injuries were proximately caused by the subject accident are rendered speculative (*see*, ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]). Thus, plaintiff's medical submissions were insufficient to raise a triable issue of fact as to whether plaintiff sustained a "serious injury" (*see*, ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]).

Moreover, plaintiff failed to proffer competent medical evidence that he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days subsequent to the subject accident (*see*, ***Faulkner v Steinman***, 28 AD3d 604, 813 NYS2d 529 [2d Dept 2006]).

Finally, plaintiff submitted no evidence that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss (*see*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Therefore, the motion (#004) by defendants Black and Volvo for summary judgment in their favor dismissing the complaint and any cross claims or counterclaims as against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

Defendant Jill Razzano (Razzano) now cross-moves (#005) for summary judgment in her favor dismissing the complaint and any cross claims as against her on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of her cross motion, defendant Razzano submits the supplemental summons and amended complaint, her answer with cross claim and adopts and incorporates the facts, legal arguments, exhibits and procedural history of counsel for co-defendants Black and Volvo. In light of the above, defendant Razzano's cross motion for summary

judgment is granted.

Defendants Felix Romero and Yanayra Romero (Romero) cross-move (#007) for summary judgment in their favor dismissing the complaint and all cross claims as against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and defendant Maria R. Marzano (Marzano) cross-moves (#008) for summary judgment in her favor dismissing the complaint as against her on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Defendants Romero and defendant Marzano seek to incorporate by reference all of the facts, law, arguments and exhibits of co-defendants Black and Volvo on their motion. However, their cross motions must be denied as procedurally defective for failure to submit a complete copy of the pleadings (*see*, CPLR 3212 [b]; ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2d Dept 2005]; ***Gallagher v TDS Telecom***, 280 AD2d 991, 720 NYS2d 422 [4th Dept 2001]). The pleadings submitted with another party's motion or cross motion cannot be incorporated by reference (*see*, CPLR 3212 [b]). Nevertheless, the Court searches the record pursuant to CPLR 3212 (b) and grants defendants Romero and defendant Marzano summary judgment dismissing the complaint insofar as asserted against them on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Moore v Sarwar***, *supra*).

Inasmuch as defendants' requests for summary judgment dismissing the complaint on the grounds that plaintiff failed to sustain a "serious injury" as defined in Insurance Law § 5102 (d) have been granted, plaintiff's motion (#006) for summary judgment in his favor on the issue of liability is denied as moot (*see*, ***Gilman v Cohen***, 7 Misc3d 127(A), 801 NYS2d 234 [App Term, 1st Dept 2005]).

Dated: OCT 18 2006

J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**