Index No.: 2501-04

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

PAUL ZEPHIRIN,

Plaintiff,

- against -

WALDO PERRIER and CHRISTINA WILSON,

Defendants.

CASE DISPOSED: YES
MOTION R/D: 11/6/06
SUBMISSION DATE: 1/12/07
MOTION SEQUENCE NO.: 004 MG
ATTORNEY FOR PLAINTIFFS
Law Offices of Neil Moldovan, PC
One Old Country Road, Suite 235
Carle Place, New York 11514

Siben & Siben
90 East Main Street
Bay Shore, New York 11706
ATTORNEYS FOR DEFENDANT
McCabe Collins McGeough & Fowler
346 Westbury Avenue, PO Box 9000
Carle Place, New York 11514

John P. Humphreys, Esq.
PO Box 9028
Melville, New York 11747

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated October 10, 2006; Affirmation dated October 5, 2006; Exhibits A through G annexed thereto; and upon due deliberation; it is

ORDERED, that the motion by defendants, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of defendants and dismissing the Complaint, based upon plaintiff's failure to comply with Insurance Law §5104, is granted without opposition.

The underlying action is one to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident that occurred on July 13, 2003 on Mount Avenue at the intersection with Wyandanch Avenue, Town of Babylon, New York. The plaintiff

maintains that he suffered a "serious injury" pursuant to Insurance Law §5102(d). The defendant contends that the injuries allegedly suffered by the plaintiff do not meet the statutory threshold requirement of "serious injury" and must be dismissed as a matter of law.

The plaintiff in his bill of particulars, dated May 12, 2004, stated that he sustained multiple soft tissue injuries, including herniated discs at C3/C4 through C6/C7, T1/T2, L2/L3 and L3/L4 with disc space narrowing; S-shaped thoracolumbar scoliosis; post traumatic cervical, thoracic and lumbar sprain/strain with muscle spasms and post-concussion syndrome. No fractures were alleged.

At his deposition, the plaintiff testified that after nine months of treatment following the accident, all parts of his body that were hurt had improved. He also stated that his last treatment with a doctor for his alleged injuries following the subject accident was on April 14, 2004 and went on to state that as of the date of the deposition, he was treating with a Dr. Ena, for injuries sustained in a subsequent motor vehicle accident that occurred on January 14, 2005. Plaintiff was not working at the time of the subject accident and has made no claim for lost wages. He claims to have been confined to home for one month following the accident and stated that the accident did not cause any restrictions on his daily activities. Finally, he testified that his physical condition from the time he terminated treatment on April 14, 2004 until his subsequent accident was "excellent."

In support of the instant motion, the defendants have submitted the neurological independent medical report of Maria DeJesus, M.D., who examined the plaintiff on July 13, 2003. The subject report is also based upon pertinent medical records and reports, as well as X-ray and MRI reports. Dr. DeJesus concluded that the plaintiff had completely recovered from any injuries he may have sustained as a result of the July 13, 2003 accident; was not neurologically disabled; and despite subjective complaints, there were no objective findings to substantiate them.

The defendants have also submitted the results of an orthopedic examination of the plaintiff which was conducted on September 7, 2005 by Michael J. Katz, M.D. At the time of examination, the plaintiff presented with complaints of left sided lower back pain. Dr. Katz conducted range of motion tests of the cervical and thoracolumbosacral spine, which were all within normal limits. Dr. Katz's diagnosis was cervical and thoracolumbosacral strain, resolved. He concluded that the plaintiff was not disabled and demonstrated no signs of permanence.

The plaintiff did not submit a medical report or any other type of report, affidavit or affirmation in opposition to the motion. As a result, the conclusions of Drs. DeJesus and Katz have not been challenged by the plaintiff.

The question of whether of not a plaintiff has established a prima facie case of serious injury rests with the Court in the first instance. Licari v. Eliot, 57 N.Y.2d 230, 455 N.Y.S.2d 570. The case law has repeatedly confirmed the need for submission of objective medical evidence in admissible form in order for the plaintiff to overcome a prima facie showing of "no serious injury" by the defendant. See, Jenkins v. Diamond, 308 A.D.2d 510, 764 N.Y.S.2d 857; DeJesus

v. Grazadrei, 302 A.D.2d 554, 755 N.Y.S.2d 302; Dominguez-Gionta v. Smith, 306 A.D.2d 432, 761 N.Y.S.2d 310. Based on the foregoing, the Court finds that the defendants have established, prima facie, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d), thereby shifting the burden to the plaintiff to submit sufficient evidence to raise a triable issue of fact on that issue (see, Gaddy v. Eyler, 79 N.Y.2d 955, 582 N.Y.S.2d 990, 591 N.E.2d 1176). Here, the plaintiff has failed to submit any evidence whatsoever.

Based on the aforesaid, the Court finds that the defendants, with sufficient evidence in admissible form, have demonstrated that plaintiff has not suffered a "serious injury" as a matter of law (see, Lowe v. Bennett, 122 A.D.2d 728, aff'd 69 N.Y.2d 701) and plaintiff has failed to produce evidence to show that he sustained a serious injury pursuant to Insurance Law §5102(d), (see, Zoldas v. Lousie Cab Corp., 108 A.D.2d 378). Accordingly, based upon the totality of the evidence submitted and the law, the Court finds that the plaintiff has failed to establish that he has sustained a "serious injury" as a matter of law, therefore rendering summary judgment dismissing the complaint as the appropriate remedy at this juncture. Asaf v. Ropog Cab Corp., 153 A.D.2d 520.

The foregoing constitutes the Order of this Court.

Dated: March 6, 2007

DENISE F. MOLIA

HON. DENISE F. MOLIA J.S.C.