SHORT FORM ORDER

INDEX No. 05-8257
CAL. No. 06-01308-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 10/23/06 (#001)
10/27/06 (#002)
ADJ. DATE 11/30/06
Mot. Seq. # 001 - MD
002 - MG; CASEDISP

SYED SHAH,

Plaintiff,

- against -

ROSEMARY UMGELTER,

Defendant.

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Upon the following papers numbered 1 to 34 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-8; 9-21; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 22 - 28; Replying Affidavits and supporting papers 32 - 34; Other : (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purposes of this determination the motions by plaintiff and defendant for summary judgment relief are consolidated and decided together; and it is further

ORDERED that plaintiff's motion for summary judgment on liability grounds is denied as academic; and it is further

ORDERED that defendant's motion 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 for personal injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident which occurred on Jericho Turnpike in front of the premises known as 836 Jericho Turnpike, Nesconset, New York, on March 14, 2003. Plaintiff now moves for summary judgment on liability grounds. Defendant cross moves for summary judgment dismissing the complaint on the basis that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Opposition and reply papers have also been filed.

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 cross motion, defendant submits, inter alia, the pleadings; the plaintiff's verified bill of particulars; the unaffirmed report of plaintiff's treating radiologist, Michael Laucella, M.D.; the unaffirmed report of plaintiff's other treating radiologist, Charles T. Sitrin, M.D.; the affirmed report of defendant's examining radiologist, Stephen W. Lastig, M.D.; the affirmed report of defendant's examining neurologist, Richard A. Pearl, M.D.; the affirmed report of defendant's examining orthopedist, Jay Nathan; and the plaintiff's deposition transcript.

Plaintiff claims in his bill of particulars that he sustained, among other things, cervical spine disc bulges and herniations; cervical subluxations with spasms; straightening of the cervical spine; lumbar disc bulges and herniations; lumbar subluxations with spasms; a right knee contusion/sprain/strain; and a left shoulder sprain/strain. Plaintiff also claims that he was confined to his home for about three weeks as a result of his injuries, and that he was out of work from March 14, 2003 through to April 11, 2003. Moreover, plaintiff claims that he sustained a serious injury in the categories of a permanent loss of use,

a permanent consequential limitation, a significant limitation, and a non-permanent injury.

In his report dated March 22, 2003, Dr. Laucella states that he performed MRI studies of the plaintiff's cervical spine, lumbar spine, and right knee on March 21, 2003, and his findings with respect to the cervical spine include some narrowing of the neural foramina secondary to degenerative change, but no loss of disc height at C5-6 and C6-7. He also observed osteophyte formation and mild endplate sclerosis of the cervical spine which he opined was compatible with degenerative changes. With respect to plaintiff's lumbar spine, Dr. Laucella found straightening of the normal lumbar lordosis and small anterior osteophytes, however, he also noted that there were no fractures, spondylolisthesis, or spondylolysis. Concerning plaintiff's right knee, he observed that there were no fractures or dislocations. Additionally, he found that there was no significant effusion of the right knee. Dr. Laucella opined that these studies showed degenerative changes of the plaintiff's cervical spine, lumbar spine, and right knee.

In his report dated December 8, 2004, Dr. Sitrin states that he performed x-ray studies of the plaintiff's lumbosacral spine on December 4, 2004, and his findings include normal sacroiliac joints; normally maintained pedicles; and hypertrophic spurring of the L3-4 vertebral bodies. He opined that these studies were normal except for the degenerative spur formation.

In his report dated February 16, 2006, Dr. Lastig states that he performed an independent review of the MRI studies of the plaintiff's cervical spine dated April 14, 2003, and his findings include normal alignment of vertebral bodies; normal prevertebral soft tissues; no fractures; posterior spondylitic changes with osteophytic ridging; multilevel disc desiccation, and disc space narrowing. He opined that these studies showed advanced multilevel degenerative disc disease/spondylitic changes which were unrelated to the accident, as well as straightening of the cervical spine which he concluded may be related to muscle spasm or positioning during testing. In addition, Dr. Lastig states that he performed an independent review of the MRI studies of the plaintiff's lumbar spine dated April 14, 2003, and his findings include no fractures; mild degenerative hypertrophic changes in the lower facet joints; multilevel disc desiccation; mild spondylosis; mild hypertrophic changes; and narrowing of the lumbar spinal canal. He opined that the narrowing of plaintiff's lumbar spinal canal was congenital and unrelated to the accident. In addition, he opined that the multilevel disc pathology was degenerative in nature and also unrelated to the accident.

In his report dated February 14, 2006, Dr. Pearl states that he performed an independent neurological examination of the plaintiff on February 13, 2006, and his findings include intact cranial nerves; a motor exam that was "5/5" in all extremities with normal tone; DTR's that were symmetrically "2+"; an intact sensory system; and a normal gait. He also observed that all ranges of motion of the plaintiff's cervical and lumbar spine were normal, and that there was no paravertebral tenderness or spasm in the cervical, dorsal, or lumbosacral spine. Additionally, he observed no atrophy or fasciculations. Dr. Pearl opined that plaintiff had sustained a lumbosacral sprain, but that there were no objective findings to indicate a neurological injury.

In his report dated March 6, 2006, Dr. Nathan states that he performed an independent orthopedic examination of the plaintiff on that date, and his findings include a negative impingement with respect to

the shoulders; a negative foraminal compression test of the cervical spine; and a negative straight leg raising test. He also found that there was a full range of motion of the shoulders bilaterally; no instability of the knees; and no vertebral tenderness or spasm of the thoracolumbar spine. Dr. Nathan opined that plaintiff had sustained sprains of the lumbosacral spine and right knee, but that he had returned to his pre-accident status and was not disabled.

Plaintiff testified that he did not lose consciousness as a result of the accident. Although emergency personnel arrived, he drove himself home. The next day he sought medical care at Patchogue Medical and Rehabilitation as recommended by his attorney. His treatment consisted of massages, electric stimulation, adjustments, "needles" and heat for about four months. At the end of four months, he felt better and decided to stop additional treatment. He described his condition at this time as "good." Plaintiff also testified that he missed about one month from his employment due to his injuries. When he returned to work, he resumed his normal duties and two weeks later he was earning overtime. In March 2004, he made one trip to Pakistan to visit his family. At this time, he is able to perform his pre-accident duties at work. Plaintiff further testified, however, that he can no longer perform weight training activities or jog.

By these submissions, defendant made a prima facie showing that plaintiff did not sustain a serious injury (*see*, ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; ***Teoduro v Conway Transp. Serv.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Gousgoulas v Melendez***, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Defendant's examining neurologist found a normal range of motion of the plaintiff's cervical and lumbar spine with no palpable muscle spasm. Similarly, defendant's examining orthopedist found that there was a full range of motion of the plaintiff's shoulders and no instability of his knees. In addition, defendant's examining orthopedist opined that plaintiff had no disability as a result of the accident and that he had merely sustained sprains which had resolved. Moreover, Dr. Lastig opined that plaintiff had a congenital narrowing of the lumbar spine as well as degenerative changes of the cervical and lumbosacral spine which were unrelated to the accident (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). The defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendant has met her burden as to all categories of serious injury alleged by 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 the two affirmed reports of plaintiff's treating radiologist, Stephen Hershowitz, M.D.; the two affirmed reports of plaintiff's physiatrist, Sima Anand, M.D.; and the affirmed report of plaintiff's treating physician, Joseph Perez, M.D.

In one of his reports dated April 15, 2003, Dr. Hershowitz states that he performed MRI studies of plaintiff's cervical spine on April 14, 2003, and his findings include straightening of the spine; desiccation of all discs; spinal stenosis; and marginal osteophytes. He also observed diffuse disc bulging impinging on the cord, as well as posterior disc herniations at C3-4 and C4-5 causing small ventral impressions on the thecal sac. In his other report dated April 15, 2003, Dr. Hershowitz states that he performed MRI studies of the plaintiff's lumbar spine on April 14, 2003, and his findings include

minimal bilateral facet hypertrophy; desiccation of all discs; and borderline spinal stenosis. In addition, he noted a diffuse disc bulge at L3-4 impinging upon the thecal sac, and a posterior disc herniation at L2-3 causing a small ventral impression upon the thecal sac.

In one of her reports dated April 22, 2003, Dr. Anand states that she performed an EMG/NCV study of plaintiff's upper extremities on that date, and her findings include active denervation in the left C3-4 and C4-5 musculature. She opined that this was an abnormal study that showed the presence of a left cervical radiculopathy. In her other report dated April 22, 2003, Dr. Anand states that she performed an EMG/NCV study of the plaintiff's lower extremities on that date, and her findings include active denervation in the left L2-3 and L3-4 musculature. She opined that this was an abnormal study that showed the presence of left lumbar radiculopathy.

In his report dated October 13, 2006, Dr. Perez states that he performed an initial independent medical examination of the plaintiff on that date, and his findings include stable gait; no fasciculations; and a decreased range of motion of the cervical and lumbar spine with paraspinal tenderness and spasms. While he observed that the left tendon was "+1," he also noted that the right tendon was "+2." He opined that plaintiff sustained, inter alia, herniated and bulging cervical discs, bulging lumbar disks, as well as cervical and lumbar radiculopathy which was causally related to the accident. Dr. Perez opines that plaintiff is permanently disabled in that he is limited in his capabilities at work and at home.

Plaintiff's submissions are insufficient to raise a triable issue of fact as Dr. Perez has entirely failed to address the pre-existing degenerative condition of plaintiff's cervical and lumbar spine, and as Dr. Perez did not provide any foundation or objective medical basis supporting the conclusions which he reached, namely, that the alleged conditions were causally related to the accident (*see*, ***Knoll v Seafood Express***, 5 NY3d 817, 803 NYS2d 25 [2005]; ***Gomez v Epstein***, 29 AD3d 950, 818 NYS2d 101 [2d Dept, 2006]; ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [1st Dept 2006]). Instead, the affirmation of Dr. Perez largely consists of unsubstantiated speculation concerning the causal relationship between the accident and plaintiff's condition several years later (*see*, ***Damstetter v Martin***, 247 AD2d 893, 668 NYS2d 863 [4th Dept 1998]), as well as conclusory assertions tailored to meet the statutory requirements (*see*, ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). While Dr. Perez records plaintiff's complaints of pain, plaintiff has failed to present any medical proof that was contemporaneous with the accident showing any initial range of motion restrictions for the affected body parts (*see*, ***Ramirez v Parache***, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; ***Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; ***Petinrin v Levering***, 17 AD3d 173, 794 NYS2d 12 [1st Dept 2005]). While a disc herniation may constitute a serious injury, the MRI reports of Dr. Hershowitz are not probative for the purposes of demonstrating a serious injury because they contain no opinion as to causation (*see*, ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and do not establish the extent of the alleged physical limitations resulting from the alleged disc injuries and their duration (*see*, ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]; ***Nelson v Amicizia***, 21 AD3d 1015, 803 NYS2d 87 [2d Dept 2005]). Moreover, Dr. Perez failed to offer objective medical proof showing a significant impairment with respect to the function of plaintiff's right knee (*see*, ***Chan v Casiano***, 2007 NY Slip Op 108 [2d Dept, Jan. 9, 2007]). In any event, Dr. Perez has not provided an adequate explanation for the cessation of plaintiff's treatments several months after the accident and his recent examination of the plaintiff on October 13, 2006 (*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]). Plaintiff's gap in treatment was, in essence, a cessation of treatment which he has failed to adequately address by way of competent medical proof (*see*, ***Pimentel v Mesa***, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]; ***Neugebauer v Gill***, 19 AD3d 567, 797 NYS2d 541 [2d Dept 2005]; ***McConnell v Ouedraogo***, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]).

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*, ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]; ***Gjelaj v Ludde***, 281 AD2d 211, 721 NYS2d 643 [1st Dept 2001]). While plaintiff testified that he was curtailed in his activities, he did not testify in sufficient detail as to what his "customary daily activities" consisted of, or the period of time he was allegedly curtailed (*see*, Insurance Law § 5102 [d]), nor did he submit an affidavit detailing the same (*see*, ***Jean-Mehu v Berbec***, 215 AD2d 440, 626 NYS2d 274 [2d Dept 1995]). Thus, plaintiff has provided insufficient medical proof to raise an issue of fact that he sustained a serious injury under the no-fault law (*see*, ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; ***Bruce v New York City Trans. Auth.***, 16 AD3d 608, 792 NYS2d 193 [2d Dept 2005]).

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 in this regard must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, defendant's cross motion for summary judgment is granted and the complaint is dismissed. In light of the above determination, the plaintiff's motion for summary judgment on liability grounds in denied as academic.

Dated: MAR 0 5 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**