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SHORT FORM ORDER

INDEX No. 04-26320
CAL. No. 06-02022-MV

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10/18/06 (#001)
10/27/06 (#002)
ADJ. DATE 12/11/06
Mot. Seq. # 001 - MotD; CASEDISP
002 - XMG

Action No. 1
Index No. 04-24600

MERLIN MEMBRENO,

Plaintiff,

- against -

DOUGLAS A. MORALES,

Defendant.

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Action No. 2
Index No. 04-26320

FRANCISCO BENITEZ,

Plaintiff,

- against -

DOUGLAS A. MORALES and MERLIN J. MEMBRENO,

Defendants.

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Upon the following papers numbered 1 to 40 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-12; 13-20; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 21-25; 26-30; Replying Affidavits and supporting papers 31-33; 34-36; 37-40; 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 defendants in Action No. 2 are consolidated and decided together; and it is further

ORDERED that the motion (001) by defendant Membreno for summary judgment dismissing plaintiff Francisco Benitez' complaint on liability grounds and on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is determined as indicated below; and it is further

ORDERED that the motion (002) by defendant Morales for summary judgment dismissing plaintiff Francisco Benitez' complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is granted.

This is one of two related actions which were consolidated for the purposes of joint trial by prior order dated December 1, 2005 of the Supreme Court (Jones, J.). In this action, entitled "Action No. 2", plaintiff Francisco Benitez seeks to recover damages for serious injuries allegedly sustained by him as a result of a motor vehicle accident that occurred on Fifth Avenue at or about its intersection with Candlewood Road, Bay Shore, New York on April 25, 2004. The accident allegedly happened when the vehicle operated by defendant Morales made a left turn on Fifth Avenue and collided with the southbound vehicle operated by defendant Membreno, and in which Mr. Benitez was riding as a passenger. Mr. Benitez' complaint alleges that he sustained a "serious injury" as defined in Insurance Law § 5102 (d) and economic loss in excess of basic economic loss within the meaning of Article 51 of the Insurance Law. Defendant Membreno now moves for summary judgment dismissing the complaint on liability grounds and on the ground that Mr. Benitez did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Additionally, defendant Morales cross moves for summary judgment dismissing the complaint on the ground that Mr. Benitez did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Mr. Benitez opposes these motions, defendant Morales opposes co-defendant Membreno's motion, and defendants have filed a reply papers.

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 this motion and with respect to Mr. Benitez' claim of a "serious injury," defendant Membreno submits, inter alia, the pleadings; plaintiff's bill of particulars; the affirmed report of plaintiff's no-fault examining neurologist, David W. Rabinovici, M.D.; the unaffirmed report of plaintiff's no-fault examining chiropractor, David S. Bagshaw, D.C.; the unaffirmed report of plaintiff's no-fault examining acupuncturist, Kenneth Moss, L.Ac.; and plaintiff's deposition transcript. The reports of plaintiff's no-fault examining chiropractor and acupuncturist, which are not in admissible form, have not been considered in this determination (*see*, CPLR 2106; ***Pagano v Kingsbury***, *supra*).

Plaintiff claims in his bill of particulars that he sustained, among other things, an acute cervical sprain with spine straightening; disc herniations at C5-6, T1-2, and L3-4; a decreased range of motion of the cervical and lumbar spine in all planes; and a right knee injury. Plaintiff also claims that he sustained a serious injury in the categories of a permanent consequential limitation, a significant limitation, and a non-permanent injury. In addition, plaintiff claims a "significant loss of the use of a body organ or member, function or system" which does not fit within any of the "serious injury" categories defined in Insurance Law § 5102 (d).

In his report dated June 1, 2004, Dr. Rabinovici states that he performed an independent neurological examination of the plaintiff on that date, and his findings include motor strength that was "5/5" bilaterally with no fasciculations; deep tendon reflexes that were "2+" and symmetrical; normal gait; negative thoracic spinal percussion; and a right knee that was mildly positive to palpation. Dr. Rabinovici opined that plaintiff had sustained sprains/strains of the cervical and lumbosacral spine, and an injury to his right knee.

Plaintiff testified that he was rendered unconscious by the accident and that he woke up in the emergency room at Southside Hospital. He was examined, given hard support braces to wear for his neck and back, and then released one hour later. At the time of the accident, he was employed by J. H. Construction. By the following Thursday, he informed his employer that he could no longer work due to his neck, back and knee pain. Sometime at the end of 2005, he started working for Pacifico, where he works from 9 a.m. to 4 p.m. picking up trash and performing other duties. His condition started improving after he received about six months of physical therapy to his neck, back, arms and legs. He had no recollection of receiving any medical treatment in 2005, but testified that he had last received medical treatment for his injuries sometime in 2006. Plaintiff further testified that he stayed home for about one year after the accident. While he was able to lift 75 lb concrete bags prior to the accident, he is now unable to lift heavy objects. Lastly, plaintiff testified that he is presently unable to play soccer or

do much walking.

In support of the cross motion, defendant Morales submits, inter alia, the three affirmed reports of defendant's examining radiologist, Sheldon P. Feit, M.D.; the affirmed report of defendant's examining neurologist, Edward M. Weiland, M.D.; and the affirmed report of defendant's examining orthopedist, Arthur M. Bernhang, M.D. In one of his reports dated May 25, 2005, Dr. Feit states that he performed an independent radiological review of the MRI studies of the plaintiff's cervical spine dated June 6, 2004, and his findings include mild disc bulges corresponding with ventral epidural defects at the C3-4, C5-6 and C6-7 levels; desiccatory changes; and no frank focal herniations. He opined that these studies showed preexisting degenerative changes in that the disc bulges were secondary to annular degeneration and/or ligamentous laxity. In his second report dated May 25, 2005, Dr. Feit states that he performed an independent radiological review of the MRI studies of the plaintiff's lumbosacral spine dated June 6, 2004, and his findings include a mild disc bulge at L5-6 slightly impinging on the existing L5 nerve roots bilaterally; mild desiccatory changes at the L5-S1 disc; and no focal herniations. He opined that these studies showed preexisting degenerative changes in that the disc bulges were secondary to annular degeneration and/or ligamentous laxity. In his third report dated April 25, 2005, Dr. Feit states that he performed an independent radiological review of the MRI studies of the plaintiff's right knee dated May 28, 2004, and his findings include intact ligaments; a small amount of joint effusion; and small area of meniscal degeneration without a tear. He opines that these studies showed no significant abnormalities causally related to the plaintiff's injury.

In his report dated August 1, 2006, Dr. Weiland states that he performed an independent neurological examination of the plaintiff on that date and his findings include an intact sensory system; motor power that was "5/5" throughout; a full range of motion of the right knee with no joint crepitus or effusion; and an unlimited straight leg raising test at 90 degrees. He also found that there were normal ranges of cervical and lumbar spine motion. Dr. Weiland opined that plaintiff had sustained cervical and lumbosacral sprains/strains which had resolved, and that he had a history of contusions to the right knee. Additionally, Dr. Weiland concluded plaintiff had a normal neurological examination as it pertains to the accident.

In his report dated August 15, 2006, Dr. Bernhang states that he performed an independent orthopedic examination of the plaintiff on August 7, 2006, and his findings include symmetrical knee and ankle reflexes; negative meniscal signs; and no palpable fibromyalgia, trigger points or spasm. He also observed that plaintiff's knee extension and flexion were 0/0 and 135/135 degrees, with the average ranges being 0/0 and 134/134 degrees. In addition, he noted that dorsal lumbar expansion with the knees extended was 8" with normal being 4" and above. Moreover, he noted that straight-leg raising was to 75/75 degrees, with normal being 55 degrees and above. Dr. Bernhang opined that any causally related injuries which plaintiff may have sustained to his cervical spine, lumbar spine and right knee have resolved without any residual symptoms.

By their submissions, defendants 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]). Plaintiff's examining no-fault neurologist found, upon his examination performed about two

five weeks after the accident, that plaintiff's right knee was mildly positive to palpation and that he had sustained sprains and strains of the cervical and lumbosacral spine. Defendant Morales' examining neurologist found, upon his recent examination, that there was a normal range of motion of the plaintiff's cervical and lumbar spine as well as a full range of motion of the right knee. In addition, defendant Morales' examining orthopedist, found, upon his recent examination, that plaintiff had no palpable fibromyalgia, trigger points or spasm. He opined that all of plaintiff's injuries had resolved without residual symptoms. Furthermore, the defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendants have met their 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 these motions, Mr. Benitez submits, inter alia, the affirmation of counsel; the personal affidavit of Nicholas Martin, D.C.; and his personal affidavit. At the outset, the Court notes that the affirmation of counsel is without probative value on the issue of whether the plaintiff sustained a "serious injury" as defined in Insurance Law § 5102 (d) (*see*, ***Carplunk v Friedman***, 269 AD2d 349, 704 NYS2d 94 [2d Dept 1999]). Further, Dr. Martin's report is deficient to the extent that he attempts to rely upon the unsworn reports of plaintiff's physicians (*see*, ***Sayas v Merrick Trans.***, 23 AD3d 367, 804 NYS2d 769 [2d Dept 2005]), and to the extent that he attempts to render a medical diagnosis or prognosis which is beyond the scope of chiropractic practice (*see*, Education Law § 6551; ***McGuirk v Vedder***, 271 NYS2d 731, 706 NYS2d 485 [3d Dept 2000]; ***Crozier v Lesniewski***, 195 AD2d 657, 599 NYS2d 729 [3d Dept 1993]).

Dr. Martin avers that he performed a chiropractic examination of the plaintiff on September 29, 2006, and his findings include an irregular gait; "fixations" in the upper and lower cervical spine; tenderness in the cervical spine; and spasms in the cervical and lumbar area. He also observed that cervical flexion, extension, left/right rotation, and left/right lateral flexion were 50, 30, 70/65, 40/30 degrees with the normal ranges being 60, 50, 80/80, and 40/40 degrees. In addition, he noted that plaintiff's lumbar flexion, extension, left/right rotation, and left/right lateral flexion were 90, 20, 20/30, and 15/20 degrees, compared with the normal ranges of 90, 30, 30/30, and 20/20 degrees. He also avers that he referred plaintiff to an orthopedic surgeon for his right knee. Dr. Martin opined that plaintiff sustained, among other things, causally related sprains and strains of the cervical and lumbar spine.

Plaintiff avers that he is unable to move his body the way he needs to due to pain, and that he continues to suffer from flare-ups of pain and tenderness when he overextends himself. More specifically, he alleges that he has difficulty performing any activity which requires bending his body forward, and that he can only perform "light duty" assignments which limit his earning potential.

Initially, Dr. Martin has entirely failed to address the pre-existing degenerative condition of plaintiff's cervical and lumbosacral spine, as he 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]). While Dr. Martin records plaintiff's complaints of pain, plaintiff has failed to present 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]). Instead, the affidavit of Dr. Martin largely consists of unsubstantiated speculation concerning the causal relationship between the accident and plaintiff's condition several years afterwards (*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]). Further, the mere findings of muscle spasms by Dr. Martin, which were not objectively measured or compared with normal function, are insufficient to raise a triable issue of fact (*see*, ***Clements v Lasher***, 15 AD3d 712, 788 NYS2d 707 [3d Dept 2005]). In any event, Dr. Martin has not provided an adequate explanation for the cessation of plaintiff's treatments more than one year after the accident and his recent examination of the plaintiff on September 29, 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*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***McConnell v Ouedraogo***, 24 AD3d 423, 805 NYS2d 418 [2d Dept 2005]; ***Ketz v Harder***, 16 AD3d 930, 793 NYS2d 203 [3d Dept 2005]). Therefore, the conclusory affidavit of Dr. Martin, which was tailored to meet the statutory requirements, is insufficient to establish a "serious injury" for plaintiff under the no-fault law (*see*, ***Burke v Galli***, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied*, 91 NY2d 806, 669 NYS2d 1 [1998]; ***Khan v Hamid***, *supra*).

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*, ***Felix v New York City Transit Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2d Dept 2006]). 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*, ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002])

Moreover, 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, Mr. Benitez' complaint is dismissed and the branch of defendant Membreno's motion which is for summary judgment on liability grounds is denied as academic.

Dated: MAR 1 1 2007

J.S.C.

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