SHORT FORM ORDER

INDEX No. 05-8054
CAL. No. 06-01661-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 11/22/06
ADJ. DATE 1/17/07
Mot. Seq. # 001 - MD

JOHN J. VICINO	:	SEIDNER, ROSENFELD
	:	& GUTTENTAG, LLP
Plaintiff,	:	Attorneys for Plaintiff
	:	403 Deer Park Avenue
- against -	:	Babylon, New York 11702-2352
	:	
	:	DeSENA & SWEENEY, LLP
CHARLES P. MULLER,	:	Attorneys for Defendant
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Defendant.	:	Hauppauge, New York 11788

Upon the following papers numbered 1 to 14 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 _____; Replying Affidavits and supporting papers _____; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this unopposed motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a "serious injury" pursuant to Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on October 16, 2004. By his verified bill of particulars, plaintiff alleges that as a result of the subject accident he sustained serious injuries including, L5-S1 central disc herniation; L5-S1 effacement of the ventral aspect of the thecal sac; bilateral neural foraminal stenosis; L5-S1 circumferential disc bulging; aggravation/ exacerbation of disc dessication; right hip sprain; decreased lower back range of motion; decreased hip range of motion; aggravation/exacerbation of prior right femoral rod insertion; cervical sprain; and left shoulder sprain. Plaintiff's injuries from a prior motor vehicle accident in 1989 were a broken right femur which required the insertion of a metal rod and a broken left pinky. At the time of the subject accident, plaintiff was employed at home as a graphic design artist.

Defendant now moves for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a "serious injury" pursuant to Insurance Law § 5102 (d). In support of his motion, defendant submits, among other things, the summons and verified complaint; the answer; plaintiff's verified bill of particulars; plaintiff's deposition transcript; an MRI report dated October 28, 2004 of plaintiff's lumbosacral spine; reports of x-rays of plaintiff's cervical and lumbar spine performed on October 16, 2004; the affirmed report dated May 19, 2006 of defendant's examining orthopedist Arthur M. Bernhang, M.D. (Dr. Bernhang); the affirmed report dated May 10, 2006 of defendant's examining neurologist, Mathew M. Chacko, M.D. (Dr. Chacko); and the affidavit of service of the subject motion.

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]).

At his deposition, plaintiff testified that in 1989 at the age of 17 he broke his right femur and his left pinky while a passenger in a prior motor vehicle accident and that a metal rod was inserted in his right femur. According to plaintiff, he did not have any problems with his right hip and right leg between the time that he had recovered from the 1989 accident until the subject accident. Plaintiff testified that after the subject accident, plaintiff felt pain in his neck, upper back, lower back, left shoulder and a couple of hours later in his right leg. He was treated at the emergency room of Good Samaritan Hospital and then released. In addition, plaintiff testified that within one week he began treatment with Dr. Arvan who referred him to a physical therapist who treated plaintiff with heat stimulation and exercises three days a week for eight to twelve weeks. Plaintiff stated that he subsequently received three epidural injections from Dr. Fandos over six weeks for pain in his lower back. According to plaintiff, the epidural treatments did not provide relief and his medical treatment ended in July 2005. In the Fall of 2005, Dr. Arvan mentioned that lower back surgery was available to plaintiff. Plaintiff testified that following the accident he required assistance for about three months with work deliveries from his friend and his mother. Plaintiff further testified that his current complaints consisted of back pain from his neck to his lower back to his hip and that he takes Ibuprofin medication every four to five hours daily.

In his affirmed report, Dr. Bernhang indicated that his orthopedic physical examination of plaintiff on May 12, 2006 revealed that plaintiff's sitting straight leg raising was positive and lying supine, plaintiff's straight leg raising was positive at 45/35, normal being 55 degrees and above. In addition, Dr. Bernhang reported that plaintiff's pelvic roll was 45 degrees with back pain but no leg pain. Dr. Bernhang diagnosed traumatic aggravation of pre-existing degenerative changes of the lumbar spine, noted in the initial x-rays taken at Good Samaritan Hospital as a mild degree of disc and endplate degenerative changes at L5-S1, with disc herniation at L5-S1. He opined that the subject accident may have aggravated said condition but did not cause it and concluded that whatever soft tissue aggravation occurred as a result of the subject accident, appear to have resolved.

Initially, the Court notes that the reported limitations of movement of plaintiff's lumbar spine, as indicated above, do not support the conclusion that the traumatic aggravation of pre-existing degenerative changes of plaintiff's lumbar spine have resolved. In addition, the limitations found during sitting and supine straight leg raising testing were not adequately quantified or qualified so as to establish the absence of a significant limitation of motion (*see*, ***Buchanan v Celis***, ___ NYS2d ___, 2007 WL 926823, 2007 NY Slip Op 02689 [NYAD 2 Dept Mar 27, 2007]). Also, Dr. Bernhang reported range of motion measurements for plaintiff's cervical spine, shoulder and hip but failed to compare those findings to what is deemed normal ranges of motion for those areas of plaintiff's body (*see*, ***McLaughlin v Rizzo***, ___ NYS2d ___, 2007 WL 926515, 2007 NY Slip Op 02720 [NYAD 2 Dept Mar 27, 2007]; ***Harman v Busch***, 37

AD3d 537, 829 NYS2d 680 [2d Dept 2007]; ***Iles v Jonat***, 35 AD3d 537, 825 NYS2d 540 [2d Dept 2006]). Moreover, certain bilateral range of motion measurements such as lateral flexion 40/35 upon examination of plaintiff's cervical spine and active shoulder abduction 150/145 showed apparent limitations when compared with each other and absent a comparison with normal measurements, it cannot be concluded that any limitations were mild, minor or slight so as to be considered insignificant within the meaning of the no-fault statute (*see*, *id*).

Dr. Chacko indicated in his affirmed report based on his neurological examination of plaintiff on May 10, 2006, among other things, that plaintiff's straight leg raising was up to 60 to 70 degrees bilaterally with 90 being normal. He concluded that plaintiff had a history of cervical and lumbar strain that was resolved from an objective neurological standpoint. However, he failed to establish the absence of a significant limitation of motion (*see*, ***Fudol v Sullivan***, ___ NYS2d ___, 2007 WL 766218, 2007 NY Slip Op 02062 [NYAD 2 Dept Mar 13, 2007]). Thus, defendant failed to establish, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Cruz v Williams***, 34 AD3d 719, 825 NYS2d 510 [2d Dept 2006]).

Inasmuch as defendant failed to establish his prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained a serious injury, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; ***McDowall v Abreu***, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

Accordingly, the instant motion is denied.

Dated: APR 11 2007

J.S.C.

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