SHORT FORM ORDER

INDEX No. 04-21908
CAL. No. 06-01512-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 10-25-06
ADJ. DATE 1-22-07
Mot. Seq. # 001- MotD; CASEDISP

RICHARD POWELL and MICHELLE POWELL, Plaintiffs, - against - HENRY PREGO, Defendant.	SIBEN & FERBER, LLP Attorneys for Plaintiffs 1455 Veterans Memorial Highway Hauppauge, New York 11749 STEVEN J. SMETANA, ESQ. Attorneys for Defendant 201 North Service Road, Suite 303 Melville, New York 11747

Upon the following papers numbered 1 to 37 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 21-27; 28-33 ;Replying Affidavits and supporting papers 34-36 ; Other 37 (memorandum of law) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for summary judgment dismissing plaintiffs' complaint on liability grounds and on the ground that plaintiff Richard Powell did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is determined as indicated below.

This is an action to recover damages, individually and derivatively, for serious injuries allegedly sustained by plaintiff Richard Powell as a result of a motor vehicle accident that occurred on Sycamore Avenue, Bohemia, Township of Islip, New York on November 24, 2003. The accident allegedly happened when the vehicle owned and operated by Mr. Powell impacted the car owned and operated by defendant Henry Prego, which in turn collided with the car operated by non-party Rose Tepedino. Plaintiffs claim that defendant Prego caused the accident by failing to signal and by suddenly making a right turn in front of Mr. Powell, whereas defendant Prego claims that Mr. Powell caused the accident by attempting to improperly pass his vehicle on the right. The first cause of action in the complaint alleges that Mr. Powell 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. The second cause of action alleges that Mrs. Powell sustained the loss of services and companionship of her husband, Michelle Powell. Plaintiff opposes this motion, and defendant has filed a reply.

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 the plaintiffs' claim of a serious injury, defendant submits, inter alia, the pleadings, the plaintiffs' verified bill of particulars; Mr. Powell's Workers' Compensation Board records; the unaffirmed report of Mr. Powell's treating physician, Stuart N. Kandel, M.D.; the two unaffirmed reports of Mr. Powell's treating radiologist, Albert Zilkha, M.D.; the unaffirmed report of Mr. Powell's other treating physician, Yury Krementsov, M.D.; the affirmed report of Mr. Powell's Workers' Compensation Board examining physician, Jayaraj S. Kumar, M.D.; the affirmed report of defendant's examining orthopedist, Wayne Kerness, M.D.; the affirmed report of defendant's examining neurologist, Sarasavani Jayaram, M.D.; and Mr. Powell's deposition testimony.

In their bill of particulars, plaintiffs' claim that Mr. Powell sustained a severe cervical sprain with herniated disks and radiculopathy; a left shoulder sprain with an impingement; and sprains of the left elbow, wrist, and hand. They also claim that Mr. Powell was confined to Brookhaven Memorial Hospital on November 24, 2003, but that he was not confined to his bed or home. The Court construes these

allegations to mean that plaintiffs claim that Mr. Powell sustained a serious injury in the categories of a permanent consequential limitation and a significant limitation.

Mr. Powell's Workers' Compensation Board records submitted by the defendant show that he sustained four prior work related accidents. By notice of decision dated February 14, 1992 (Saks, W.C. L.J.), Mr. Powell was awarded financial compensation for the 25 percent loss of the use of his left thumb in connection with a fall from a ladder on October 3, 1989. State Farm Fire and Casualty Company's notice dated October 9, 1991 shows that Mr. Powell received a total award in the sum of $3,510 for the 7 ½ percent partial loss of use of his left arm in connection with a work related accident on June 3, 1990. Furthermore, by notice of decision dated April 11, 1990 (Saks, W.C. L.J.), Mr. Powell was awarded a course of treatment in connection with a work related injury to his neck that he sustained on August 2, 1990. Moreover, Mr. Powell's Workers' Compensation Board case files show that he sustained another work related accident on February 22, 1993 in which he claimed injuries to his cervical, dorsal and lumbosacral spine.

In his report dated January 23, 1990, Dr. Kandel states that he examined Mr. Powell on January 23, 1990 in connection with a hyperextension injury to his left wrist in October 1989, and his findings include some weakness of strength with complaints of pain in the inter-metacarpal area with pronation and supination of the hand. He opined that Mr. Powell had sustained a sprain of the volar capsule of the left wrist and a sprain of the inter-metacarpal ligament of the left hand.

In his report dated December 4, 1990, Dr. Zilkha states that he performed MRI studies of Mr. Powell's left shoulder on that date, and his findings include an-ill defined area of abnormal signal intensity in the supraspinatus tendon which he opined was consistent with tendonitis. In his report dated January 5, 2004, Dr. Zilkha states that he performed MRI studies of Mr. Powell's cervical spine on January 2, 2004, and his findings include disc desiccation from C2 to T1, as well as herniated disks at the C5-6 and C6-7 levels. Dr. Zilkha opined that these studies showed two herniated disks as well as degenerative disc disease from C2 to T1.

In his report dated February 22, 1993, Dr. Krementov states that he examined Mr. Powell on that date in connection with his occupational accident on October 1, 1992, and his findings include a restricted range of motion of the neck with tenderness in the paraspinal muscles radiating to the shoulders and occipital areas. He opined that Mr. Powell had sustained a vertebral derangement, instability in the cervical muscles and ligaments, as well as post-traumatic arthritic syndrome in the vertebral spine due to an occupational injury.

In his report dated March 19, 2002, Dr. Kumar states that he performed an independent medical examination of Mr. Powell on March 18, 2002, in connection with his prior work related accident on June 3, 1990. Dr. Kumar noted that Mr. Powell had a recurrence of left shoulder pain aggravated by heavy lifting which took place after his shoulder surgery. He found that Mr. Powell's left shoulder abduction and anterior flexion were each to 160 degrees with a mild external rotation defect. Dr. Kumar opined that Mr. Powell had an "exclusive" 12 ½ percent loss of use of the left arm which was permanent.

In his report dated October 10, 2005, Dr. Kerness states that he performed in independent orthopedic examination of Mr. Powell on that date, and his findings include an intact sensory system; muscle strength that was "5/5" bilaterally with no atrophy; and DTR's that were equal and reactive. While he observed decreased cervical rotation of approximately 15 degrees bilaterally, as well as abduction and decreased forward elevation of the left shoulder of approximately 20 degrees, he also found no spasm or tenderness about the cervical spine and no tears of the left rotator cuff. In connection with his findings and his review of Mr. Powell's medical history, he opined that plaintiff's limitations in cervical spine and left shoulder movements were due to preexisting degenerative changes. Dr. Kerness also opined that Mr. Powell had sustained sprains and strains of the cervical spine, as well as injuries to his left shoulder, elbow, wrist, and hand which had resolved. Furthermore, he concluded that Mr. Powell was not disabled and that he can continue to work.

In his affirmed report dated October 10, 2005, Dr. Jayaram states that he performed an independent neurological examination of Mr. Powell on that date and his findings include an intact sensory system; no tenderness or spasms about the thoracic spine; no muscle atrophy or fasciculations; and left shoulder muscle strength that was "4/5." While he observed that Mr. Powell's range of cervical spine motion was slightly decreased in flexion, extension and rotation, he also noted that there was no tenderness, spasms, or trigger points about the cervical spine. In connection with his findings and Mr. Powell's medical history, he opined that the limitations in Mr. Powell's cervical spine ranges of motion were due to preexisting degenerative conditions. Dr. Jayaram also opined that Mr. Powell had no permanent or residual neurological injuries or disability related to the trauma from the accident.

Mr. Powell testified to the effect that he initially declined treatment when an ambulance first arrived at the scene, however, he later asked for medical assistance. Emergency personnel placed him in a stretcher and he was taken to Brookhaven Hospital. After x-rays were taken, he was released the same day. About a day later, he saw Dr. Ladinsky, his family physician. Mr. Powell had injured his left shoulder in a construction accident about fifteen years ago and it was operated on about two or three years prior to his deposition. He did not remember the last time he received treatment for his neck prior to this accident. He also did not remember if he had ever had sustained any prior injuries to his left arm or left hand. As a result of his injuries, he was confined to his home for a few days, but was not bedridden. In addition, Mr. Powell testified that he is presently unable to perform cabinet installation work, yard cleanups, or household repairs. He is also unable to play softball. He had played softball once a week seasonally for about two years after his shoulder surgery up until the accident, but then stopped playing afterwards. While Mr. Powell testified that he has been unable to perform kitchen cabinet installation work, plaintiffs' bill of particulars does not claim that Mr. Powell sustained a serious injury in the category of non-permanent injury, and there are no allegations in their bill to support such a claim (*see*, ***Robinson v Sciavoni***, 249 AD2d 991, 672 NYS2d 500 [4th Dept 1998]).

By his submission, defendant made a prima facie showing that Mr. Powell 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]). While defendant's examining orthopedist observed slight limitations in Mr. Powell's cervical rotation as well as slight to moderate limitations in his shoulder abduction/forward elevation, he also found that there was no spasm of the cervical spine and no rotator cuff tears of the left shoulder. Also, while defendant's examining neurologist found a slight decrease in Mr. Powell's left shoulder muscle strength and some decreased ranges of cervical spine motion, he also noted that there were no spasms about the cervical spine as well as no observable tenderness, muscle atrophy, or fasciculations. Further, defendant's examining physicians opined, based upon their review of Mr. Powell's past medical history, that his cervical spine and left shoulder limitations were due to preexisting degenerative conditions and unrelated to the accident (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). The defendant's remaining evidence, including Mr. Powell's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendant has met his burden as to all categories of serious injury alleged by plaintiffs, the Court turns to plaintiffs' 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, plaintiffs submit, inter alia, the affirmed report of Mr. Powell's radiologist, Dr. Zilkha; the two affirmed reports of Mr. Powell's no-fault examining orthopedist, Michael J. Katz, M.D.; and the personal affirmation of Mr. Powell's no-fault examining orthopedist, Kenneth S. Glass, M.D. In his report dated January 5, 2004, Dr. Zilkha states that he performed MRI studies of Mr. Powell's left shoulder on January 3, 2004, and his findings include thinning and irregularity of the infraspinatus tendon; a small amount of fluid in the bursa and joint; cystic changes of the humeral head; mild hypertrophic changes of the acromioclavicular joint; and no significant muscle atrophy. Dr. Zilkha opined that the changes in the infraspinatus tendon were consistent with tendinosis/tendonitis, but also that there was no evidence of any rotator cuff tears.

In his report dated February 18, 2004, Dr. Katz states that he performed an examination of Mr. Powell on that date and his findings include cervical forward flexion, extension and bilateral rotation which were 80% of the normal range; mild spasm of the cervical spine; intact sensation in the C5-T1 dermatomes; and intact motor strength in the upper extremities. Dr. Katz opined that Mr. Powell's shoulder impingement had resolved, but that there was cervical radiculopathy which was causally related to the instant accident as well as his prior accidents. He further concluded that Mr. Powell was capable of his daily activities including those of his business. In his report dated May 4, 2005, Dr. Katz states that he examined Mr. Powell on that date and his findings include cervical forward flexion, extension, and bilateral rotation which was 80% of normal; intact sensation; and intact motor strength in the upper extremities. He noted that Mr. Powell had complaints of neck pain, but that he had not followed through with any surgery as of that date. Dr. Katz concluded that Mr. Powell had a moderate and partial degree of causally related disability, but determined that he was capable of his activities of daily living including employment.

In his personal affirmation, Dr. Glass avers that he examined Mr. Powell on December 9, 2003, and his findings included a limited range of motion of the cervical spine with complaints of pain in the articulations of the paraspinal muscles. Dr. Glass opines that Mr. Powell's ability to use his cervical spine has been substantially and significantly limited by the accident. More specifically, he opined that Mr. Powell is limited in his ability to work as a carpenter.

Plaintiffs have provided insufficient medical proof to raise an issue of fact that Mr. Powell sustained a serious injury 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]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, Dr. Glass failed to address Dr. Zilkha's findings of degenerative changes to Mr. Powell's cervical spine and left shoulder, and 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]). Additionally, Dr. Glass failed to indicate an awareness that Mr. Powell was involved in several other accidents which predated the instant one, in which he injured his neck, as well as his left shoulder, wrist and hand. Therefore, any conclusion on his part that Mr. Powell's current injuries were causally related to the subject accident was mere speculation (*see*, ***D'Alba v Choi***, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]; ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]). Moreover, as the affirmation of Dr. Glass appears to be based upon one examination that was conducted shortly after the accident and nearly three years prior to the filing of the defendant's motion, it is without probative value to the extent that it attempts to project a significant limitation or a permanent consequential limitation (*see*, ***Olson v Russell***, 35 AD3d 684, 828 NYS2d 417 [2d Dept 2006]; ***Tudisco v James***, 28 AD3d 536, 813 NYS2d 482 [2d Dept 2006]). In any event, Mr. Powell's cessation of treatment more than two years ago is not adequately addressed by way of competent medical proof (*see*, ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; ***Pimentel v Mesa***, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]; ***Karabchievsky v Crowder***, 24 AD3d 614, 808 NYS2d 338 [2d Dept 2005]). While Dr. Glass states that further conservative medical treatment would only be palliative, he did not propose a specific plan for more aggressive treatment options, and there is no evidence in the record that Mr. Powell has had surgery or any other form of aggressive treatment due to his injuries (*see*, ***Baez v Rahamatali***, 6 NY3d 868, 817 NYS2d 204 [2006]). Furthermore, Mr. Powell's subjective complaints of pain to his health care providers do not constitute a significant injury within the meaning of the statute (*see*, ***Feliz v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]).

Moreover, since there is no evidence in the record demonstrating that Mr. Powell's alleged economic loss exceeded the statutory amount of basic economic loss, plaintiffs' claim in this regard must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Based upon the foregoing, Mrs. Powell's individual claims for loss of services and companionship also fail (*see*, ***Maddox v City of New York***, 108 AD2d 42, 487 NYS2d 354 [2d Dept 1985]; ***Cody v Village of Lake George***, 177 AD2d 921, 576 NYS2d 912 [3d Dept 1991]). Accordingly, plaintiffs' complaint is dismissed and the branch of defendant's motion which is for summary judgment on liability grounds is denied as academic.

Dated: APR 23 2007

J.S.C.

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