SHORT FORM ORDER

INDEX No. 04-28318
CAL. No. 06-01556-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 1/22/07
Mot. Seq. # 001 - MD
002 - XMD

EDGAR A. HUAYTA,

Plaintiff,

- against -

GLADYS BENAVIDES,

Defendant.

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Mineola, New York 11501

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Upon the following papers numbered 1 to 31 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 28; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 29 - 31; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendant, Gladys Benavides, pursuant to CPLR 3212 and Insurance Law 5102(d) for an order granting summary judgment dismissing the complaint, asserting plaintiff's injuries do not meet the serious injury threshold, opposed by plaintiff, is denied; and it is further

ORDERED that this motion (002) by plaintiff, Edgar A. Huayta, pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability and denying defendant's motion as untimely made is, opposed by defendant, is denied.

CPLR 3212(a) provides in pertinent part that "[A]ny party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown."

Pursuant to CPLR 2214, a motion is made when the papers are served. Hence, the motion was made on October 23, 2006 and the cross motion on January 12, 2007. No date for filing has been set by this court; therefore, the instant motions should have been filed within 120 days after the note of issue was filed. In the instant action, the note of issue was filed June 27, 2006 (defendant's reply, exhibit B). Therefore, the last date for making either motion (001) or cross motion (002) would be October 25, 2006. In that motion (001) was filed on October 23, 2006, motion (001) is timely. In that the cross motion was not made until January 12, 2007, such motion is deemed untimely; and plaintiff has not demonstrated good cause for not having timely commenced such cross motion (***Gonzales v 98 Mag Leasing Corp. et al,*** 95 NY2d 124, 711 NYS2d 131 [2000]).

Accordingly, it is determined by this Court that motion (001) has been timely filed. Motion (002) was not timely filed, and no good cause has been demonstrated for the failure to timely file such cross motion.

This is an action sounding in negligence arising out of an automobile accident which occurred on June 23, 2002 at the intersection of Washington Avenue and Morris Street, County of Suffolk (defendant's exhibit B). Both plaintiff and defendant were operators of the vehicles involved in the accident. Defendant was operating a white Plymouth van; plaintiff was operating a 1998 Ford (defendant's exhibit F, p.8).

Plaintiff has claimed in his bill of particulars (defendant's exhibit D) that as a result of the accident, he sustained the following injuries: disc bulge impinging on the thecal sac at C 3-4; disc bulge effacing thecal sac at C 4-5; significant permanent loss of cervical range of motion; cervical sprain; acute cervical disc syndrome; lumbar disc syndrome; L 4-5 radiculopathy; significant loss of range of motion; concussion; left wrist sprain; left knee concussion; left knee internal derangement; and grade 1 impingement syndrome, right shoulder.

Defendant claims entitlement to an order granting summary judgment dismissing the complaint, asserting plaintiff did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d). In support of motion (001) defendant has submitted, inter alia, a copy of the summons and complaint; defendant's answer; a copy of the bill of particulars; uncertified copy of a Southside Hospital Emergency Department record, Bayshore Physical therapy record, record of Michael Trimba, M.D.; signed and sworn copy of the deposition of plaintiff, Edgar A. Huayta; an uncertified copy of an absentee calendar; and sworn letters of defendant's examining physicians: orthopedist Joseph P. Stubel, M.D., dated April 10, 2006; and neurologist Richard Pearl, M.D. dated April 25, 2006.

Pursuant to Insurance Law 5102(d), " '[s]erious injury' means a personal injury which results in 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 medical 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."

The term "significant" as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment" (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570).

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 "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]).

Dr. Pearl, defendant's examining neurologist, examined plaintiff on April 25, 2006. It was his opinion that plaintiff sustained a cervical and lumbosacral sprain and post-traumatic headaches (defendant's exhibit J). Dr. Pearl performed testing of plaintiff's cranial nerves, wrist, elbows, cervical spine, and lumbar spine and states there were no objective findings to indicate neurological injury, need for neurological healthcare, testing or neurological injury to correlate with any alleged findings on testing. He found claimant had a pre-existing history of degenerative condition of the spine and injury to the lower back as documented on image studies and history. Dr. Pearl, however, did not indicate which portion of the spine he was referring to with regard to the degenerative condition of the spine. Dr. Pearl indicates normal objective range of motions based upon his physical examination of plaintiff, but deferred discussion of allegations involving the knees and right wrist to the appropriate orthopedic consultants.

Dr. Stubel performed an orthopedic examination of plaintiff on behalf of defendant on June 23, 2002 (defendant's exhibit I). He indicates plaintiff was employed as a cemetery worker at the time of the accident and was out of work from the date of the accident until August, 2002. He continued that work until March 2003, at which time he started doing delivery work. Dr. Stubel's examination revealed no quantifiable limitations of movement of the lumbar and cervical spine, wrist, right shoulder and left knee. It was his opinion that the accident of June 23, 2002 has a causal relationship to the symptoms described by plaintiff, and based upon his findings at the time of the examination, it was determined there were no objective signs of disability with reference to the injuries claimed in the accident. Dr. Stubel further opined that there was no need for surgery, further diagnostic testing, household help, medical supplies or transportation; that he can perform his usual activities of daily living and his usual work; and he can return to his pre-loss activity levels. It was also Dr. Stubel's opinion that there was a

pre-existing injury to the lower back, left knee, and left wrist from a work related injury in 2001 which is exacerbated by the injuries from the June 23, 2002 accident.

Based upon the foregoing, defendant has demonstrated entitlement to an order granting summary judgment on the issue of serious injury.

Plaintiff opposes the application and has submitted, inter alia, a copy of a medical record from North Shore-Long Island Jewish Health System; various evaluation reports by Dr. Trimba, plaintiff's treating physician; the affidavit of Edgar Huayta; Bay Shore Physical Therapy records; sworn report of Mark Armstrong, Radiologist; sworn report of Dr. Irving Friedman; letter from Catholic Cemeteries; sworn narrative report of Dr. Trimba; and a signed copy of the deposition transcript of defendant.

Plaintiff has testified at his deposition (defendant's exhibit F, p. 23) that he went for physical therapy every day from June through the first couple days in December following the accident, then two or three times a week, then stopped going for a while because of work, and returned again two to three times a week. He had been working at Catholic Cemetery at the time of the accident, but due to the accident, missed three months work. In August he went back to work at the cemetery but was unable to do heavy lifting.

The signed letter from Craig M. McHugh of Catholic Cemeteries (plaintiff's exhibit I) indicates Mr. Huayta worked as a seasonal field worker at St. Charles Cemetery, was working forty hours a week, and was out of work for approximately 9.2 weeks. He returned to work August 27, 2002.

The signed, sworn report of radiologist, Mark Armstrong (plaintiff's exhibit G), indicates there is a right sided disc bulge at C 3-4 that impinges upon the thecal sac and right lateral recess, and at C 4-5, there is a broad disc bulge effacing the thecal sac. The signed and sworn report of plaintiff's neurologist, Irving Friedman, M.D. (plaintiff's exhibit H), indicates he reviewed the MRI films performed June 18, 2002 and diagnosed a right sided C 3-4 disc bulge impinging on the thecal sac and right lateral recess. At C 4-5, a disc bulge is seen effacing the thecal sac. He states the disc bulges are related causally to the injuries of June 23, 2002, and degenerative changes are very minimal for a 45 year old man. A disc bulge may constitute a serious injury within the meaning of Insurance Law 5102 (***Hussein et al v Harry Littman et al,*** 287 AD2d 543, 731 NYS 2d 477 [2001]). Plaintiff has demonstrated the existence of bulging discs as set forth above. Neither of defendant's experts refute the existence of bulging discs or causation relating to the accident of June 23, 2002.

The sworn report of Dr. Trimba, dated November 6, 2006 (plaintiff's exhibit J) indicates Mr. Huayta presented complaining of neck pain radiating to arms, low back pain radiating to legs, numbness in his arms and legs, pain in the left knee, the left wrist, insomnia, flashbacks, dizziness, and headache. Physical examination revealed limited range of motion in the cervical and lumbar spine, tenderness in the cervical and lumbar paravertebral musculature and spinous processes. Dr. Trimba found objective limitations of movement of both the cervical spine and lumbar spine. Straight leg raising was positive bilaterally at 40-50 degrees with reproduction of pain in the L4-5 distribution. The impression was concussion; left wrist sprain; left knee contusion; cervical, thoracic, and lumbar strain and sprain; rule out cervical, lumbar disc herniation and radiculopathy. He stated the prognosis is guarded.

Dr. Trimba further opined that the current pattern of symptoms will most probably persist for an

indefinite period of time with periodic remissions and exacerbations caused by various aggravations. He stated it is medically reasonable to predict that this injury is permanent in nature and that patient suffers from permanent moderate partial disability with permanent limitations as noted. Dr. Trimba further opined that within a reasonable degree of medical probability, although further treatment in the future may alleviate some symptoms, the permanent residuals of the injury cannot be completely resolved by way of further medical intervention, and there will always be some aspect of the residual permanent impairment experience for the balance of this patient's lifetime. Dr. Trimba also opines that the patient's symptoms and objective findings are consistent with the nature and onset of the injury reported, and there is a causal relationship between the current complaint and the injury reported.

Based upon the factual issues raised in the foregoing reports submitted by plaintiff in opposition to defendant's motion for summary judgment on the issue of serious injury, it is determined that plaintiff has met his burden by clearly demonstrating that there are factual issues concerning whether or not plaintiff has sustained a serious injury, and whether these injuries are permanent and preclude him from performing his pre-accident activities and employment.

Accordingly, that defendant's application seeking dismissal of the complaint on the issue of serious injury is denied.

Dated: MAY 14 2007

J.S.C.

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