SHORT FORM ORDER

INDEX No. 05-165
CAL. No. 06-02965-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 2-6-07
ADJ. DATE 3-13-07
Mot. Seq. # 001 - MG; CASEDISP

HERMAN QUINTANILLA, Plaintiff, - against - JOSE GUEVARA-ALFARO and FRANCE PATRICK a/k/a PATRICK FRANCE, Defendants.	CHRISTOPHER J. CASSAR, P.C. Attorney for Plaintiff 13 East Carver Street Huntington, New York 11743 ZAKLUKIEWICZ, PUZO, et al. Attorneys for Defendants 2701 Sunrise Highway, P.O. Box 389 Islip Terrace, New York 11752

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 13 - 17; Replying Affidavits and supporting papers 18 - 20; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants 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 to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred at the intersection of Pigeon Hill Road and Route 25 in Huntington, New York on October 14, 2003. The accident allegedly happened when the vehicle owned by defendant Patrick Franco, who has been sued herein as France Patrick/Patrick France, and operated by defendant Jose Guevara-Alfaro collided with plaintiff's vehicle. More specifically, the vehicle operated by defendant Guevara-Alfaro, while traveling east bound on Route 25, allegedly passed a red light at the intersection of Pidgeon Hill Road and impacted plaintiff's vehicle which was proceeding southbound on Pidgeon Hil Road.

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, defendants submit, inter alia, the pleadings; plaintiff's bill of particulars; the affirmed report of defendants' examining orthopedist, Richard S. Goodman, M.D.; the affirmed report of defendants' examining neurologist, Mathew M. Chacko, M.D.; and the plaintiff's deposition transcript.

Plaintiff claims in his bill of particulars that he sustained, among other things, head injuries; cervical, thoracic, and lumbar spinal injuries; and shoulder injuries. Plaintiff also claims that he was confined to his bed for two days and to his home for thirty days. Additionally, plaintiff claims that he was rendered disabled from the date of the accident to the present time. Moreover, plaintiff claims 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 August 10, 2006, Dr. Goodman states that he performed an independent

orthopedic examination of plaintiff on that date, and his findings include motor power that was symmetrical and within normal limits; a biceps reflex that was absent on the left and "1+" on the right; a forearm reflex that was absent on the left and "3+" on the right. He also observed that plaintiff's cervical flexion, extension, right/left rotation and right/left lateral flexion were 15, 15, 10/20, 10/5 degrees with the normal ranges being 30, 30, 90/90 and 30/30 degrees. Dr. Goodman noted that plaintiff reported having a prior accident in 1984, and a subsequent lower back injury in August 2004. He also noted that plaintiff's medical history showed preexisting degenerative changes to his cervical and thoracic spine. Dr. Goodman opined that plaintiff had a significant degenerative pathology in the cervical, thoracic and lumbar spine which was related to his prior 1984 accident. He also opined that plaintiff sustained a cervical and thoracic sprain as a result of the subject accident, but that there were no objective orthopedic residuals.

In his report dated August 17, 2006, Dr. Chacko states that he performed an independent neurological examination of plaintiff on that date, and his findings include normal tone and strength in all extremities with no atrophies or fasciculations; DTRs that were "2+" and symmetrical; a normal sensory system; and a straight leg raising test that was up to 70-80 degrees bilaterally, with 90 degrees being normal. He observed that plaintiff's cervical flexion, extension, right/left lateral flexion, and right/left lateral rotation were 40, 60, 30/30, and 60/60 degrees, with 50, 60, 45/45, 80/80 degrees being the normal ranges. He also noted that there was no observable muscle spasm of the cervical and lumbar areas even though plaintiff complained of tenderness upon palpation. Dr. Chacko opined that there was no objective evidence of any neurological disability.

Plaintiff testified that he did not immediately request medical attention at the scene of the accident. The following day, he went to see his chiropractor who examined him and took x-rays. His chiropractor continued to treat him for about two months, after which point he stopped treatment. While he was not working at the time of the subject accident due to a prior lower back injury on July 13, 2003, plaintiff is currently employed as a groundskeeper at a Town of Huntington golf course. His job duties include picking up garbage, cutting the greens, and reloading a water dispenser. Although he is unable to lift heavy objects, he is still able to lift items weighing about forty to fifty pounds. Plaintiff further testified that his current limitations consist of his inability to walk briskly or quickly perform tasks. While plaintiff testified that he has not had any subsequent automobile or work related accidents, defendants' examining orthopedist noted that plaintiff's medical history included a subsequent lower back injury in August 2004. Lastly, plaintiff testified that he also had a prior work related back injury in California approximately eighteen years ago for which he received chiropractic treatment.

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]; ***Teodoru v Conway Transp. Svc.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]; ***Grant v Heli Trucker, Inc.***, 294 AD2d 538, 742 NYS2d 874 [2d Dept 2002]). While defendants' examining orthopedist found that plaintiff had a limited range of cervical spine motion, he opined that his condition was related to his prior 1984 accident which resulted in degenerative changes to the cervical and thoracic spine. Even though defendants' examining neurologist found that plaintiff had a limited range of cervical spine motion, he also noted that there was no observable muscle spasm. Further, defendants' examining experts each

opined that there was no objective evidence of any orthopedic or neurological deficits as a result of the subject accident. Defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendants met their burden as to all categories of serious injury alleged by the 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, among other things, the unaffirmed MRI report of plaintiff's treating radiologist, Michele Rubin, M.D.; and the unaffirmed MRI report of plaintiff's other treating radiologist, Harvey L. Lefkowitz, M.D. Initially, the Court has considered the unaffirmed reports of doctors Rubin and Lefkowitz as they were specifically discussed by defendants' examining orthopedist in his own report (*see*, ***Kearse v NY City Transit Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

In her report dated November 19, 2003, Dr. Rubin states that she performed MRI studies of plaintiff's cervical spine on that date, and her findings include scoliosis; prominent anterior vertebral spurs at C3-4, C5-6, and C6-7; a central disc herniation at C3-4; annular bulging at C5-6; a spinal cord that was normal in appearance; a normal lordosis; and normal cerebellar tonsils. She also observed that the osteophytes at C5-6 significantly narrow the left neural foramen with impingement of the existing left C6 nerve root. Dr. Rubin opined that plaintiff's cervical scoliosis was likely related to muscle spasm.

In his report dated February 13, 2004, Dr. Lefkowitz states that he performed MRI studies of plaintiff's lumbosacral spine on that date, and his findings include intact vertebral bodies; "satisfactory" alignment; unremarkable discs at L1-2 and L2-3; and a disc protrusion and herniation at L4-5. While he observed broad based disc bulges at L3-4, L4-5 and L5-S1, he also noted that these discs showed multiple levels of desiccation.

Plaintiff has provided insufficient medical proof to raise an issue of fact that he 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, it is noted that plaintiff failed to submit any medical proof addressing his prior and subsequent accidents or his condition relative to these accidents (*see*, ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Plaintiff has also entirely failed to address the pre-existing degenerative condition of his cervical and thoracic spine as diagnosed by his own treating radiologists, and therefore, has failed to establish that the alleged conditions were causally related to or exacerbated by the accident (*see*, ***Knoll v Seafood Express***, 5 NY3d 817, 803 NYS2d 25 [2005]; ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Gomez v Epstein***, 29 AD2d 950, 818 NYS2d 101 [2d Dept, 2006]; ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [1st Dept 2006]). In the absence of an explanation by a treating medical provider as to the significance of plaintiff's pre-existing degenerative conditions, it would be sheer speculation to conclude that the subject accident was the cause of the his injuries (*see*, ***Lagois v Public Adm'r of Suffolk County***, 303 AD2d 644, 760 NYS2d 52 [2d Dept 2003]; ***Freese v Maffetone***, 302 AD2d 490, 756 NYS2d 70 [2d Dept 2003]). Additionally, plaintiff has also 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]), or proof by way of a recent medical examination showing any physical limitations resulting from his alleged injuries (*see*, ***Frier v Teague***, 288 AD2d 177, 732 NYS2d 428 [2d Dept 2001]). While a disc herniation may constitute a serious injury, the MRI reports of plaintiff's treating radiologists 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 any physical limitations resulting from the alleged disc injuries (*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]). In any event, plaintiff has not explained the admitted cessation of his medical treatment more than three years ago (*see*, ***Philips v Zilinsky***, 2007 NY Slip Op 3285 [2d Dept 2007]).

Additionally, plaintiff has failed 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 as to what his "customary daily activities" consisted of within the relevant time frame, 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]).

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, this motion for summary judgment is granted and the complaint is dismissed.

Dated: MAY 14 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION