SHORT FORM ORDER

INDEX NO. 05-6732
CALENDAR NO. 06- 02143-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 12-20-06
ADJ. DATE 2-23-07
Mot. Seq. # 001 MG;CASEDISP

JAMES BENEDETTO,

Plaintiff,

– against –

EDWARD R. MCMILLAN and GERALDINE MCMILLAN,

Defendants.

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ____: Answering Affidavits and supporting papers 12 - 24; Replying Affidavits and supporting papers 25 - 26: Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff James Benedetto commenced this action to recover damages for personal injuries sustained in a motor vehicle accident that occurred at the intersection of Middle Country Road and Eastwood Boulevard in the Town of Brookhaven on May 12, 2002. The bill of particulars alleges that plaintiff suffered various injuries as a result of the collision, including sprains/strains in the cervical, thoracic and lumbar regions of the spine; posterior disc herniation at level C6-C7; and "aggravation of preexisting disc pathology C2/3 through C6/7." It further

alleges that, while plaintiff was not confined to bed or home for any period of time, he was unable to work for four months after the accident.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff is precluded by Insurance Law §5104 from recovering for non-economic loss, as he did not sustained a "serious injury" within the meaning of Insurance Law §5102 (d). Defendants' submissions in support of the motion include copies of the pleadings; a transcript of plaintiff's deposition testimony; and sworn medical reports prepared by Dr. Noah Finkel and Dr. Frederick Mortati. At defendants' request, Dr. Finkel, an orthopedic surgeon, and Dr. Mortati, a neurologist, examined plaintiff in April 2006, and review various medical records related to his alleged injuries.

Plaintiff opposes the motion, arguing that issues of fact exist as to whether he sustained injuries within the "permanent consequential limitation of use" or the "significant limitation of use" categories. Plaintiff further asserts that a triable issue exists as to whether he sustained a nonpermanent injury within the 90/180 category. Plaintiff's evidence in opposition includes an affidavit and sworn medical reports by his treating chiropractor, Dr. David BenEliyahu; records related to his treatment at the emergency department of Mather Memorial Hospital; and sworn magnetic resonance imaging (MRI) reports concerning plaintiff's cervical and lumbar regions dated May 30, 2002 and June 18, 2002.

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see*, ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see*, ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251

[2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact, or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see*, ***Grasso v Angerami***, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Plaintiff testified at a deposition conducted on March 14, 2006 that he is employed as a wood floor installer by World Class Custom Floors, and that he missed four months of work due to the injuries he suffered in the accident. He testified that he sought medical treatment at the emergency department of Mather Memorial Hospital the day of the accident, and that he sought treatment from his primary care physician approximately one week later. Plaintiff testified that approximately two weeks after the accident he was referred by his attorney to a chiropractor, Dr. BenEliyahu, for treatment. He testified that he regularly received chiropractic treatments from Dr. BenElyiahu until December 2002, and that he did not receive any other medical treatment for his injuries. When questioned about his present condition, plaintiff testified that he continues to experience intermittent headaches and pain in his neck and back, and that he no longer is able to lift weights due to his spinal injuries.

Dr. Finkel's report states that plaintiff presented with complaints of recurrent neck stiffness, and pain and stiffness in his lower back. It states, in relevant part, that plaintiff exhibited full active range of motion during testing of the cervical region, although he did complain of pain at the extreme ranges of movement. It states that the examination of plaintiff's cervical spine revealed no evidence of pain, tenderness or paraspinal spasm, and that plaintiff demonstrated full range of motion in his upper extremities. The report states that there was no evidence of pain, spasm or tenderness in plaintiff's lumbar region, and that range of motion testing showed lumbar joint movement within normal limits. In addition, it states that plaintiff's deep tendon reflexes were normal, and that there was no evidence of weakness or atrophy in his upper or lower extremities. Dr. Finkel opines in the report that plaintiff suffered cervical and lumbar strains as a result of the accident, and that such injuries have resolved. He further concludes that his examination produced no objective findings corroborating plaintiff's complaints of pain and stiffness, and that there is no objective evidence of disability.

Similarly, Dr. Mortati's report states that plaintiff walked with a normal gait, with no sign of cerebellar dysfunction. It states that plaintiff had excellent muscle strength in his upper and lower extremities, and that his muscle tone and bulk were intact. It states that plaintiff could touch his fingers to his toes during forward flexion; that the straight leg raise test was negative bilaterally; and that no spasms were detected in the paraspinal muscles. Further, the report states that plaintiff's deep tendon reflexes and sensory responses were normal. Dr. Mortati concludes that plaintiff's complaints of neck and back pain are not due to cervical or lumbosacral radiculopathy or to any other neurological pathology.

The medical evidence presented by defendants establishes prima facie that plaintiff did

not suffer a serious injury as a result of the accident (*see*, ***Hasner v Budnik*** 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2006]; ***Meely v 4 G's Truck Renting Co.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). A defendant who submits admissible proof that a plaintiff has full range of motion and suffers no disabilities as a result of the subject accident establishes prima facie that the plaintiff did not sustain a serious injury, despite the existence of an MRI report showing a herniated or bulging disc (*see*, ***Kearse v New York City Tr. Auth.***, *supra*; ***Meely v 4 G's Truck Renting Co.***, *supra*; ***Diaz v Turner***, 306 AD2d 241, 761 NYS2d 93 [2d Dept 2003]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see*, ***Gaddy v Eyler***, *supra*).

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitations of movement and their duration (*see*, ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see*, ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of limitations that are based on a recent examination of plaintiff (*see*, ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). Moreover, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see*, ***Joseph v Layne***, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; ***Batista v Olivo***, *supra*).

Here, plaintiff failed to provide a reasonable explanation for the cessation of medical treatment for his alleged spinal injuries seven months after the subject motor vehicle accident (*see*, ***Phillips v Zilinsky***, __ AD3d __, 2007 WL 1147395 [2d Dept, April 17, 2007]; ***Hasner v Budnik***, *supra*; ***D'Alba v Yong-Ae Choi***, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]; ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]). Plaintiff alleges that he ceased all medical treatment for his alleged injuries seven months after the accident, because No Fault benefits were terminated and he "had no health insurance [and] accordingly could not afford the treatment." However, he failed to present any evidence substantiating the claim that No Fault benefits were terminated in December 2002 and that, despite being employed full time, he could no afford to pay for additional medical care (*see*, ***Mohamed v Siffrain***, 19 AD3d 561, 797 NYS2d 532 [2d Dept 2005]; ***Neugebauer v Gill***, 19 AD3d 567, 797 NYS2d 541 [2d Dept 2005]; ***Villalta v Schechter***, 273 AD2d 299, 710 NYS2d 87 [2d Dept 2000]; ***Gomez v Ford Motor Credit Co.***, 10 Misc 3d 900, 810 NYS2d 838 [Sup Ct, Bronx County 2005]).

Further, plaintiff failed to produce competent medical evidence that he was unable to perform substantially all of his daily activities for at least 90 of the 180 days immediately following the accident (*see*, ***Zinger v Zylberberg***, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; ***Davis v New York City Tr. Auth.***, 294 AD2d 531, 742 NYS2d 658 [2d Dept], *lv denied* 98 NY2d 612, 749 NYS2d 475 [2002]; ***Sainte-Aime v Ho***, *supra*; ***Arshad v Gomer***, 268 AD2d 450, 701 NYS2d 919 [2d Dept 2000]). The affidavit and medical reports by Dr. BenElyiahu demonstrate that range of motion testing performed on August 2, 2002 revealed only minimal restrictions in joint function in the cervical and lumbar regions of plaintiff's spine. The allegation by Dr. BenElyiahu that plaintiff "was still not ready to go back to work" in August 2002, therefore, is rejected as tailored to meet the statutory requirements of Insurance Law §5102 (d) (*see*, ***Sainte-Aime v Ho***, *supra*). Plaintiff's assertion, standing alone, that he was unable to work for four months due to his injuries is insufficient to create a triable issue of fact as to the 90/180 claim (*see*, ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Saint-Aime v Ho***, *supra*; ***Jackson v New York City Tr. Auth.***, 273 AD2d 200, 708 NYS2d 469 [2d Dept 2000]).

Accordingly, summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: MAY 2 1 2007

J.S.C.

__X__ FINAL DISPOSITION____ NON-FINAL DISPOSITION