SHORT FORM ORDER

INDEX No. 05-28609
CAL. No. 07-00253-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-7-07
Mot. Seq. # 002 - MD

DENNIS J. WINTER, JR.,	:	SANDERS, SANDERS, BLOCK, et al.
	:	Attorneys for Plaintiff
	:	100 Herricks Road
Plaintiff,	:	Mineola, New York 11501
	:	
- against -	:	LOCCISANO & LARKIN
	:	Attorneys for Defendant
DEON ANTHONY JOHNSON,	:	150 Motor Parkway, Suite 405
Defendant.	:	Hauppauge, New York 11788-5108

Upon the following papers numbered 1 to 10 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; 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 motion (002) by defendant Deon Anthony Johnson 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, unopposed by plaintiff, is denied.

This is an action sounding in negligence arising out of a two-vehicle accident which occurred on May 5, 2003 on Southern State Parkway at or near exit 22 (Meadow Brook Parkway), County of Nassau, State of New York, when plaintiff's vehicle was struck in the rear while stopped at a traffic light. Venue is premised upon plaintiff's residence in Suffolk County. Plaintiff claims to have sustained serious injury within the meaning of Insurance Law §5102(d).

Defendant Deon Anthony Johnson 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).

Plaintiff has set forth in his bill of particulars (defendant's exhibit B) that he sustained the following injuries, inter alia: broad based disc herniation at C6-7; paracentral disc herniation at L3-4; disc bulge at L4-5; disc bulge at L5-S1; cervical spine and lumbosacral spine derangement of the vertebral discs; and bilateral cervical radiculopathy.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented ***(Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment ***(Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers ***(Winegrad v N.Y.U. Medical Center***, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form ***(Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

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 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."

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 [1982]).

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*** (supra).

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]).

In support of motion (001) defendant Johnson has submitted, inter alia, a copy of the summons and complaint; defendant's verified answer; a copy of the bill of particulars; signed and sworn partial copy of the deposition transcript of plaintiff, Dennis J. Winter; sworn letters of defendant's examining physicians: orthopedist Isaac Cohen, M.D., dated September 21, 2006; and neurologist Matthew M. Chacko, M.D. dated September 21, 2006; and uncertified copies of letters to the Social Security Administration from Seymour Einhorn, M.D., dated May 15, 1989 and August 11, 1993.

Dr. Chacko, defendant's examining neurologist, examined plaintiff on September 21, 2006 (defendant's exhibit D). He set forth in his letter to Liberty Mutual Insurance Company that Mr. Winter is a 61 year old gentleman who gives a history that he was the driver of a vehicle involved in a motor vehicle accident, and was seen at Mid Island Hospital emergency department the day after with complaints of neck and back pain and pain in his head. There was a past medical history of plaintiff being involved in a bus accident in 1980 wherein he hurt his neck and back and from which he had some residual pains in the neck and back. He has a history of cancer of the colon in 1987, and he had a lymph node taken out of the left side of his neck with radical surgery in 2003. He has not worked since 1989 due to ill health.

Dr Chacko's physical examination revealed the range of motion testing of plaintiff's neck to be 30 degrees (50 degrees normal); extension of 40 degrees (60 degrees normal); lateral rotations 45 degrees (80 degrees normal); lateral flexions 30 degrees (45 degrees normal) cranial nerve examination II through XII including fundus examination was unremarkable. Deep tendon reflexes were 2+ and symmetrical; and straight leg raising 30 degrees bilaterally (90 degrees normal). Physical examination of plaintiff's lumbar spine revealed flexion less than 30 degrees (60 degrees normal); lateral flexion to about 10-15 degrees (25 degrees normal) and extension was 10-15 degrees (25 degrees normal).

Dr. Chacko reviewed the reports of the MRI scans which he stated showed small broad based disc herniation at the C6-7 level with no spinal stenosis or cord compression noted, and a small left paracentral disc herniation at L3-4 with mild encroachment of the left L3 nerve root and slight disc bulging at L4-5 and L5-S1. He could not determine if these findings were preexisting.

Dr. Chacko stated there was no objective evidence of any neurological disability relating to the accident of May 5, 2004, though he noted Mr. Winter was on disability due to multiple other problems since 1989.

Dr. Cohen examined Mr. Winter on September 21, 1006. Cervical spine examination revealed a

range of motion with flexion, extension and lateral bending in the 40 degree range (45 degrees normal) and rotational motion possible to 70 degrees (80 degrees normal). Reflexes were present, equal and symmetrical in both upper extremities in biceps, triceps and brachioradialis.

Examination of Mr. Winter's thoracolumbar spine revealed a grossly restricted range of motion with flexion possible to about 10 degrees (90 degrees normal), hyperextension possible to about 5 degrees (30 degrees normal), lateral bending in each direction of 5 degrees and rotational motion of 5 degrees (30 degrees normal).

Negative straight leg signs to 90 degrees was noted and reflexes in both knee jerks and ankle reflexes were equal and symmetrical. Mr. Winter said he was unable to heel/toe walk, but had a satisfactory gait with normal dorsiflexion and plantar flexion indicating he is able to dorsiflex the foot as well as lift the heel from the ground without difficulty. Mr. Winter complained of numbness of the fifth digit in both hands and feet.

Dr. Cohens's diagnosis was that of status post motor vehicle accident, cervical and lumbosacral strain, resolved. Dr. Cohen sets forth in his discussion that there are no objective findings upon physical examination and claimant demonstrates no objective evidence of disability. Dr. Cohen further states Mr. Winter's subjective complaints are not corroborated by the objective examination. Dr. Cohen notes there are minimal degenerative changes in the cervical spine area with small herniated disc of no clinical significance as well as degenerative changes involving the lumbosacral spine of no clinical significance. Dr. Cohen stated the physical examination was unremarkable other than the voluntary restriction of range of motion. It was his opinion that Mr. Winter does not have any evidence of residual disability or permanency related to the accident and sustained a mild soft tissue injury as a consequence of the motor vehicle accident. Dr. Cohen also stated there was no objective evidence of disability or permanency.

The letter of Dr. Einhorn, M.D., dated May 15, 1989 [1] to the Social Security Administration (defendant's exhibit F), indicates Mr. Winter was seen on May 12, 1989 for complaints of low back pain, cervical spine pain, left sciatica and right knee pain, having been injured on the job. He has a history of a herniated lumbar disc, and at present, is unable to lift anything weighing about 10 lbs. He is limited in his ability to sit for more than 10 minutes at a time, and then has to get up and walk around. He can walk one half block and then must rest. He is unable to stand in one place for more than ten to fifteen minutes at a time. He was out of work since December 29, 1988 because of the low back pain.

Dr. Einhorn's letter also sets forth that Mr. Winter has a history of cervical spine pain, described as severe, which he claims is getting worse. He sleeps with a collar at night. There is no radiating pain to the upper extremities. He has difficulty turning his head from side to side and experiences severe occipital headaches for which he is taking pain medication constantly. He had been a bus driver, but because of his neck and back problems, he was made supervisor, but had to stop working as a supervisor because he was unable to stand or sit for long periods of time.

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[1] This letter is found not to be in admissible form but is considered as not objected to by plaintiff.

Past history revealed a resection in 1987 for carcinoma of the large bowel. He has symptoms of carpal tunnel syndrome. He occasionally gets vasospasms secondary to compression of the median nerve, has weakness and drops objects such as eating utensils, pen or pencil.

Physical examination revealed about 50% range of motion associated with spasm. Examination of the back revealed 50% range of motion, spasm and pain with extension, positive leg signs, positive Patrick test, and was tender to deep palpation over the L4-5 level. Examination of both wrists revealed a positive Tinel sign and wrist flexion test. Dr. Einhorn stated that Mr. Winter had a herniated lumbar disc, and from an orthopedic point of view, felt Mr. Winter to be totally disabled.

The letter of Dr. Einhorn, dated August 11, 1993 (defendant's exhibit G)[2] indicates Mr. Winter was seen for complaints of pain in his low back, left sciatica, pain in the cervical spine and right knee. The letter further indicates that since he does very little, the pain bothers him less than it did when he was last seen in the office. Dr. Einhorn also indicated Mr. Winter has a history of a psychiatric diagnosis of obsessive-compulsive and takes medication, including Xanax. He also takes Zantac for ulcer disease.

Physical examination revealed about 30% range of motion of the neck, associated with spasm with pain radiating down the left lower extremity. Examination of the cervical spine revealed about 50% range of motion associated with spasm. Mr. Winter was found to be still markedly totally disabled with multiple problems, including chronic cervical and lumbar disc disease with exacerbations.

Defendant has also submitted the transcript for the examination before trial of Mr. Winter (defendant's exhibit C) wherein Mr. Winter testified he had been in an accident in 1980 when his parked bus was struck head on by another car. The car also struck a woman and then fled the scene. He sustained injury to his head, neck and back as a result of that accident. He had an MRI taken of his cervical spine, which he said was inconclusive or unremarkable. He was out of work for about four months and received Worker's Compensation benefits. He wore a collar on his neck at night and a corset during the day when he drove. He was made supervisor at his job thereafter.

As a result of the within accident, Mr. Winter testified he sustained injury to his neck and back and was getting pain radiating down both sides of his body, extremities, hands and legs, limitation in range of motion, and he experienced headaches. He was being treated by his neurologist, Dr. Einhorn, and by a chiropractor, Dr. Piesnokoski from whom he received therapy. He was also treated with acupuncture to his neck and shoulders at New York Orthopedic and Rehabilitation. He was treated by Dr. DeMoura who recommended surgery to his lower back as the alternative to living in pain. He also testified that he was to have surgery for an inguinal hernia, but this is not pleaded in the bill of particulars as related to this accident.

Mr. Winter also testified that as a result of this accident he can no longer do certain things around the house, such as maintenance, painting, and little things. He cannot play paddle ball any longer, and

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[2] This letter is not in admissible form and it appears there is a mistake where the letter states "The neck revealed about 30% range of normal motion....pain radiated down to the left lower extremity."

no longer goes fishing which he used to do once a month. His wife does the house cleaning and laundry, and she usually does the grocery shopping with their daughter. He cannot help her carry the bags at all. He claimed that sex with his wife has diminished and that they have become a little distant. When asked what his day usually consists of, he testified he gets up, has breakfast, sits and reads the paper, opens the door to let his dogs out. The remainder of the transcript has not been provided to this Court.

In reviewing all of defendant's submissions, it is determined that defendant has not demonstrated prima facie entitlement to an order granting summary judgment on the issue of serious injury. Dr. Chacko reviewed the reports of the MRI scans which he stated showed small broad based disc herniation at the C6-7 level with no spinal stenosis or cord compression noted, and a small left paracentral disc herniation at L3-4 with mild encroachment of the left L3 nerve root and slight disc bulging at L4-5 and L5-S1. He could not determine if these findings were preexisting.

Dr. Cohens's diagnosis was that of status post motor vehicle accident, cervical and lumbosacral strain, resolved. He sets forth in his discussion that there are minimal degenerative changes noted in the cervical spine area with small herniated disc, which he states are of no clinical significance, as well as degenerative changes involving the lumbosacral spine of no clinical significance. He does not address the issue of the left paracentral disc herniation at L3-4 with mild encroachment of the left L3 nerve root and slight disc bulging at L4-5 and L5-S1. Dr. Cohen stated the physical examination was unremarkable other than the voluntary restriction of range of motion, yet he recorded limitations in range of motion in his report. It is determined that Dr. Cohen's discussion that Mr. Winter's limitations of motion are voluntary is conclusory and unsupported by his report. His discussion that the cervical herniated disc is of no significance is also conclusory and unsupported by his report. This finding of voluntary limitation is in conflict with the findings of Dr. Chacko who actually quantified the limitations in the range of motion found during physical examination of Mr. Winter and did not opine these limitations were voluntary.

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith,*** 294 AD2d 540; 742 NYS2d 876 [2nd Dept 2002]). Defendant has demonstrated the existence of a herniated cervical disc, a herniated lumbar disc and two bulging lumbar discs as set forth above. Neither of defendant's experts refute the existence of the herniated discs nor do they rule out causation relating to the accident of March 31, 2005. Based upon the factual issues raised in the moving papers submitted by defendant in support of the instant application, it is determined that defendant has not met his burden of demonstrating by admissible evidence that there are no factual issues concerning whether plaintiff has sustained a serious injury within the meaning of Insurance Law §5102(d) or whether the injuries were caused by the subject motor vehicle accident.

To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see,* ***Toure v Avis Renta A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197; ***Gaddy v Eyler,*** 79 NY2d 955, 582 NYS2d 99-0, 591 NE 1176). Here, defendant failed to satisfy his burden of establishing, prima facie, that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see,* ***Agathe v Tun Chen Wang***, ___NYS2d ___, 2006 WL 2965205, 2006 NY Slip Op 07434 [NYAD 2 Dept Oct 17, 2006]; *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819

NYS2d 48 [2d Dept 2006]).

Since defendants failed to establish their entitlement to judgment as a matter of law as set forth above, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; ***Zuckerman v City of New York***, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]).

Accordingly, defendant's motion for an order granting summary judgment on the issue of serious injury is denied.

Dated: MAY 3 1 2007

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**