SHORT FORM ORDER

INDEX No. 05-27081
CAL. No. 06-02433-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 4-26-07
Mot. Seq. # 001 - MG; CASEDISP
002 - XMD

ROBERT BARSONY,	:	GENE DUENAS, J.D.P.C.
	:	Attorney for Plaintiff
	:	92 Front Street
Plaintiff,	:	Hempstead, New York 11550
	:	
- against -	:	ROBERT P. TUSA, ESQ.
	:	Attorney for Defendant
ADRIANA M. ROJAS,	:	898 Veterans Memorial Hwy, Suite 320
Defendant.	:	Hauppauge, New York 11788

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 - 10 ; Notice of Cross Motion and supporting papers 11 - 23 ; Answering Affidavits and supporting papers 24 - 26 ; Replying Affidavits and supporting papers 27 - 31 ; Other ; ~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion 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 and the complaint is dismissed; and it is further

ORDERED that plaintiff's cross motion for summary judgment in his favor on liability grounds is denied as both untimely and academic.

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 Route 110 and Semon Road in Huntington, New York on June 22, 2005. The accident allegedly occurred when the vehicle operated by plaintiff, that had been stopped at a stop light, was rear-ended by the vehicle owned and operated by defendant. Richard Muller, a non-party to this action, owned the vehicle that plaintiff was operating at the time of the accident. Plaintiff claims in his complaint that he sustained a "serious injury" resulting in basic economic loss and non-economic loss as defined by Section 5102 of the Insurance Law. Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Initially, as the note of issue in this action was filed on October 19, 2006, any motion for summary judgment made after February 16, 2007 was untimely (*see*, CPLR 3212 [a]). As plaintiff's cross motion was not made until March 7, 2007. the date that it was served, his application that is for an order granting his summary judgment on liability grounds is denied as untimely. Furthermore, plaintiff has not demonstrated good cause for the

delay, and the court may not deem that good cause exists (*see*, ***Miceli v State Farm Mut. Auto. Insur. Co.,*** 3 NY3d 725, 786 NYS2d 379 [2004]; ***Rocky Point Drive-In, L.P. v Town of Brookhaven***, 2007 NY Slip Op 1717 [2d Dept 2007]; ***Rivers v City of New York***, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]). Plaintiff's claim, however, that he sustained a "serious injury" as defined by section 5102 of the Insurance Law has been treated as opposition to defendant's timely motion.

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 her motion, defendant submits, inter alia, the pleadings; plaintiff's verified bill of particulars; the plaintiff's Huntington Hospital emergency room and x-ray records; the unaffirmed report dated July 7, 2005 of plaintiff's treating orthopedist, William A. Healy, III, M.D.; the affirmed report of defendant's examining orthopedist, Wayne Kerness, M.D.; the affirmed report of defendant's examining neurologist, Warren Cohen, M.D.; and the affirmed report of defendant's examining radiologist, Sheldon P. Feit, M.D. Plaintiff claims in his bill of particulars that he sustained neck and lower back sprains/strains; right hip and leg injuries; a lumbar disc herniation at L5-S1; and a psychological injury. In addition, plaintiff claims that he sustained a serious injury in the categories of a permanent

consequential limitation and a significant limitation.

Plaintiff's hospital emergency room records on the date of the accident show that he was complaining of back pain radiating down the side of his right leg and calf. The attending physician examined the plaintiff and noted that there was midline tenderness at the trachea, but that his neck was supple. X-rays of plaintiff's pelvis performed at the hospital showed no acute fractures or dislocations.

In his report dated July 7, 2005, Dr. Healy states that he performed an initial examination of plaintiff on that date, and his findings include marked cervicotrapezial spasm, and no motor, sensory, reflex or vascular deficits. While he found some limitation of flexion/extension, he also noted that there was no limitation in lateral rotation and bending. Dr. Healy opined that plaintiff had sustained cervical and lumbar strains and he recommended that plaintiff undergo a course of physical therapy combined with oral anti-inflammatories.

In his report dated August 15, 2006, Dr. Kerness states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include intact sensation; DTRs that were normal and "2+" bilaterally; muscle strength that was "5/5" bilaterally with no atrophy; and a full range of cervical spine and hip motion. While Dr. Kerness observed that plaintiff's gait was antalgic, he also noted that his lumbar range of motion was full except for lumbar flexion that was 80 degrees, with normal being 90 degrees. He opined that plaintiff had sustained a cervical spine sprain/strain and a right hip injury that had resolved, as well as mild lumbar radiculopathy that was unresolved. Additionally, Dr. Kerness concluded that plaintiff had no disability and was capable of performing all activities of his daily living, including working, without restrictions.

In his report dated August 15, 2006, Dr. Cohen states that he performed an independent neurological examination of plaintiff on that date, and his findings include no limitation of movement of the hips, knees or ankles; no detectable spasm or tenderness about the thoracic spine; normal muscle tone and bulk; and a negative straight leg raising test. While he found some diffuse sacral spinal and right paraspinal tenderness, he also observed that plaintiff was able to squat fully. He also observed that there was a full range of lumbar spine motion, except for flexion which was 70 degrees with normal being 90 degrees. He noted that plaintiff denied any head or neck symptoms and that his complaints consisted of, inter alia, cramping in the right thigh and right calf. Dr. Cohen opined that plaintiff's cervical and lumbar sprains had resolved without neurological deficits, and that there was no evidence of radiculopathy or traumatic neuropathy.

In his report dated October 18, 2006, Dr. Feit states that he performed an independent review of plaintiff's lumbar MRI studies dated January 6, 2006, and his findings include desiccatory changes at all visualized lumbar intervertebral discs, most marked at L5-S1; mild disc bulges at L1-L2 and L5-S1; osteophytes at the L5-S1 level; and no herniations. He opined that these studies showed degenerative spondylosis as well as mild disc bulges that were degenerative secondary to annular degeneration and/or ligamentous laxity. Dr. Feit also concluded that these changes were not post-traumatic or causally related to the accident.

By her submissions, defendant 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]; ***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]; ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Defendant's examining neurologist found that plaintiff had no limitation of the hips, knees or ankles and that he was able to squat fully even though there was some diffuse sacral tenderness. Similarly, defendant's examining orthopedist found that plaintiff had a full range of cervical spine and hip motion. Additionally, both of defendant's examining experts concluded that plaintiff had no ongoing impairments secondary to the subject accident. Further, defendant's examining radiologist opined that there were degenerative changes to plaintiff's lumbar spine which were not post-traumatic in etiology (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). Defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendant met her burden as to all categories of serious injury alleged, 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 sworn report of plaintiff's treating chiropractor, Keith Nelson, D.C., and a partial transcript of plaintiff's deposition testimony. In his report dated February 22, 2007, Dr. Nelson states that he performed an initial chiropractic examination of plaintiff on January 14, 2006, and his findings include moderate spasm and trigger points in the trapezius muscles bilaterally; fixation on motion over segments C5-6; midline tenderness overlying T3, T6-7, L5-S1; and a positive straight leg raising test on the right at 60 degrees. He also found limitations in plaintiff's range of cervical and thoraco-lumbar spine motion. According to Dr. Nelson, plaintiff underwent a course of 88 chiropractic treatments at his office for a period of approximately twelve months and one week which consisted of, inter alia, specific spinal adjustments of the cervical, thoracic and lumbar spine. Dr. Nelson states that he re-examined plaintiff on September 8, 2006 and again on February 23, 2007. Although Dr. Nelson has not furnished any information with respect to his exam conducted on September 2006, the findings of his latter exam include an articular fixation at L5-S1; moderate erector muscle spasm; tender paraspinal muscles to the right of L5-S1; DTRs that were "+2" bilaterally; and a positive straight leg raising test at 60 degrees on the right. While he found that plaintiff's movement was guarded, he also noted that plaintiff's heel/toe walking was normal and that he was able to get on and off the examination table by himself. Additionally, he observed that plaintiff's thoraco-lumbar spine flexion, extension, right/left flexion and right/left rotation were 70, 20, 20/20 and 25/30 degrees, with the normal range being 90, 30, 30/30 and 30/30 degrees. Dr. Nelson opined that plaintiff had sustained lumbar disc syndrome, lumbar segmental dysfunction/subluxation at L5, and sciatic radiculopathy which were causally related to the accident and permanent.

Plaintiff testified at his examination before trial to the effect that he underwent physical therapy for about three months after the accident with his last treatment being sometime in October 2005. Although he had scheduled more physical therapy appointments, his no-fault carrier, GEICO, terminated his benefits. As a result of his injuries, he gets numbness and cramping in his right leg and right hip while he sits at work. His symptoms also awaken him at night. Plaintiff further testified that, as a result of his injuries, he cannot jog or play sports and that he has difficulty doing his laundry tasks.

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]; ***Taranto v McCaffrey***, 2007 NY Slip Op 03908 [2d Dept, May 1, 2007]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, Dr. Nelson has entirely failed to address the pre-existing degenerative condition of plaintiff's lumbar spine, as he did not provide any foundation or objective medical basis supporting the conclusions which he reached, namely, that plaintiff's symptoms 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]). While Dr. Nelson records plaintiff's complaints of pain, he has 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]). Instead, the affidavit of Dr. Nelson largely consists of unsubstantiated speculation concerning the causal relationship between the accident and plaintiff's condition six months afterwards (*see*, ***Damstetter v Martin***, 247 AD2d 893, 668 NYS2d 863 [4th Dept 1998]), and conclusory assertions tailored to meet the statutory requirements (*see*, ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Also, the findings of muscle spasms by Dr. Nelson, which were not objectively measured or compared with normal function, are insufficient to raise a triable issue of fact (*see*, ***Clements v Lasher***, 15 AD3d 712, 788 NYS2d 707 [3d Dept 2005]). Furthermore, the report of Dr. Nelson, which references a whole body impairment of 7 percent, tends to show that plaintiff's injuries were mild, minor or slight (*see*, ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]; ***Moore v County of Suffolk***, 6 AD3d 408, 774 NYS2d 375 [2d Dept 2004]). Additionally, Dr. Nelson's failure to furnish any specific information concerning the alleged treatment rendered to plaintiff on or after September 2006, or of the frequency and duration of said treatment, makes it clear that his report was tailored to meet the statutory requirements (*see*, ***Powell v Williams***, 214 AD2d 720, 625 NYS2d 634 [2d Dept 1995]). In any event, Dr. Nelson has not adequately explained the approximate six-month gap in treatment between the conclusion of plaintiff's last exam in September 2006 and his most recent examination of plaintiff in February 2007, shortly after the filing of defendant's motion (*see*, ***Chan v Casinao***, 36 AD3d 580, 828 NYS2d 173 [2d Dept 2007]; ***Pimentel v Mesa***, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]). Thus, plaintiff's unexplained gap in medical treatment, was in essence, a cessation of treatment that is not sufficiently addressed by competent proof (*see*, ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; ***Neugebauer v Gill***, 19 AD3d 567, 797 NYS2d 541 [2d Dept 2005]; *compare*, ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]). Moreover, plaintiff's subjective complaints of pain to Dr. Nelson do not constitute a significant injury within the meaning of the statute (*see*, ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]).

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted, and plaintiff's cross motion for summary judgment is denied as both untimely and academic.

Dated: JUN 07 2007

J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION