SHORT FORM ORDER

INDEX No. 03-11920
CAL. No. 07-00024-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 5-23-07
ADJ. DATE 6-22-07
Mot. Seq. # 002 - MG
003 - XMD

CHRISTINE SPIKOSKI and STEVIE BURKE, Plaintiffs, - against - HUB TRUCK RENTAL and JAMES SKIPWITH, Defendants.	JACOBY & MEYERS, LLP Attorneys for Plaintiffs 436 Robinson Avenue Newburgh, New York 12550 SAVONA & SCULLY Attorneys for Defendants 111 Broadway, 12th Floor New York, New York 10006

Upon the following papers numbered 1 to 27 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 13 - 15 ; Answering Affidavits and supporting papers 16 - 25 ; Replying Affidavits and supporting papers 26 - 27 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Christine Spikoski for summary judgment dismissing defendants' counterclaim against her on the ground that plaintiff Stevie Burke did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the cross motion by defendants for summary judgment dismissing the complaint as to plaintiff Stevie Burke on the ground that he did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that, this court having searched the record pursuant to CPLR 3212 (b), the complaint as to plaintiff Stevie Burke against defendants is also dismissed.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs Christine Spikoski and Stevie Burke as a result of a motor vehicle accident on Smithtown Avenue in Islip, New York, on November 6, 2002. At the time of the accident, plaintiff Burke was a passenger in a vehicle owned by nonparty Deborah Spikoski and operated by plaintiff Christine Spikoski when it collided with a vehicle owned by defendant Hub Truck Rental Corporation, s/h/a Hub Truck Rental, and operated by defendant James Skipwith.

By their bill of particulars, plaintiffs allege that plaintiff Burke sustained serious injuries as a result of the subject accident, including a herniated disc at L4-L5; lumbosacral spine radiculopathy; foraminal narrowing at C6-C7; loss of normal cervical lordosis; cervical, thoracic and lumbosacral spine myofascitis; left knee joint effusion; and derangement of both knees and the right elbow. In addition, plaintiff Burke claims that he was confined to bed for approximately three days and to his home intermittently.

Plaintiff Spikoski now moves for summary judgment dismissing defendants' counterclaim against her for contribution with respect to the personal injuries sustained by plaintiff Burke on the ground that plaintiff Burke did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support, plaintiff Spikoski submits *inter alia*, the pleadings; a bill of particulars; the transcript of the deposition testimony given by plaintiff Burke; the affirmed report dated May 11, 2005 of plaintiff Spikoski's examining orthopedist, Dr. Arthur Bernhang, based on an examination of plaintiff Burke on May 4, 2005; the affirmed report dated May 10, 2005 of plaintiff Spikoski's examining neurologist, Dr. Edward Weiland; and the affirmed MRI report dated March 26, 2007 of Dr. Stephen Lastig concerning plaintiff Burke's lumbar spine, based on the review of the MRI film taken on November 6, 2002.

Here, plaintiff Spikoski made a prima facie showing that plaintiff Burke did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed reports of her examining physicians and plaintiffs' bill of particulars (*see*, ***Thompson v Abbasi***, 15 AD3d 95, 788 NYS2d 48 [2005]). The MRI report dated March 26, 2007 of plaintiff Burke's lumbar spine revealed that "no focal disc herniations or annular bulges are identified." On May 4, 2005, approximately two years and six months after the subject accident, Dr. Bernhang examined plaintiff, using certain orthopedic and neurological tests, including Provocative test, Spurling's test and Straight Leg Raising. He found that all the test results were negative or normal and that there is no trigger points or spasm. He reported his findings with respect to the various ranges of motion of plaintiff Burke's cervical spine, elbows and knees. Although Dr. Bernhang found that plaintiff had normal range of motion in the cervical spine, he also found range of motion restrictions when compared to normal range of motion with respect to plaintiff Burke's elbows and knees: 130 degrees elbow flexion (146 degrees normal), 75 degrees supination (84 degrees normal), 80 degrees pronation (71 degrees normal) and 125 degrees knee flexion (134 degrees normal). Moreover, Dr. Bernhang failed to provide objective test measurements for plaintiff Burke's lumbar extension, flexion and rotation. Dr. Bernhang's report indicates that "[d]orsal lumbar expansion with the knees extended is 10½" (normal being 4" and above), the fingertips coming to within 4" of the floor. Lateral flexion is to the proximal tibia." Although the affirmed report of Dr. Bernhang was deficient in that he failed to specify the range of motion, the affirmed report of plaintiff Spikoski's examining neurologist, Dr. Weiland, was sufficient to establish a prima facie case that plaintiff Burke did not sustain a serious injury (*see*, ***Kerzhner v N.Y. Ubu Taxi Corp.***, 17 AD3d 410, 792 NYS2d 622 [2005]). On May 10, 2005, Dr. Weiland examined plaintiff Burke, using certain orthopedic and neurological tests including Lasegue's Maneuver, Fabere-Patrick sign, Adson's Maneuver, Lhermitte's test, Soto-Hall sign, Kemp's test and Romberg's test. Dr. Weiland found that all the test results were negative or normal and that there was no tenderness or spasm. He also found that "[n]o joint crepitus or effusions were noted" in the knees and elbows. Dr. Weiland reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and shoulders and compared those findings to the normal ranges of motion. He found that plaintiff Burke had full range of motion in his cervical and lumbar spine, shoulders, knees and elbows. Dr. Weiland opined that plaintiff Burke was capable of performing his usual daily activities and that there was no disability or restriction at the time of the examination (*see*, ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2005]). Thus, plaintiff Spikoski has sustained her

burden of demonstrating that there is no objective evidence of physical limitations resulting from plaintiff Burke's alleged injuries (*see*, ***Santos v Marcellino***, 297 AD2d 440, 746 NYS2d 111 [2002]; ***O'Neal v Cancilla***, 294 AD2d 921, 741 NYS2d 815 [2002]; ***Hutchinson v Beth Cab Corp.***, 207 AD2d 283, 612 NYS2d 10 [1994]).

At his deposition, plaintiff Burke testified that he was a security officer at the time of the accident and that, following the accident, he did not return to work. He had received physical therapy including a TENS unit, heat, acupuncture and chiropractic treatment five days a week for one and a half or two months. Plaintiff Burke also testified that, while there is no activity that he is unable to perform, he can no longer engage in sports, playing baseball and lifting weights. Rather, he does 3 sets of 50 push-ups twice a week and 30 sets of 10 sit-ups and swims at the pool. His deposition testimony thus reveals that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see*, ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [1997]). Thus, plaintiff Spikoski met her initial burden of establishing that plaintiff Burke did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see*, ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [2005]).

In opposition, plaintiff Burke contends that he did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, he submits, *inter alia*, the affirmed record dated June 5, 2007 of Easter Island Medical Care, P.C. including numerous reports and notes of his treating physician, Dr. D. Korman, and test results; the affirmed report dated November 24, 2002 of his treating neurologist, Dr. Stephen Fromm; the unaffirmed MRI report dated November 27, 2002 of Dr. Jatinder Singh concerning plaintiff Burke's cervical, dorsal and lumbar spine; the unaffirmed MRI report dated February 4, 2003 of Dr. Jatinder Singh concerning plaintiff Burke's knee; the affirmed MRI report dated December 19, 2002 of plaintiff Burke's cervical spine, taken on December 11, 2002 by Dr. Philip Beuchert; the affirmed MRI report dated December 24, 2002 of plaintiff Burke's lumbar spine, taken on December 18, 2002 by Dr. Beuchert; and the affirmed MRI report dated January 28, 2003 of plaintiff Burke's left knee, taken on January 22, 2003 by Dr. Beuchert.

Here, plaintiff Burke failed to raise a triable issue of fact that he sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Sims v Megaris***, 15 AD3d 468, 790 NYS2d 487 [2005], *lv denied* 5 NY3d 703, 800 NYS2d 374 [2005]). The MRI report of plaintiff Burke's left knee, performed by Dr. Beuchert on January 22, 2003, revealed that there is a small joint effusion, but no evidence of internal derangment. The MRI reports of plaintiff Burke's cervical and lumbar spine, performed by Dr. Beuchert on December 11, 2002 and December 18, 2002 respectively, revealed that plaintiff Burke had possible foraminal narrowing at C6-C7, loss of the normal cervical lordosis and a small disc herniation at L4-L5. The mere fact that a plaintiff suffers from herniated discs is insufficient to establish "serious injury" for purposes of Insurance Law § 5102 (d) (*see*, ***Howell v Reupke***, 16 AD3d 377, 790 NYS2d 703 [2005]; ***Foley v Karvelis***, 276 AD2d 666, 714 NYS2d 337 [2000]). Instead, for such injuries to constitute a "serious injury" within the contemplation of the Insurance Law, it is incumbent upon a plaintiff to provide objective medical evidence of the degree of the alleged physical limitation resulting from the injuries and their duration (*see*, ***Toure v Avis Rent A Car Sys.*** , *supra*; ***Foley v Karvelis***, *supra*). Dr. Fromm stated in his report dated November 24, 2002 that he had treated plaintiff Burke since November 8, 2002 for approximately two weeks after the subject accident. During the treatment of plaintiff Burke, Dr. Fromm administered certain orthopedic

and neurological tests and found that straight leg raising test was negative and that there were spasm and loss of cervical and lumbar lordosis. Dr. Fromm administered range of motion tests of plaintiff Burke's cervical and lumbar spine and reported his findings with respect to the various ranges of motion, but failed to compare his findings to the normal ranges of motion (*see*, ***Caracci v Miller***, 34 AD3d 515, 823 NYS2d 681 [2006]). Dr. Fromm also failed to set forth the objective tests that were performed to support his conclusion that plaintiff suffered from any limitation of the range of motion in his cervical spine (*see*, ***Murray v Harford,*** 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Ersop v Variano***, 307 AD2d 951, 763 NYS2d 482 [2003]). Moreover, plaintiff Burke failed to submit any medical evidence based on a recent examination in admissible form (*see*, ***Oliva v Gross***, 29 AD3d 551, 816 NYS2d 110 [2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2005]). Furthermore, he failed to submit any competent medical evidence to support a claim that plaintiff Burke was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days as a result of the subject accident (*see*, ***Vita v Enterprise Rent-A-Car***, 8 AD3d 558, 779 NYS2d 128 [2004]).

Under the circumstances, plaintiff Burke failed to raise a triable issue of fact as to whether he sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident. Thus, plaintiff Spikoski's motion for summary judgment dismissing defendants' counterclaim against her is granted.

Defendants cross-move for summary judgment in their favor dismissing the complaint as to plaintiff Burke on the ground that he has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendants submit only an affirmation of one of their attorneys which attempts to incorporate by reference "recitation of facts, statutory language, pleadings, written discovery, deposition testimony and legal arguments" submitted in the motion by plaintiff Spikoski.

Pursuant to CPLR 3212 (b), a motion for summary judgment "shall be supported by *** a copy of the pleadings." Defendants failed to submit the pleadings, without which it is not possible to determine whether summary judgment is warranted. In any event, even assuming that all of the papers submitted on the motion by plaintiff Spikoski were referred and incorporated, the cross motion by defendants is denied, as discussed above (*supra*).

Nevertheless, this court has the authority to search the record and summary judgment may be granted to a non-movant who is entitled to such relief without the necessity of a cross motion (CPLR 3212[b]). Since plaintiff Burke failed to demonstrate that he sustained a "serious injury" under Insurance Law § 5102 (d), the Court grants summary judgment in the asserted cause of action by plaintiff Burke against defendants (*see*, ***Jason v Danar***, 1 AD3d 398, 767 NYS2d 779 [2003]; ***Hernandez v Linhart***, 290 AD2d 534, 736 NYS2d 695 [2002]).

Dated: JUL 24 2007

J.S.C.

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