SHORT FORM ORDER

INDEX No. 04-12065
CAL. No. 06-02662-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 4-17-07
ADJ. DATE 6-15-07
Mot. Seq. # 005 - MD
006 - XMD

GREGORY SUSSMAN,

Plaintiff,

- against -

DONALD L. DOMITE, CITICAPITAL COMMERCIAL LEASING CORPORATION, TRANSATLANTIC AUTOMOBILE EXPORT, INC and CINGULAR WIRELESS, LLC,

Defendants.

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Upon the following papers numbered 1 to 39 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 - 24 ; Answering Affidavits and supporting papers 25 - 29 ; Replying Affidavits and supporting papers 30 - 36; 37 - 39 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Donald Domite, Citicapital Commercial Leasing Corporation and Cingular Wireless, LLC for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by plaintiff for summary judgment in his favor on the ground that he did sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Gregory Sussman, when his vehicle was rear-ended by a vehicle operated by defendant Donald Domite on Route 25 in Middle Island, New York, on June 3, 2003.

By his bill of particulars, plaintiff alleges that he sustained serious injuries as a result of the subject accident, including herniated discs at C3-C4 and C4-C5; a bulging disc at C5-C6; cervical radiculopathy; facial numbness; right TMJ tenderness; and exacerbation of right carpal tunnel syndrome. In addition, plaintiff claims that he was confined to bed for approximately two weeks and to his home for approximately nine to ten months.

Defendants Donald Domite, Citicapital Commercial Leasing Corporation and Cingular Wireless, LLC ("defendants") now move for summary judgment in their favor dismissing the complaint against them on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendants submit, *inter alia*, the pleadings; a bill of particulars; the affirmed report dated April 11, 2006 of their examining orthopedist, Dr. Joseph Stubel; the affirmed report dated April 11, 2006 of their examining neurologist, Dr. Cecily Anto; the affirmed report dated September19, 2006 of their examining oral surgeon, Dr. John Esposito; and the CT report of plaintiff's cervical and lumbar spine and pelvis, taken on June 3, 2003.

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***, 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 Sys.***, 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 [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 [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 [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 [1990]).

Here, defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2005]). On April 11, 2006, approximately two years and ten months after the subject accident, defendants' examining orthopedist, Dr. Stubel, examined plaintiff, using certain orthopedic and neurological tests and found that there is a positive Tinel's sign at the right cubital and carpal tunnel and that there was no tenderness, trigger points or spasm. Dr. Stubel reported his findings with respect to the various ranges of motion of plaintiff's cervical spine and compared those findings to the normal ranges of motion. Although Dr. Stubel found that plaintiff had normal range of motion in the cervical spine, he failed to set forth the objective tests that were performed to support his conclusion that plaintiff did not suffer from any limitation of the range of motion in his cervical spine (*see*, ***Vazquez v Basso***, 27 AD3d 728, 815 NYS2d 626 [2006]; ***Kennedy v Brown***, 23 AD3d 625, 805 NYS2d 408 [2005]; ***Nembhard v Delatorre***, *supra*). On April 11, 2006, defendants' examining neurologist, Dr. Anto, examined plaintiff, using certain orthopedic and neurological tests and found that there is a positive Tinel's sign on the right wrist and that Romberg's test was negative. Dr. Anto reported her findings with respect to the various ranges of motion of plaintiff's cervical spine. Nevertheless, Dr. Anto failed to compare her findings with a normal range of motion (*see*, ***Baudillo v Pam Car & Truck Rental***, 23 AD3d 420, 803 NYS2d 922 [2005]; ***Aronov v Leybovich***, 3 AD3d 511, 770 NYS2d 741 [2004]). She also failed to set forth any objective tests (*see*, ***Vazquez v Basso***, *supra*; ***Kennedy v Brown***, *supra*). On September19, 2006, defendants' examining oral surgeon, Dr. Esposito, performed an oral examination of plaintiff. Dr. Esposito concluded that there was no pathology in the temporomandibular joint (TMJ) and that there is negative abnormalities of the head, neck, face, skin, and lips. In addition, the CT report revealed that there are degenerative disc changes at C5-C6.

Thus, defendants failed to establish, prima facie, their entitlement to judgment as a matter of law. Accordingly, their motion for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d) is denied. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiff's opposition papers (*see*, ***Barrett v Jeannot***, 18 AD3d 679, 795 NYS2d 727 [2005]).

Plaintiff cross-moved for summary judgment in his favor and opposes defendants' motion for summary judgment on the ground that he did sustain a "serious injury" within the meaning of Insurance Law § 5102 (d). Plaintiff contends that he 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. In support, plaintiff submits, *inter alia*, the pleadings; a bill of particulars; two affirmed reports dated September 17, 2003 and April 11, 2006 of Dr. Cecily Anto, based on an examination of plaintiff on September 17, 2003 and April 11, 2006 respectively; the medical record dated June 3, 2003 of Stony Brook University Hospital; the affirmed report dated May 9, 2007 of his treating physician, Dr. Patrick Poole; the affirmed medical record of Dr. John Labiak; and two affirmed MRI reports dated November 24, 1986 and November 29, 1986 of plaintiff's cervical and lumbosacral spine respectively, both taken on December 23, 1986 by Dr. Azad Anand. Defendants oppose the cross motion as being untimely under CPLR 3212 (a).

Here, as defendants correctly point out, plaintiff's cross motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue, that is, November 14, 2006 (*see*, CPLR 3212 [a]). Instead, the affidavit of service of plaintiff's cross motion is

dated May 15, 2007, 62 days after the deadline to file the cross motion for summary judgment. Nevertheless, an untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (*see*, ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2005]; ***Boehme v A.P.P.L.E.***, 298 AD2d 540, 749 NYS2d 49 [2002]). Under the circumstances, the issues raised by the untimely cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see*, CPLR 3212 [b]) to review the untimely cross motion on the merits (*see*, ***Grande v Peteroy***, *supra*). The Court, however, denies plaintiff's cross motion for summary judgment since he does not allege in his complaint, amended complaint, bill of particulars or supplemental bill of particulars any claim under the 90/180 category of serious injury (*see*, ***Seymour v Roe***, 301 AD2d 991, 755 NYS2d 452 [2003]).

Dated: JUL 24 2007

J.S.C.

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