SHORT FORM ORDER

INDEX No. 04-27933
CAL. No. 06-02337-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 3-2-07 (003)
3-6-07 (004)
ADJ. DATE 5-31-07
Mot. Seq. # 003 - MG; CASEDISP
004 - MG

BOGDAN DERYLO and MARIA DERYLO, Plaintiffs, - against - ANDREW CANNELLA, DEMETRA CANNELLA, ANNA I. BEJARANO and JUAN LOIAZA, Defendants.	MICHAEL S. LAMONSOFF, ESQ. Attorney for Plaintiffs 80 Maiden Lane New York, New York 10038 DeSENA & SWEENEY, LLP Attorneys for Defendants Cannella 1383 Veterans Memorial Hwy, Suite 32 Hauppauge, New York 11788 JOHN W. HOBBES, PLLC Attorney for Defendants Bejarano & Loiaza 18 First Street, P.O. Box 420 Riverhead, New York 11901

Upon the following papers numbered 1 to 39 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 17 - 22 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 23 - 33 ; Replying Affidavits and supporting papers 34 - 36; 37 - 39 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions for summary judgment dismissing plaintiffs' complaint on the ground that plaintiff Bogdan Derylo did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) are each granted.

This is an action to recover damages, individually and derivatively, for serious injuries allegedly sustained by plaintiff Bogdan Derylo as a result of a motor vehicle accident that occurred on Portion Road approximately 300 feet east of Waverly Avenue in the Town of Brookhaven, County of Suffolk, New York on September 15, 2003. The accident allegedly happened when the two vehicles owned by defendants Anna I. Bejarano and Demetra Cannella, and operated by defendants Juan Loiaza and Andrew Cannella, made contact with the vehicle owned by Mr. Derylo. Defendants Cannella, Bejarano and Loaiza now move for summary judgment dismissing the complaint on the ground that Mr. Derylo did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiffs oppose this motion and

defendants have each filed a reply.

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 their motion, defendants Cannella submit, inter alia, the summons and complaint; their verified answer; plaintiffs' verified bill of particulars in response to their demands; the two affirmed reports of defendants' examining radiologist, A. Robert Tantleff, M.D.; the affirmed report of defendants' examining neurologist, Mathew M. Chacko, M.D.; the affirmed report of defendants' examining orthopedist, Vartkes Khachadurian, M.D.; and a partial transcript of plaintiff's deposition testimony.

Plaintiffs claim in their bill of particulars, among other things, that Mr. Derylo sustained disc herniations of the cervical spine; left C6 radiculopathy; and a left shoulder injury, including supraspinatus tendinosis/tendinopathy. Plaintiffs also claim that Mr. Derylo was incapacitated from his employment for approximately one week immediately following the accident and intermittently to date. Additionally, plaintiffs claim that Mr. Derylo sustained a "serious injury" in the categories of a fracture, a significant disfigurement, a permanent loss of use, a permanent consequential limitation, a significant limitation and

a non-permanent injury.

In his report dated November 3, 2004, Dr. Tantleff states that he performed an independent radiological review of the MRI studies of plaintiff's left shoulder dated October 8, 2003, and his findings include mild osteoarthritic changes of the acromioclavicular joint; an unremarkable biceps tendon; an intact rotator cuff; and no dislocation or fracture of the osseous structures. He also observed that there was no evidence of any abnormal joint fluid, soft tissue swelling, edema, or hematoma. Dr. Tantleff opined that these studies showed mild degenerative osteoarthritic changes of the acromioclavicular joint without compromise of the rotator cuff outlet or subacromial arch. Additionally, he concluded that there was no evidence of a recent trauma as these studies were performed only three weeks following the accident.

In his report dated November 3, 2004, Dr. Tantleff states that he performed an independent radiological review of the MRI studies of plaintiff's cervical spine dated November 25, 2003, and his findings include desiccation of all visualized discs with a loss of disc height; diffuse endplate spurring consistent with cervical spondylosis; mild facet arthropathy; and chronic dextroconvex scoliosis. He also observed that there was no evidence of edema, spasm, fractures, prevertebral soft tissue swelling, or cord compression. Dr. Tantleff opined that these findings were consistent with chronic, degenerative discogenic disc disease and cervical spondylosis that required years to develop and which were not causally related to the accident.

In his report dated January 13, 2006, Chacko states that he performed an independent neurological examination of plaintiff on that date, and his findings DTR's that were "2+"/symmetrical; a normal sensory exam; normal strength in the upper extremities; and no focal sensory abnormailities. He observed that there was a "mild limitation" of motion of the neck in all directions with no palpable muscle spasm in the cervical or thoracic region. Additionally, while he observed an 80 degree limitation in abduction of the left shoulder, he also noted that there were no fasciculations or atrophy of plaintiff's upper extremities. Dr. Chacko opined that this exam did not reveal any clear focal neurological deficits and that there were no findings consistent with cervical radiculopathy. Furthermore, he concluded that there was no objective evidence of a neurological disability and that plaintiff was capable of performing the normal activities of his daily living.

In his report dated January 13, 2006, Dr. Khachadurian states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include no atrophy of the upper extremities; negative impingement/rotator cuff tests; no prominence of the AC joint; no spasm or shift of the cervical spine; and a normal range of motion of the upper extremity joints. He also observed that plaintiff's range of cervical motion was normal and that there was a normal to full range of motion of the shoulders. Dr. Khachadurian opined that plaintiff had sustained a cervical sprain and a left shoulder contusion which had each resolved and that there was no evidence of cervical radiculitis/radiculopathy or of any other injuries. Additionally, he concluded that plaintiff did not sustain a permanent injury or impairment and that he was capable of performing his usual work activities unrestricted.

Plaintiff testified to the effect that, after the accident, he was taken via ambulance to University Hospital at Stony Brook after the accident, where he was treated and released. A week later he was examined by Dr. Villafuerte at Superior Medical Clinic. He then underwent physical therapy for

approximately ten months. Plaintiff further testified, that as a result of his injuries, he no longer runs, plays volleyball or swims, and that he cannot drive without taking rest stops.

In support of their motion, defendants Bejarano and Loiaza submit, inter alia, their verified answer with cross-claim, and the affirmed reports of doctors Khachadurian and Tantleff, that were also submitted by defendants Cannella and which have been discussed above.

By their submissions, defendants made a prima facie showing that Mr. Derylo 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]; ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Dr. Khachadurian found that Mr. Derylo had a full range of motion of the cervical spine and a normal to full range of motion of both shoulders. While Dr. Chacko observed an 80 degree limitation in left shoulder abduction, he also noted that there were no fasciculations or atrophy of the left shoulder. Additionally, while Dr. Chacko observed a "mild limitation" of cervical motion in all directions, he also found that there was no muscle spasm in the cervical or thoracic areas (*see*, ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Furthermore, defendants' examining radiologist opined that there were preexisting degenerative changes to Mr. Derylo's cervical spine which were long-standing in nature and unrelated to trauma, and that there were mild degenerative changes to his acromioclavicular joint which was also unrelated to recent trauma (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). Moreover, defendants' examining radiologist found, upon his review of the MRI films of Mr. Derylo's cervical spine and left shoulder, that there were no fractures (*c.f.*, ***Smolyar v Krongauz***, 2 AD3d 518, 767 NYS2d 873 [2d Dept 2003]). Defendants' remaining evidence, including Mr. Derylo's deposition testimony, also supports a finding that he did not sustain a significant disfigurement or any other type of serious injury. As defendants have met their burden as to all categories of serious injury alleged, the Court turns to plaintiffs' 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 these motions, plaintiffs submit, among other things, the two affirmed reports of Mr. Derylo's treating radiologist, Robert Diamond; the sworn report of Mr. Derylo's treating physical therapist, Michelle Spicka, D.P.T.; the eight unaffirmed reports of Mr. Derylo's treating physiatrist, Albert Villafuerte, M.D.; the three unaffirmed reports of Mr. Derylo's treating orthopedist, Dov J. Berkowitz, M.D.; and Mr. Derylo's personal affidavit. Initially, the Court notes that the reports of doctors Villafuerte and Berkowitz, have not been considered as they are unaffirmed and, therefore, inadmissible (*see*, ***Legendre v Bao***, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]). Contrary to plaintiffs' assertions, the mere reference by defendants' examining physicians to seven of the eight reports of Dr. Villafuerte and to one of the three reports of Dr. Berkowitz, without discussion of the results therein or submission of same, is insufficient to render these documents admissible (*see*, ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; *compare*, ***Elder v Stokes***, 35 AD3d 799, 828 NYS2d 138 [2d Dept 2006]; ***Zarate v McDonald***, 31 AD3d 632, 819 NYS2d 288 [2d Dept 2006]). Furthermore, all of the submitted reports of doctors Villafuerte and Berkowitz, even if they were admissible, are without probative value to demonstrate a serious injury in the categories of a permanent consequential limitation or a significant

limitation as they are not based upon a recent examination of Mr. Derylo (*see*, ***Marziotto v Striano***, 38 AD3d 623, 831 NYS2d 551 [2d Dept 2007]; ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]). While the report of Michelle Spicka, D.P.T. refers to a recent examination of Mr. Derylo, it is, nonetheless, without probative value as to any category of serious injury as a physical therapist cannot by definition diagnose or make prognosis, and is incompetent to determine the permanency or duration of a physical limitation (*see*, ***Brandt-Miller v McArdle***, 21 AD3d 1152, 801 NYS2d 834 [3d Dept 2005]; ***Delaney v Lewis***, 256 AD2d 895, 682 NYS2d 270 [3d Dept 1998]).

In his report dated October 9, 2003, Dr. Diamond states that he performed MRI studies of plaintiff's left shoulder the prior day, and his findings include a laterally down-sloping acromion and supraspinatus tendinosis/tendinopathy. While he observed synovial fluid in the shoulder joint, he also noted that the rotator cuff and osseous structures of the shoulder were otherwise unremarkable. In his report dated November 26, 2003, Dr. Diamond states that he performed MRI studies of plaintiff's cervical spine on the prior day, and his findings include foraminal narrowing, and no focal prevertebral or posterior paraspinal abnormal masses. While he observed posterior disc herniations at C3-4, C5-6 and C6-7, he also noted that these studies showed no significant protrusions into the neural canal, recesses or foramina.

Mr. Derylo avers that he received physical therapy for approximately 11 months after the accident but discontinued treatment when no-fault stopped paying his bills. After moving to Nebraska, he treated with a chiropractor for a period of time and then began a regiment of physical therapy. He is currently engaged in his profession, but has had to adjust his work routine because of difficulties with the use of his left arm and shoulder. He further avers that he is unable to resume various sporting activities which he regularly engaged in prior to the accident.

Plaintiffs have provided insufficient medical proof to raise an issue of fact that Mr. Derylo 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]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). Initially, plaintiffs have entirely failed to address the pre-existing degenerative condition of Mr. Derylo's cervical spine and left shoulder acromioclavicular joint, as diagnosed by defendants' examining radiologist (*see*, ***Knoll v Seafood Express***, 5 NY3d 817, 803 NYS2d 25 [2005]; ***Gomez v Epstein***, 29 AD3d 950, 818 NYS2d 101 [2d Dept 2006]). While a disc bulge/herniation and a shoulder injury may constitute a serious injury, the MRI reports by Dr. Diamond are not probative for the purposes of demonstrating a serious injury because they contain no opinion as to causation of the cervical disc herniations and supraspinatus tendinosis/tendinopathy (*see*, ***Garcia v Solbes***, 2007 NY Slip Op 4786 [2d Dept, June 5, 2007]), and do not establish the duration of his alleged injuries (*see*, ***Tobias v Chupenko***, 2007 NY Slip Op 5259 [2d Dept. June 12, 2007]; ***Cerisier v Thibiu***, *supra*). Plaintiffs have failed to present admissible medical proof that was contemporaneous with the accident showing any initial, quantified and qualified range of motion restrictions for the affected body parts (*see*, ***Berktas v McMillan***, 40 AD3d 563, 835 NYS2d 388 [2d Dept 2007]; ***Ramirez v Parache***, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; ***Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]). Mr. Derylo's approximate two-year gap in treatment was, in essence, a cessation of treatment which is not satisfactorily explained by plaintiffs' submissions (*see*, ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; ***Pimentel v Mesa***, 28 AD3d 629, 813

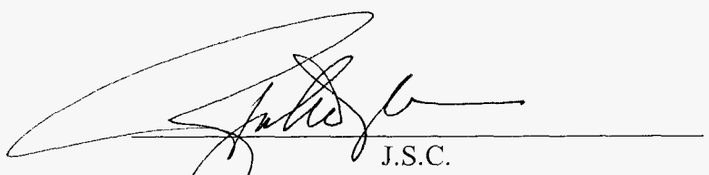
NYS2d 517 [2d Dept 2006]). Moreover, plaintiffs have failed to present any admissible medical proof that Mr. Derylo sustained a serious injury in the categories of a fracture (*see*, ***Kaplan v Septama***, 38 AD3d 847, 834 NYS2d 206 [2d Dept 2007]; ***Schwartzman v Friedler***, 279 AD2d 517, 718 NYS2d 882 [2d Dept 2000]), or of a significant disfigurement (*see*, ***Edwards v DeHaven***, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]).

Additionally, the proof submitted by the plaintiffs is insufficient to raise a triable issue of fact that Mr. Derylo sustained a medically-determined injury or impairment rendering him unable to substantially perform all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see*, ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]). Although Mr. Derylo alleges, among other things, that he has had to adjust his work schedule and that no longer engages in certain sporting activities, the record lacks objective medical proof of any substantial curtailment of his activities within the relevant time period after the accident (*see*, ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

Moreover, since there is no evidence in the record demonstrating that Mr. Derylo's alleged economic loss exceeded the statutory amount of basic economic loss, plaintiffs' claim in this regard must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Watford v Boolukos***, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Based upon the foregoing, Mrs. Derylo's individual claims for loss of services and companionship also fail (*see*, ***Maddox v City of New York***, 108 AD2d 42, 487 NYS2d 354 [2d Dept 1985]; ***Cody v Village of Lake George***, 177 AD2d 921, 576 NYS2d 912 [3d Dept 1991]).

Accordingly, these motions for summary judgment are granted and the complaint is dismissed in its entirety.

Dated: JUL 24 2007



J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION