SHORT FORM ORDER

INDEX No. 06-4754
CAL. No. 06-02906-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 5-18-07
ADJ. DATE 7-18-07
Mot. Seq. # 003 - MD
004 - XMD

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GEORGE AIKEN,

Plaintiff,

- against -

RANDOLPH HOWARD,

Defendant.

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FELBERBAUM, HALBRIDGE & WIRTH
Attorneys for Plaintiff
357 Veterans Memorial Highway
Commack, New York 11725

DeSENA & SWEENEY, LLP
Attorneys for Defendant
1383 Veterans Memorial Highway, Suite 32
Hauppauge, New York 11788

Upon the following papers numbered 1 to 33 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers 13 - 29 ; Answering Affidavits and supporting papers 30 - 31 ; Replying Affidavits and supporting papers 32 - 33 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for summary judgment dismissing the complaint against him on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

ORDERED that the cross motion by plaintiff for summary judgment in his favor on the issue of liability is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff George Aiken when his vehicle collided with a vehicle owned and operated by defendant Randolph Howard at the intersection of Route 109 and Wellwood Avenue in the Town of Babylon, Suffolk County, New York, on July 3, 2005.

By his bill of particulars, plaintiff alleges that he sustained serious injuries as a result of the subject accident, including bulging discs at C3-C4, C4-C5, C5-C6 and C6-C7; straightening of the normal cervical lordosis; tenderness, spasm and trigger points in the cervical and lumbar spine; cervical,

thoracic and lumbar strain/sprain; shoulder depression and bilateral knee pain. In addition, plaintiff claims that he has been confined to bed and home intermittently.

Defendant now moves for summary judgment in his favor dismissing the complaint against him on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant submits, *inter alia*, the pleadings; a bill of particulars; the affirmed report dated December 19, 2006 of his examining orthopedist, Dr. Arthur Bernhang, based on the examination of plaintiff on December 11, 2006; the affirmed report dated December 12, 2006 of his examining neurologist, Dr. Richard Pearl, based on the examination of plaintiff on December 11, 2006; and the MRI report dated November 21, 2006 of Dr. Steven Mendelsohn concerning plaintiff's cervical spine, taken on October 17, 2005.

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, defendant failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Cruz v Williams***, 34 AD3d 719, 825

NYS2d 510 [2006]; ***Nembhard v Delatorre***, 16 AD3d 390, 791NYS2d 144 [2005]). On December 11, 2006, approximately one year and five months after the subject accident, defendant's examining physician, Dr. Bernhang, examined plaintiff, using certain orthopedic and neurological tests, including Provocative test, Spurling's test, Straight Leg Raising, Sitting Straight Leg Raising and FABER and FADIR tests. All the test results were negative or normal, although Straight Leg Raising was positive. He reported his findings with respect to the various ranges of motion of plaintiff's cervical spine and shoulders. Dr. Bernhang found range of motion restrictions when compared to normal range of motion with respect to plaintiff's cervical spine and shoulders: 35/40 degrees lateral flexion (43 degrees average) in the cervical spine and 135/135 degrees abduction (170 degrees average), 130/130 degrees forward flexion (158 degrees average), 80/80 degrees external rotation (90 degrees average) and 60/60 degrees internal rotation (70 degrees average) in the shoulders. Moreover, Dr. Bernhang failed to provide objective test measurements for plaintiff's lumbar extension, flexion and rotation. Dr. Bernhang's report indicates that "[d]orsal lumbar expansion with the knees extended is 6½" [and] lateral flexion is to the mid thigh." On December 11, 2006, defendant's examining neurologist, Dr. Pearl, examined plaintiff, using certain orthopedic and neurological tests including Babinski sign, Romberg test, Tinel's sign and Straight Leg Raising test. All the test results were negative. Dr. Pearl reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. He found that plaintiff had normal range of motion in his cervical and lumbar spine. Nevertheless, Dr. Pearl failed to specify the degree of range of motion in lateral bending of plaintiff's cervical spine in support of his conclusion that plaintiff did not sustain a serious injury (*see*, ***Browdame v Candura***, *supra*). In addition, the MRI report of plaintiff's cervical spine revealed that there is "no evidence of focal disc herniation or any trauma related abnormality" and he had "mild diffuse age related cervical degenerative changes."

Thus, defendant failed to establish, prima facie, his entitlement to judgment as a matter of law. Accordingly, defendant's 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***, 13 AD3d 679, 795 NYS2d 727 [2005]).

Plaintiff now cross-moves for summary judgment in his favor on the complaint on the issue of liability and opposes defendant's motion for summary judgment on the ground that plaintiff did sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendant opposes the cross motion as being untimely under CPLR 3212 (a).

Here, as defendant correctly points 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, December 15, 2006 (*see*, CPLR 3212 [a]). Instead, the affidavit of service of plaintiff's cross motion is dated July 9, 2007, 86 days after the deadline to file the cross motion for summary judgment. Plaintiff's counsel has provided no explanation or "good cause" for serving the cross motion 86 days late, and thus, the Court has no discretion to entertain on the merits the branch of plaintiff's cross motion which is for summary judgment on the issue of liability (*see*, ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***Thompson v Leben Home for Adults***, 17 AD3d 347, 792 NYS2d 597 [2005]).

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 as to "serious injury" 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 on the merits the branch of the untimely cross motion which is for summary judgment on the issue of serious injury (*see*, ***Grande v Peteroy***, *supra*). The branch of plaintiff's cross motion, however, must also be denied as procedurally defective for failure to submit a complete copy of the pleadings, that is, the complaint and the answers of defendant (*see*, CPLR 3212 [b]; ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2005]; ***Gallagher v TDS Telecom***, 280 AD2d 991, 720 NYS2d 422 [2001]; ***Mathiesen v Mead***, 168 AD2d 736, 563 NYS2d 887 [1990]). The pleadings submitted with another party's motion or cross motion cannot be incorporated by reference (*see*, CPLR 3212 [b]).

Accordingly, defendant's motion and plaintiff's cross motion for summary judgment are denied.

Dated: AUG 0 6 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION