Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Gary M. Cessman and Richard Peterson,

Plaintiff(s)

-against-

Natalie A. Scettini and Manuela Wisdom,

Defendant(s)

Motion date: 4/4/07
Submitted: 5/2/07
Motion Sequence No.: 005 MG
006 MG
007 MD
Index No.: 6068-04

Attorney for Plaintiff(s):
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Upon the following papers numbering 1 to 20 read upon these motions for summary judgment:

Notice of Motion and supporting papers 1 - 6;
Notice of Cross Motion and supporting papers 7 - 9;
Notice of Motion and supporting papers 10 - 12;
Affidavit in Opposition and supporting papers 13 - 18;
Reply Affidavits and supporting papers 19 - 20; it is

ORDERED that this motion by defendant, Natalie Scettini (005) and cross motion by defendant Manuela Wisdom (006) for an order pursuant to CPLR 3212 granting summary judgment in favor of defendants dismissing plaintiffs' complaint on the ground that plaintiffs have not sustained a serious injury as defined by Insurance Law 5102(d) is granted; and it is

further

ORDERED that this action is dismissed; and it is further

ORDERED that this motion by defendant, Manuela Wisdom (007) for an order pursuant to CPLR 3212 granting summary judgment in favor of said defendant on the issue of liability is denied as moot.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs, Gary Cessman ("Cessman") and Richard Peterson ("Peterson") in a motor vehicle accident that occurred on June 16, 2003. The accident allegedly occurred when, while stopped at a red light, the vehicle, in which Cessman was driving and which Peterson was a passenger, was hit in the rear by the vehicle driven by defendant Manuela Wisdom. At the time of the accident, the Wisdom vehicle was also stopped at a red light when it was hit in the rear by the vehicle driven by defendant Natalie Scettini. The impact from the first impact then pushed the Wisdom vehicle into the Cessman vehicle.

Defendants now move for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint on the ground that neither plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d).

> 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 his Bill of Particulars, Cessman alleges the following injuries: disc bulges, cervical spine sprain, thoracic spine sprain and post traumatic headaches. Cessman claims that such injuries cause stiffness, numbness, headaches, discomfort, restriction of motion, limitation of movement and loss of use and function of the injured portion of plaintiff's body.

Defendants established a prima facie entitlement to summary judgment by the submission of the affirmed report of Warren Cohen, M.D. which indicates that plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102(d) (see Young v. Caramanica, 755 AD2d 263, 755 NYS2d 263 [2d Dept. 2003]). More specifically, Dr. Cohen's report indicates that all testing was negative, including all range of motion tests. In opposition to this motion, plaintiff Cessman submits the affirmed report of Maria Herrera, M.D. which is insufficient to raise a triable issue of fact.

In her report, Dr. Herrera indicates that she first examined Cessman on June 16, 2003 and later on July 17, 2003. She also refers to office notes of her colleague, Dr. Ravinovici, who apparently treated Cessman from July 2003 through October 2003. In her report, Dr. Herrera noted that her examination of Cessman on March 1, 2007 revealed no range of motion deficits in Cessman's cervical spine and that tenderness was absent on palpation. She further indicated that, with respect to Cessman's thoracic spine, that tenderness was absent on palpation. She indicates range of motion deficits in Cessman's lumbar spine with respect to flexion and extension and that tenderness was absent. Dr. Herrera concludes that "The patient has reached maximal medical improvement. Based on the patient's history, review of records and physical exam findings, it is my medical opinion the patient is moderately partially disabled with regards his headaches and mildly disabled respect his med-back pain and due to the passage of time since the accident, his disability is permanent."

Initially the court notes that nothing in Dr. Herrera's report indicates that Cessman suffered a "serious injury" as defined by the Insurance Law. While it is not clear under which definition of serious injury Cessman seeks to recover damages, Dr. Herrera's report fails to indicate that he suffered "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." Rather by her own words, Cessman's disability to his back is, while permanent is "mild." She does not claim that this permanent disability is a "loss of use" of that body organ or member Nor does she claim it constitutes a consequential limitation.

In any event, while Dr. Herrera found certain limitations in Cessman's range of motion of the lumbar spine, there is no competent medical evidence showing similar range of motion deficits contemporaneous with the accident (see Bestman v. Seymour, 41 AD3d629, 838 NYS2d 645 [2d Dept. 2007]). Moreover, Dr. Herrera relies on unsworn reports of other physicians (see Doyage v. Teleeba, 35 AD3d 798, 828 NYS2d 443 [2d Dept. 2006]). Finally, neither Dr. Herrera or Cessman explain the gap in treatment form October 2003 until March 2007 (see Bestman v. Seymour, 41 AD3d supra).

With respect to Cessman's headaches, there is nothing in Dr. Herrera's report to causally connect any headaches with the accident. According to the report of Dr. Stephen Hershowitz, the MRI taken on September 25, 2003 indicated only "minimal periventricular areas of increased signal intensity, representing a non-specific finding that can be seen in patients with migraine headaches." Dr. Hershowitz does not connect such headaches to the accident and there are no contemporaneous medical reports indicating that Cessman suffered a concussion in the accident.

Since Cessman failed to submit competent medical evidence of injury, his self-serving affidavit regarding pain is insufficient to establish that he suffered a serious injury in the accident

on June 16, 2003 (see Felix v. New York City Transit Authority, 32 AD3d 527, 819 NYS2d 835 [2d Dept. 2006]).

With respect to Peterson, in his Bill of Particulars, he alleges the following injuries: herniated discs at C4-5 and C5-6; cervical spine sprain, herniated discs at L4-5 and L5-S1 with flattening of the ventral aspect of the thecal sac at said levels, disc bulges at L3-4, lumbar spine sprain, thoracic spine sprain and post traumatic headaches. Peterson claims that such injuries cause stiffness, numbness, headaches, discomfort, restriction of motion, limitation of movement and loss of use and function of the injured portion of plaintiff's body.

Evidence of a disc herniation alone is insufficient to establish a serious injury under the Insurance Law; rather to constitute a serious injury, a disc herniation must be accompanied by objective evidence of the alleged physical limitations resulting from the disc injury (see eg Kearse v. New York Transit Authority, 16 AD3d 24, 789 NYS2d 281 [2d Dept. 2005]). "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury" (Toure v. Avis Rent A Car System, 98 NY2d 345, 746 NYS2d 865 92002]).

Defendants established a prima facie entitlement to summary judgment by the submission of the affirmed report of Warren Cohen, M.D., neurologist and Wayne Kerness, M.D., orthopaedic surgeon which indicate that Peterson did not suffer a serious injury within the meaning of Insurance Law §5102(d) (see Young v. Caramanica, 755 AD2d 263, 755 NYS2d 263 [2d Dept. 2003]). More specifically, both Dr. Cohen and Dr. Kerness' report indicates that all testing was negative, including all range of motion tests and that Peterson is capable of all daily activities. In opposition to this motion, Peterson submits the affirmed report of Maria Herrera, M.D. which is insufficient to raise a triable issue of fact.

In her report, Dr. Herrera indicates that she first examined Peterson on June 16, 2003 and later on August 11, 2003 and November 23, 2003. She also refers to office notes of her colleague, Dr. Ravinovici, who apparently treated Cessman from periodically until April 19, 2004 when he reported no lumbar or cervical symptoms. In her report, Dr. Herrera noted that her examination of Peterson on March 1, 2007 revealed certain range of motion limitations in Peterson's cervical spine with positive orthopedic findings. She further indicated that, with respect to Peterson's thoracic spine, that tenderness was absent on palpation. She indicates range of motion deficits in Peterson's lumbar spine with respect to flexion and that tenderness was present. Dr. Herrera concludes that "The patient has reached maximal medical improvement. Based on the patient's history, review of records and physical exam findings, it is my medical opinion the patient is moderately partially disabled and due to the passage of time since the accident, his disability is permanent."

While Dr. Herrera found certain limitations in Peterson's range of motion of the cervical and lumbar spine, there is no competent medical evidence showing similar range of motion deficits contemporaneous with the accident (see Bestman v. Seymour, 41 AD3d629, 838 NYS2d 645 [2d Dept. 2007]). In fact, in her report dated June 30, 2003 Dr. Herrera fails to quantify

Peterson's alleged range of motion deficits but refers to them as mild (cervical) and moderate (lumbar). In her November 25, 2003 report she again fails to quantify the range of motion results and states that Peterson was "mildly restricted" in his cervical spine and range of motion in his lumbar spine was normal. Moreover, Dr. Herrera and Peterson fail to offer any explanation for the the gap in treatment form November 2004 until March 2007 (see Bestman v. Seymour, 41 AD3d supra). Since Peterson failed to submit competent medical evidence of injury, his self-serving affidavit is insufficient to establish that he suffered a serious injury in the accident on June 16, 2003 (see Felix v. New York City Transit Authority, 32 AD3d 527, 819 NYS2d 835 [2d Dept. 2006]).

Dated: August 17, 2007

HON. WILLIAM B. REBOLINI, J.S.C.