SHORT FORM ORDER

INDEX No. 05-13079
CAL. No. 07-00191-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 5-3-07
ADJ. DATE 6-28-07
Mot. Seq. #001 - MG; CASEDISP

WILLIAM SCIUTI and ROBIN SCIUTI,	:	YOUNG & YOUNG, LLP
	:	Attorneys for Plaintiffs
Plaintiffs,	:	863 Islip Avenue
	:	Central Islip, New York 11722
- against -	:	
	:	SHAYNE, DACHS, STANISCI, et al.
ANGELO GIGLIO and CAROL GIGLIO,	:	Attorneys for Defendants
	:	250 Old Country Road
Defendants.	:	Mineola, New York 11501

Upon the following papers numbered 1 to 34 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14 -31 ; Replying Affidavits and supporting papers 32 - 34 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motions for summary judgment dismissing plaintiffs' complaint on the ground that plaintiff William Sciuti did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages, individually and derivatively, for serious injuries allegedly sustained by plaintiff William Sciuti as a result of a motor vehicle accident that occurred on Pleasant Avenue and Route 27A, Blue Point, Town of Brookhaven, State of New York on May 2, 2005. It is alleged that the vehicle owned by Angelo Giglio and operated by Carol Giglio impacted the vehicle operated by Mr. Sciuti. Defendants now move for summary judgment dismissing the complaint on the ground that Mr. Sciuti did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiffs oppose this motion and defendants have 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 submit, inter alia, the pleadings; plaintiffs' verified bill of particulars; the four affirmed reports of defendants' examining radiologist, Audrey Eisenstadt, M.D.; the affirmed report of defendants' examining orthopedist, S. Farkas, M.D.; the affirmed report of defendants' examining neurologist, C. M. Sharma, M.D.; the unsworn report of defendants' examining acupuncturist, Martin P. LoCascio, M.D.; the unsworn report of defendants' examining chiropractor, Harvey Orenstein, M.D.; and a four page excerpt of plaintiff's deposition testimony. Initially, the Court notes that the unsworn reports of defendants' examining acupuncturist and chiropractor are not in admissible form (*see*, CPLR 2106; *see also*, ***Pagano v Kingsbury***, *supra*; ***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454 [1st Dept 1991]), and as such they have not been considered in this determination.

Plaintiffs claim, in their bill of particulars, that Mr. Sciuti sustained straightening of the cervical lordosis; lumbar disc herniations; a left maxillary sinus cyst/polyp; shoulder tendinosis/tendinopathy (unspecified); and hypertrophic changes in the acromioclavicular joint (unspecified). Plaintiffs further claim, however, that Mr. Sciuti was not confined to a hospital or to his bed or home. Moreover, plaintiff's claim that Mr. Sciuti sustained a serious injury in the categories of a permanent consequential limitation, a significant limitation and a non-permanent injury. While plaintiff's claim a serious injury in the category of a non-permanent injury, they also state in their bill of particulars that this category is "inapplicable."

In her report dated May 27, 2006, Dr. Eisenstadt states that she performed an independent radiological review of the MRI studies dated June 8, 2005 of Mr. Sciuti's cervical spine, and her findings include intervertebral discs of normal height and alignment; no annular tears; and a polyp in the left maxillary sinus. While she observed some cervical straightening, she also noted that there was normal alignment of the cervical spine. Dr. Eisenstadt opined that the left maxillary polyp was caused by an inflammatory process with no traumatic association with the accident. In her report dated May 27, 2006, Dr. Eisenstadt states that he performed an independent radiological review of the MRI studies dated June 8, 2005 of Mr. Sciuti's lumbar spine, and his findings include normal alignment; mild osteophyte formation at the L5-S1 level; desiccation and bulging at the L5-S1 Level; and no focal disc herniations. Dr. Eisenstadt opined that the osteophyte formation and dessication required more than three months to develop and predate the accident. She further concluded that bulging is not traumatic, but degeneratively induced and related to ligamentous laxity. In her report dated May 27, 2006, Dr. Eisenstadt states that he performed an independent radiological review of the MRI studies dated June 10, 2005 of Mr. Sciuti's left shoulder, and his findings include narrowing of the subacromial space due to low lying acromion and hypertrophic spurring; tendinosis of the supraspinatus tendon; an intact biceps tendon; and unremarkable labrum. In her report dated May 27, 2006, Dr. Eisenstadt states that he performed an independent radiological review of the MRI studies dated June 15, 2005 of Mr. Sciuti's right shoulder, and his findings include narrowing of the subacromial space due to a low lying acromion/hypertrophic spurring; tendinosis of the supraspinatus tendon; an intact biceps tendon; and unremarkable labrum. Dr. Eisenstadt opined that the low lying acromion in Mr. Sciuti's shoulders was due to a developmental abnormality and that the hypertrophic spurring in his shoulders was the result of degenerative disease. She also concluded that there was no evidence of any recent trauma to the osseous, ligamentous, muscular or labral structures of either shoulder.

In his report dated February 13, 2007, Dr. Farkas states that he performed an independent orthopedic examination of Mr. Sciuti on that date, and his findings include DTR's that were "2+"; a motor examination that was "5+"; a negative shoulder impingement test; and full stability of the shoulders without crepitus. He also found that there was no spasm or crepitus to palpation during static positioning or active range of motion of the cervical and lumbar spine. Dr. Farkas further noted that Mr. Sciuti stood 5' 11" tall, weighed 350 pounds and was diabetic as well as asthmatic. Additionally, he observed that forward flexion of the lumbar spine was to approximately 80 degrees with normal being 90 degrees, and that flexion and extension of the cervical spine was 40 degrees, with normal being 30 to 50 degrees. Moreover, Dr. Farkas found that shoulder abduction was to 160 degrees, with normal being 160-170 degrees. He opined that Mr. Sciuti's size was the reason for his show of a decreased range of motion of the cervical and lumbar spine. He further concluded that Mr. Sciuti had not sustained a permanent injury and that there was no orthopedic impairment which would prevent him from carrying out the activities of his daily living without restriction.

In his report dated March 12, 2007, Dr. Sharma states that he performed an independent neurologic examination of Mr. Sciuti on March 7, 2007, and his findings include no muscular atrophy or deformity; an intact sensory system; no atrophy of the arms or legs; and diminished DTR's in the arms and legs due to diffuse diabetic polyneuropathy which was unrelated to the accident. He also observed that Mr. Sciuti weighed approximately 360 pounds and was unable to squat. He further

noted that Mr. Sciuti reported having bilateral knee surgery in 1993 due to a prior job related accident. Dr. Sharma opined that Mr. Sciuti did not sustain a neurologic injury and that there is no permanency or disability as a result of the accident.

Mr. Sciuti testified that he was not employed at the time of the accident. The last time he had been employed was October 1992. He sustained injuries to his hips, knees, ankles and right thigh in a prior work related motor vehicle accident. Mr. Sciuti further testified that his only source of income at the time of the accident was disability payments from the State Insurance Fund in connection with his prior accident.

By their submissions, defendants made a prima facie showing that Mr. Sciuti 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]; ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]; ***Pucci v Pazienza***, 289 AD2d 316, 734 NYS2d 100 [2d Dept 2001]). While defendants' examining orthopedist found that Mr. Sciuti had some minimal restrictions in the range of motion of the cervical spine, lumbar spine and shoulders, he also noted that there was no spasm or crepitus, and he opined that these restrictions were due to Mr. Sciuti's body size. Defendants' examining neurologist found that the diminished DTR's in Mr. Sciuti's arms and legs, was due to diffuse diabetic polyneuropathy. Additionally, defendants' examining radiologist opined that there were preexisting degenerative changes to Mr. Sciuti's lumbar spine which were unrelated to trauma, and that there were mild degenerative changes to his acromioclavicular joints which were also unrelated to recent trauma (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). Furthermore, defendants' examining radiologist opined that the bilateral low lying shoulder acromion was due to a developmental abnormality and that there was no evidence of any recent trauma. Defendants' remaining evidence, including Mr. Sciuti's deposition testimony and plaintiff's bill of particulars, also supports a finding that he did not sustain a 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 the motion, plaintiffs submit, among other things, the four affirmed reports of Mr. Sciuti's treating radiologist, Robert Diamond, M.D.; the affirmation of Mr. Sciuti's treating physiatrist, Ahmed Elemam, M.D.; the affidavit of Mr. Sciuti's treating chiropractor, Bernhard Sengstock, M.D.; the affidavit of Mr. Sciuti's treating physical therapist, Glenn Segal, L.P.T.; and Mr. Sciuti's personal affidavit. Initially, Dr. Sengstock's affirmation is deficient to the extent that he attempts to rely on the unsworn and inadmissible reports of Mr. Sciuti's other health care providers (*see*, ***Olson v Russell***, 35 AD3d 684, 828 NYS2d 417 [2d Dept 2006]; ***Dominguez-Gionta v Smith***, 306 AD2d 432, 761 NYS2d 310 [2d Dept 2003]), and to the extent that he attempts to render a medical diagnosis or prognosis which is beyond the scope of chiropractic practice (*see*, Education Law § 6551; ***McGuirk v Vedder***, 271 NYS2d 731, 706 NYS2d 485 [3d Dept 2000]; ***Crozier v Lesniewski***, 195 AD2d 657, 599 NYS2d 729 [3d Dept 1993]). To the extent, however, that Dr. Sengstock relied upon his own testing and observations, his opinion has been considered. Further, the affidavit of therapist Segal is 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]). Moreover, the affirmation of Dr. Elemam, which is based upon his medical examinations which occurred more than one and one-half years earlier, and which attempts to project a permanent limitation, is without probative value in the absence of a recent examination (*see*, ***Elgendy v Nieradko***, 307 AD3d 251, 762 NYS2d 275 [2d Dept 2003]; ***McKinney v Lane***, 288 AD2d 274, 733 NYS2d 456 [2d Dept 2001]). Plaintiffs' remaining submissions are without probative value in opposing the motion since they are unsworn, unaffirmed or uncertified (*see*, ***Duke v Saurelis***, 2007 NY Slip Op 5681 [2d Dept, June 26, 2007]).

In one of his reports dated June 9, 2005, Dr. Diamond states that he performed MRI studies of plaintiff's cervical spine on June 8, 2005, and his findings include straightening of the cervical lordosis; no significant protrusions into the neural canal, recesses or foramina; and a left maxillary sinus cyst/polyp. In his other report dated June 9, 2005, Dr. Diamond states that he performed MRI studies of plaintiff's lumbar spine on June 8, 2005, and his findings include L-3/4 through L-5/S1 disc herniations with an abutment of the existing right L-3 root. While he observed increased T-2 signal intensity in the posterior paraspinal fascial tissues, he also noted that there were no focal prevertebral or posterior paraspinal abnormal masses. In his report dated June 13, 2005, Dr. Sengstock states that he performed MRI studies of plaintiff's left shoulder on June 10, 2005, and his findings include hypertrophic changes in the acromioclavicular joint; supraspinatus tendinosis; and trace synovial fluid. In his report dated June 16, 2005, Dr. Sengstock states that he performed MRI studies of plaintiff's left shoulder on June 10 and 15, 2005, and his findings include supraspinatus tendinosis and trace synovial fluid.

In his affidavit, Dr. Sengstock avers that he first treated Mr. Sciuti on May 6, 2005 in connection with his motor vehicle accident four days earlier, and his findings include aberrant motion and subluxation of C-1, C-2, C-7, T-6, T-7, L-4, L-5 and S-1. On May 12, 2005, he performed range of motion testing which showed, inter alia, a spine impairment of 10%, a right upper extremity impairment of 2%, and a final whole person impairment of 12%. He performed additional testing on July 7, 2005 which indicated a final whole person impairment of 13%. Dr. Sengstock opines that Mr. Sciuti sustained a permanent partial disability as a result of the accident on May 2, 2005. On April 26, 2007, he retained the services of Professional Healthcare Service, P.C. for the purposes of performing computerized range of motion testing of Mr. Sciuti under his direct supervision. According to Dr. Sengstock, the results of this testing showed that Mr. Sciuti had a whole person impairment of 50%with localized impairments of the upper and lower extremities as well as the spine. Dr. Sengstock opines that Mr. Sciuti cannot properly function as his ranges of motion and strength are severely limited.

Mr. William Sciuti avers that he had a prior motor vehicle accident in 1993 which resulted in his permanent disability from work due to knee problems. He denied that he ever had any prior injuries to his neck, back or arms. He has been unable to engage in his usual activities of gardening, fishing and hunting due to his injuries. He is also unable to assist his wife with housework or caring for the family dogs. Furthermore, he has gained approximately 100 pounds since the accident and has

consulted a weight loss specialist. Mr. Sciuti further avers that he his injuries have caused him physical difficulties strained his marriage.

Plaintiffs have provided insufficient medical proof to raise an issue of fact that Mr. Sciuti 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]). Dr. Sengstock has entirely failed to address Mr. Sciuti's prior hip and lower body injuries and his prior bilateral knee surgeries (*see*, ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). Dr. Sengstock also failed to address the pre-existing degenerative condition of Mr. Sciuti's lumbar spine and shoulder joints, his preexisting diabetic polyneuropathy/asthma, his morbid obesity, or the developmental abnormalities of his acromioclavicular shoulder joints as diagnosed by defendants' examining radiologist and therefore, has failed to establish that the alleged conditions were causally related to or exacerbated by the accident (*see*, ***Knoll v Seafood Express***, 5 NY3d 817, 803 NYS2d 25 [2005]; ***Gomez v Epstein***, 29 AD3d 950, 818 NYS2d 101 [2d Dept 2006]). In the absence of an explanation by a treating medical provider as to the significance of Mr. Sciuti's pre-existing degenerative conditions and diabetic polyneuropathy, it would be sheer speculation to conclude that the subject accident was the cause of the his injuries (*see*, ***Lagois v Public Adm'r of Suffolk County***, 303 AD2d 644, 760 NYS2d 52 [2d Dept 2003]; ***Freese v Maffetone***, 302 AD2d 490, 756 NYS2d 70 [2d Dept 2003]). While a disc herniation may constitute a serious injury, the MRI reports of Mr. Sciuti's treating radiologist is not probative for the purposes of demonstrating a serious injury because they contain no opinion as to causation (*see*, ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and do not establish the extent of any physical limitations resulting from the alleged disc and shoulder injuries (*see*, ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]). Dr. Sengstock's failure to furnish any specific information concerning the alleged treatment rendered to Mr. Sciuti on or after July 7, 2005, or of the frequency and duration of said treatment, makes it clear that his report was tailored to meet the statutory requirements (*see*, ***Earle v Chapple***, 37 AD3d 520, 830 NYS2d 275 [2d Dept 2007]; ***Powell v Williams***, 214 AD2d 720, 625 NYS2d 634 [2d Dept 1995]). In any event, plaintiffs have failed to adequately explain by submission of objective medical evidence the lengthy gap in Mr. Sciuti's treatment in 2006 and his last examination in April 2007 (*see*, ***Philips v Zilinsky***, 39 AD3d 728, 834 NYS2d 299 [2d Dept 2007]; ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007])

Mr. Sciuti's self-serving affidavit is insufficient to show that he sustained a serious injury since there is no objective medical evidence in support of it (*see*, ***Tobias v Chupenko***, 2007 NY Slip Op 5259 [2d Dept, June 12, 2007]). Plaintiffs also failed to proffer any competent medical evidence that Mr. Sciuti was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days subsequent to the accident (*see*, ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). Although Mr. Sciuti alleges, among other things, that he is unable to help with housework 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]).

Since there is no evidence in the record demonstrating that Mr. Sciuti'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*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Based upon the foregoing, Mrs. Sciuti'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, this motion for summary judgment is granted and the complaint is dismissed.

Dated: AUG 0 6 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION