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SHORT FORM ORDER

INDEX No. 03-14940
CAL. No. 06-02585-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 2-27-07
ADJ. DATE 4-17-07
Mot. Seq. # 001 - MG CASEDISP
002 XMG
003 - XMG
004 - XMD
005 - XMD

NICOLA MUIA,	:	ANTHONY GALLO, P.C. Attorney for Plaintiff 6080 Jericho Turnpike Commack, New York 11725
Plaintiff,	:	CRAFA & SOFIELD, P.C. Trial Counsel for Plaintiff's Attorney Gallo 100 North Centre Avenue, Suite 302 Rockville Centre, New York 11570
- against -	:	
	:	BOEGGEMAN, GEORGE, HODGES, et al. Attorneys for Defts. Chenault & Stanley 11 Martine Avenue White Plains, New York 10606
MEA CHENAULT, LOUIS STANLEY, BENJAMIN H. TULLY, NANCY H. TULLY, LISE SAINT-JEAN and GUY C. SAINT JEAN,	:	LOCCISANO & LARKIN Attorneys for Defendants Tully 150 Motor Parkway, Suite 405 Hauppauge, New York 11788-5108
Defendants.	:	ROBERT P. TUSA, ESQ. Attorneys for Defendants Saint-Jean 898 Veterans Memorial Hwy, Suite 320 Hauppauge, New York 11788

Upon the following papers numbered 1 to 72 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15-17; 18-20; 21-31; 32-46; Answering Affidavits and supporting papers 47-56; 57-66; Replying Affidavits and supporting papers 67-68; 69-70; 71-72 ; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendants, Mea Chenault and Louis Stanley ("Defendants Chenault"), for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that this cross motion by defendants, Benjamin H. Tully and Nancy H. Tully ("Defendants Tully"), for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that this cross motion by defendants, Lise Saint-Jean and Guy C. Saint-Jean ("Defendants Saint-Jean"), for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint is granted; and it is further

ORDERED that this cross motion by plaintiff, Nicola Muia, for an order pursuant to CPLR 3212, granting summary judgment in his favor on the issue of liability and against defendants, Mea Chenault and Louis Stanley, is denied as moot; and it is further

ORDERED that this cross motion by defendants, Benjamin H. Tully and Nancy H. Tully ("Defendants Tully"), for an order pursuant to CPLR 3212, granting them summary judgment on the issue of liability and dismissing the plaintiff's complaint is denied as moot.

This is an action to recover damages for injuries allegedly sustained by the plaintiff, on August 9, 2002, at approximately 3:11 pm, as a result of a multiple car motor vehicle accident that occurred at the intersection of New York Avenue and Depot Road, 50 feet south of Broadway Avenue, Huntington, County of Suffolk, New York. Plaintiff was proceeding southbound on New York Avenue, after coming to a stop for a red light his vehicle was struck in the rear by the vehicle operated by Ms. Chenault and owned by Mr. Stanley. Mr. Tully, who was operating a vehicle owned by his mother, Nancy Tully, was stopped at the red light when his vehicle was impacted from the rear by the vehicle operated by Mrs. Saint-Jean and owned by Mr. Saint-Jean. Mr. Tully was caused to strike the rear of Ms. Chenault's vehicle after the impact to the rear of his vehicle and Ms. Chenault was pushed forward into the rear of the plaintiff's vehicle.

Plaintiff, by his bill or particulars, alleges that he sustained a cervical radiculitis at the C6 level, cervicogenic dizziness-disequilibrium of a disabling nature, resultant from cervical whiplash injury with involvement of propriceptive fibers, bilateral cervical brachialgia, cerivcal spondylosis with osteophytes at multiple levels, cerviogenic cephalgia, bilateral cervicobrachialgia, gait unsteadiness, degenerative spondylitic changes at C3-C4, C4-C5, C5-C6 and C6-C7 causing varying degrees of spinal stenosis and foraminal narrowing, 2mm anterior displacement of C4-C5, small central spur/disc herination at C2-3, broad based spur C3-4 question herniation causing a moderate degree of spinal stenosis, right foraminal narrowing at this level, broad based spur C5-6 causing bilateral foraminal narrowing and a moderate degree of stenosis, broad based central left sided spur causing moderate stenosis at C6-7 and some left narrowing, loss of balance and headaches, intermittent numbness of both hands, primarily affecting the ulnar nerve aspect, C8-T1 radiculopathy vs ulnar neuropathy, loss of normal lordosis, lacunae in the left centrum, and painful and limited motion of neck. Plaintiff also claims that he is unable to watch television without a headrest, he requires two to three pillows to sleep on at night, he is unable to go to Barnes and Noble to read because he cannot rest his head on the chairs and he cannot garden, fish, hunt or hold his 18 ½ month old granddaughter for more than two or three minutes.

Defendants Chenault now move for summary judgment on the basis that plaintiff fails to meet the

serious injury threshold as required by Insurance Law § 5102 (d). Defendants submit, the pleadings, plaintiff's deposition transcript and copies of plaintiff's medical records.

Defendants Tully and defendants Saint-Jean also cross move for summary judgment on the basis that plaintiff has no cause of action because he has failed to meet Insurance Law § 5102 (d) serious injury threshold.

Plaintiff opposes the instant motions on the grounds that he has sustained a permanent limitation of use of his cervical spine as a result of the motor vehicle accident and the defendants have failed to met their burden of proof that he did not sustain a serious injury. Plaintiff submits, the affirmation of Dr. Gina Penzi-Luxemberg, the affirmation of Dr. Max Rudansky, plaintiff's affidavit, copy of plaintiff's deposition transcript.

On a motion for summary judgment where the proponent of the motion has presented a prima facie case that the plaintiff's claimed injury is not a "serious injury" by the statutory definition, the burden then shifts to the plaintiff to demonstrate that a "serious injury" was sustained by the plaintiff or that questions of fact exist as to whether the injury sustained was "serious" (***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [1992]; ***Lowe v Bennett***, 122 AD2d 728, 511 NYS2d 603 [1986]). A defendant seeking summary judgment based on lack of a serious injury, relying on the findings of the defendant's own witnesses, must submit those findings in admissible form, such as, affidavits and affirmations, and not unsworn reports, in order to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, *supra*). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see*, ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Pagano v Kingsbury***, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see*, ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see,* Insurance Law § 5104 [a]; ***Martin v Schwartz***, *supra*). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "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."

Plaintiff must demonstrate a total loss of use of a body organ, member, function or system in order to recover under the "permanent loss of use" category (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). Under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system categories, a plaintiff may prove the extent or degree of physical limitation by use of an expert's qualitative assessment of the plaintiff's injury, so long as the qualitative assessment is based upon an objective basis and compares the plaintiff's limitations to "the normal function, purpose and use of the affected body organ, member, function or system (***Toure v Avis Rent A Car System, Inc.***, 98 NY2d 345, 746 NYS2d 865 [1994]).

At his examination before trial plaintiff testified that immediately after stopping his car at the right light on New York Avenue, he felt an impact to the rear of his vehicle, followed by two more impacts, and he did not hear any other impacts prior to the first impact to his vehicle. Plaintiff testified that although no part of his body made contact with any portion of the interior of his vehicle, he immediately thereafter felt pain in his neck and tingling in his hands. He stated he also felt dizzy and had a headache. Plaintiff stated that he twice refused the offers of medical assistance, and instead his son-in-law, Dr. Ernest Chisena, came to the accident scene and took him to Huntington Hospital's emergency room. He stated that the hospital kept him overnight and gave him a shot of Tigan for nausea and placed a cervical collar around his neck, which he wore for four weeks following the accident. He stated that he was released from the hospital the following day and was informed to follow-up with Dr. Chisena. Mr. Muia testified that he went to Dr. Chisena, who is an orthopedic surgeon that had previously treated him for a lumbar disc herination and pain in his lower back, upon release from the hospital. He stated that his main complaints were pain from the base of his neck radiating to his head, dizziness, tingling in his hands, specifically the fourth and fifth fingers of his right hand, and nausea. Plaintiff stated that he could not turn his neck. He stated he attended physical therapy for his neck for three or four months three times a week following the accident. Mr. Muia testified that he drove himself to physical therapy. Plaintiff testified that he also treated with Dr. Rudansky, a neurologist, whom he had been treating with since 1997 after he suffered a cerebral hemorrhage. Mr. Muia stated that the cerebral hemorrhage did not cause him to sustain any damage. Plaintiff testified that at the time of the accident he was not employed and had retired from his career as a physician in 1998 after fracturing his left wrist. He stated that he had retired once before in 1995 due to severe psoriasis of his hands and wrist. Mr. Muia testified that he did not work at all between 1995 and 1997 because of his hands, but he was able to enjoy gardening and fishing. Mr. Muia stated that since the accident he continues to treat with Dr. Rudansky every 3 months as a follow-up. Mr. Muia testified that on December 16, 2003, he returned to work at as a General Practitioner at a medical facility and that he works 40 hours per week, although he is limited in his ability to adequately perform his duties because he is unable to hold his head in certain positions due to the dizzy spells and disequilibrium that he suffers from. Mr. Muia further testified that the accident has decreased his quality of life.

Here, the defendants have met their prima facie burden entitling them to judgment as a matter of law that the plaintiff did not sustain a serious injury as defined under Insurance Law § 5102 (d) as a result of the subject accident (***Licari v Elliott***, *supra*; ***Gaddy v Eyler***; *supra*; ***Martin v Schwartz***, *supra*). Notwithstanding the fact that the hospital medical reports submitted by defendants in support of their motion for summary judgment establish that plaintiff's neck motion was restricted immediately after the accident and he was dizzy and nauseated, the X-rays performed on plaintiff's cervical spine and lumbar spine revealed no gross fracture or subluxation, and the X-ray of the lumbar spine revealed a normal bony architecture with no evidence of fracture. In addition, the CT scan of the upper cervical spine failed to demonstrate any evidence of fracture or subluxation. Moreover, Dr. Marc Weinberg's consultation report, dated August 10, 2002, states there is no evidence of significant trauma to the spine or brain. Dr. Robert Goldman's report dated March 15, 2003, states that the magnetic resonance angiography of the neck ("MRI"), showed an unremarkable MRI of the vertebral and carotid arteries. Thus, the hospital records pertaining to the treatment of plaintiff immediately following the accident do not show any objective medical evidence that plaintiff sustained a serious injury (***Solarzano v Power Test Petro, Inc.***, 181 AD2d 631, 582 NYS2d 10 [1992]). In addition, plaintiff in his deposition testified that his yearly cruises to different parts of the world have not been curtailed by the subject accident, including trips to the Caribbean in February of 2003 and 2004 and to Italy in September 2003. Moreover, since the accident plaintiff has come out of retirement and is now practicing medicine as a general practitioner for 40 hours per week. Therefore, the defendants have established that plaintiff has not suffered a serious injury under § 5102 (d) of the Insurance Law ((***Pommells v Perez***, *supra*; ***Licari v Elliot***, *supra*; ***Pagano v Kingsbury***, *supra*).

Plaintiff, in opposition, has failed to refute the defendants showing that plaintiff did not sustain a serious injury. Dr. Chisena stated in his report, dated August 9, 2002, that plaintiff suffered from aggravated cervical degenerative joint disease with possible disc herniation, aggravated lumbar degenerative joint disease with disc herniation present and dizziness of an unknown origin. Although, under appropriate circumstances, an aggravation of a preexisting disc condition can constitute a "serious injury" (*see*, ***Phillips v Tissotvanpatot***, 280 AD2d 735, 720 NYS2d 274 [2001]), however, Dr. Michael Shapiro in his report, dated August 9, 2002, states that the CAT scan of plaintiff's cervical spine was unremarkable without any paraspinal soft tissue abnormality seen. In addition, Dr. Max Rudansky, a neurologist, in his affirmed report of March 2007, states that the trauma from the accident activated an otherwise latent condition and is the competent producing cause of plaintiff's disabling and permanent condition. However, no objective evidence has been submitted by which the claimed aggravation can be measured (*see*, ***Hines v Capital Dist. Transp. Auth.***, 280 AD2d 768, 719 NYS2d 777 [2001]) and the mere fact that a physician labels a condition as being permanent does mean that it falls within the auspices of the serious injury threshold under Insurance Law § 5102 (d) (***Lopez v Senatore***, 65 NY2d 1017, 494 NYS2d 101 [1985]; ***Grossman v Wright***, *supra*; ***Powell v Hurdle***, 214 AD2d 720, 625 NYS2d 634 [1995]).

Plaintiff also relies upon Dr. Gina Penzi-Luxemberg's affirmed report, dated March 20, 2007. Dr. Gina Penzi-Luxemberg, specialist in the field of spine-sports-rehabilitation medicine, states that plaintiff suffers from spinal enthesopathy with trigger points, cervical radiculopathy and degenerative disc disease of the cervical spine with cord compression and paresthesias and cervical extension causing dizziness. However, Dr. Penzi-Luxemberg also states in her report that the plaintiff's gait is within normal range, he does not require assistance, there is no swelling, his ENT is unremarkable, the patient is able to heel and

toe walk without difficulty, his sensation is intact to pinprick and light touch, the upper and lower extremities reveal good range of motion, the postural exam of the spine is limited by the positions of the patient's head and that the patient was able to get on and off the examination table without assistance or difficulty. Additionally, Dr. Rudansky states that he has treated the plaintiff for injuries he sustained in the subject motor vehicle accident since August 2002. He states that his repeated neurological clinical examinations of the plaintiff over the past three years, have demonstrated that the plaintiff suffers from "persistent gait unsteadiness– disequilibrium with associated dizziness with cervical neck extension–lateral rotation" and "marked cervical paravertebral tenderness" and these findings are consistent with MRI studies performed on plaintiff in August of 2002, which showed that there was mild chronic lower motor neuron dysfunction in the right C6 muscles without active denervation and no evidence of ulnar neuropathy at elbow or polyneuropathy. However, neither Dr. Penzi-Luxemberg's report nor Dr. Rudansky's report provides a sufficient qualitative or quantitative analysis of the injuries to suggest that the injuries suffered rise to the level of a limitation or limitations that can be considered significant or permanent (see ***Knoll v Seafood Express***, 17 AD3d 233, 793 NYS2d 391 [2005]; ***Pinkowski v All-States Sawing & Trenching, Inc.***,1 AD3d 874, 767 NYS2d 502 [2003]). Additionally, neither report quantifies with specificity the extent to which the plaintiff's range of motion is restricted (***O'Neill v Rogers***, 163 AD2d 466, 559 NYS2d 669 [1990]). Therefore, the subjective quality of plaintiff's transitory disequilibrium and unsteady gait, which appears when he holds his head in certain positions, does fall within the objective definition of serious injury as contemplated by the precepts of Insurance Law § 5102 (d) (***Scheer v Koubek***, 70 NY2d 678, 518 NyS2d 788 [1987]; ***Licari v Elliot***, *supra*; ***Grossman v Wright***, *supra*).

Accordingly, defendants Chenault's motion for summary judgment and defendants Tully and defendants Saint-Jean's cross motions for summary judgment are granted.

In light of the determination that plaintiff did not sustain a serious injury, both defendants Tully's and plaintiff's cross motions for summary judgment on the issue of liability, are rendered moot, and are denied as such (***Pagano v Vanness***, 1 AD3d 419, 766 NYS2d 908 [2003]).

Dated: AUG 06 2007

J.S.C.

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