SHORT FORM ORDER

INDEX No. 04-27639
CAL. No. 07-0147-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 4-25-07
ADJ. DATE 7-11-07
Mot. Seq. # 001 - MG; CASEDISP

ZEGONG ZHANG	:	KRAUSE & MAUSER, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	11 Park Place, Suite 1715
	:	New York, New York 10007
- against -	:	
	:	ROBERT P. TUSA, ESQ.
KATHLEEN KENNA,	:	Attorney for Defendant
	:	898 Veterans Memorial Highway, Suite 320
Defendant.	:	Hauppauge, New York 11788

Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11 - 20 ; Replying Affidavits and supporting papers 21 - 23 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's motion for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted and the complaint is dismissed.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on South Entrance Drive at the intersection of Stony Brook Road, Village of Stony Brook, Town of Brookhaven, New York on September 24, 2002. The accident allegedly occurred when the vehicle owned and operated by defendant rear-ended the vehicle operated by the plaintiff. Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in 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 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 his motion, defendant submits, inter alia, the pleadings; plaintiff's bill of particulars; the unaffirmed report of plaintiff's treating neuroradiologist, Patricia Roche, M.D.; the unaffirmed report of plaintiff's treating osteopath, Gerald Kelly, M.D.; the affirmed report of defendant's examining radiologist, Sheldon P. Feit, M.D.; and the affirmed report of defendant's examining orthopedist, Arthur M. Bernhang, M.D. Plaintiff claims, in his bill of particulars, that he sustained a bulging cervical disc; herniated cervical discs; a cervical spine sprain/strain with an internal derangement; post-arthritic changes with a restricted range of motion; muscle spasms; and an exacerbation of previously asymptomatic changes in the cervical spine. Plaintiff also claims that he was confined to his bed for approximately one week following the accident and that he was absent from work for one day. While plaintiff claims that he sustained economic loss greater than basic economic loss, he also claims that he did not sustain a loss of earnings. Additionally, plaintiff claims that he sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In her report March 12, 2001, Dr. Roche states that she performed MRI studies of plaintiff's cervical spine on that date, and her findings include right and left-sided disc herniations at C5-6; narrowing of the neural foramina bilaterally; a narrowed subarachnoid space; and mild to minimal uncinate hypertrophy. She also found that there was a decreased signal intensity in the posterior aspect of the vertebral bodies in midline sagittal/axial cuts, which she opined may represent calcification of the posterior longitudal ligament.

In his report dated October 2, 2002, Dr. Kelly states that he examined the plaintiff on that date, and his findings include a good active/passive range of motion and very tight posterior neck muscles without symptoms of radiculopathy. He noted that plaintiff was not acutely distressed and that he reported that he was working. Dr. Kelly further noted that plaintiff had a pre-existing history of a herniated disc from a previous motor vehicle accident.

In his report dated August 11, 2006, Dr. Bernhang states that he performed an independent orthopedic examination of plaintiff on August 4, 2006, and his findings include symmetrical reflexes at the elbows and no palpable fibromyalgia, trigger points or spasm. He observed that plaintiff's cervical flexion, extension, lateral flexion and cervical rotation were 40, 45, 20/40 and 80/80 degrees, compared with the normal range of 38, 38, 43/43 and 45/45 degrees. In connection with plaintiff's medical history, he noted that plaintiff was working and that plaintiff did not mention his prior motor vehicle accident in 2001. Dr. Bernhang opined that plaintiff sustained a traumatic aggravation of a pre-existing disc herniation at C5-6 which had resolved. He also concluded that plaintiff was capable of performing the activities of his daily living including employment and that he was not disabled.

In his report dated August 9, 2005, Dr. Feit states that he performed an independent radiological review of the x-rays of plaintiff's cervical spine dated February 20, 2001, as well as the MRI studies of the plaintiff's cervical spine dated March 12, 2001, October 7, 2002, and January 16, 2003. Dr. Feit states that the x-rays of plaintiff's cervical spine show intact intervertebral disc space heights as well as anterior osteophyte formation at C4-5, C5-6 and C6-7 levels. He opined that these x-ray studies showed degenerative changes in plaintiff's cervical spine. In connection with the MRI studies dated March 12, 2001, Dr. Feit's findings include desiccatory changes at all the visualized cervical discs; a ventral epidural defect at the C5-6 level; a moderate central herniation compressing on the cervical cord; and no evidence of spondylolisthesis. In connection with the MRI studies dated October 7, 2002, Dr. Feit's findings include a large ventral epidural defect corresponding to a central herniation, and no other bulges or herniations. He opined that there was no appreciable change from the prior study. In connection with the MRI studies dated January 16, 2003, Dr. Feit's findings include a large ventral epidural defect at the C5-6 level corresponding to a central herniation, and no other significant bulges or herniations. He opined that these studies showed a central herniation at C5-6, which was slightly more prominent than the initial scan of October 7, 2002. Additionally, while Dr. Feit opined that the scan dated January 16, 2003 showed a slight enlargement of plaintiff's C5-6 herniation, he also concluded that it predated and was unrelated to the accident on September 24, 2002.

By his submissions, defendant made a prima facie showing that plaintiff 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]; ***Gousgoulas v Melendez***, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). While Dr. Bernhang found a 23/3 percent limitation in plaintiff's lateral flexion, he also found that plaintiff's flexion, extension and rotation exceeded the average range-of motion and that there was no palpable spasm (*see*, ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). In any event, Dr. Bernhang opined that plaintiff's symptoms of a traumatic aggravation of a pre-existing disc herniation had resolved and that he was not disabled. Furthermore, defendant's examining radiologist opined that there were preexisting degenerative changes to plaintiff's cervical spine, and that

the C5-6 herniation was pre-existing, and unrelated to the subject accident (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). Defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendant has met her burden as to all categories of serious injury alleged, the Court turns to plaintiff's 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 this motion, plaintiff submits, among other things, the affirmed report and affirmation of plaintiff's treating physician, Tsai C. Chao, M.D., and the plaintiff's personal affirmation. Initially, the Court notes that Dr. Chao's report and affirmation are deficient to the extent that he attempts to rely on the reports of plaintiff's other health care providers which have not been submitted (*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]). To the extent, however, that Dr. Chao relies on his own testing and observations, his opinion has been considered.

In his report dated April 27, 2007, Dr. Dr. Chao states that he examined plaintiff on that date, and his findings include a supple but very stiff neck; a positive Spurling test; muscle spasm/tenderness at the sternocleidomastoid/upper trapezius muscles; midline tenderness between L4-5 and L5-S1; normal muscle tone throughout all four extremities; and a normal gait. In her affirmation, Dr. Chao avers that his examination of plaintiff on April 27, 2007, showed that plaintiff's flexion, extension, right/left rotation and right/left side bending were 50, 60, 70/60 and 25/15 degrees, compared with the normal ranges of 60, 80, 80/80 and 45 degrees. Dr. Chao also avers that plaintiff sustained a permanent partial incapacitation based upon his examination of plaintiff's cervical and lumbar spine.

In his affirmation, plaintiff avers that he started physical therapy sessions about one week following the accident which he continued for about four months. Plaintiff also avers that he stopped his treatment when his no-fault benefits were terminated. He admitted that he was involved in a prior accident on February 19, 2001, and that he received chiropractic treatment for about three months in connection with his prior injuries. Plaintiff further avers that he is no longer able to lift heavy objects, sit/stand for long periods of time, or jog.

Plaintiff has provided insufficient medical proof to raise an issue of fact that he 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]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; ***Paton v Weltman,*** 23 AD3d 895, 804 NYS2d 129 [3d Dept 2005]; ***Lynch v Lorkowski***, 12 AD3d 489, 783 NYS2d 875 [2d Dept 2004]). At the outset, the report and affirmation of Dr. Chao, which are based upon a sole examination conducted on April 27, 2007, are insufficient to connect plaintiff's injuries to the accident (*see*, ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; ***Komar v Showers***, 227 AD2d 135, 641 NYS2d 643 [1st Dept 1996]). While Dr. Chao records plaintiff's complaints of pain, he has failed to present objective medical proof that was contemporaneous with the accident showing any initial range of motion restrictions for the affected body parts (*see*, ***Ramirez v Parache***, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; ***Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]). Instead, the affidavit of Dr. Chao largely consists of unsubstantiated speculation concerning the causal relationship between the accident and plaintiff's condition several years afterwards (*see*, ***Damstetter v Martin***, 247

AD2d 893, 668 NYS2d 863 [4th Dept 1998]), as well as conclusory assertions tailored to meet the statutory requirements (*see*, ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Also, plaintiff failed to submit any objective medical proof addressing his prior accident and his condition relative thereto (*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]). In any event, plaintiff has failed to adequately explain, by submission of objective medical evidence, the lengthy gap since his last treatment in 2003 and his most recent medical examination in April 2007 (*see*, ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]; ***Pimentel v Mesa***, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]; ***Neugebauer v Gill***, 19 AD3d 567, 797 NYS2d 541 [2d Dept 2005]). Plaintiff's gap in treatment was, in essence, a complete cessation of treatment (*see*, ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]).

Plaintiff also failed to proffer any competent medical evidence that he 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]; ***Hernandez v Diva Cab Corp.***, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). Although plaintiff alleges, among other things, that he is unable to lift heavy objects and jog, the record lacks objective medical proof of any substantial curtailment of his activities within the relevant time period after the accident (*see*, ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]; ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]). Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, his claim for economic loss in excess of basic economic loss must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]).

Dated: AUG 2 3 2007

J.S.C.

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