SHORT FORM ORDER

INDEX No. 05-5335
CAL. No. 06-02365-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 2-20-07
ADJ. DATE 4-30-07
Mot. Seq. # 002 - MD
003 - XMD

CHERYL GORMEZ, as parent and natural guardian of JORDAN GORMEZ and CHERYL GORMEZ, Plaintiffs, - against - MUIR HUSSAIN LODI and RUBEN PIZZAS, INC., Defendants.	TINARI, O'CONNELL, OSBORN, et al. Attorneys for Plaintiffs 320 Carleton Avenue, Suite 6800 Central Islip, New York 11722 JOHN P. HUMPHREYS, ESQ. Attorneys for Defendant Lodi 3 Huntington Quadrangle, P.O. Box 9028 Melville, New York 11747 BRYAN M. ROTHENBERG, ESQ. Attorneys for Defendant Ruben Pizzas 100 Duffy Avenue, Suite 500 Hicksville, New York 11801

Upon the following papers numbered 1 to 29 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 19; Answering Affidavits and supporting papers 20 - 26; Replying Affidavits and supporting papers 27 - 29; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant Lodhi's (Lodi) motion for summary judgment dismissing the complaint and cross claims is denied; and it is further

ORDERED that defendant Ruben Pizzas, Inc.'s cross motion for summary judgment dismissing the complaint and cross claims is denied.

This action arose from an accident occurring on October 1, 2004 in which the plaintiff allegedly sustained serious personal injuries. The defendant, Muir Hussain Lodi (Lodi), moves for summary judgment dismissing the complaint pursuant to Insurance Law §5102(d) and dismissing the cross claims. Co-defendant, Ruben Pizzas, Inc. (Pizzas), cross moves for dismissal of the complaint on the same arguments and proof asserted by Lodi in the motion and for dismissal of the cross claims. The plaintiffs oppose the motion and cross motion. Lodi has submitted a reply affirmation in rebuttal to that opposition.

Under the Insurance Law "'[s]erious injury' means 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" (Insurance Law §5102[d]).

In the context of the plaintiff's claims, the term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use" (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570 [1982]). For this purpose, the plaintiff must demonstrate not only the extent or degree of the limitation but also its duration (***Beckett v Conte,*** 176 AD2d 774, 575 NYS2d 102 [1991], app. den. 79 NY2d 753, 581 NYS2d 281). The duration of the injury must be more than "fleeting" (***Partlow v Meehan,*** 155 AD2d 647, 548 NYS2d 239 [1989]). The term "consequential" means important or significant (***Kordana v Pomellito,*** 121 AD2d 783, 503 NYS2d 198 [1986], app. dis. 68 NY2d 848, 508 NYS2d 425). A "permanent loss" of use of a body organ, member, function or system must be total (***Oberly v Bangs Ambulance, Inc.,*** 96 NY2d 295, 727 NYS2d 378 [2001]). In order to prove the extent or degree of physical limitation, an expert can designate a numeric percentage of a plaintiff's loss of range of motion or give a "qualitative assessment of a plaintiff's condition...provided that the evaluation has 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 Sys.,*** 98 NY2d 345, 746 NYS2d 865, 868 [2002]; rearg. den. ***Manzano v O'Neil,*** 98 NY2d 728, 749 NYS2d 478).

Generally, on a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law §5102(d), 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]). "It is well settled that the proponent of a motion for summary judgment under the no-fault statute must submit admissible evidence demonstrating that a plaintiff did not sustain a serious injury as defined by Insurance Law § 5102[d]" (***Fitzmaurice v Chase,*** 288 AD2d 651, 652, 732 NYS2d 690, 691 [2001]; *see*, ***Barbarulo v Allery,*** 271 AD2d 897, 707 NYS2d 268 [2000]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.,*** 171 AD2d 588, 567 NYS2d 454, 455 [1991]). 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 non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

The defendant submits in support of his motion, inter alia, the affirmation of his attorney, copies of the parties' pleadings, the verified bill and supplemental bill of particulars, an unsworn MRI report from Central Suffolk Hospital dated October 22, 2004 (MRI report), the unsworn report of Dr. Richard J. Bogdanski (Dr. Bogdanski), the plaintiff's treating chiropractor, an unsigned and unsworn report from Orthopedic Associates of Long Island (Associates), dated October 15, 2004, the sworn reports of the defendant's experts, Doctors Edward M. Weiland (Dr. Weiland) and S. Farkas (Dr. Farkas), dated August 15, 2006 and August 10, 2006, respectively, and a copy of the transcript of the plaintiff's

deposition testimony[1]. The MRI report and Dr. Bogdanski's report, although unsworn, are admissible (***Abrahamson v Premier Car Rental of Smithtown,*** 261 AD2d 562, 691 NYS2d 83 [1999]; ***Pagano v Kingsbury,*** supra). The report of Associates, although otherwise admissible (*see*, ***Pagano v Kingsbury,*** supra) is inadmissable in that it is unsigned (***Pagan v Gondola Cab Corp.,*** 235 AD2d 251, 652 NYS2d 277 [1997]).

The plaintiff, Jordan Gormez, alleges in his complaint that the subject accident occurred on October 1, 2004 and that he sustained serious injuries pursuant to Section 5102 of the Insurance Law "and/or economic loss greater than basic economic loss" (Motion, Exhibit A). The plaintiff, Cheryl Gormez, asserts a claim for loss of services and for reimbursement of medical services paid by her for the medical treatment of her son.

The plaintiff, Jordan Gormez, avers in the bill of particulars that he sustained, as a result of the accident, inter alia, a fracture of the right foot, lumbar sprains or strains, lumbosacral neuritis and radiculitis, lumbar subluxation, myalgia and myofascitis, vetebrogenic (sic) radiculitis and myositis. He was confined to his bed and home for approximately one month following the accident and was unable to attend high school for four days following the accident. He missed work for one week following the accident and had lost earning of sixty dollars. He makes no claim for special damages. The plaintiff further avers that he is claiming the serious injury categories of fracture, permanent loss, permanent consequential limitation, significant limitation and non-permanent injury. The plaintiff avers in the supplemental bill of particulars that he sustained a disc bulge at L4-5 and withdraws his claim for loss of wages. The plaintiff, Cheryl Gormez, avers in the bill of particulars that she was deprived of the services, society and companionship of Jordan Gormez for approximately one month after the accident, that special damages were paid for by no-fault insurance and that no-fault payments were made by Travelers Insurance Company.

The MRI report states that an MRI was taken of the plaintiff, Jordan Gormez's, right foot to evaluate whether the plaintiff had sustained a fracture or Lisfranc injury. The report stated under "IMPRESSION" that there was no evidence of a fracture and that there was a probable contusion "at the base of the fifth metatarsal" (Motion, Exhibit H). Dr. Bogdanski noted in his report that radiographs taken on October 26, 2004 of Jordan Gormez "revealed no apparent fractures" (Motion, Exhibit I).

Dr. Weiland, a neurologist, averred that he conducted a neurological examination of the plaintiff, Jordan Gormez, on August 15, 2006. Under the heading "TREATMENT", Dr. Weiland indicated that the plaintiff "was evaluated at Central Suffolk Hospital emergency department where he was treated and released after x-rays apparently revealed a 'fracture' to his right foot" and that the plaintiff received an immobilizing splint and was discharged home (Motion, Exhibit K). Upon examination Dr. Weiland found that there was full range of the right foot and ankle, that gait and coordination skills were normal and that there was no evidence of foot drop. His diagnosis, inter alia, was that there was a "[h]istory of traumatic injury to the right foot and right lower extremity-healed" (Motion, Exhibit K, page 4 [bracketed material added]).

Dr. Farkas, an orthopedist, averred in his report that he performed an examination of the plaintiff on

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[1] This transcript was submitted as part of the defendant's reply papers.

August 10, 2006. Dr. Farkas noted under the "HISTORY" portion of his report that the plaintiff was a 17 ½ year old male who claimed that, while he was a pedestrian, he was struck by a motor vehicle on October 1, 2004. The plaintiff further claimed that the vehicle ran over his right foot. Dr. Farkas further noted that after the accident the plaintiff went to the Central Suffolk Hospital emergency room where he was evaluated and released in a half cast and crutches. Upon examination of the plaintiff's right foot, Dr. Farkas found that there was no complaint of pain upon palpation of the feet, that plantarflexion bilaterally was within a normal range and that there was no complaint of pain during range of motion testing. His diagnosis was that the plaintiff had sustained a resolved contusion of the right foot as a result of the accident. Dr. Farkas further averred that his diagnosis was based on the plaintiff's description of the accident and his physical examination "taking into account the subjective complaints and objective findings" (Motion, Exhibit L).

This evidence submitted by the defendant does not establish prima facie that the plaintiff did not sustain a fracture as a result of the accident. Although the MRI report and Dr. Bogdanski's report indicated the absence of a fracture, Dr. Weiland stated in his report that the plaintiff's treatment records indicated that x-rays taken earlier at the Central Suffolk Hospital emergency room revealed a fracture in the plaintiff's right foot. Dr. Weiland also noted that the emergency room used an immobilizing splint and he concluded that the plaintiff had sustained a traumatic injury to the right foot. Dr. Bogdanski's report was deficient in that, in addition to being undated, he did not indicate whether the radiographs he reviewed were of the plaintiff's right foot. Although Dr. Farkas concluded that the plaintiff had sustained a contusion to the right foot which had healed, he does not indicate that he relied on x-ray reports in making this diagnosis (*see*, ***Bednar v Eaton,*** 294 AD2d 780, 743 NYS2d 185 [2002]). Dr. Farkas also noted that the plaintiff's treatment records indicate that he was released from the Central Suffolk Hospital emergency room with a half cast and crutches. Moreover, the plaintiff testified in his deposition that, following the accident, the doctors at both the hospital and Associates informed him that the x-rays of his foot showed that there was a fracture.

Since the defendant did not sustain his burden of proof that the plaintiff did not sustain a serious injury as a matter of law (***Agha v Alamo Rent A Car,*** 35 AD3d 639, 827 NYS2d 261 [2006]; ***Lesane v Tejada,*** 15AD3d 358, 790 NYS2d 44 [2005]; ***Poma v Ortiz,*** 2 AD3d 616, 768 NYS2d 336 [2003]), the Court does not have to consider whether the plaintiff's evidence tendered in opposition to the motion raised a triable issue of fact. Accordingly, defendant Lodhi's motion for summary judgment dismissing the complaint and cross claims is denied. Defendant, Pizzas's cross-motion for summary judgment, which adopts the arguments of defendant Lodi, is also denied.

Dated: [illegible] 27, 2007

J.S.C.

____ FINAL DISPOSITION _X___ NON-FINAL DISPOSITION