SHORT FORM ORDER

INDEX No. 05-7817
CAL. No. 06-01898-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 3-30-07
ADJ. DATE 5-25-07
Mot. Seq. # 001 - MG; CASEDISP

PAUL HARRIS,	:	BORDA, KENNEDY, ALSEN & GOLD, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	1805 Fifth Avenue
	:	Bay Shore, New York 11706
- against -	:	
	:	ROBERT P. TUSA, ESQ.
STACEY V. CAFERRI,	:	Attorney for Defendant
	:	898 Veterans Memorial Highway, Suite 320
Defendant.	:	Hauppauge, New York 11788

Upon the following papers numbered 1 to 31 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 25 - 27 ; Replying Affidavits and supporting papers 30 - 31 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant, Stacey Caferri, for an order pursuant to CPLR 3212, granting her summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Paul Harris, on July 1, 2002, as a result of a motor vehicle accident that occurred on Commack Road at its intersection with the westbound ramp to the Northern State Parkway, Town of Huntington, County of Suffolk, New York. Plaintiff was a backseat passenger in the motor vehicle operated by another employee of Arrow Security on his way home from work when the accident occurred. The vehicle that plaintiff was riding in was struck in the right passenger side by the vehicle owned and operated by the defendant when the defendant attempted to make a left turn onto Commack Road.

Plaintiff, by his bill of particulars, alleges that he sustained a nondisplaced tear of the anterior acetabular labrum, right varicocele, patella spurs, spicular bone extending away from the distal medial femur towards the joint space with broken pieces of uncertain significance of the left knee, lumbosacral sprain/strain, tear of right anterior acetabular labrum, hypoesthesia of the left L1 dermatome and of the L2, L3, L4, L5 and S1 dermatomes bilaterally, lumbar nerve root injury, lumbar disc displacement, lumbar radiculopathy/radiculitis, lumbar myofascitis, lumbar muscle spasm, right sacroiliac derangement,

internal derangement, right hip, chronic right hip sprain, right hip contusion, right flank contusion, lumbosacral radiculopathy, right calf spasm, right ankle edema, left knee pain and swelling, left knee and left tibia pain, pain in the right flank, low back, right posterior buttock and right hip, right lateral anterior thigh pain, right knee pain, and aggravation of prior back injury and right leg injury.

Defendant now moves for summary judgment on the basis that plaintiff did not sustain a serious injury as required by Insurance Law §5102 (d). Defendant also asserts that plaintiff's claimed injuries are not causally related to the subject accident. Defendant further contends that collateral estoppel should be given to the Worker's Compensation Law Judge's findings of fact that plaintiff's injury to his right hip and leg is not causally related to the subject accident. Defendant submits, the pleadings, Arrow Security letter in reference to plaintiff's employment dates, plaintiff's medical records from Huntington Hospital, the reports of plaintiff's treating neurosurgeon, Dr. Stephen R. Fromm, verified bill of particulars from plaintiff's suit against Karen V. Leitch and Suffolk Transportation Services, Inc., Worker's Compensation decision dated February 18, 2004 (Chanis, J.), and the affirmed reports of defendant's examining physicians, Dr. Mark J. Zuckerman, Dr. Barry M. Katzman and Dr. David J. Panasci.

Plaintiff opposes the instant motion on the grounds that he has sustained a serious injury to his back and left knee as evidenced by the findings of the Worker's Compensation Law Judge. Plaintiff submits, the police motor vehicle accident report and Worker's Compensation decision dated February 18, 2004 (Chanis, J.).

Regarding defendant's assertion that collateral estoppel is applicable with respect to the findings of the Law Judge's determination that the plaintiff's right hip and leg injury was not causally related to the subject motor vehicle accident.

Collateral estoppel is a component of the broader doctrine of res judicata, which states that parties in a litigation as well as those in privity with them, where there has been a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of facts and questions of law that were necessary to the determination and outcome of the matter or any subsequent matter (***Gramatan Home Investors Corp. v Lopez***, 46 NY2d 481, 414 NYS2d 308 [1979]; ***Baldwin v Brooks***, 83 AD2d 85, 443 NYS2d 906 [1981]). Moreover, the doctrine of collateral estoppel is available to give conclusive effect to the quasi-judicial determinations of an administrative agency where that agency acts within its applicable adjudicatory authority to hear cases brought before its tribunal using procedures that are substantially similar to those employed in a court of law (***Staatsburg Water Co v Staatsburg Fire Dept***, 72 NY2d 147, 531 NYS2d 876 [1988]; ***Ryan v New York Tel. Co.***, 62 NY2d 494, 478 NYS2d 823 [1984]; *see also,* ***Clemens v Apple***, 65 NY2d 746, 492 NYS2d 20 [1985]). Where there has been an identity of issue that has been fully litigated and decided in the prior action, that is decisive in the present action, collateral estoppel is applicable (***Staatsburg Water Co v Staatsburg Fire Dept***, *supra*). The Court must then determine whether a full and fair opportunity to litigate the issue at bar existed, including, "the nature of the forum and the importance of the claim litigated in the prior litigation, the initiative and incentive to litigate and the actual extent of the litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation" (***Clemens v Apple***, *supra*).

The Court initially notes that there is an identity of the issues that were determined during the Worker's Compensation hearing and the plaintiff's action for personal injury. The findings of the Law Judge during the Worker's Compensation hearing that the plaintiff did not sustain an injury to his right hip and leg during the subject accident were predicated upon the fact that there was no medical proof to support such a finding. There can be no argument that this issue was fully litigated during the Worker's Compensation hearing as plaintiff had every incentive to do so. Nor can there be any argument that the plaintiff was handicapped or inhibited from fully addressing the issue during the Administrative Hearing. Plaintiff has put forth no persuasive argument that would allow this Court to determine that the plaintiff did indeed sustain an injury to his right hip and leg that was the result of the current motor vehicle accident and as such the Court can find no reason why the rule of collateral estoppel should not be applied to the instant matter (***Malloy v Trombley***, 50 NY2d 46, 427 NYS2d 969 [1980]; ***Russom v Waldron***, 224 AD2d 905, 638 NYS2d 521 [1996]; *but see,* ***Baldwin v Brooks***, *supra*). Additionally, the Law Judge's findings give a thorough detail of the evidence submitted and the careful deliberations to be had by the judge, and therefore negates any issue of casualness in regards to her resolution of the matter. Moreover, the plaintiff had every opportunity to be heard on the issue, was fully motivated to do so and was in no way prevented from asserting his right, thus the plaintiff is collaterally estopped from relitigating the issue of the injury to his right hip and leg (***Barnett v Ives***, 265 AD2d 865, 696 NYS2d 321 [1999]).

With respect to the application of collateral estoppel regarding the Law Judge's finding that the plaintiff did in fact sustain an injury to his left leg and knee, there was no determination by the Law Judge that the plaintiff did in fact suffer an injury that met the serious injury threshold (*see,* Insurance Law § 5102 (d)). Moreover, the fact that the defendant's liability was not at issue during the Worker's Compensation hearing requires that the defendant not be precluded from proving or asserting the defense of failure to meet the serious injury threshold as required by Insurance Law § 5102 (d) (***Baldwin v Brooks***, *supra*; ***Phillips v Presswood***, 58 AD2d 624, 395 NYS2d 693 [1977]; ***Barnett v Ives***, *supra*).

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]).

Here, defendant has met her burden of establishing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject motor vehicle accident (***Licari v Elliott***, *supra*; ***Gaddy v Eyler***; *supra*; ***Martin v Schwartz***, *supra*). 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]). Dr. Michael Streiter's radiological report of the x-ray of plaintiff's lower left leg, dated July 2, 2002, states that there is no evidence of fracture or dislocation, the articular surfaces are intact and the soft tissue present a normal appearance. Although the report of Dr. Stephen Fromm, plaintiff's neurologist, dated December 19, 2003, states that plaintiff's range of motion is decreased, it does not quantify with specificity the extent to which the plaintiff's range of motion is restricted (***Pinkowski v All-States Sawing & Trenching, Inc.***,1 AD3d 874, 767 NYS2d 502 [2003]; ***Linares v Mompoint***, 273 AD2d 446, 711 NYS2d [2000]; ***O'Neill v Rogers***, 163 AD2d 466, 559 NYS2d 669 [1990]). In addition, the affirmed neurological report of Dr. Mark Zuckerman, dated May 16, 2006, states that he had normal sensations in

his left foot and upper extremities, there was no pain, tenderness or spasm of the cervical spine and there was no evidence of lumbosacral strain or lumbosacral radiculopathy. Moreover, the affirmed medical report of Dr. Barry Katzman, dated May 23, 2006, states plaintiff's lumbar strain has been resolved and that there is no need for any casually related orthopedic treatment, follow-up or physical therapy. Furthermore, the medical report of Dr. David J. Panasci, dated September 26, 2006, states that there are no fractures, dislocation or joint effusion of the plaintiff's left knee although there is a calcification extending from the medial femoral condyle along the medial aspect of the knee, but that this calcification is related to an old medial collateral ligament injury, and unrelated to the subject accident. Therefore, the defendant has 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*).

In opposition plaintiff has failed to refute defendant's prima facie showing that plaintiff did not sustain a serious injury in the subject motor vehicle accident. Plaintiff has failed to come forth with objective medical proof that he sustained an injury of a permanent consequential limitation or of a significant limitation, based upon a recent examination (***McKinney v Lane***, 288 AD2d 274, 733 NYS2d 456 [2001], ***Frier v Teague***, 288 AD2d 177, 732 NYS2d 428 [2001], ***Letellier v Walker***, 222 AD2d 658, 635 NYS2d 682 [1995]). Plaintiff has also failed to submit any medical evidence establishing that he sustained a serious injury, he simply relies upon the determinations of the Law Judge at the Worker's Compensation hearing which is insufficient to defeat defendant's motion for summary judgment (***Gomez v Epstein***, 29 AD3d 950, 818 NYS2d 101 [2006]; ***Sainte-Aime v Suwai Ho***, 274 AD2d 569, 712 NYS2d 133 [2000]; ***Smith v Askew***, 264 AD2d 834, 695 NYS2d 405 [1999]). Moreover, plaintiff has not shown that he was unable to perform substantially all of his daily activities for not less than 90 days out of the first 180 following the accident (***Ryan v Xuda***, 243 AD2d 457, 663 NYS2d 220 [1997]; ***Traugott v King***, 184 AD2d 765, 587 NYS2d 192 [1992]). Plaintiff also fails to adequately explain his cessation in treatment (***Pommells v Perez***, *supra*; ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]). Under these circumstances, plaintiff has failed to make a sufficient showing to defeat defendant's motion for summary judgment.

Accordingly, defendant's motion for summary judgment is granted.

Dated: OCT 0 2 2007

J.S.C.

_X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION