SHORT FORM ORDER

INDEX No. 05-15485
CAL. No. 07-01539-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 7-31-07
ADJ. DATE 9-19-07
Mot. Seq. # 001 - MG; CASEDISP

PAUL GONNELLY, JR.,	:	MAZZEI & BLAIR
	:	Attorneys for Plaintiff
Plaintiff,	:	9B Montauk Highway
	:	Blue Point, New York 11715
- against -	:	
	:	CASCONE & KLUEPFEL, LLP
DENIZ AKSAN,	:	Attorneys for Defendant
	:	1399 Franklin Avenue, Suite 302
Defendant.	:	Garden City, New York 11530

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 - 12 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 20 ; Replying Affidavits and supporting papers 21 - 23 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for summary judgment dismissing the complaint on the basis that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is granted.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred in front of the premises known as 442 Granny Road, Medford, New York on April 24, 2004. The accident allegedly happened when the vehicle owned and operated by defendant Deniz Aksan collided with the vehicle which the plaintiff was operating. Defendant now moves for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint on the basis 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 this motion, defendant submits, inter alia, the pleadings; plaintiff's bill of particulars; plaintiff's Brookhaven Memorial Hospital Medical Center emergency room and x-ray records made on the day of the accident; the affirmed report of defendant's examining orthopedist, Michael J. Katz, M.D.; the affirmed report of defendant's examining neurologist, Richard A. Pearl, M.D.; and plaintiff's deposition testimony. Plaintiff claims, in his bill of particulars, that he sustained right foraminal bulges at L3-4 and L4-5 causing right foraminal narrowing at the L3-4 and L4-5. Plaintiff also claims that he was taken by ambulance from the scene and brought to Brookhaven Memorial Hospital on the day of the accident. The Court construes these allegations to mean that plaintiff sustained a serious injury in the categories of a permanent consequential limitation and a significant limitation.

Plaintiff's Brookhaven Memorial Hospital Medical Center emergency room records show that he complained of neck, upper back and right shoulder pain upon his arrival by ambulance. The attending physician observed that plaintiff's neurological signs were normal and that there was no signs of trauma or vertebral tenderness. X-rays of plaintiff's cervical spine, which were taken at the hospital, showed no fractures or dislocations and no prevertebral swelling. X-rays of plaintiff's right shoulder also showed no fractures or dislocations. After being diagnosed with a right shoulder contusion and a neck strain, plaintiff was discharged that day.

In his report dated May 22, 2007, Dr. Katz states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include a normal range of motion of the lumbosacral spine without any paravertebral muscle spasm; full sensation to light touch; a negative straight leg raise test; and a normal gait. Dr. Katz opined that plaintiff had sustained a lumbosacral derangement which

was now resolved as there were no signs of permanence relative to the musculoskeletal system. He also concluded that plaintiff was capable of performing the activities of his daily living, including gainful employment, and was not disabled.

In his report dated May 30, 2007, Dr. Pearl states that he performed an independent neurological examination of plaintiff on that date, and his findings include intact cranial nerve functions; a motor examination that was "5/5" in all extremities with normal tone; DTR's that were "2+" and symmetrical; and an ability to heel/toe well. He also observed that plaintiff had a normal range of motion of the cervical and lumbar spine with no atrophy or fasciculation. Dr. Pearl opined that plaintiff had sustained a sprain of the lumbosacral spine but that there were no objective signs to indicate a neurological injury. He further concluded that plaintiff was not disabled.

Plaintiff testified to the effect that, as a result of the accident, the vehicle's air bags did not deploy and he was not bleeding from any part of his body. He was taken by ambulance to the emergency room at Brookhaven Memorial Hospital where he was treated and released the same day. He treated for about two weeks after the accident as no-fault denied coverage for his medical bills. At the time of the accident, plaintiff was working full-time for P.G. Maintenance, his father's landscaping business and he worked part-time at "Hands On Production," a stage company. During the off-season, however, he only worked part-time at his father's business. While plaintiff initially testified that he worked for his father from 2002 through to 2006, he subsequently testified during his deposition that he stopped working from April 2004 to April 2005 because he was told not to engage in heavy lifting. Plaintiff also testified that he was able to work in an office setting, but was unable to secure such a position. Several weeks prior to his deposition, he worked for "Hands On" loading/unloading and setting up tall carts for an air show. Plaintiff was involved in a subsequent accident in 2005 or 2006, but denied a re-injury to his back. In 2006, however, he came down with "mono." It is noted, that during plaintiff's deposition, his counsel stipulated that there is no claim for lost earnings.

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]; ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Plaintiff's hospital records for the day of the accident show that his neurological signs were normal and that there was no evidence of trauma or signs of vertebral tenderness. Dr. Katz found, upon a recent orthopedic examination, that plaintiff had a normal range of motion of the lumbosacral spine without any paravertebral muscle spasm. Similarly, Dr. Pearl found, upon a recent neurological examination, that plaintiff had a normal range of motion of the cervical and lumbar spine with no atrophy or fasciculation. Additionally, defendant's experts opined that plaintiff had sustained a lumbosacral derangement/sprain, but that there were no signs of permanence. Defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a serious injury. As defendant has met his 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, inter alia, the affirmation of plaintiff's treating

orthopedist Mark Stephen, M.D. and the plaintiff's personal affidavit. Initially, the court notes that Dr. Stephen's affirmation is deficient to the extent that he attempts to rely on the unaffirmed and unsworn records of plaintiff's other treating medical 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]), however, to the extent that his opinion is based upon his own observations, it was considered. In his affirmation, Dr. Stephen avers that he first examined plaintiff on April 25, 2007 in connection with his complaints of neck and back pain. During his subsequent examinations on May 9 and 16, 2007, he observed that plaintiff had a "restricted" range of lumbar flexion and extension with complaints of pain, which he opined was uncommon for a 21 year old. His treatment plan included trigger point injections and a prescribed program of physical therapy, with a direction that plaintiff avoid heavy lifting, carrying or standing for extended periods of time. Dr. Stephen opined that plaintiff's injuries were causally related to the accident. He also determined that plaintiff had reached "maximum benefits" after he had completed approximately three months of therapy, so he instead prescribed an exercise program for plaintiff to perform at home.

Plaintiff avers that, as a result of his daily neck and lower back pain, he has difficulty turning his head. As a result of his bodily pain, he gave up his landscaping job with P & G Maintenance after the accident. While he presently does not receive physical therapy, he performs home exercises on a daily basis on the advice of his medical providers. He received trigger point injections but that they were not helpful. Plaintiff further avers that he has difficulty lift/carrying heavy objects, bending, and sleeping.

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]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]). At the outset, plaintiff failed to submit any medical proof addressing his subsequent automobile accident or his condition relative to this accident (*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 this regard, Dr. Stephen failed to indicate an awareness of plaintiff's subsequent accident, therefore, any conclusion on his part that plaintiff's claimed injuries or need for surgery are causally related to the subject accident is mere speculation (*see*, ***D'Alba v Choi***, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]). While Dr. Stephen records plaintiff's complaints of pain, he has failed to present objective medical proof that was contemporaneous with the accident showing any initial quantified and qualified range of motion restrictions for plaintiff's lumbar spine (*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]). Dr. Stephen has also failed to set forth any significant, objectively measured limitations in the functioning and use of plaintiff's lumbar spine (*see*, ***Porto v Blum***, 39 AD3d 614, 833 NYS2d 245 [2d Dept 2007]; ***Springer v Arthurs***, 22 AD3d 829, 803 NYS2d 170 [2d Dept 2005]). Instead, the affidavit of Dr. Stephen, which is based upon treatments by him that did not begin until three years after the accident, 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***, *supra*). In any event, at the time of his examination by Dr. Stephen on April 25, 2007, plaintiff had not received treatment for injuries associated with the accident since 2004. Plaintiff's approximate twenty-eight month gap in treatment was, in essence, a cessation of treatment

which he has entirely failed to address by way of objective medical proof (*see*, ***Karabchievsky v Crowder***, 24 AD3d 614, 808 NYS2d 338 [2d Dept 2005]; ***Puerto v Omholt***, 17 AD3d 650, 795 NYS2d 117 [2d Dept 2005]).

Plaintiff also failed to proffer any objective 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*, ***Gavin v Sati***, 29 AD3d 734, 815 NYS2d 250 [2d Dept 2006]; ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]). While plaintiff avers that he has difficulty performing certain activities such as lifting/carrying heavy objects, the record otherwise lacks objective 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]; ***O'Neal v Cancilla***, 294 AD2d 921, 741 NYS2d 815 [4th Dept 2002]; ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]). Additionally, plaintiff did not assert that he was advised by a medical practitioner to cease all employment or to curtail his other activities (*see*, ***Ersop v Variano***, 307 AD2d 951, 763 NYS2d 482 [2d Dept 2003]; ***Monette v Keller***, 281 AD2d 523, 721 NYS2d 839 [2d Dept 2001]). 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 in this regard must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Watford v Boolukos***, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, this motion for summary judgment is granted and the complaint is dismissed.

Dated: OCT 16 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION