SHORT FORM ORDER

INDEX No. 03-15715
CAL. No. 07-00278-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 6-20-07
ADJ. DATE 8-20-07
Mot. Seq. # 006 - MD
007 - XMD

JACK INZERILLO, Plaintiff, - against - TOWN OF HUNTINGTON, FRANK CASTELLANO, PRESTON CAMPAGNE, TRUE BLUE SWIMMING POOLS and MICHAEL TRUEHART, individually and d/b/a TRUE BLUE SWIMMING POOLS, INC., Defendants.	FREDRICK P. STERN & ASSOCIATES, P.C. Attorneys for Plaintiff 2163 Sunrise Highway Islip, New York 11751 JOHN J. LEO, ESQ., Town Attorney By: Valerie E. Smith, Esq. Attorneys for Deft Town of Huntington Town Hall, 100 Main Street Huntington, New York 11743 GACOVINO, LAKE & ASSOCIATES, P.C. Attorneys for Defendant Castellano 270 West Main Street Sayville, New York 11782 HARMS & FINNERAN Attys for Defts True Blue & Truehart One Whitehall Street, 13th Floor New York, New York 10004

Upon the following papers numbered 1 to 25 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 13; Answering Affidavits and supporting papers 14 - 22; Replying Affidavits and supporting papers 23 - 25; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Town of Huntington and Frank Castellano for an order pursuant to CPLR 3212 granting summary judgment in their favor on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by defendants True Blue Swimming Pools and Michael Truehart, Jr. individually and d/b/a True Blue Swimming Pools for an order pursuant to CPLR 3212 granting summary judgment in their favor on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on May 16, 2003 at approximately 4 pm when his vehicle was rear-ended by a vehicle owned by defendant Town of Huntington (Town) and operated by defendant Frank Castellano (Castellano) that had been struck by a vehicle operated by defendant Preston Campagne on Cuba Hill Road, approximately 150 feet north of Little Plains Road in Huntington, New York. By his verified bill of particulars, plaintiff alleges that as a result of the subject accident, he sustained cervical spine disc disease; cervical sprain and strain; lumbar spine disc disease; lumbar spine sprain and strain; thoracic disc disease; mid back strain; and decreased range of motion in all directions due to pain and paraspinal tenderness and muscle spasm noted with respect to cervical, thoracic and lumbar spine. In addition, plaintiff alleges that he also sustained uncinate hypertropy to the right side of the C3-C4 interspace resulting in osseous narrowing of the entrance to the right foramen; a posterior herniation at C4-C5; and broad-based bulging at C5-C6. Plaintiff also claims that following the accident he was treated and released from the emergency room at Southampton Hospital and that since the accident he has been restricted in his work as a pool installer to office and administrative duties.

Defendants Town and Castellano now move for summary judgment in their favor on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of the motion, they submit the note of issue, certificate of readiness and compliance conference order with certification; the summons and verified complaint; their verified answer; plaintiff's verified bill of particulars; and plaintiff's deposition transcript.

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 "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see*, ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***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]).

Here, defendants Town and Castellano failed to submit any independent medical evidence to establish that plaintiff did not suffer any physical limitations or restrictions as a result of his alleged disc injuries and, therefore, they were not entitled to summary judgment (*see*, ***Kearse v New York City Trans. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005], distinguishing ***Derival v New York City Trans. Auth.***, 289 AD2d 281, 734 NYS2d 579 [2d Dept 2001]; ***Gray v Lasurdo***, 302 AD2d 560, 755 NYS2d 627 [2d Dept 2003]; ***Hussein v Littman***, 287 AD2d 543, 731 NYS2d 477 [2d Dept 2001]; ***Mariaca-Olmos v Mizrhy***, 226 AD2d 437, 640 NYS2d 604 [2d Dept 1996]; ***Flanagan v Hoeg***, 212 AD2d 756, 757, 624 NYS2d 853 [2d Dept 1995]). In their reply, defendants Town and Castellano submit the affirmed report dated July 25, 2005 of defendant's examining orthopedic surgeon, Arthur M. Bernhang, M.D. (Dr. Bernhang), based on his examination of plaintiff on July 11, 2005. Although the attorney for defendants Town and Castellano had indicated in his affirmation to the motion that Dr. Bernhang's report was attached as an exhibit, said report was not provided with the motion papers. In the reply papers an Assistant Town Attorney explained that it was an inadvertent omission, that the report had been exchanged with plaintiff's counsel in September 2006 such that plaintiff could not be prejudiced by the report's submission with the reply papers. Plaintiff's attorney noted the omission in his affirmation in support of his opposition to the motion and cross motion and argued that allowing the submission by reply and consideration of said report would irreparably prejudice plaintiff who would not be afforded an opportunity to examine and respond to said report.

Defendants Town and Castellano are not entitled to remedy the basic deficiencies of their moving papers by submitting an expert affirmation in reply since they sought to remedy those basic deficiencies in their prima facie showing rather than respond to arguments in plaintiff's opposition papers (*see*, ***Scansarole v Madison Square Garden, L.P.***, 33 AD3d 517, 827 NYS2d 1 [1st Dept 2006]; ***Migdol v City of New York***, 291 AD2d 201, 737 NYS2d 78 [1st Dept 2002]; ***Miller v Brust***, 278 AD2d 462, 717 NYS2d 663 [2d Dept 2000]). This rule is generally employed in the context of summary judgment motions to prevent a movant from remedying basic deficiencies in its prima facie showing by submitting evidence in reply, thereby shifting to the non-moving party the burden of demonstrating the existence of a triable issue of fact at a time when that party has neither the obligation nor opportunity to respond (*see*, ***Kennelly v Mobius Realty Holdings LLC***, 33 AD3d 380, 822 NYS2d 264 [1st Dept 2006]). That plaintiff may have had notice of the existence of the expert affirmation does not remedy the fact that at this stage of motion practice plaintiff has neither the obligation nor opportunity to respond (*see*, *id.*). Thus, defendants Town and Castellano failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Taylor v Ellis***, 5 AD3d 471, 772 NYS2d 570 [2d Dept 2004]).

Defendants True Blue Swimming Pools and Michael Truehart, Jr. individually and d/b/a True Blue Swimming Pools (True Blue) cross-move for summary judgment in their favor on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of their cross motion, defendants True Blue submit the summons and amended verified complaint; their answer and demand for a bill of particulars and attorney verification and affidavits of service by mail. Their attorney indicates in his affirmation in support that he has reviewed co-defendants' affirmation in support of the motion and each of the exhibits and that he adopts and incorporates by reference all of the arguments made by the attorney for the co-defendants in support of the motion for the same relief.

Inasmuch as defendants True Blue are relying on the same submissions as those proffered by co-defendants Town and Castellano which were found deficient as discussed above, defendants True Blue have also failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Taylor v Ellis***, *supra*).

It so follows that defendants having failed to establish their prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained a serious injury, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; ***McDowall v Abreu***, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

Accordingly, the instant motion and cross motion are denied.

Dated: OCT 16 2007

J.S.C.

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