SHORT FORM ORDER

INDEX NO. 05-20159
CALENDAR NO. 07-00833-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 6-15-07
ADJ. DATE 8-20-07
Mot. Seq. # 002 MD

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JOHN MASULLO and MAUREEN D. MASULLO,

Plaintiffs,

– against –

ROBERT A. SQUITIRO and MAUREEN A. SQUITIRO.

Defendants.

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Upon the following papers numbered 1 to 30 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 - 26; Replying Affidavits and supporting papers 27 - 30; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied.

This action was commenced to recover damages, personally and derivatively, for injuries allegedly sustained as the result of a rear-end collision that occurred on Route 112 in the Town of Brookhaven on January 15, 2003. Plaintiff John Masullo, the driver of one of the vehicles, alleges in a supplemental bill of particulars that he suffered various personal injuries in the accident, including posterior disc herniations at levels C2-3 and C6-7 with cerebrospinal fluid (CSF) impression; central disc herniations at levels L4-5 and L5-S1 with thecal sac compromise; cervical and lumbar radiculopathy; cervical and lumbar myofascial pain syndrome; patellofemoral syndrome in the left knee; and "aggravation/exacerbation of prior cervical spin injury resulting in left neural foraminal stenosis at C3-4 and hypertrophic changes in the acromioclavicular joint of the left shoulder associated with wasting/atrophy of the left deltoid muscle." He further alleges that while he was not confined to bed or home after the accident, he sustained personal injuries within the following four categories of Insurance Law § 5102 (d): 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; and medically determined injury of a nonpermanent nature, which prevented him from performing his usual daily activities for at least 90 days out of the 180 days immediately following the accident.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as he did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d). Defendants' submissions in support of the motion include copies of the pleadings; a transcript of plaintiff's deposition testimony; and sworn medical reports prepared by Dr. Edmunde Stewart, Dr. Beatrice Engstrand; and Dr. Harvey Lefkowitz. At defendants' request, Dr. Stewart, an orthopedic surgeon, and Dr. Engstrand, a neurologist, conducted examinations of plaintiff in January and February 2007, and reviewed certain medical records and reports concerning the alleged injuries. Dr. Lefkowitz, a radiologist, conducted an independent review of magnetic resonance imaging (MRI) scans of plaintiff's spine and left shoulder performed in 2003 and 2005.

Plaintiffs oppose the motion, arguing that defendants' submissions are insufficient to establish a prima facie case that plaintiff Joseph Masullo did not suffer a permanent consequential or significant limitation of use of spinal function as a result of the injuries allegedly sustained as a result of the collision. Alternatively, plaintiffs assert that evidence submitted in opposition raises a triable issue of fact as to whether plaintiff suffered injuries within the "limitation of use" categories or the 90/180 category set forth in Insurance Law § 5102 (d). Plaintiffs' submissions include an affidavit and medical records by plaintiff's treating chiropractor, Dr. David Ben Eliyahu, and affirmed MRI reports concerning plaintiff's left shoulder, cervical spine and lumbar spine.

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see*, ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may 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 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438,

600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see*, ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see*, ***Grasso v Angerami***, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The medical report prepared by Dr. Stewart states that plaintiff presented with complaints of constant pain in his neck, lower back, and left knee. It states, among other things, that plaintiff exhibited normal range of motion in his cervical and lumbar regions, and in his left knee and left shoulder. It states that there was no evidence of spasm or point tenderness in the cervical spine; that the straight leg raise test, which checks for sciatic nerve and nerve root involvement, was negative in both the supine and sitting position; and that plaintiff's reflexes, muscle tone, motor strength, and sensory responses in the upper and lower extremities were within normal limits. The report further states that examination of plaintiff's left knee revealed no ligament instability, no point tenderness, and no sign of injury to the meniscus. Dr. Stewart concludes that plaintiff sustained cervical and lumbosacral sprains in the accident, which have resolved, and that presently there is no objective evidence of orthopedic disability in plaintiff's neck, back, left knee or left shoulder causally related to the accident. He further opines that plaintiff's subjective complaints of knee pain are referable to his occupation as a floor installer, and that his complaint of shoulder pain is related to a recent diagnosis of brachial neuritis and not to the 2003 motor vehicle accident.

Similarly, the report by Dr. Engstrand states that plaintiff demonstrated normal movement in his cervical and lumbar regions during range of motion testing, and that a motor examination revealed normal tone, bulk and power. The report states that plaintiff complained of pain at 35 degrees of hip flexion during the straight leg raise test, that he had muscle atrophy in the left shoulder region, and that he had diminished reflexes on the left side. Dr. Engstrand opines that plaintiff suffers from degenerative disc disease in the cervical and lumbar areas. She also asserts that an MRI scan shows pre-existing joint disease in plaintiff's left shoulder, yet defers the question of whether plaintiff's shoulder injury is due to degenerative changes to an orthopedist. Dr. Engstrand concludes that plaintiff does not suffer from any neurological disability, and that he may "continue gainful employment and normal activities of daily living."

Dr. Lefkowitz report states, in relevant part, that MRI scans of plaintiff's cervical region performed in February 2003 and March 2005 reveal posterior disc bulges at levels C4-5, C5-6 and C6-7, but no evidence of herniations or cord compression. It states that an MRI study of plaintiff's lumbar region performed in February 2003 shows disc dehydration and a posterior disc bulge at level L4-5, and that such findings may be due to normal wear and tear on the spine. Further, the report states that there was no evidence of disc herniation or secondary post-traumatic changes in plaintiff's lumbar spine. Lastly, Dr. Lefkowitz' report states that an MRI scan of plaintiff's left shoulder performed in April 2005 reveals that the rotator cuff and labrum are intact; that both the acromioclavicular joint and the glenohumeral joint are unremarkable; that there is no evidence of rotator cuff impingement; and that the bicep tendon is normal.

The sworn medical reports offered by defendants in support of the motion are insufficient to demonstrate prima facie that plaintiff John Masullo did not suffer a serious injury in the accident. Here, while both Dr. Stewart and Dr. Engstrand found that plaintiff had normal range of motion in his spine,

no medical explanation is offered by Dr. Engstrand as to the significance, if any, of the positive finding during the straight leg test (*see*, ***Buchanan v Celis***, 38 AD3d 819, 832 NYS2d 637 [2d Dept 2007]; ***DeLuca v Miceli***, 37 AD3d 643, 830 NYS2d 331 [2d Dept 2007]). Moreover, neither Dr. Stewart nor Dr. Engstrand set forth the objective tests they performed during their examination of plaintiff to support their determination that he has full range of motion in his cervical and lumbar regions (*see*, ***Cedillo v Rivera***, 39 AD3d 453, 835 NYS2d 238 [2d Dept 2007]; ***Kavanagh v Singh***, 34 AD3d 744, 826 NYS2d 97 [2d Dept 2006]; ***Ilardo v New York City Tr. Auth.***, 28 AD2d 610, 814 NYS2d 210 [2d Dept 2006]; ***Junco v Ranzi***, 288 AD2d 440, 733 NYS2d 897 [2d Dept 2001]). Further, defendants provided no explanation for the conflict between Dr. Stewart and Dr. Engstrand's findings as to plaintiff's reflexes and the presence of muscle atrophy in plaintiff's left shoulder region. Similarly, defendants did not address the apparent conflict between Dr. Engstrand's finding that plaintiff suffers from degenerative changes in his left shoulder and Dr. Lefkowitz' finding that the MRI scan of the shoulder was unremarkable. Accordingly, the motion for summary judgment is denied, as defendants failed to establish prima facie that plaintiff John Masullo did not sustain a serious injury within the meaning of Insurance Law §5102 (d) as a result of the subject accident (*see*, ***Buchanan v Celis***, *supra*; ***DeLuca v Miceli***, *supra*; ***Whittaker v Webster Trucking Corp.***, 33 AD3d 613, 823 NYS2d 95 [2d Dept 2006]).

Dated: OCT 16 2007

J.S.C.

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