SHORT FORM ORDER

INDEX No. 04-20407
CAL. No. 07-01169-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 8-28-07
ADJ. DATE 9-28-07
Mot. Seq. # 003 - MD

JUAN MARINE,	:	BORDA, KENNEDY ALSEN & GOLD LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	1805 Fifth Avenue
	:	Bay Shore, New York 11706
- against -	:	
	:	KELLY, RODE & KELLY, LLP
FLORA A. FUENTES and MARTHA D. GUEVARA,	:	Attorneys for Defendants
	:	218 Griffing Avenue
Defendants.	:	Riverhead, New York 11901

Upon the following papers numbered 1 to 12 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 9 - 10 ; Replying Affidavits and supporting papers 11 - 12 ; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint 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 the then 35 year old plaintiff on July 9, 2003 when the vehicle that he was operating was involved in a collision with defendants' vehicle on Molloy Street at its intersection with Garibaldi Avenue, in Babylon, New York. By his complaint, plaintiff seeks to recover damages for serious injuries allegedly sustained in the subject accident as defined in Insurance Law § 5102 (d) or economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

In his bill of particulars, plaintiff alleges that as a result of the subject accident he sustained injuries including, straightening of the normal cervical curve of the spine consistent with muscular spasm; a complex tear of the posterior horn of the medial meniscus of the left knee; traumatic cervical paraspinal myofascitis; thoracic myofascitis; traumatic lumbar paraspinal myofascitis; sprain and strain of the left shoulder and upper arm; sprain and strain of the left wrist; sprain and strain of the left knee;

and left eye twitches. In addition, plaintiff alleges in his bill of particulars that his injuries constitute serious injuries under the following 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; 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's bill of particulars also indicates that plaintiff was not employed on the date of the subject accident and was not confined to a hospital and that whether plaintiff was confined to bed or home was "to be supplied."

Defendants now move for summary judgment in their favor dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of their motion, defendants submit the summons and complaint; their answer; plaintiff's bill of particulars; the affirmed report dated March 26, 2007 of defendants' examining orthopedic surgeon, Arthur M. Bernhang, M.D. (Dr. Bernhang), based on an examination of plaintiff on March 19, 2006; and the affirmed report dated March 21, 2007 of defendants' examining neurologist, Beatrice C. Engstrand, M.D. (Dr. Engstrand) based on an examination of plaintiff on March 19, 2006.

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]). 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]).

Here, defendants failed to establish, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident inasmuch as defendants' examining orthopedic surgeon found limitations when he examined plaintiff despite his ultimate conclusion that plaintiff did not sustain a "serious injury" and both of defendants' examining physicians failed to address all of plaintiff's claimed injuries (*see*, ***Bentivegna v Stein***, 42 AD3d 555, 841 NYS2d 316 [2d Dept 2007]; ***Staubitz v Yaser***, 41 AD3d 698, 839 NYS2d 113 [2d Dept 2007]; ***Wade v Allied Bldg. Products Corp.***, 41 AD3d 466, 837 NYS2d 302 [2d Dept 2007]; ***Tchjevskaia v Chase***, 15 AD3d 389, 790 NYS2d 175 [2d Dept 2005]). Defendants' examining orthopedic surgeon, Dr. Bernhang, indicated in his report based on an examination of plaintiff almost three years after the subject accident that plaintiff related that his present complaints consisted of his neck and left wrist and left knee bothering him in cold weather and that his low back bothered him when bending and that he had pain in the middle of his back. In addition, defendants' examining orthopedic surgeon indicated that upon measuring plaintiff's active ranges of motion by goniometer/tape measure he found that plaintiff's cervical spine flexion was 45 as compared to the Average Range of Joint Motion (ARJM) of 38; plaintiff's cervical spine extension was 60 compared to the ARJM of 38; plaintiff's left/right lateral flexion was 45/45 as compared to the ARJM of 43; and plaintiff's left/right cervical rotation was 60/60 as compared to the ARJM of 45. His measurements with respect to plaintiff's shoulders were as follows: left/right active shoulder abduction 150/150 as compared to the ARJM of 170; left/right active shoulder forward flexion 140/140 as compared to the ARJM of 158; external rotation 85/90 as compared to the ARJM of 90; and internal rotation of 60/60 as compared to the ARJM of 70. Defendants' examining orthopedic surgeon's findings also included symmetrical reflexes at the elbow; negative results for Spurling's test for cervical radiculopathy; and bilaterally negative results for provocative tests for median carpal tunnel or ulnar nerve neuropathy.

Regarding plaintiff's lumbar examination, defendants' examining orthopedic surgeon noted that lying supine, plaintiff's straight-leg raising was 80/80 (normal being 55 degrees and above) and that plaintiff's pelvic roll was negative; FABER and FADIR tests were negative; and that plaintiff's knee jerks and ankle jerks were symmetrical. With respect to plaintiff's wrists, defendants' examining orthopedic surgeon recorded measurements of left/right wrist dorsiflexion of 80/80 as compared to the ARJM of 71 and left/right wrist palmar flexion of 75/60 as compared to the ARJM of 73. He added that Finkelstein's test for de Quervain's was negative and that there was no localizing tenderness about the wrist and no "click"on supination or pronation.

As for plaintiff's knee injury, the Court notes that a magnetic resonance imaging report of plaintiff's knee showing a meniscal tear does not, alone, establish a serious injury (*see*, ***Nannarone v Ott***, 41 AD3d 441, 837 NYS2d 311 [2d Dept 2007]). The mere existence of such an injury is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see*, *id.*). Defendants' examining orthopedic surgeon provided the following results of his examination of plaintiff's knees: knee extension 0/0 as compared to the ARJM of 0 and knee flexion of 115/115 as compared to the ARJM of 134. He added that there was no fluid palpable in either knee; no crepitation on motion of the patella in the patellofemoral joint; and that there

were prominent tibial tubercles, bilaterally, asymptomatic. He also found that meniscal signs were negative to the grind test; that there was no popliteal fullness; and that the anterior drawer sign was negative.

Defendant's examining orthopedic surgeon concluded that he found no objective orthopedic evidence of any residual of injuries said to have occurred to the cervical spine, lumbar spine, left knee or left wrist. He noted that plaintiff was not under any active medical care and did not appear to be disabled. He opined that plaintiff's prognosis was excellent and that plaintiff was able to return to his "pre-loss" activity levels including occupational duties without restrictions.

The affirmed report of defendants' examining orthopedic surgeon indicated certain below average range of motion measurements: plaintiff's bilateral knee flexion measurements were 14 percent below average; bilateral active shoulder abduction was 12 percent below average; bilateral active shoulder flexion was 11 percent below average; external rotation of the left shoulder was 5.6 percent below average; and bilateral internal rotation of the shoulders were 14 percent below average. Said findings were insufficient to satisfy defendants' burden of demonstrating that plaintiff had full range of motion and that he suffered from no disabilities (*see,* ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]).

The examination findings listed in the affirmed report of defendants' examining neurologist, Dr. Engstrand, who also examined plaintiff almost three years after the subject accident did not remedy the deficiencies in defendants' examining orthopedic surgeon's report. Defendants' examining neurologist tested plaintiff's ranges of motion by visual inspection and found that plaintiff's cervical and lumbar range of motion findings were all normal when compared with normal measurements. Said findings conflicted with the findings of defendants' examining orthopedic surgeon and presented an issue of credibility for the jury (*see*, ***Redmond v Schultz***, 152 AD2d 823, 544 NYS2d 33 [3d Dept 1989]; ***Pettersen v Curreri***, 99 AD2d 774, 472 NYS2d 23 [2d Dept 1984]). Specifically, plaintiff's cervical ranges of motion were flexion 45 degrees (45 degrees being normal); extension 45 degrees (45 degrees being normal); rotation 80 degrees (80 degrees being normal); and cervical lateral flexion 40 degrees (40 degrees being normal). Plaintiff's lumbar ranges of motion were flexion 90 degrees (90 degrees being normal); extension 30 degrees (30 degrees being normal); rotation 30 degrees (30 degrees being normal); and lateral flexion 30 degrees (30 degrees being normal). Defendants' examining neurologist's other findings included findings that plaintiff's cranial nerve testing was normal; plaintiff's deep tendon reflexes were 2 and equal bilaterally in the biceps, brachioradialis, triceps, patellar jerks, and Achilles jerks; plantar responses were down going; and that plaintiff's station and gait were normal. In conclusion, defendants' examining neurologist diagnosed cervical and lumbar sprain and opined that there was no disability. Notably, neither of defendants' examining physicians addressed plaintiff's claimed injuries of thoracic myofascitis or reported examining that portion of plaintiff's body (*see*, ***Hughes v Cai***, 31AD3d 385, 818 NYS2d 538 [2d Dept 2006]).

Moreover, defendants did not adequately address the category of serious injury that plaintiff sustained medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident in their motion papers and, therefore, failed to establish their prima facie entitlement to summary judgment as to that claim (*see*,

Insurance Law § 5102 [d]; ***Lopez v Geraldino***, 35 AD3d 398, 825 NYS2d 143 [2d Dept 2006]). Defendants' attorney states in his affirmation in support of the motion that defendants did not receive any additional bill of particulars with respect to the information "to be supplied" according to the original bill of particulars; emphasizes that the bill of particulars indicated that plaintiff was unemployed at the time of the accident: and states that he is familiar with plaintiff's deposition testimony concerning his employment at the time of the subject accident and time out of work and adds that the testimony is contradictory to the claims in the bill of particulars. Without the submission of the actual pages of the examination before trial, defendants' attorney, who lacks personal knowledge, cannot offer his version of plaintiff's testimony as evidence (*see*, ***Feratovic v Lun Wah, Inc.***, 284 AD2d 368, 725 NYS2d 892 [2d Dept 2001]; ***Carpluk v Friedman***, 269 AD2d 349, 704 NYS2d 94 [2d Dept 2000]).

Inasmuch as defendants 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]). Therefore, the motion for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

Dated: NOV 15 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION