SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

ERMIS MARTINEZ,

Plaintiff(s),

INDEX No. 12405/05

-against-

MOTION DATE: 9/10/07

CAROL A. GARCIA and JOHN GIUNTA,

Defendant(s).

MOTION SEQ. No. 1-MG
XXX

The following papers read on this motion:
Notice of Motion/Affirmation/Exhibits
Affirmation in Opposition/Exhibits
Reply

In this action arising out of an automobile collision, defendants Carol Garcia and John Giunta seek Orders granting them summary judgment dismissing the Complaint alleging that the plaintiff has failed to demonstrate that he suffered the requisite serious physical injuries as required by Insurance Law §§ 5102, 5104. The plaintiff opposes.

In this action plaintiff seeks damages for personal injuries allegedly sustained as a result of a two car automobile collision occurring on August 9, 2002.

In his Verified Bill of Particulars, plaintiff alleges that as a result of that collision he suffered cervical disc herniations at C3-4 and disc bulges at C5-6, and C6-7, nerve root irritation and loss of cervical motion. He also states that he suffered cervical and lumbar radiculitis, headaches, spasms, myofascitis, pain and loss of range of motion, flexion and extension of the cervical and lumbar spine. (Caldwell Motion, Exh. B)

At his deposition plaintiff claims that he was involved in the accident on August 9, 2002 but did not seek medical treatment until approximately six days later, when he went to a chiropractor. He testified that he missed two weeks of work and that he had a previous shoulder injury from another car accident three years earlier. He testified that the earlier car accident resulted in litigation.

Plaintiff's transcript was never executed.

There are no records presented indicating what physical therapy plaintiff initially underwent, or for how long. There is no record of any further medical examination or any treatment by a physician, or even a chiropractor after the initial six months after the accident.

In opposition to the application plaintiff provides an Affirmation of Dr. Teymuraz Datikashvili, who notes the plaintiff's initial complaints of pain from August 9, 2002. He states that the MRI of plaintiff's cervical spine revealed a herniation at C3-4 and bulges at C5-6 and C6-7, which the doctor states are consistent with an auto accident injury. He also states that an electrodiagnostic study revealed nerve root irritation at L5-S1. He states that the plaintiff underwent physical therapy for approximately six months, at which time the plaintiff revealed maximum results.

While the doctor states that he found range of motion limitations at the end of the initial six months, he fails to state what objective tests he performed to arrive at these findings.

The Court notes that the doctor fails to state that plaintiff's injuries were serious or that they prevented him from working or performing his regular daily activities.

The doctor also states that he examined the plaintiff on June 7, 2007, some five years after the accident. He fails to note any treatment which the plaintiff received in the interim. He notes the plaintiff's subjective complaints of pain, which he now states are permanent. He notes findings of limitations in the plaintiff's spine, but again, fails to state what objective tests were performed to arrive at these results, nor that the limitations as noted, are significant. The doctor states that he recommended a home exercise program and opines that they significantly limit his daily activities, however, again the Court must note that he fails to state how or what activities are limited, nor does he prescribe any medication or therapy for the plaintiff.

While the doctor recommended physical therapy, there is no evidence of who performed such therapy, nor is there any indication that this physician ever examined the plaintiff again prior to the 2007 examination.

He states that the plaintiff suffers a limitation and permanent injury to his spine. There is no MRI or acceptable objective testing recently performed which could be used to support such a conclusion. There is no statement that any such limitation is significant.

The doctor notes plaintiff's complaint of pain, but there are no objective tests identified as being performed and is no finding of any significant disability or limitations, nor is there any indication of any findings of significant restrictions in the report, which merely recommends continued home exercises, not supervised or prescribed physical therapy.

The plaintiff offers no other medical evidence to support his claim of injuries.

None of the records provided include any affirmation from a physician stating that the plaintiff was disabled, unable to perform substantially all of his daily activities or was unable to return to work following the accident due to his injuries. No doctor states that he could not perform his usual activities. There is no finding from any doctor that plaintiff suffered a permanent or significant limitations of motion.

In order to prove serious injury under the category of 90 out of 180 days, limitations, a plaintiff must establish that he or she was unable to perform their usual and customary daily acts for 90 out of the 180 days immediately following the accident. *DeFilippo v. White*, 101 AD2d 801 (2nd Dept. 1994). This must be more than a slight curtailment. *Gaddy v. Eyler*, 79 NY2d 955 (1992). He or she must provide competent objective medical evidence demonstrating that an injury was sustained which prevented these activities. *McKnight v. Lavalle*, 147 AD2d 902 (4th Dept. 1989); *Zaffuto v. Martorano*, 161 AD2d 639 (2nd Dept. 1990); *Melind v. Lauster*, 195 AD2d 653 (3rd Dept. 1993) *aff'd* 82 NY2d 828.

A plaintiff cannot demonstrate a claim that he could not perform his usual daily activities for more than 90 days of the first 180 days following the accident, due to his injuries unless there is proof presented that the failure to return was medically necessary. *June v. Gonet*, 298 AD2d 811 (3rd Dept. 2002); *Rum v. Pam Transportation, Inc.*, 250 AD2d 751 (2nd Dept. 1998). *Crespo v. Kramer*, 295 AD2d 467 (2nd Dept. 2002).

The Court finds that the plaintiff presents no medical evidence to support his claim that there is a triable issue of fact whether the accident prevented him from performing his customary daily activities during 90 of the first 180 days following the accident. The plaintiff has not demonstrated that there is a question of fact whether the restrictions alleged were medically indicated or that the curtailed activities comprised a significant portion of plaintiff's usual daily activities. *Below v. Randall*, 240 AD2d 439 (3rd Dept. 1997).

In this instance there is no such proof.

As to the claim of permanent injuries, counsel for the defendant contends that this medical evidence is insufficient to demonstrate that the plaintiff suffered the requisite serious physical injuries as a result of this collision, and therefore those claims alleged in the Complaint should be stricken pursuant to CPLR § 3212 and Insurance Law § 5102.

Plaintiff's physician fails to specifically identify plaintiff's current permanent serious disability caused by this accident. While he notes pain and subjectively tested limitation, there is no evidence of any specific objective medical tests relied upon in concluding that the plaintiff suffers a consequential limitation and permanent disability.

In support of their motion for summary judgment, defendants provide a sworn report from an orthopedic surgeon, Dr. John Killian, who examined plaintiff on November 16, 2006. The orthopedic surgeon states that prior to the examination he reviewed all of plaintiff's medical records, including the MRI reports, the physical therapy reports, chiropractic, and biofeedback reports, as well as a neurologist and physiatrist's consult reports. The doctor noted that the plaintiff, had complaints of back pain, stated that he was injured while delivering flowers and missed two weeks of work. He noted plaintiff's claims and records indicating back and neck pain. He also notes that the plaintiff stated that he stopped all therapy after six months and has had no further treatment, nor any new accident or injury.

Dr. Killian notes plaintiff's statement that he continues to have intermittent neck pain and that sometimes it hurts when he is sleeping and that he takes Aleve for the pain. He also notes plaintiff's complaint of low back pain when he sits too long or walks too much, which he relieves with Aleve and a hot pack.

Dr. Killian states that he examined plaintiff and found normal cervical and lumbar lordosis with no evidence of atrophy, asymmetry or deformity or spasm. He found a normal range of motion in his cervical and lumbar spines with no restrictions or spasm. And noted only a refusal to bend further by the plaintiff. He states that a neurological examination also had normal findings. Dr. Killian states that he concluded that the plaintiff was treated for neck and back injuries in 2002 and that they were not significant or traumatic. He states that there is no objective findings to support the plaintiff's subjective complaints of pain. He states that he concludes that there is no permanent impairment or disability with plaintiff's neck and back and that he has fully recovered from his injuries and may work and perform his daily activities without medical limitations or restrictions.

Defendants also provide an affirmation from Dr. Sheldon Feit, a radiologist who reviewed the plaintiff's Cervical MRI films. Dr. Feit states that there is evidence of mild bulges at C3-4, C4-5 and C5-6with no herniation. He states that the MRI, taken within five months of the accident, reveals pre-existing degenerative changes not post-traumatic bulges, and are not causally related to the accident. (Motion, Exh G)

This orthopedic surgeon states that he found no objective evidence of any continuing injury or disability and found a full range of motion to the plaintiff's thoracolumbar spine and left shoulder. He noted that the records revealed that the plaintiff had not been treated since 2003. He concludes that there is no showing of any total loss of use to the plaintiff. (Motion, Exh. F). He concluded that she was not in need of any further treatment or therapy, did not need any restrictions on his normal activities and was suffering no permanent or residual injuries. He stated that the plaintiff stated that he takes Advil when necessary and is not undergoing any treatment. (Motion, Exh. F)

As to the claim of permanent injuries, counsel for the defendants contends that the medical evidence presented is insufficient to demonstrate that the plaintiff suffered the requisite serious physical injuries as a result of this collision, and therefore those claims alleged in the Complaint should be stricken pursuant to CPLR § 3212 and Insurance Law § 5102.

There is no evidence that the plaintiff has received any treatment since physical therapy stopped in 2004, nor is there any evidence that he is currently in need of any therapy or treatment nor is he in need of any restrictions on his activities.

Plaintiff's physician does not specifically identify plaintiff's current permanent serious disability caused by this accident. He notes pain and subjectively tested limitation, but no specific objective medical tests relied upon in concluding that the plaintiff suffers a consequential limitation and permanent disability.

The failure to provide such objective medical evidence render the medical records provided insufficient to defeat an otherwise meritorious motion for summary judgment. *Barbarulo v. Allery,* 271 AD2d 897 (3rd Dept. 2000). A plaintiff's statements that he was otherwise limited due to his own subjective complaints of pain are also insufficient to defeat summary judgment. *Georgia v. Ramautar,* 180 AD2d 713 (2nd Dept. 1992); *Scheer v. Koubek*, 70 NY2d 678 (1987).

It is the burden of the plaintiff to establish his or her serious physical injury by providing the Court with objective medical evidence, that there is a degree and extent of limitation of use and or function, which

is permanent. An expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury, provided that the evaluation has 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*, 98 NY2d 345 (2002). It must be a medical opinion supported by objective tests, such as x-rays, MRIs, Laseque tests or other recognized tests with quantitative results. Such tests, to be considered by the Court must be provided in admissible form. *Grasso v. Angerami*, 79 NY2d 813 (1991); *Friedman v. U-Haul Truck Rental*, 216 AD2d 266 (2nd Dept. 1995); *Pagano v. Kingsbury*, 182 AD2d 268 (2nd Dept. 1992).

The Courts required objective medical findings and diagnostic tests to support a plaintiff's complaints of pain and limitation. Such shall include: (1) a detailed percentage of loss of range of motion; (2) objective orthopedic or neurological tests and results; (3) a medical opinion relating to those test results to the injuries claimed; (4) proof establishing that the injuries were caused by the accident; (5) a sworn medical opinion that the injuries are permanent, *Barbarulo v. Allery*, *supra*; (6) be based on a recent examination; and (7) must explain any lapse or discontinuance of treatment. *Grossman v. Wright,* 268 AD2d 79 (2nd Dept. 2000).

The medical affirmation of plaintiff's physician as well as the other records provided by plaintiff in this instance, do not constitute competent evidence of a continued permanent "serious injury" for the purposes of Insurance Law § 5102(d). *Scheer v. Koubek*, 70 NY2d 678 (1987); *Marshall v. Albano*, 182 AD2d 614 (2nd Dept. 1992).

In this case the plaintiff provides no medical records and objective tests his physician relied upon in making his conclusions and diagnosis. In total, there is insufficient evidence to rebut that offered by the defendant to support a claim of serious permanent injuries and consequential limitations.

The medical evidence provided by the plaintiff in this action is clearly insufficient to raise a triable issue of fact. There is no objective finding of permanent consequential injuries and or limitations resulting from this collision. There is no proof of any current examination of the plaintiff by a physician specifically identifying plaintiff's current permanent significant disabilities caused by this accident, nor current specific objective medical tests relied upon in concluding that either plaintiff continues to suffer a permanent significant disability.

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Based on the evidence presented, the motion of the defendant seeking summary judgment dismissing the claims of plaintiff, is Granted. CPLR § 3212. The plaintiff has not set forth the necessary proof to demonstrate that he suffered the threshold serious physical injuries necessary to maintain this action. Insurance Law §§ 5102, 5104.

It is, SO ORDERED.

Dated: Nov 14, 2007

HON. GEOFFREY J. O'CONNELL, J.S.C.