SHORT FORM ORDER

INDEX No. 05-7398
CAL. No. 06-02805-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 4-18-07
ADJ. DATE 6-18-07
Mot. Seq. # 001 - MotD
002 - XMD

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ROBERT WORHACZ,

Plaintiff,

- against -

LAURO TORRES,

Defendant.

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Upon the following papers numbered 1 to 33 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 21 ; Answering Affidavits and supporting papers 22 - 24 ; Replying Affidavits and supporting papers 29 - 30; 31 - 33 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the Court, sua sponte, amends its order, dated August 6, 2007, solely for the purposes of correcting a typographical error contained therein and the order shall henceforth read as follows:

ORDERED that defendant's motion for summary judgment on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is granted solely to the extent indicated below, otherwise denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment on the issue of liability is denied as untimely.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on the Grand Central Parkway at or near its intersection with Northern Boulevard, County of Queens, New York on August 16, 2004. The accident allegedly happened when the vehicle that was operated by Lauro Torres struck the rear of the truck operated by plaintiff and owned by plaintiff's employer, United Rental Highway Technicians, Inc. The Court's computerized records indicate that the note of issue in this action was filed on December 6, 2006. Defendant now moves for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and plaintiff cross moves for summary judgment

on the issue of liability.

CPLR 3212 (a) requires that a motion for summary judgment be made within 120 days after the filing of a note of issue, except with leave of court on good cause shown (*see*, CPLR 3212 [a]). Plaintiff made his cross motion on May 16, 2007, as indicated in his affidavit of service of the cross motion, which is more than one month after April 5, 2007, the 120-day deadline following the filing of the note of issue thereby rendering the cross motion untimely (*see*, CPLR 3212[a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Notably, plaintiff did not seek leave to file a late motion for summary judgment in his notice of cross motion (*see e.g.* ***Welch v City of Glen Cove***, 273 AD2d 302, 708 NYS2d 475 [2d Dept 2000]). In addition, counsel for plaintiff has provided no explanation or "good cause" for serving the cross motion more than month late, and thus, the Court has no discretion to entertain it on the merits (*see*, ***Brill v City of New York***, *supra*; ***Rivers v City of New York***, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]). A one month delay is not minimal (*compare*, ***Miranda v Devlin***, 260 AD2d 451, 688 NYS2d 578 [2d Dept 1999][cross motion was made approximately five days after expiration of applicable 120-day period]). Moreover, assertions that no prejudice resulted from the delay since the action is not ready for trial and that the motion is meritorious are insufficient justifications to permit late filing (*see*, ***Gaines v Shell-Mar Foods, Inc.***, 21 AD3d 986, 801 NYS2d 376 [2d Dept 2005]). The Court notes that this cross motion does not fall under the exception where a timely motion for summary judgment is made on nearly identical grounds (*see e.g.*, ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; ***James v Jamie Towers Hous. Co.***, 294 AD2d 268, 743 NYS2d 85 [1st Dept 2002], *affd* 99 NY2d 639, 760 NYS2d 718 [2003]). Although defendant timely moved for summary judgment, the issue of whether plaintiff sustained a serious injury as defined in Insurance Law § 5102 (d), is different from whether there is a triable issue of fact as to liability. Further, the fact that the cross motion was timely served in accordance with the stipulations of adjournment executed by counsel for the parties does not render the cross motion timely pursuant to the rule.

Turning to defendant's motion, 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 verified bill of particulars; the unaffirmed report of plaintiff's treating radiologist, Alvand Hassankhnai, M.D.; the unaffirmed report of plaintiff's other treating radiologist, Steven Kuchta, M.D.; the two affirmed reports of defendant's examining radiologist, Roger A. Berg, M.D.; the affirmed report of defendant's examining neurologist, Warren Cohen, M.D.; the affirmed report of defendant's examining orthopedist, Wayne Kerness, M.D.; and plaintiff's deposition testimony.

Plaintiff claims in his bill of particulars that he sustained, among other things, a subacute fracture of the sesamoid bone in the right ankle; cervical and lumbar disc protrusions; cervical spine disc herniations; cervical and lumbar strains/sprains; and a hiatal hernia. Plaintiff also claims that he sustained economic loss in excess of basic economic loss as defined in Section 5102 of the Insurance Law. Additionally, plaintiff claims that he sustained a serious injury in the categories of a fracture, a significant disfigurement, a permanent consequential limitation, a significant limitation and a non-permanent injury. Plaintiff claims in his supplemental bill of particulars that he sustained a loss of earnings of approximately $12,000.

In his report dated November 8, 2004, Dr. Hassankhnai states that he performed cervical MRI studies of plaintiff's cervical spine on that date, and his findings include a left posterolateral foraminal disc protrusion at C-4/5 resulting in moderate left foraminal narrowing and C-5 nerve root compression; a left posterolateral C-6/7 protrusion resulting in moderate left C-7 root compression; and broadbased central disc osteophytosis. Dr. Hassankhnai opined that these studies showed degenerative disc disease at C-4/5, C-5/6 and C-6/7.

In his report dated March 7, 2005, Dr. Kuchta states that he performed MRI studies of plaintiff's right ankle on that date, and his findings include no fractures, subluxations, dislocations or osteoblastic/osteolytic lesions. While he observed a small region of heterogenous signal within the distal Achilles tendon, he also noted that there were no ligamentous lesions or tears. Dr. Kuchta opined that these studies showed "possible" slight tendinosis of the Achilles tendon.

In his report dated November 21, 2005, Dr. Berg states that he performed an independent

radiological review of plaintiff's cervical spine on November 8, 2004, and his findings include a normal alignment of the spinal column; dessication with disc bulging and spondylosis; and no acute bony edema. Dr. Berg opined that these studies showed chronic degenerative disc disease which was not attributable to the accident. In his report dated November 21, 2005, Dr. Berg states that he performed an independent radiological review of plaintiff's lumbar spine on November 8, 2004, and his findings include a normal lumbar lordosis; desiccation at all levels except for L-3/4; disc bulges with spondylosis; minimal degeneration from L-1 to L-3; and no herniation or displacement of the existing nerve roots. Dr. Berg opined that these studies showed degenerative disc disease in the lumbar spine which was not caused by the accident.

In his report dated June 27, 2006, Dr. Cohen states that he performed an independent neurological examination of plaintiff on that date, and his findings include normal muscle tone; normal grip strength bilaterally; an intact sensory system; reflexes that were "2+" bilaterally; and a normal gait. He also observed that there was a full range of motion of the cervical spine with no spasm. While he observed a 40 degree limitation in lumbar flexion, he also noted that there were negative lumbar test results and no spasm or trigger points about the lumbar spine. Dr. Cohen opined that plaintiff sustained cervical and lumbar sprains which had resolved and that the restrictions in his lumbar range of motion appeared to be self-imposed. He also concluded that plaintiff was not disabled that he could continue working without any restrictions.

In her report dated June 27, 2006, Dr. Kerness states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include no surgical scars about the cervical or lumbar spinal area; no swelling or deformity of the right ankle; no muscle atrophy; no spasms about the cervical or lumbar spine; and muscle strength that was "5/5" bilaterally. He observed that there was a full range of motion of the cervical and lumbar spine, with the exception of lumbar flexion which was 80 degrees compared with the normal range of 90 degrees. Furthermore, he observed that there was no swelling or tenderness of the feet and that subtalar joint motion was normal. Dr. Kerness opined that plaintiff had sustained cervical, thoracic and lumbar spine sprains/strains as well as right foot/ankle injuries which had resolved without residuals. He also concluded that plaintiff was capable of working without restrictions.

Plaintiff testified to the effect that he was he was driving his employer's truck and engaged in his normal work duties at the time of the accident. Although emergency personnel arrived at the scene, plaintiff declined treatment and went to his home in Smithtown. Later that evening, he received medical treatment for his neck, lower back and right foot. A few weeks later, Dr. Vesey x-rayed his right foot and gave him gel shoe inserts as well as a pair of crutches. He had previously injured his back in 1989 or 1990 in a work related accident, and was awarded benefits for a few months. He is presently unable to play sports or do much walking due to his injuries. Plaintiff further testified that he was not paid for the period of time that he was out of work, but did not know how much money he lost due to the accident.

By his submissions, defendant made a prima facie showing that plaintiff did not sustain a serious injury (*see*. ***Butuzowa v Alisova***, 10 AD3d 1022, __NYS2d__ [2d Dept, May 29, 2007]; ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Dr. Kerness found, upon a

recent examination, that there was normal subtalar joint motion of the feet with no swelling and no surgical scars about the cervical or lumbar spine. Additionally, doctors Kerness and Cohen found that there was a full range of motion of the cervical spine with no spasm. While Dr. Cohen observed a 40 degree limitation in lumbar flexion, he also noted that there was no spasm or trigger points about the lumbar spine (*see*, ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Furthermore, Dr. Berg opined that there were preexisting degenerative changes to plaintiff's cervical and lumbar spine which were unrelated to trauma (*see*, ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). Moreover, Dr. Kuchta found, upon his review of the MRI films of plaintiff's right ankle, that there were no fractures or subluxations (*see*, ***Harris v Carella***, 2007 NY Slip Op 5867 [4th Dept, July 6, 2007]). Defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that he did not sustain a significant disfigurement, or any other serious injury. As defendant 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, among other things, the unsworn report dated September 20, 2004 of his treating chiropractor, Philip A. Faquet, III, D.C.; the unaffirmed report dated November 2, 2004 of plaintiff's treating orthopedist, Kevin G. Vesey, M.D.; and Dr. Vesey's affirmation. Initially, the Court notes that the unsworn reports of doctors Faquet and Vesey are not in admissible form (*see*, ***Dowling v Mosey***, 32 AD3d 1190, 821 NYS2d 326 [4th Dept 2006]; ***Legendre v Bao***, 29 AD3d 645, 816 NYS2d 495 [2d Dept 2006]; ***Buonaiuto v Shulberg***, 254 AD2d 384, 679 NYS2d 89 [2d Dept 1998]), and as such they have not been considered in this determination. In his affirmation, Dr. Vesey avers that he examined plaintiff on November 2, 2004, and his findings include tenderness in the ball of the foot; tenderness at the anterolateral ligament complex; and an inability to stand on his toes. He opines that the x-rays of plaintiff's ankle and foot, which he took on November 2, 2004, show a subacute fracture of the lateral sesamoid bone. He opined, with a reasonable degree of medical certainty, that plaintiff's fracture is causally related with his motor vehicle of August 16, 2004 based upon his x-ray films, his physical examinations of plaintiff and medical records maintained in his office.

By the submission of Dr. Vesey's affirmation, plaintiff raised a triable issue of fact that he sustained a serious injury in the category of a fracture (*see*, ***Kaplun v Septama***, 38 AD3d 847, 834 NYS2d 206 [2d Dept 2007]; ***Boorman v Bowhers***, 27 AD3d 1058, 811 NYS2d 534 [4th Dept 2006]; ***Keevins v Drobbin***, 303 AD2d 463, 758 NYS2d 76 [2d Dept 2003]). The Court reaches a different conclusion, however, with respect to plaintiff's claim of a serious injury to his cervical and lumbar spine as he has failed to submit any admissible medical proof that was contemporaneous with the accident showing any initial range of motion restrictions in his 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]). In any event, plaintiff has not proffered any objective medical explanation for the cessation of the medical treatment to his spine approximately two years ago (*see*, ***Teodoru v Conway Transp. Serv.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Vallejo v Builders for the Family Youth, Diocese of Brooklyn, Inc.***, 18 AD3d 741, 795 NYS2d 712 [2d Dept 2005]). Plaintiff also has failed to present any admissible medical proof that he sustained a serious injury in the categories of a

significant disfigurement (*see generally*, ***Harris v Carella***, 2007 NY Slip Op 5867 [4th Dept, July 6, 2007]; ***Edwards v DeHaven***, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]), and his failure to proffer any expert testimony or photographs specifically addressing this issue constitutes an abandonment of this claim (*see*, ***Edwards v DeHaven***, *supra*). Similarly, plaintiff's failure to address the alleged hiatal hernia constitutes an abandonment of this claim as well (*see generally*, ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]).

Additionally, the proof submitted by the plaintiff is insufficient to raise a triable issue of fact that he sustained a medically-determined injury or impairment rendering him unable to substantially perform all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see*, ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Hernandez v DIVA Cab Corp***., 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]). While plaintiff testified, among other things, that he is presently unable to play sports or do much walking due to his injuries, he did not submit an affidavit detailing the same, and the record otherwise lacks objective proof of any substantial curtailment of his activities within the relevant time period after the accident (*see*, ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). 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 also be dismissed (*see*, CPLR 3212 [b]; *see*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]).

Accordingly, defendant's motion for summary judgment is determined as indicated above, and plaintiff's cross motion for summary judgment on the issue of liability is denied.

Dated: NOV 15 2007

J.S.C.

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