SCW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

TRIAL/IAS PART 11

FRANCISCO SALAS

INDEX NO. 12351/06

Plaintiff(s),

MOTION SEQUENCE NO. 1

- against -

COLLEGE POINT ASPHALT LLC AND EDWARD MARENCIK,

MOTION SUBMISSION DATE: 10/5/07

Defendant(s).

The following papers read on this motion:

Notice of Motion.....X
Affirmation in Opposition.....X
Reply Affirmation.....X
Memorandum of Law.....X

The motion by defendants for an Order pursuant to CPLR §3212 summarily dismissing the plaintiff's complaint on the grounds that any injuries plaintiff sustained as a result of the subject accident do not satisfy the "serious injury" threshold requirements of §§ 5102(d) and 5104(a) of the New York State Insurance Law is determined as hereinafter provided.

This personal injury action arises out of a motor vehicle accident that occurred on November 23, 2004 at approximately 2:45 p.m. on the westbound Grand Central Parkway at the intersection of the exit ramp to the Whitestone Expressway, Queens, N.Y.

The following injuries were caused and/or created by the negligence, careless and/or reckless conduct of the defendants as follows:

Straightening and reversal of the lumbar lordosis
Disc bulge at L1-L2 level where disc material approximates the ventral thecal sac and is encroaching on the ventral subarachnoid space
L1-L2 contour abnormal of the thecal sac due to the annulus fibrosis of the disc

Disc bulge at L5-S1 level where disc material is seen to approximate the ventral epidural fat
L5-S1 the epidural fat appears directly displaced by the annulus fibrosis of the disc
Straightening of the cervical lordosis.
Shallow right paracentral disc herniation at C4-C5 abutting the thecal sac
C5-C6 broad-based central disc herniation encroaching on the thecal sac partially effacing the ventral subarachnoid space and abutting the cord itself
Marked productive change at the acromioclavicular joint which is encroaching on the supraspinatus muscle tendon complex of the right shoulder ** requiring surgery
Right shoulder joint effusion
Tendonitis of the supraspinatus tendon of the right shoulder ** requiring surgery
Decreased range of motion of the cervical spine
Decreased range of motion of the lumbar spine
Bilateral carpal tunnel syndrome/medial nerve entrapment at the wrist
Right shoulder impingement syndrome
Derangement of the lumbosacral spine

The above injuries are accompanied by severe pain, tenderness, swelling, stiffness, discomfort, distress, weakness, stress, restriction of motion, degeneration of the underlying soft tissue, blood vessels, bones, nerves, tendons, ligaments and musculature and all of the natural consequences flowing therefrom.

Plaintiff has further suffered and continues to suffer severe pain and difficulty with prolonged sitting, standing, walking, bending, climbing stairs, lifting or carrying heavy objects, performing strenuous activities and finding a comfortable position sleeping.

Plaintiff has and will continue to experience impairment, disruption and difficulty with daily activities, way of life and enjoyment of life including significant impairment of numerous daily activities that plaintiff had previously taken for granted.

Any and all of the above injuries will result in traumatic arthritis and/or onset of arthritis, osteoarthritic involvement, osteoporosis and/or necrosis at an earlier age, at an accelerated rate and with greater severity that would have otherwise occurred.

All of the above injuries are permanent in nature.

The plaintiff's Supplemental Verified Bill of Particulars states:

The following injuries were caused and/or created by the negligence, careless and/or reckless conduct of the defendants as follows:

Tear of the rotator cuff of the right shoulder, requiring surgery**

Marked productive change at the acromioclavicular joint which is encroaching on the supraspinatus muscle tendon complex of the right shoulder, requiring surgery**
Right shoulder joint effusion, requiring surgery**
Tendonitis of the supraspinatus tendon of the right shoulder, requiring surgery**
Right shoulder impingement syndrome, requiring surgery**
Straightening and reversal of the lumbar lordosis
Disc bulge at L1-L2 level where disc material approximates the ventral thecal sac and is encroaching on the ventral subarachnoid space
L1-L2 contour abnormal of the thecal sac due to the annulus fibrosis of the disc
Disc bulge at L5-S1 level where disc material is seen to approximate the ventral epidural fat
L5-S1 the epidural fat appears directly displaced by the annulus fibrosis of the disc
Straightening of the cervical lordosis
Shallow right paracentral disc herniation at C4-C5 abutting the thecal sac
C5-C6 broad-based central disc herniation encroaching on the thecal sac partially effacing the ventral subarachnoid space and abutting the cord itself
Decreased range of motion of the cervical spine
Decreased range of motion of the lumbar spine
Bilateral carpal tunnel syndrome/medial nerve entrapment at the wrist
Derangement of the lumbosacral spine

As a result of the above injuries and trauma of this accident, plaintiff experiences nervousness, nightmares, insomnia, anxiety and inability to attend his daily vocation and avocation.

SURGERY

On December 12, 2005 plaintiff underwent surgery at North General Hospital located at 1879 Madison Avenue, New York, New York 10035; SURGEON: FRANK CARR, M.D.

ARTHROSCOPY RIGHT SHOULDER
ARTHROSCOPIC SHAVING OF TORN ROTATOR CUFF RIGHT SHOULDER
ARTHROCARE WANT TREATMENT OF TORN ROTATOR CUFF RIGHT SHOULDER

The defendants in support of the requested relief amongst other things submit certain records related to treatment by the plaintiff's treating physicians at Pro-Med Medical P.C.; an affirmation of Leon Sultan, M.D., an orthopedist of an orthopedic medical examination of the plaintiff conducted on March 7, 2007; an affirmation of Frederick S. Mortati, M.D., a neurologist of a neurological examination of the plaintiff conducted on February 15, 2007; the January 24, 2007 deposition transcript of the plaintiff and certain medical records, Verified Complaint and Verified Bill of Particulars in a separate, prior action entitled "**Salas v Neubauer**" wherein the defendant contends that the plaintiff set forth the same injuries

as in the instant action.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.,** 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v. New York Univ. Med. Center**, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; **Zuckerman v. City of New York**, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v. McAuliffe**, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v. Prospect Hosp.**, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; **Zuckerman v. City of New York**, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law **(see Licaro v. Elliot,** 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; **Palmer v. Amaker,** 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; **Tipping-Cestari v. Kilhenny,** 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) **(see, Zoldas v. Louise Cab Corp.,** 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; **Wright v. Melendez,** 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

> "(d) 'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, ember, 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 pertinent part, Dr. Sultan sets forth:

> CERVICAL SPINE EXAMINATION: His head is normally centered on the

shoulders, the shoulders are level. The cervical curvature is maintained. I detect no active paracervical muscle spasm. There are no trigger points on palpation over the right or left trapezius musculature. Range of motion testing of the cervical spine has been obtained with accurate visual measurements. Head and neck extension is to 30° (normal 25-35°), flexion is to 45° (normal 40-50°), right and left rotation is to 55° (normal 45-60°), right and left lateral tilt is to 25° (normal 20-30°). Biceps and triceps reflexes are symmetrically dull. Sensory testing of both upper extremities is normal. Grip strength is firm on both sides, pinch mechanism is intact bilaterally. The Tinel's test and the Phalen's test is negative bilaterally.

RIGHT SHOULDER EXAMINATION: Inspection of the right shoulder reveals well healed arthroscopic puncture wound scars. The right shoulder does not demonstrate any deltoid muscle atrophy when compared to the left side. There are no complaints of pain on palpation over the long head of the biceps tendon or the acromioclavicular joint. Range of motion testing of the right shoulder has been obtained with accurate visual measurements. Right shoulder abduction and forward elevation is to 175° (normal 170-180°). Internal rotation is complete and external rotation is to 45° (normal 40-50°). Adduction is to 45° (normal 45-50°) and posterior extension is to 40° (normal 40-45°). The right shoulder impingement test is grossly negative. Similar range of motion findings are noted on the opposite side.

THORACOLUMBAR EXAMINATION: His spinal column is normally aligned, the pelvis is not tilted, lordotic curvature is maintained. I detect no active parathoracic or paralumbar muscle spasm. Sacroiliac joints are non-tender to palpation. Heel and toe standing is unimpaired. The Trendelenburg test is negative on both sides. Observed ambulating without external support, his gait pattern is stead without any clinical signs of antalgia. Range of motion testing of the thoracolumbar spine has been obtained with accurate visual measurements. Forward flexion at the waist is to 75° (normal 60-90°), lumbar extension is to 15° (normal 10-15°), trunk rotation to the right and left is to 55-60° (normal 45-70°); trunk tilting to the right and left is to 25° (normal 20-25°). In the supine position, the straight leg raising test is negative bilaterally. Knee jerk and ankle jerk reflexes are symmetrically dull. Plantar reflexes are downgoing. Sensory testing of both lower extremities is intact. Big toe extension is strong bilaterally. The Patrick test is negative bilaterally.

DISCUSSION: From an orthopedic point of view, today's clinical examination in regard to this gentleman's cervical spine, right shoulder and thoracolumbar spine reveals that he is orthopedically stable and neurologically intact. Today's examination does not confirm any residual causally related orthopedic or neurological impairment in regard to the occurrence of 11/23/04. For the occurrence of 3/8/04, I note similar injuries and similar test results, however, the above described pre and post accident EMG and MRI readings are not reflected in today's examination.

Dr. Mortati opines in said physician's report of neurological examination:

MENTAL STATUS:

Mental Status, intact.

CRANIAL NERVES:

Cranial nerves II-XII, normal.

MOTOR SYSTEM:

Muscle strength is excellent, all four extremities, distal, as well as proximal muscles. No muscle atrophy present. Muscle tone, normal. Sustained posture-holding of the out-stretched upper extremities shows no pronator drift on either side. Cerebellar testing, intact.

REFLEXES:

Deep tendon reflexes symmetrically active at 1+ at the biceps, triceps, brachioradialis and ankle jerks. Ankle jerks trace bilaterally. Plantars, flexor both sides.

SENSORY SYSTEM:

The patient reports subjective diminished appreciation of pinprick, light touch and temperature in both feet with a fading border to normal at about the ankles. Vibration is moderately impaired at toes, intact at ankles and fingers.

IMPRESSION:

Mild distal symmetrical sensory peripheral neuropathy, probably diabetic.

COMMENT:

As a result of this accident, the patient did not sustain any neurological pathology. Specifically, please note that there is absolutely no evidence for cervical radiculopathy or for carpal tunnel syndrome either by history or by examination. He does, however, have a very mild underlying sensory peripheral neuropathy probably secondary to his diabetes.

Recommended orthopedic evaluation re his persisting right shoulder girdle symptoms.

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" **(Winegrad v. New York University Medical Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694)** and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact **(see Gaddy v. Eyler,** 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; **Jean-Meku v. Berbec,** 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; **Horan v. Mirando,** 221

AD2d 506, 633 NYS2d 402, Second Dept., 1995).

In opposition to the requested relief, the plaintiff submits an affidavit from the plaintiff himself; an affirmation of Frank Carr, M.D., a treating physician of the plaintiff and an affirmation of Allen Rothpearl, M.D., a radiologist of a review of certain MRIs of the plaintiff.

The Court notes that in relation to the defendants' contention that the plaintiff's claimed injuries in the plaintiff's prior accident of March 8, 2004 as set forth in the plaintiff's Verified Bill of Particulars in the action "**Salas v Neubauer**" and the claimed injuries in the instant action contain a number of claimed similarities. The Court notes that the plaintiff states:

> . . . After the accident and after the police arrived I went home and began to experience pain in my right arm and shoulder, neck and lower back. That evening I was unable to sleep due to the pain. The following day I sought treatment at a clinic called Pro Med located at 97-45 Queens Boulevard in Queens, New York. I knew of this facility because I had treated there for a prior accident where I had injured by right shoulder and back. For that accident of March 8, 2004 I treated with Pro Med for approximately three months and prior to the accident of November 23, 2004 the pain in my right shoulder, neck and back had essentially resolved itself and the accident of November 23, 2004 aggravated that condition and brought the pain on once again in my right shoulder, neck and back. For my accident of March 2004, I had an MRI of my right shoulder, cervical spine and lumbar spine.

Dr. Carr sets forth in his affirmation:

> 2. Currently, I am affiliated with AAKA Orthopedic Associates, P.C. and on February 16, 2005 I first saw Mr. Francisco Salas in regard to his motor vehicle accident of November 23, 2004 with Pro-Med Medical, P.C. At that initial visit he presented with complaints of pain in his neck, lower back and right shoulder. I was aware that he had begun a treatment regimen with our office under Dr. Rosarion who had also performed an EMG study which had revealed a mild bilateral carpal tunnel syndrome. At that initial visit I performed a physical exam of the cervical spine and forward flexion was limited to 8 degrees with the norm being 45 degrees and extension was 0 degrees with the norm being 45 degrees. Also noted was severe pain and discomfort in the cervical spine. Left to right lateral bending was limited to 10 degrees with the norm being 45 degrees.
>
> 3. I examined the right shoulder and abduction was limited to 60 degrees with the norm being 150 degrees; forward flexion was limited to 70 degrees with the norm being 150 degrees; and extension was limited to 10 degrees with the norm being 40 degrees producing pain and discomfort in the right shoulder.
>
> 4. I also performed a lumbar spine range of motion study and the straight leg raise test was positive at 30 degrees for pain and discomfort.
>
> 5. As of February 16, 2005, the patient had underwent an MRI of the cervical

spine which had revealed a C5-6 broad based central disc herniation encroaching on the thecal sac. It was my expert medical opinion that the disc pathology diagnosed via MRI was causally related to the subject motor vehicle accident.

6. My initial diagnosis of the patient was C5-6 broad based central disc herniation; impingement of the right shoulder and derangement of the lumbar spine.

7. It was my expert medical opinion that the limitations of motion in the cervical spine, lumbar spine and right shoulder were causally related to the motor vehicle accident of November 23, 2004 and said findings were consistent with the clinical presentation in my office. Further, it was my expert medical opinion that said limitation were significant in nature and would inhibit the patient's ability to carry out his normal activities of daily living including sitting, standing, lifting, bending or any other strenuous activities. It was also my expert medical opinion that said injuries were permanent in nature and the disc pathology diagnosed via MRI were not subject to resolution without surgical intervention.

8. My plan was for the patient to continue with physical therapy, to have an MRI of the right shoulder and to return in four weeks.

9. The MRI of the right shoulder was conducted on March 10, 2005 and revealed tendonosis of the supraspinatus tendon and impingement syndrome of the right shoulder.

10. He had had a prior MRI of the right shoulder on April 2, 2004 which revealed a partial tear of the supraspinatus of the rotator cuff of the right shoulder.

11. I continued to treat Mr. Salas on a monthly basis and on December 12, 2005 he underwent arthroscopy of the right shoulder with an arthroscopic shaving of the torn rotator cuff and a partial synovectomy of the right shoulder. The pre-operative and post-operative diagnosis were impingement syndrome of right shoulder and a torn rotator cuff of the right shoulder.

Based upon the foregoing, there is an issue of fact as to whether the plaintiff suffered a serious injury in the accident in issue of November 23, 2004. As such, the defendants' application for an Order pursuant to CPLR §3212 summarily dismissing the plaintiff's complaint on the grounds that any injuries plaintiff sustained as a result of the subject accident do not satisfy the "serious injury" threshold requirements of §§ 5102(d) and 5104(a) of the New York State Insurance Law is **denied.**

ENTERED Roy S. Mahon

DATED: 12/6/2007

DEC 10 2007 J.S.C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE