5

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

JOSEPH CAMILLERI,

Plaintiff,

-against-

ANDREW FLINT,

Defendant.

Motion Sequence # 1
Submitted September 11, 2007

INDEX NO: 9376/06

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Requested Relief

Defendant, ANDREW FLINT, moves for an order, pursuant to CPLR §3212, granting him summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102(d). Plaintiff, JOSEPH CAMILLERI, opposes the motion, which is determined as follows:

Background

This is an action for personal injuries allegedly sustained by the plaintiff when he was involved in a motor vehicle accident on November 5, 2004 on Route 110 near Conklin Street in Farmingdale, New York. It appears that plaintiff was driving his 1998 Lincoln

Continental when he was contacted in the rear by defendant's 1998 Ford Taurus. At his deposition, plaintiff stated that he felt his head and neck snap back upon impact and he described the contact as a "jolt" or "medium-size bang" to the rear of his car. He stated that, because of his weight (between 350 and 400 pounds), the seat back tilted back about 25 degrees. Plaintiff stated that, following the accident, he pulled over to look at the car and saw "a little scraping" and "no major damage" to the rear bumper. There was a little dent to the center of the bumper which he never repaired. Plaintiff further testified that, after looking at defendant's vehicle and not seeing any damage, he continued on to work and worked the full day.

Plaintiff testified that his head and neck was bothering him but, because he had no medical insurance and didn't know how to pay for medical treatment, he retained his present attorneys who referred him to Bellmore Medical in Merrick, New York. He testified that, after seeing a doctor, he began physical therapy about three (3) times per week for six (6) weeks for neck pain, headaches and numbness in his hands. After another doctor's visit, he continued therapy for six (6) more weeks and then, after another doctor's visit, continued therapy two (2) times per week. He testified that his headaches improved after a couple of weeks and that he wore a wrist brace for two (2) months, but stopped because the numbness was better. The records reflect that he stopped therapy in April 2005, but after a gap of one (1) year, went to see Dr. Gregorace in May/June 2006 and had therapy for six (6) weeks and saw Dr. Liguouri for his hands three (3) times. At the time of his deposition, January 22, 2007, he stated that he had no appointments to see any medical providers.

Plaintiff claimed that his neck still bothers him and he has occasional headaches. He stated that he cannot sit for too long, carry cases of water or cans and that the rotation of his neck and head is limited. He claimed that he cannot clean his house or get a good nights sleep. Notwithstanding his claimed injuries, plaintiff missed no time from work following the accident. At the time, he was employed by Funatics, a video/DVD wholesaler (which went out of business in July/August 2005), and he continued to work full time at phone sales, working all day at a computer with a phone ear piece. When his job at Funatics ended, he continued with the same kind of work from his home on a full time basis.

On June 9,2006, plaintiff commenced the instant action by filing the summons and verified complaint. In his bill of particulars, plaintiff alleged that he sustained the following injuries which he claims are serious, severe and permanent:

- Straightening of the curvature of the cervical spine with loss of normal lordosis;
- Posterior disc bulge at the C3/4 level;
- Posterior disc herniation at the C4/5 level with impingement upon the cord;
- C5/6 intervertebral disc space narrowing with productive changes;
- Posterior disc bulge at the C6/7 level;
- Neck pain with radiation down both arms;
- Tenderness over cervical paraspinal muscles;
- Cervical myofascial derangement;
- Neck pain with radiation to bilateral trapezius, left greater than right;
- Weakness in bilateral deltoids;
- Right and left Carpal Tunnel Syndrome;
- Headaches;
- Numbness and tingling of the right hand;
- Post traumatic cephalgia;
- Cervical derangement with spinal cord involvement;
- Restricted range of motion in cervical and lumbar spine;
- Injury to and involvement of surrounding nerves, tendons, blood vessels, ligaments, and connective tissue in and around the above set forth areas;
- Severe pain, suffering and discomfort, especially in cold or damp weather and upon movement or remaining same position;

- Prolonged need to take medication to alleviate pain and discomfort;
- Restriction of motion;
- Potential arthritic degeneration at injury site;
- Possible future surgical intervention;
- Loss and/or reduction of the quality of life;
- Nervousness, anxiety, personality changes, loss of self-confidence, insomnia, fear, increased fear due to possible future sequelae of injuries;
- Accompanying severe pain, tenderness, swelling, stiffness, discomfort, deformity, distress, weakness and related injuries to the underlying soft tissues, blood vessels, nerves, tendons, ligaments, musculature and cartilages in and about the areas surrounding the aforementioned injuries.

Bill of Particulars, Exhibit "D" ¶7, Notice of Motion.

In support of the motion to dismiss, defendant submits the affirmed report of John Kelemen, M.D., a Diplomate of the American Board of Physiatry and Neurology, dated March 1, 2007, who performed various objective neurological tests on plaintiff. Dr. Kelemen found no Tinel's signs over the wrists or elbows; sensory exam was intact; and no evidence of any neurological abnormality or disability as result of the subject accident. *Exhibit "H", Notice of Motion.*

Defendant also submits the affirmed report of Leon Sultan, M.D., orthopedist and Diplomate of the American Board of Orthopedic Surgery, dated March 8, 2007, who performed various objective tests, including cervical range of motion (normal), sensory testing of upper extremities (normal), grip strength (normal), Tinel's and Phelan's tests (negative), Trendelenburg (negative), and range of motion of thoracolumbar spine (normal). According to Dr. Sultan the examination of plaintiff's cervical and thoracolumbar spines and plaintiff's hands revealed that he was orthopedically stable and neurologically intact with no residual causally related orthopedic or neurological impairment from the accident. Dr. Sultan opines that, from a clinical point of view, there is no correlation between the orthopedic exam and the cervical spine MRI and upper extremity EMG

readings found in plaintiff's medical records. *Exhibit "I", Notice of Motion.*

In further support of the motion, defendant submits the affirmed report of Isaac Cohen, M.D., an orthopedist, who examined plaintiff on March 8, 2005. Dr. Cohen performed various objective tests and stated that the plaintiff's "mild complaints of carpal tunnel syndrome are clearly pre-existent to this injury and most likely related to his morbid obesity. The diabetes is also a factor of his current condition. At the time of examination, there is no indication of any additional treatment". (*Exhibit "G", Notice of Motion*).

Counsel for defendant urges that he is entitled to summary judgment dismissing the complaint as plaintiff cannot meet any of the legal mandates required to establish that he has sustained a serious injury under Insurance Law §5102(d).

The Law

In order to satisfy the statutory "serious injury" threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d). (*See, Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 [C.A.2002]; *Scheer v Koubek*, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 795 NYS2d 20 [1st Dept. 2005]).

On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action (*Hughes v Cai*, 31 AD3d 385, 818 NYS2dd 538 [2nd Dept. 2006]; *Browdame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2nd Dept. 2006]). The proof must be viewed in a light most favorable to the non-

movants, here the plaintiff (*Perez v Exel Logistics, Inc.*, 278 AD2d 213, 717 NYS2d 278 [2nd Dept. 2000]). If the movant satisfies that burden, the burden shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he/she sustained a serious injury or that there are questions of fact as to whether the purported injury, in fact, is serious (*Flores v Leslie*, 27 AD3d 220, 810 NYS2d 464 [1st Dept. 2006]).

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]).

After a careful reading of defendant's submission, it is the judgment of the Court that defendant has made an adequate *prima facie* showing of entitlement to summary judgment. The burden now burden shifts to the opposing party to show that a factual

dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 (C.A. 1979). Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, 559 NYS2d 873 (1st Dept. 1990), *aff'd* 76 NY2d 927 (C.A. 1990); *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 (C.A. 1980).

In opposition to the defendant's motion for summary judgment, counsel for plaintiff submits the affirmed medical report of Joseph Gregorace, D.O., a physiatrist at Island Sound Physical Medicine & Rehabilitation, P.C., dated May 12, 2006. Dr. Gregorace initially saw plaintiff on November 8, 2004 as a result of the accident on November 5, 2004, "for physiatric evaluation of his neck pain radiating to both traps". (Plaintiff's Exhibit "B"). Dr. Gregorace saw plaintiff in follow-up evaluations on 12/6/04, 1/10/05, 2/21/05, 4/19/05, 5/23/05, 6/20/05, 3/31/06 and on 5/10/06. When initially seen by Dr. Gregorace, the plaintiff's range of motion in his cervical spine was restricted in the following fashion: cervical flexion 40 degrees out of 60 degrees normal, extension 42 degrees out of 50 degrees normal, right rotation 64 degrees out of 80 degrees normal, left rotation 68 degrees out of 80 degrees normal. As a result of the May 10, 2006 examination, Dr. Gregorace found "cervical flexion 50 degrees out of 60 degrees normal, extension 50 degrees out of 50 degrees normal, right rotation 70 degrees out of 80 degrees normal, left rotation 68 degrees out of 80 degrees normal". Dr. Gregorace noted that an EMG/NCV Study Of The Upper Extremities was performed on 12/13/04 and revealed a bilateral sensorimotor carpal tunnel syndrome. In Dr. Gregorace's affidavit, sworn to August 30,

2007, (Plaintiff's Exhibit "C"), he states the following: "As noted in my examination of 5/25/07, he now has the following limitations: cervical flexion 52 degrees out of 60 degrees normal, extension 50 degrees out of 50 degrees normal, right rotation 74 degrees out of 80 degrees normal, left rotation 72 degrees out of 80 degrees normal". A copy of a "medical examination of 5/25/07" was not submitted to the Court. (The Court notes Dr. Gregorace's reference to the plaintiff as "she" in the first paragraph of page 8 of his medical report dated May 12, 2006 [Plaintiff's Exhibit "B"]). Dr. Gregorace's diagnosis as a result of the accident was as follows: cervical disc herniations at C4/5 and C5/6 with mild impingement upon the cord at these levels; cervical disc bulges at C3/4 and C6/7; cervical myofascial derangement. Dr. Cohen's reference to the plaintiff's weight and diabetic condition fail to relate these "conditions" to any of the alleged injuries sustained in the subject accident. Dr. Gregorace states that, at the April 19, 2005 visit, the plaintiff was advised to go to his primary care physician to get better control of his blood sugar. Dr. Gregorace discussed the plaintiff's "long term sequelae from untreated diabetes".

Counsel for defendant noted a "gap" in treatment between June 20, 2005 and March 31, 2006, as well as "a gap" in treatment between May 10, 2006 and May 25, 2007. The plaintiff in his affidavit, sworn to September 4, 2007 (Plaintiff's Exhibit "D") stated that "[a]fter being told that there was not much more that could be done for me, I discontinued my treatment. I was advised that if the pain grew worse, I should return to treatment". Dr. Gregorace noted that, even after therapy, the plaintiff "continued to demonstrate signs and symptoms of severe residual inflammatory pathology to the muscular and supportive structures of the cervical spine. These changes are permanent in my opinion and physical stress may trigger recurrent episodes of new pain". Dr. Gregorace opined that the

plaintiff's "disability is partial, permanent and has a tendency to result in chronic localized pain with progression, remission and exacerbation during over-use of the neck". The Court finds that plaintiff's explanation, that, in Dr. Gregorace's opinion, he had reached his maximum medical improvement, was a satisfactory explanation for the "gap" in treatment, sufficient to defeat the summary judgment motion on that issue. *See Brown v Archy*, 9 AD3d 30, 776 NYS2d 56 (1st Dept. 2004); *compare Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (C.A. 2005).

At each visit, Dr. Gregorace designated a numeric percentage of plaintiff's loss of range of motion based upon objective testing to prove the extent or degree of physical limitation and a diagnosis of cervical disc herniations at C4/5 and C5/6 with mild impingement on the cord at these levels and cervical disc bulges at C3/4 and C6/7. It is the judgment of the Court that plaintiff's expert medical report was sufficient to raise triable issues of fact as to whether the subject accident was the cause of plaintiff's alleged injuries. *Toure v Avis Rent A Car Systems, Inc.*, *supra*. The differences of opinion among the medical experts as to the nature, cause and extent of plaintiffs' injuries raise issues of credibility that must be resolved by a jury. *Kaplan v Gak*, 259 AD2d 736, 685 NYS2d 634 (2nd Dept. 1999).

Notwithstanding anything to the contrary, the plaintiff did not present competent medical evidence to support his claim that he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days following the subject accident. *Jackson v Colvert*, 24 AD3d 42, 805 NYS2d 424 (2nd Dept. 2005). Plaintiff's deposition testimony established that he did not suffer an injury that prevented him from performing

substantially all of his customary daily activities for at least 90 days of the 180 days immediately after the accident.

Conclusion

Based on the foregoing, it is hereby

ORDERED, that defendant's motion for an order granting summary judgment dismissing the complaint is denied, except as to an injury that prevented him from performing substantially all of his customary daily activities for at least 90 days of the 180 days immediately after the accident.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 10, 2007

WILLIAM R. LaMARCA, J.S.C.

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