SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

SCAN

ROBERT COCHERO,

Plaintiffs,

-against-

AHARON TRIGER and ALICE TRIGER,

Defendants.

Motion Sequence #1
Submitted December 14, 2007

INDEX NO: 15034/06

The following papers were read on this motion:

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

Defendants, AHARON TRIGER and ALICE TRIGER, move for an order, pursuant to CPLR §3212, granting them summary judgment dismissing plaintiff's complaint on the grounds that plaintiff failed to sustain a "serious injury" within the parameters of Insurance Law §5102(d). Plaintiff, ROBERT COCHERO, opposes the motion, which is determined as follows:

The TRIGER defendants seek summary dismissal of the complaint herein predicated on the grounds that plaintiff did not sustain a "serious injury" as a result of the underlying motor vehicle accident which occurred on April 10, 2006 on Atlantic Avenue at

or near its intersection with Clark Avenue, Oceanside, New York. Plaintiff alleges that he was operating a motor vehicle which was stopped in traffic when it was rear ended by the defendants' vehicle. Plaintiff claims a "serious injury" under Insurance Law § 5102(d) with respect to, *inter alia*, a permanent consequential limitation of use of a body function or system and a medically determined injury or impairment of a non-permanent nature which prevented him from performing all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the 180 days immediately following the accident.

On a motion for summary judgment based on a failure to sustain a serious injury within the meaning of Insurance Law § 5102(d), the movant must make a *prima facie* showing that the injured plaintiff did not sustain a serious injury. *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 (C.A. 2005). With respect to the categories of a "permanent consequential limitation of use" and a "significant limitation of use", whether a limitation of use or function is significant or consequential relates to medical significance, and involves a comparative determination of the degree or qualitative nature of an injury based on normal function, purpose and use of the body part. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 (C.A. 2002).

In support of the motion to dismiss, defendants submit the affirmations of Harold A. Kozinn, M.D., an orthopedist, and C.M. Sharma, M.D., a neurologist, who examined plaintiff on July 5, 2007. Dr. Kozinn found a full range of motion of plaintiff's lumbosacral spine and that straight leg raising, Laseque test and Fabrere Patrick tests were all negative, bilaterally. He found no disability or further treatment indicated but noted a

resolved lumbosacral spine sprain/strain. Dr. Kozinn offered no opinion as to injury with respect to plaintiff's cervical spine. Dr. Sharma found no causally related neurological lesions, nor any neurological disability or limitation with respect to usual work and activities. He offered no opinion as to plaintiff's lumbosacral or cervical spine.

A defendant who submits admissible proof that the plaintiff has a full range of motion, and suffers no disabilities causally related to the subject accident, establishes a *prima facie* case that plaintiff did not sustain a serious injury within the purview of Insurance Law § 5102(d), despite the existence of an MRI which shows herniated or bulging discs. *Kearse v New York City Transit Authority*, 16 AD3d 45, 789 NYS2d 281 (2nd Dept. 2005). Here, however, neither of defendants' experts has addressed plaintiff's allegations, set forth in his bill of particulars, concerning his cervical spine, including limited range of motion and cervical radiculopathy. Defendants have, therefore, failed to make a *prima facie* showing that plaintiff did not sustain a serious injury. Where a defendant does not meet the initial burden, the court need not consider whether the plaintiff's opposition papers are sufficient to raise a triable issue of fact. *Kouros v Mendez*, 41 AD3d 786, 838 NYS2d 669 (2nd Dept. 2007).

Notwithstanding same, even if the court deemed defendants' proof sufficient to meet their burden in establishing a lack of serious injury, it is the Court's judgment that plaintiff has raised a triable issue of fact in the serious injury categories of permanent consequential limitations of use of a body, organ or member and significant limitation of use of a body function or system, by virtue of the affidavit of his treating chiropractor, Gerson F. Mendoza, who last examined plaintiff on October 29, 2007. Although the mere

existence of bulging or herniated disc does not alone raise a triable issue of fact as to whether plaintiff sustained a serious injury (*Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2nd Dept. 2006]), Dr. Mendoza's affidavit references objective medical findings and diagnostic tests, specifies the decreased range of motion plaintiff sustained as a result of the accident, and asserts that plaintiff's injuries are permanent and causally related to the subject motor vehicle accident. Dr. Mendoza notes evidence of central disc herniation at L4-5 and focal central herniation at C3-4, creating impingement on the thecal sac.

Although he had a prior work-related injury, plaintiff attests that it did not involve his cervical spine and that, at the time of the accident, his back was symptom free. According to his affidavit, plaintiff stopped treatment when his no-fault benefits terminated and he could not otherwise afford to pay for treatment. It is the Court's view that plaintiff's submission is sufficient to raise a factual issue as to whether plaintiff sustained a permanent consequential limitation or significant limitation of use of his cervical spine. *Nigro v Kovac*, 45 AD3d 547, 845 NYS2d 404 (2nd Dept. 2007); *Santiago v Rodriguez*, 38 AD3d 639, 832 NYS2d 589 (2nd Dept. 2007); *Lim v Tiburzi*, 36 AD3d 671, 829 NYS2d 145 (2nd Dept. 2007); *Shpakovskaya v Etienne*, 23 AD3d 368, 804 NYS2d 769 (2nd Dept. 2005); *Clervoix v Edwards*, 10 AD3d 626, 781 NYS2d 690 (2nd Dept. 2004).

To qualify as a serious injury under the 90/180 day category, there must be objective evidence of a medically determined injury of a non-permanent nature supported by objective or credible medical evidence based upon objective findings and tests substantiating the injury and connecting it to the accident. *Tirado v Craig*, 241 AD2d 449 663 NYS2d 831 (2nd Dept. 1997). The record is devoid of any showing that plaintiff was

prevented from performing substantially all of the material acts which constituted his usual and customary activities for not less than ninety days during the one hundred eighty days immediately following the injury. Insurance Law § 5102(d)]; *Albano v Onolfo*, 36 AD3d 728, 830 NYS2d 205 (2nd Dept. 2007); *Picott v Lewis*, 26 AD3d 319, 809 NYS2d 541 (2nd Dept. 2007); *Doran v Sequino*, 17 AD3d 626, 795 NYS2d 245 (2nd Dept. 2005); *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 (2nd Dept. 2000). Significantly, plaintiff testified that he missed only a few days of work–"not anything big". Plaintiff has failed, therefore, to raise a factual issue regarding the 90/180 category of injury. Based on the foregoing, it is hereby

ORDERED, that defendants motion for an order granting summary judgment is denied, except as to the 90/180 day category of injuries.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 4, 2008

WILLIAM R. LaMARCA, J.S.C.

ENTERED
MAR 10 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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