SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x

GARY A. FORD

Plaintiff,

-against-

DIANE M. BRUSCHINI and RALPH BRUSCHINI and MICHAEL T. GIANNETTO

Defendant.

----------x

TRIAL PART: 21
NASSAU COUNTY

INDEX NO: 011145/06

MOTION SEQ. NO: 4 & 5

SUBMIT DATE:2/29/08

The following papers having been read on this motion:

Notice of Motion 1
Memorandum of Law.....2
Cross-Motion.....3
Opposition 4
Reply..... 5,6

The motion by defendants Diane M. Bruschini and Ralph Bruschini (hereinafter referred to as the "Bruschini defendants") and the cross-motion by defendant Michael T. Giannetto (hereinafter referred to as "Giannetto"), for summary judgment on the grounds that the plaintiff did not sustain a serious injury as defined under Insurance Law § 5120(d) are granted for the reasons set forth herein.

Plaintiff alleges he was injured in an automobile collision that occurred on April 14, 2004 at or near the intersection of North Broadway and Columbia Drive, Jericho, N.Y. Defendants contend the plaintiff did not sustain a serious injury. They note plaintiff's deposition testimony that he did not make any "pain" complaints to anyone at the scene. (Notice of Motion by Bruschini defendants', Exhibit F, Plaintiff's EBT, pp. 43-44). The plaintiff went home after the collision (p.

44), and the following week he went to a chiropractor (p. 45). He had treatments with the chiropractor for four to five months (p. 51)and plaintiff received no medication for injuries in the collision (p. 47). Plaintiff last received physical therapy in the summer of 2004 (p. 57) claiming that he stopped getting treatments because the Insurance Company refused to continue to pay. (p. 55). Plaintiff testified that he still does home exercises that have helped "a whole lot" (pgs. 57-58). Apparently, plaintiff has been involved in prior auto collisions in February 1996, 1998, and 2000 (pgs. 59, 72 and 83) and one subsequent collision in November of 2004 (pg. 96). Currently plaintiff claims that his back bothers him if he walks or sits for a long period of time, his right knee "gives out" at times, and he cannot lift objects (pgs. 105, 107). Plaintiff stated that he was in bed for two or three days after the collision of April 17, 2004, but he was not "confined" to bed (pg. 108).

Defendants offer the affirmed report June 6, 2007 of Dr. S. Farkas, an orthopedist. (The Notice of Motion, Exhibit D and the Cross otion as Exhibit E). Dr. Farkas found plaintiff had resolved cervical, lumbar and right knee sprains and had no orthopedic disabilities. Defendants also offer the sworn report dated June 5, 2007 of Dr. Naunihal Sachdev Singh, a neurologist. (Notice of Motion, Exhibit E, Cross Motion, Exhibit F). Dr. Singh found plaintiff had no neurological disability and found plaintiff could continue to work and perform his activities of daily living that plaintiff had done before the April, 2004 collision. Dr. Singh noted plaintiff informed Dr. Singh that plaintiff's neck pain is much better and as of the report date, he had no symptoms.

In a serious injury matter, when a defendant seeks summary judgment on the issue that the plaintiff did not sustain a serious injury, the burden is placed upon the defendant to prove through admissible evidence that the plaintiff failed to meet the statutory threshold of "serious injury" (*Gaddy v Eyler*, 79 NY2d 955; *Lagois v Public Administrator of Suffolk County*, 303 AD2d 644).

To satisfy this requirement, a defendant must make a *prima facie* showing that the plaintiff failed to sustain a serious injury through the submissions of affidavits or affirmations of medical experts who examined the plaintiff. These affidavits and affirmations should contain the original

signatures of the affiants, and any medical reports submitted as evidentiary proof must be sworn (*Grasso v Angerami*, 79 NY2d 813).

Here, the defendants made a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) through the submission of the affirmed medical reports of an orthopedist and neurologist which determined that plaintiff did not have any permanent injury nor any disability, restriction or limitations of motion (*see Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345).

Defendants' submission of relevant portions of the plaintiff's deposition (*Jackson v Colvert*, 24 AD3d 420; *Batista v Olivo,* 17 AD3d 494), and the affirmations of defendants' physicians is sufficient to make a *prima facie* showing that plaintiff did not sustain a serious injury, within the meaning of Insurance Law § 5102(d) (*Paul v Trerotola*, 11 AD3d 441).

Therefore, the plaintiff is now required to come forward with a viable, valid objective evidence to verify her complaints of pain and limitation of motion (*Farozes v Kamran*, 22 AD3d 458). Based on the record herein, plaintiff has not met her burden.

Once the defendant has made a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of a motor vehicle accident, the plaintiff's physician must establish that any of the alleged identified limitations of plaintiff were of a significant nature (*see Sibrizzi v Davis*, 7 AD3d 691).

In opposition, plaintiff has submitted the affirmation of Dr. Walter Priestly, a chiropractor (Plaintiff's Affirmation in Opposition, Exhibit A). Assuming Dr. Priestly's affidavit was properly sworn before a notary as required by CPLR §2006 it falls short of an affidavit that raises issues of fact. Dr. Priestley clearly relies on other unsworn reports in his affirmation. An affirmation of a plaintiff's treating physician is without probative value wherein the physician relies on the unsworn reports of others (*Phillips v Zilensky*, 39 AD3d 728). Furthermore, while there may be evidence in the report presented by plaintiff's physician of a range of motion limitation of plaintiff's spine and/or

knee based upon a recent examination, the physician and/or plaintiff must proffer competent medical evidence that showed range of motion limitations in the spine and/or knee that were contemporaneous with the subject accident (*Shvartzman v Vildman*, 47 AD3d 700; *see also Ferraro v Ridge Car Service*, ___ AD3d ___, 2008 WL 607469. Neither plaintiff nor Dr. Priestly offer such contemporaneous data.

Also, a plaintiff's physician's opinion that a plaintiff's injuries and limitations were caused by the April 13, 2004 collision was speculative in light of the fact that the physician failed to acknowledge in his affirmation that the plaintiff was involved in prior automobile collisions (*Moore v Sarwar*, 29 AD3d 752).

Dr. Priestley does not explain the gap in visits from the summer of 2004 to November 28, 2007 (Dr. Priestley's examination date of plaintiff).

While a cessation of treatment is not totally dispositive since it is not required that the plaintiff continue needless treatment in order to survive a summary judgment motion, the Court of Appeals has stated in *Pommels v. Perez* (4 N.Y.3d 566) that a plaintiff who terminates therapeutic measures following the accident while claiming serious injury must offer some reasonable explanation for having done so (*See also, Mahabir v Ally*, 26 AD3d 314; *Mohamed v Siffrain*, 19 AD3d 561; *Batista v Olivo*, 17 AD3d 494). Courts that have applied *Pommells v Perez, supra*, have consistently held that to be reasonable, the explanation must be concrete and substantiated by the record. The same scrutiny should be applied to the plaintiffs' explanation that the gap or cessation of treatment occurred when the no-fault benefits stopped.

Any subjective complaints of pain and limitation of motion by a plaintiff must be substantiated by valid certified objective medical findings based on a recent examination of the plaintiff for the purpose of the application of the no-fault tort threshold (*Young v Russell*, 19 AD3d 688). Thus, statements of lack of income to be able to afford continued, needed physical therapy should be backed up by objective findings, not the conclusory phrase–"I don't have the funds."

A plaintiff is required to submit appropriate evidence as to why he ended therapy more than three years ago, but has failed to do so.

Also, the explanation of the plaintiff and his medical expert for the lapse in time is unsupported by the record (*Pommells v Perez, supra*).

Based on the above, Dr. Priestley's affidavit was insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury (*see Mahabir v Ally, supra*).Plaintiff failed to submit any competent medical evidence that he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days subsequent to the subject accident (*Abreu v Bushwick Building Products & Supplies, LLC.*, 43 AD3d 1091; *Cotto v JND Concrete & Brick, Inc.*, 41 AD3d 415).

While the plaintiffs may have sustained injuries, the record herein does not support the claim that he sustained a "serious injury" as defined by Insurance Law § 5102(d).

This constitutes the decision and order of this Court.

DATED: April 7, 2008

ENTER

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J.S.C.

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