SHORT FORM ORDER

COPY

INDEX No. 06-15472
CAL. No. 07-01954-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 10-12-07
ADJ. DATE 1-14-08
Mot. Seq. # 001 - MG; CASEDISP

THOMAS E. McLOUGHLIN, Plaintiff, - against - FRANK S. PAPPACODA, JR. and MICHELE G. PAPPACODA, Defendants.	SIBEN & SIBEN, LLP Attorneys for Plaintiff 90 East Main Street Bay Shore, New York 11706 RUSSO & APOZNANSKI Attorneys for Defendants 875 Merrick Avenue Westbury, New York 11590

Upon the following papers numbered 1 to 28 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13 - 25; Replying Affidavits and supporting papers 26 - 27; Other 28; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing the complaint is granted.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred in a store parking lot on January 23, 2006. The accident allegedly happened when a vehicle owned by defendant Frank Pappacoda and driven by defendant Michele Pappacoda backed into the front of plaintiff's vehicle as the two vehicles were waiting to exit the parking lot. The bill of particulars alleges that plaintiff sustained various personal injuries as a result of the collision, including cerviobrachial syndrome; herniated discs at levels C3-4, C4-5, C5-6, and C6-7; and "aggravation and/or exacerbation of previously asymptomatic degenerative changes at C4-5 and C5-6." It further alleges that plaintiff, who is employed by the West Islip School District, was confined to home for two days due to his injuries.

Defendants now move for summary judgment dismissing the complaint on the ground that Insurance Law § 5014 precludes plaintiff from pursuing a personal injury claim, since he did not suffer "serious injury" within the meaning of Insurance Law § 5102 (d). In support of the motion defendants submit, among other things, copies of the pleadings, a transcript of plaintiff's deposition testimony, and

affirmed medical reports prepared by Dr. Anthony Spataro, Dr. C.M. Sharma, and Dr. Sondra Pfeffer. At defendants' request, Dr. Spataro, an orthopedic surgeon, and Dr. Sharma, a neurologist, conducted examinations of plaintiff in February 2007 and reviewed medical records concerning the injuries allegedly sustained as a result of the subject accident. Dr. Pfeffer, a radiologist, conducted an independent review of a magnetic resonance imaging (MRI) scan of plaintiff's cervical spine performed in February 2006.

Plaintiff opposes the motion, arguing that defendants' submissions are insufficient to demonstrate prima facie that he did not suffer a permanent injury within the 90/180 category. Alternatively, plaintiff argues that the medical evidence submitted in opposition to the motion raises a triable issue as to whether he suffered "injuries of a permanent nature with significant limitations." Plaintiff's submissions include a sworn medical report prepared by Dr. Borimir Darakchiev, a neurological surgeon, who examined plaintiff on February 17, 2006, and a sworn medical report prepared by Dr. Barry Katzman, an orthopedic surgeon, who examined plaintiff on March 28, 2006. Plaintiff also submits a sworn MRI report concerning plaintiff's cervical spine prepared by Dr. John Himelfarb, a radiologist. In addition, plaintiff submits copies of unaffirmed medical reports prepared by physicians associated with South Shore Neurologic Associates, a medical facility that provided neurologic care to plaintiff in February and March 2006; treatment notes and an insurance report prepared by Hansen Chiropractic, a chiropractic office that treated plaintiff in January and February 2006; and copies of treatment notes and a medical insurance claim prepared by Amy Rose Physical Therapy, a physical therapy facility that provided treatments to plaintiff in May and June 2006.

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."

To recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 Ny2d 295, 299, 727 NYS2d 378 [2001]). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement and its duration (*see* ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]).

"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 the normal function, purpose and use of the body part" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]).

Further, to qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Hamilton v Rouse***, 46 AD3d 514, 846 NYS2d 650 [2d Dept 2007]; ***Ocasio v Henry***, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). Moreover, a plaintiff claiming serious injury who terminates treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Joseph v Layne***, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; ***Batista v Olivo***, *supra*).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The Court notes that, although accompanied by a certification from the facility's medical records clerk, the unaffirmed reports prepared by physicians from South Shore Neurologic Associates were not in admissible form and, therefore, were not considered in the determination of the motion (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Patterson v NY Alarm Response Corp.***, 45 AD3d 656, 850 NYS2d 114 [2d Dept 2007]; ***Pagano v Kingsbury***, *supra*).

The evidence submitted by defendants establishes prima facie that plaintiff did not suffer a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Morris v Edmond***, __ AD3d __, 850 NYS2d 641 [2d Dept 2008]; ***Washington v Cross***, __ AD3d __, 849 NYS2d 784 [2d Dept 2008]; ***Tarhan v Kabashi***, 44 AD3d 847, 844 NYS2d 89 [2d Dept 2007]; ***Baez v Rahamatali***, 24 AD3d 256, 808 NYS2d 171 [1st Dept 2005], *affd* 6 NY3d 868, 817 NYS2d 204 [2006]). Significantly, the affirmed report of Dr. Spataro states that plaintiff advised him that he suffered injuries to his neck, right shoulder and right arm as a result of the subject accident, and that he continues to experience stiffness and soreness in his neck. It states, in relevant part, that plaintiff exhibited full range of motion in his cervical spine, and that no spasm or paraspinal tenderness was detected during the spinal

examination. It further states that plaintiff demonstrated full range of motion in his right shoulder, and that clinical tests revealed no evidence of shoulder impingement. Dr. Spataro opines that plaintiff suffered sprains in his cervical spine and right shoulder as a result of the January 2006 accident. He further concludes that plaintiff is not disabled and may carry out his normal employment as a custodian. The affirmed report by Dr. Sharma states that during plaintiff's examination there was no evidence of any neurological lesions causally related to the subject accident, and no evidence of any neurological disability. Dr. Sharma concludes that plaintiff does not suffer from any neurological limitations or problems due to the accident.

Moreover, the report by Dr. Pfeffer states that the MRI study of plaintiff's cervical spine reveals multilevel disc degenerative disc disease "compatible with age (late 50s)." It states, among other things, that the MRI films show chronic disc herniation, disc dessication, and disc space narrowing at levels C3-4, C5-6 and C6-7, with the greatest amount of disc disease present at level C5-6. It further states that the cervical disc disease in plaintiff's spine pre-dates the subject accident, and that there is no evidence of any "acute (recently sustained) discal or vertebral injury." In addition, plaintiff testified at a pretrial examination that he missed only one day of work due to his injuries. He testified that he sought medical care for his injuries from a chiropractor, Dr. Hanson, and from physicians associated with New York Pain Consultants and South Shore Neurologic Associates, but that such care was limited to one or two office visits. Plaintiff testified that he also received approximately 14 weeks of physical therapy treatments for his injuries and that such treatment was provided by two facilities, Motion Dynamics Physical Therapy and Amy Rose Physical Therapy.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). Contrary to the assertions by plaintiff's counsel, the evidence submitted in opposition is insufficient to defeat summary judgment. Here, neither plaintiff nor his medical providers offer any explanation for the termination of medical treatment just months after the subject accident (*see* ***Pommells v Perez***, *supra*; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2d Dept 2007]; ***Manning v Tejeda***, 38 AD3d 622, 831 NYS2d 553 [2d Dept 2007]). There is no medical proof demonstrating that plaintiff suffered a permanent loss of use of a body organ, member, function or system as a result of the accident (*see* ***Oberly v Bangs Ambulance***, *supra*; ***Amato v Fast Repair Inc.***, 42 AD3d 477, 840 NYS2d 394 [2d Dept 2007]; ***Ali v Mirshah***, 41 AD3d 748, 840 NYS2d 83 [2d Dept 2007]). The evidence submitted by plaintiff also fails to address the findings of defendants' expert that plaintiff suffers from a preexisting degenerative disc disease in his cervical spine (*see* ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]). When a defendant presents evidence that a plaintiff's alleged pain and injuries are related to a preexisting condition, a plaintiff claiming serious injury must come forward with evidence addressing the defense of lack of causation (***Pommells v Perez***, *supra*; *see* ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]).

Further, plaintiff failed to present evidence substantiating the allegations that he suffered "significant limitation of use" in his right shoulder and cervical region due to injuries he suffered in the accident. More specifically, plaintiff did not submit any objective medical evidence showing restrictions in joint function in his right shoulder or cervical spine shortly after the accident (*see* ***Deutsch v Tenempaguay***, __ AD3d __, 2008 WL 458573 [2d Dept, Feb. 19, 2008]; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2d Dept 2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835

[2d Dept 2006]). He also failed to submit objective proof of recent findings of limitations in movement causally related to the accident (*see* ***Sharma v Diaz***, __ AD3d __, 850 NYS2d 634 [2d Dept 2008]; ***Amato v Fast Repair Inc.***, *supra*; ***Laruffa v Yui Ming Lau***, *supra*). In fact, the only medical report offered by plaintiff that includes measurements of plaintiff's range of motion is a 2006 medical report prepared by Dr. Katzman, which states plaintiff exhibited restricted movement in the cervical spine and normal movement in the right shoulder. Contrary to the assertions by plaintiff's counsel, the mere existence of a herniated or bulging disc is not evidence of serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and their duration (***Wright v Rodriguez***, __ AD3d __, 2008 WL 596276 [2d Dept, March 4, 2008]; ***Patterson v NY Alarm Response Corp.***, *supra*; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005])

Finally, plaintiff failed to submit competent evidence demonstrating that he sustained a medically determined injury of a nonpermanent nature that prevented him from performing his usual and customary activities for at least 90 of the 180 days immediately after the accident (*see* ***Furrs v Griffith***, 43 AD3d 389, 841 NYS2d 594 [2d Dept 2007]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). Rather, plaintiff's deposition testimony shows that he missed only one day of work due to his injuries, and Dr. Katzman's report, prepared just two months after the accident, concludes that plaintiff was not disabled and could continue to work. Accordingly, defendants' motion for summary judgment dismissing the action based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: 4April'08

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION