SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

NORMIL THERMIDOR,

Plaintiff,

INDEX No.009855/04

MOTION DATE: April 7, 2008
Motion Sequence # 005

-against-

WILLIAM J. NEUSS, JR.,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... X

This motion, by defendant, for an order granting defendant summary judgment on the grounds that there is no competent evidence that the plaintiff sustained a serious injury pursuant to Insurance Law §5104(a) and for such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

FACTS

On March 28, 2002, the defendant, William J. Neuss Jr., was operating his vehicle on Route 110 in Babylon, Suffolk County when his vehicle came into contact with the plaintiff, Normil Thermidor's, vehicle.

This court issued an Order dated September 7, 2005 granting plaintiff's motion for summary judgment on the issue of liability. The matter that remains herein is solely on the issue of damages.

Plaintiff claims that he has sustained a serious injury pursuant to Insurance Law § 5102(d) as a result of the aforementioned incident. The injuries alleged are to his neck, back and right knee. It was discovered that he had three motor vehicle accidents prior to this lawsuit on December 26, 1997, June 15, 1998 and October 22, 1999, and two more accidents subsequent to the instant case in 2003 and on July 1, 2005; all of which involve injuries to the plaintiff's neck and back. Additionally, the plaintiff in his 1999 accident sustained an injury to his right knee.

DEFENDANT'S CONTENTIONS

Defendant's attorney contends that the plaintiff did not sustain a serious injury pursuant to Insurance Law 5102(d), and therefore, the case should be dismissed. Counsel claims that the plaintiff has been involved in six motor vehicle accidents over the last eleven years, and the alleged injuries in the subject accident are similar to those that he sustained in the other accidents. Furthermore, he did not suffer a fracture to his right leg, and there is no medically competent evidence so as to satisfy the threshold set forth by Insurance Law 5102(d).

PLAINTIFF'S CONTENTIONS

Counsel for the plaintiff contends that summary judgment should be denied because there is an issue of fact as to whether the plaintiff has sustained a serious injury so as to satisfy the threshold under Insurance Law § 5102(d). The plaintiff claims that the instant motor vehicle accident caused serious and permanent injuries; including marrow edema from bone contusion and trabecular microfractures involving the anterior aspect of the medial femoral condyle to the right knee, subligamentous posterior disc herniations at C4-5 and C5-6 impinging on the anterior aspect of the spinal cord, posterior disc herniation at L5-S1 impinging on the anterior aspect of the spinal canal, the right neural foramen and left nerve root, lateral subluxation of the patella to the right knee, right ankle trauma with possible internal derangement, and status post head trauma and concussion with symptoms of post concussion headache syndrome. Consequently, the plaintiff is impaired to the extent that his injuries prevented him from performing work related activities for one year following

the accident, and subsequently was forced to obtain only part time employment.

DECISION

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, 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 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 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 AD2d 607, 467 NYS2d 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 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)"

Applying the foregoing legal principles to the facts of the case at bar has warranted an intensive examination of the record as presented to the court, including pleadings, affidavits, hospital records and other relevant proof.

The defendant met his burden of establishing that the plaintiff did not sustain a serious injury as a result of the subject motor vehicle accident within the meaning of Insurance Law § 5102(d). **See Toure v. Avis Rent A Car Systems, Inc.**, 98 NY2d 345, 746 NYS2d 865 (2002). In support of the motion, defendant's counsel submitted a medical report by orthopedic surgeon, John C. Killian, M.D. Based upon his objective medical findings which

include knowledge of the plaintiff's other motor vehicle accidents, review of numerous reports by the plaintiff's treating physicians and physical examination of the plaintiff, Dr. Killian concluded that there is no loss of range of motion to the plaintiff 's neck, back and right leg, and the plaintiff is not disabled. Furthermore, Dr. Killian explicitly noted that the plaintiff is capable of performing his usual daily and work related activities without any restrictions.

Additionally, counsel for the defendant proffered reports by Frederick S. Mortati, M.D., a neurologist, and Robert A. Tantleff, M.D, a radiologist; all of which show that the plaintiff did not sustain a serious injury as a result of the subject accident. In his report, Dr. Mortati concluded that as a result of the accident, the plaintiff did not sustain a cerebral concussion or a cervical or lumbosacral radiculopathy or any neurological pathology. Dr. Tantleff performed independent radiology reviews of magnetic resonance images ("MRI ") of the plaintiff's cervical spine, lumbar spine and right knee taken after the instant accident, and of the plaintiff's cervical spine and lumbar spine after his 2005 accident. With respect to the cervical and lumbar spine, Dr. Tantleff concluded that the 2002 and 2005 MRI's show that the plaintiff's injuries contributed to underlying chronic degenerative disc disease and are not causally related to the instant accident. Moreover, the MRI of the right leg does not reveal a fracture which is consistent with a previous MRI report dated August 7, 2002 by radiologist, John T. Rigney, M.D..

In opposition, plaintiff's counsel submitted medical notes prepared by the plaintiff's physician, Jeffrey Schwartz, M.D. Pursuant to **CPLR 4518(a)**, any writing or record of an event may be admissible if it is a document that was created in the regular course of business, it is the regular course of business to create such a document, and it was created on or about the time of the event. As Dr. Schwartz cannot be located, counsel tendered an affirmation by Joseph Mauceri, M.D. to certify that Dr. Schwartz's reports were made contemporaneously with his examinations of the plaintiff. However, there is nothing in the affirmation to suggest that Dr. Mauceri would possess such knowledge; only Dr. Schwartz himself can attest to when the reports were prepared in relation to the plaintiff's office visits. Moreover, even if the Dr. Schwartz's notes are deemed admissible, they are illegible so as to prevent any reasonable person from ascertaining Dr. Schwartz's findings. Therefore, Dr. Schwartz's records are without probative value because they were incorrectly affirmed. (**See CPLR 4518(a); Grasso v. Angerami**, 79 NY2d 813, 814-815, 1992).

Plaintiff's counsel submitted reports dated June 28, 2005 and February 8, 2007 by

Donald I. Goldman, M.D., in which he states that the plaintiff's injuries are causally related to the instant accident, but fails to note the plaintiff's three other relevant accidents and injuries alleged therein. However, he fails to establish that the plaintiff's injuries are serious within the meaning of Insurance Law § 5102(d).

The plaintiff claims that he sustained herniated discs at C4-5 and C5-6 of his cervical spine and at L5-S1 of his lumbar spine. It is well settled that "[p]roof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury." (**Pommels v. Perez,** 4 NY3d 566, 797 NYS2d 380, 384 (2005); **See Fauk v. Jenkins**, 301 AD2d 564, 754 NYS2d 317, 2d. Dept., 2003). In comparing the two medical reports, it is clear that the plaintiff's range of motion improved.

Dr. Goldman's reports also note an improvement in range of motion to the plaintiff's right knee. Contrary to Dr. Tantleff and Dr. Rigney's medical narratives, Dr. Goldman reported based upon his review of the plaintiff's MRIs that he sustained a microfracture of the right knee. He explains that "a microfracture is a break in the cartilage, the material that helps cushion bones at the joint, which causes swelling, stiffness, extreme discomfort and pain. Moreover, as a microfracture is a break in the cartilage, it would not appear on an x-ray and thus were not apparent on the x-rays taken at Brunswick Hospital. It would and did not appear when an MRI of the right knee was taken after the March 2002 accident." (**Goldman Affirmation,** page 2).

Although Dr. Goldman opines that the plaintiff sustained a fracture to his right leg which may be a considered a serious injury under the statute, it has been established that a tear in cartilage is not a serious injury within the meaning of Insurance Law 5102 (d). The courts have asserted that it was not the legislature's intent when it amended the law to broaden the definition of what is considered a fracture to encompass something other than a bone. (**Catlan v. Empire Storage Warehouse, Inc.**, 213 AD2d 366, 367, 623 NYS2d 311, 2d. Dept., 1995).

Significantly, Dr. Goldman does not comment on any limitations that substantially interfere with the plaintiff performing his usual and daily activities, including work related duties. Counsel for plaintiff submitted the plaintiff's affidavit wherein the plaintiff explains that he had to stop working following the accident for one year, and currently works on a part time basis. However, plaintiff's mere subjective proof

regarding his physical limitations is not enough to satisfy the 90/180 threshold set forth under Insurance Law § 5104(d). (**See Springer v Arthurs**, 22 AD3d 829, 803 NYS2d 170, 2nd Dept., 2005).

To overcome the threshold, counsel for the plaintiff is required to proffer objective medical evidence to substantiate that the plaintiff's injuries prevent him from working at full capacity. (see, **Licari v. Elliot** 57 NY2d 230, 455 NYS2d 570, 1982). In **Licari**, the court asserted that a minor limitation in use of a body part should be classified as insignificant, and "the words substantially all, as used in the statute, should be construed to mean that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment." (**Id.** at 230). Therefore, the proof adduced by the plaintiff herein has not demonstrated the existence of an issue so as to require a trial.

Accordingly, defendant's motion for summary judgment is hereby **granted.**

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated JUN 16 2008

Stephen A Bucaria
XXX J.S.C.

ENTERED

JUN 20 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE