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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:
HON. ANTHONY L. PARGA
Justice

----------X **PART 11**

LAWRENCE GUSZ,

Plaintiff,

-against-

JAMES E. RIDDICK, VICTOR PEREZ and P. PRESKI PEREZ,

Defendants.

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INDEX NO. 13643/06
X X X
MOTION DATE: 4/25/08
SEQUENCE NO. 003

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Upon the foregoing papers, it is ordered that the motion by defendants Victor Perez and P. Preski Perez for summary judgment dismissing the Complaint on the ground that the plaintiff did not sustain a serious injury (Insurance Law §5102(d)) is granted.

In this action plaintiff seeks to recover for injuries sustained in a three-car accident. At a red light plaintiff was the first car in line, hit in the rear by defendant Riddick after Riddick was hit in his rear twice by a car owned by defendant P. Preski Perez and operated by Victor Perez on May 11, 2003 on Old Country Road, Carle Place, N.Y.

Defendants Victor Perez and P. Preski-Perez are precluded from offering any testimony or evidence at trial by order dated August 31, 2007. By stipulation dated August 29, 2007 the action against defendant James E. Riddick was discontinued.

Plaintiff's injuries, as alleged in the Bill of Particulars, include spinal disc herniation requiring daily pain medication. "Permanency is claimed with respect to all injuries except those with a superficial nature." Plaintiff was confined to bed and home for four weeks intermittently and no time was missed from plaintiff's two jobs.

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

In support of this application, defendant submits the sworn report of neurologist, Warren Cohen. This report was the result of a review of plaintiff's medical records and an examination on May 15, 2007 with objective medical tests. Dr. Cohen concludes that there is a causal relationship between plaintiff's original complaints and the accident; however, the diagnosis is post-cervical sprain/strain and no disability.

Defendant's orthopedist, Patrick Dineen, examined plaintiff on May 15, 2007 using objective range of motion tests and reviewed plaintiff's medical records. Dr. Dineen's sworn report concludes that plaintiff has "Status-post cervical strain/sprain" and "HNP cervical spine" and there is no disability.

Defendant's radiologist, Neil Cantor's, sworn review of the September 23, 2003 cervical spine MRI notes degenerative changes most prevalent at C6/7; no frank card compression; small bulge and degeneration noted at C3/4 and the "herniations

themselves cannot be dated in terms of onset". Dr. Cantor concludes that the study "suggests chronic disease of many years duration".

Defendants have met their burden of a *prima facie* showing that plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*Toure v. Avis Rent A Car System*, 98 NY2d 345 (2002)).

In opposition plaintiff refers to his sworn testimony as to his injuries and medical attention he sought thereto. Plaintiff also submits the affirmation of his treating physician, orthopedist Salvatore Corso. This affirmation refers to a review of the plaintiff's medical records which extend from 2000 (a rotator cuff repair surgery) to February 2004. Dr. Corso contends that plaintiff had no history of cervical injury until the May 14, 2003 exam in connection with the May 11, 2003 accident. Dr. Corso, in narrative form, describes plaintiff's pain and concludes: "These MRI findings, along with my examination findings including muscle spasm and range of motion limitations, constitute objective evidence of injuries."

Conclusory allegations that the plaintiff's injuries are "permanent" are insufficient to make out a prima facie claim of serious injury to defeat a motion for summary judgment. *Licari v. Elliot,* 57 NY2d 678 (1987); *Gaddy v. Eyler*, 79 NY2d 955 (1992). Conclusions of even an examining physician which are unsupported by acceptable medical evidence are insufficient to defeat a motion for summary judgment directed to the threshold issue of whether the plaintiff has suffered serious physical injury. *Georgia v. Ramautar*, 180 AD2d 713 (2nd Dept. 1992); *Mobley v. Riportella,* 241 AD2d 443 (2nd Dept. 1997). A doctor must cite the objective tests performed on the injured plaintiff or specify not only the extent and degree of any limitations, but also its duration (*Giannakis v. Paschlidou*, 212 AD2d 502 (2nd Dept. 1995); *Weber v. Harbus*, 212 AD2d 525 (2nd Dept. 1995)).

Plaintiff's statements, and those of his doctor reiterating his claims, that he was otherwise limited due to his own subjective complaints of pain, are insufficient to defeat summary judgment (*Georgia v. Ramataur*, 180 AD2d 713 (2nd Dept. 1992); *Scheer v. Koubek*, 70 NY2d 678 (1987)). The mere existence of a herniated disc does not constitute serious injury (*St. Pierre v. Ferrier*, 28 AD3d 641 (2nd Dept., 2006)).

It is the burden of the plaintiff to establish his or her serious physical injury by providing the Court with objective medical evidence, that there is a degree and extent of limitation of use and or function, which is permanent. An expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Toure v. Avis Rent A Car, supra.*).

Plaintiff has not met his burden of demonstrating any questions of fact with respect to his injuries by a medical opinion supported by objective tests.

Dated: June 25, 2008.

Anthony L. Parga, J.S.C.