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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

ROBERT TREFCER, Plaintiff, - against - MELISSA TAYLOR, Defendant.	TRIAL / IAS PART 32 NASSAU COUNTY Index No. 18707/05 Motion Sequence No. 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits . . . . . ____
Briefs: Plaintiff's / Petitioner's . . . . . ____
Defendant's / Respondent's . . . . . ____

The defendant moves for an order pursuant to CPLR 3212 granting summary judgment. The plaintiff opposes the motion as untimely and there material issues of fact as to whether the plaintiff sustained serious injury as defined by Insurance Law § 5102 (d). The defendant replies this is a timely motion, and the defendant did not sustain a serious injury. The underlying action allegedly arises from a motor vehicle accident on July 15, 2003, at approximately 4:50 p.m., at the intersection of Cold Spring Road and Syosset-Woodbury Road, in Oyster Bay, New York when the a vehicle owned and operated by the defendant and the plaintiff bicyclist came into contact. This Court has carefully reviewed and considered all of the parties' papers submitted on this motion.

The defense attorney states, in a supporting affirmation dated March 13, 2008, the plaintiff submitted a verified bill of particulars alleging injuries including herniations, cervical strain, radiculopathy, pain, acromioclavicular separation, acromioclavicular joint artheosis, fraying of the infraspinatus tendon, left elbow abrasion, right ankle laceration, bruising of feet and lower back, and an abrasion on the left cheek. The defense attorney points to the plaintiff's examination before trial on April 17, 2007, where the plaintiff testified the impact was to the right side, and caused the plaintiff to fall on the left side. The defense attorney notes the plaintiff underwent an independent orthopedic examination with Sandy Farkas, M.D. on June 20, 2007, where that doctor reported a normal examination of the cervical and lumbar spine with full and normal range of motion and flexibility, and noted acromioclavicular sprain, but full stability and range of motion and without complaint of pain. The defense attorney asserts Dr Farkas concluded the plaintiff did not display any orthopedic disability, and required no orthopedic treatment nor physical therapy. The defense attorney also points out on September 18, 2007, Dr. Farkas reviewed MRI films of the plaintiff's cervical and lumbar spine taken in August 2003, and concluded the MRI studies did not reveal any herniated discs in the plaintiff's spine. The defense attorney states the plaintiff testified being limited in performing yard work, lifting weights, and doing pushups, but was unable to testify to being unable to do any activities. The defense attorney indicates the plaintiff testified he continues to run five miles a week, rides a bicycle for 20 to 30 mile rides, maintains a

gym membership, and painted the interior of the plaintiff's home. The defense attorney observes the plaintiff testified missing only one day from work after the accident, and having no restriction in any employment activities by reason of the alleged injuries. The defense attorney remarks the plaintiff testified that two years after the alleged accident the plaintiff injured his back while performing yard work at home.

The plaintiff's attorney states, in an opposing affirmation dated July 8, 2008, the defense motion is untimely under the January 29, 2008 court order, to wit 13 days late when filed on March 13, 2008. The plaintiff's attorney states, if the Court entertains this motion, there are material issues of fact regarding the plaintiff sustaining a serious injury as defined by Insurance Law § 5102 (d). The plaintiff's attorney points out the plaintiff was rushed to Syosset Hospital where the plaintiff was treated in the emergency room for neck, left shoulder and low back pain, and on the following day, the plaintiff saw Mitchell Goldstein, M.D., an orthopedic surgeon for a followup consultation for continued pain. The plaintiff's attorney notes Dr. Goldstein initially diagnosed left acromioclavicular joint sprain, cervical sprain, and post traumatic syndrome. The plaintiff's attorney claims the plaintiff followed up with neurological, orthopedic and chiropractic care for persistent symptoms in the left shoulder, neck, and back. The plaintiff's attorney notes a cervical MRI revealed left paracentral herniation at C2-3, C4-5 and C5-6 with impingement, and a followup EMG/NCV study revealed left C5-6 radiculopathy, a lumbar MRI revealed L4-5 right paracentral herniation creating a ventral

extradural defect, L5-S1 moderate left paracentral /foraminal herniation creating significant impingement, and a followup EMG/NCV study revealed left L4-5 radiculopathy. The plaintiff's attorney asserts, due to persistent pain and limitation of movement in the left shoulder, the plaintiff consulted with Answorth Allen, M.D., at the Hospital for Special Surgery, where the plaintiff was diagnosed with Grade II acromioclavicular separation with mild prominence of the distal clavicle, and an MRI of the shoulder revealed the infraspinatus tendon was frayed on the articular side, advanced acromioclavicular joint artheosis with thickening, a fissure of the interface of cartilage and superior labrum, and a traction injry to the posterior labrum. The plaintiff's attorney states, with respect to the plaintiff's bicycle and exercise activities, the plaintiff never claimed the 90 out of 180 day rule as a basis for meeting the no-fault threshold, and concedes, prior to the subject accident, the plaintiff engaged in very active and athletic activities, including biking and running, and continues an active lifestyle, inspite of the injury, pain, and the limitations of movement caused by the defendant's negligence, but that does not mean the plaintiff was not injured. The plaintiff's attorney contends the plaintiff sustained a significant limitation of use of the left shoulder, neck and back, and a permanent consequential loss of the use of the left shoulder neck and back based upon Dr. Goldstein's July 16, 2003 and May 9, 2008 examinations. The plaintiff's attorney asserts that latter examination revealed a prominence and tenderness of the AC joint, tightness in adduction and extension, restricted shoulder movement, and restricted external rotation

showing a significant limitation of the left shoulder. The plaintiff's attorney points out Dr. Goldstein believes the plaintiff is still a candidate for more aggressive management, including cortisone injections and surgical intervention to the neck, back and left shoulder. The plaintiff's attorney avers Dr. Goldstein states "there is a direction correlation between his accident from July 15, 2003 and the injuries to the left shoulder, neck and back," and the plaintiff has a "permanent partial disability related to his shoulder, neck and back." The plaintiff's attorney observes Dr. Goldstein's May 9, 2008 findings are based upon the doctor's initial examination, the plaintiff's history, the hospital and medical records, as well as the doctor's followup clinical evaluation.

The defense attorney states, in a reply affirmation dated July 25, 2008, the defense motion should not be denied as untimely because the note of issue was served by the plaintiff on July 26, 2007, and the defense notice of supplemental demands for discovery and inspection seeking medical records and authorizations had not been answered. The defense attorney states the defendant filed a motion to vacate that note of issue and compel discovery on or about August 8, 2007, and requested leave to file any motions for summary judgment 120 days from the date of the motion decision. The defense attorney notes the plaintiff's attorney requested four adjournments with respect to the defense motion for additional time to respond to the defense discovery demands. On January 25, 2008, the Court ruled the discovery was now provided, and permitted the defendant to file motions within 60 days from December 31, 2007. The defense attorney alleges the

defense law office received that court order in the first week of February 2008; the defense diligently attempted to comply with the court order by obtaining responses from the providers pursuant to the authorizations forwarded by the plaintiff's counsel; and the defense served the instant motion for summary judgment on or about March 13, 2008, less than 60 days after the court order. The defense attorney urges good cause has been shown for the timing of this motion for summary judgment, and the appellate courts favor entertaining and deciding such motions where the delay in filing was due to outstanding discovery, and the defendant moved to vacate the note of issue. This Court determines this instant defense motion for summary judgment should be considered by this Court, and decided based upon the parties' papers submitted with respect to it. The defense attorney urges the plaintiff did not sustain a serious injury under the Insurance Law based the defense moving papers. The defense attorney contends the plaintiff's claim is not a significant limitation, but merely a minor, mild, or slight limitation of use which is insignificant. The defense attorney exhorts the plaintiff fails to show the plaintiff received therapy and treatment for a significant time period after this motor vehicle accident, and that the limitation of use affected the plaintiff's daily life activities. The defense attorney avers the plaintiff has not shown, through competent medical evidence, the plaintiff's pre-existing injuries were resolved, and a comparative analysis provided which differentiates the new injuries from the old injuries, and the old injuries were aggravated or exacerbated.. The defense attorney notes the plaintiff's counsel admits the

plaintiff was not prevented from engaging in substantially all of the plaintiff's daily life activities after the accident, and the plaintiff continues an active lifestyle, is able to exercise, and does 15 pushups at a time. The defense attorney counters, while Dr. Goldstein provides numerical values for the plaintiff's range of motion to the cervical and lumbar spine and left shoulder, the doctor fails to provide an opinion of the degree to which the plaintiff's range of motion was allegedly limited, as well as the normal values for the listed ranges, and without that information, the plaintiff cannot establish the degree to which the plaintiff sustained an allegedly significant limitation, so the doctor's findings cannot be considered by the Court. The defense attorney indicates the plaintiff attorney's affirmation and Dr. Goldstein's report do not state the nature and duration of the injuries and treatment received, and notes the Dr. Goldstein states the plaintiff first visited for an evaluation the following day after the accident, and thereafter the plaintiff went for physical therapy and had improvement, however there is no other information provided by the plaintiff nor the doctor concerning the length of therapy nor the duration of the alleged injuries sustained from the accident. The defense attorney states the defendant cannot show sustaining a significant limitation because the plaintiff failed to provide object medical evidence of the alleged injuries, rather Dr. Farkas reported the plaintiff sustained only resolved sprains and strains after the accident, and the MRI studies revealed only some arthritic changes; and the MRI studies were not at consistent with the examination performed upon the plaintiff. The defense attorney states Dr.

Farkas also reported there were no objective findings relating the alleged MRI findings to any injury sustained as a result of the subject accident, yet Dr. Goldstein addresses the results of the MRI findings, but Dr. Goldstein does not state the results of the studies were casually related to the subject accident. The defense attorney also notes Dr. Goldstein did not review the MRI films, but simply referred to other physicians' reports which were not provided by the plaintiff in opposition to this defense motion, and admits the initial examinations of the plaintiff's left shoulder by the hospital physicians and Dr. Goldstein's office were unremarkable. The defense attorney reports Dr. Goldstein did not examine later MRI studies of that shoulder showing degenerative changes, and alleged hyperintensity, so Dr. Goldstein's recitation of other physicians' conclusions as to the nature and cause of the plaintiff's alleged injuries is insufficient to establish, through admissible, objective evidence, the plaintiff sustained a significant, serious injury as a result of the subject accident. The defense attorney asserts the plaintiff's alleged injuries have not kept the plaintiff from any employment nor professional activities, to wit the plaintiff took one day off from work following the accident. The defense attorney notes Dr. Goldstein repeatedly states the plaintiff has a history of lower back pain prior to this accident, and though the plaintiff had preexisting back pain, there has been significant increase and persistence now in the plaintiff's back pain, yet the plaintiff has failed to address the extent to which the preexisting injuries were allegedly aggravated as a result of the subject accident, so the plaintiff cannot establish the alleged injuries are causally

related to this accident nor that the subject accident caused significant limitation of the use of any body part.

The Second Department has held: "the respondents demonstrated "good cause" for their delay in filing their motion for summary judgment, since the note of issue was filed while there was significant discovery outstanding. The evidence submitted by the defendant here was sufficient to make a *prima facie* showing the injured plaintiff did not sustain serious injury, as defined by Insurance Law § 5102(d), in the underlying accident [citations omitted] (***see Konkowski v. Hoare***, 240 A.D.2d 638, 659 N.Y.S.2d 1006 [2nd Dept., 1997]). The evidence submitted by the plaintiff in opposition to the defense motion is insufficient to raise a triable question of fact [citations omitted] (***see Konkowski v. Hoare, supra***).

Accordingly, the motion is granted.

So ordered.

Dated: **September 16, 2008**

ENTER:

J. S. C. HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION XXX NON FINAL DISPOSITION