SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. F. DANA WINSLOW,
Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

TINSON K. PETER,

Plaintiff,

MOTION DATE: 5/30/08

-against-

MOTION SEQ. NO.: 001
INDEX NO.: 017747/06

RUTH N. PALENCIA, ESTUARDO PALENCIA AND RUTH M. PALENCIA D/B/A RNP LANDSCAPING,

Defendants.

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Defendants Ruth N. Palencia, Estuardo Palencia and Ruth M. Palencia d/b/a RNP Landscaping's motion for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff Tinson K. Peter, age 24, alleges that on August 21, 2006, at approximately 11:20 a.m., a motor vehicle owned and operated by him came into contact with a vehicle owned by defendant Ruth M. Palencia d/b/a RNP Landscaping and operated by defendant Estuardo Palencia (collectively "defendants"). The accident occurred on Old Country Road, at its intersection with Frost Street, County of Nassau. Defendants now move for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The Court finds that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiff from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated December 14, 2007, of orthopedist Michael J. Katz, MD, covering an examination of that date, report of examination, dated December 4, 2007, of neurologist Steven Ender, DO, covering an examination of that date, affirmed reports dated November 27, 2007, of radiologist Jessica F. Berkowitz, MD, covering reviews of MRIs of plaintiff's lumbar and cervical spines. Defendants also submit an unaffirmed report, dated September 30, 2006, of plaintiff's radiologist Richard J. Rizzuti, MD, covering an MRI of plaintiff's thoracic spine, unaffirmed report, dated October 2, 2006, of plaintiff's radiologist Harvey Lefkowitz, MD, covering an MRI of plaintiff's brain and unaffirmed report, dated April 5, 2007, of Dr. Lefkowitz, covering an MRI of plaintiff's left shoulder. The MRIs were purportedly performed on the dates of the reports. The

Court notes that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106**; **Grasso v. Angerami**, 79 NY2d 814; **Rodriguez v. Huerfano**, 46 AD3d 794; **Duke v. Saurelis**, 41 AD3d 770; **Young Soo Lee v. Troia**, 41 AD3d 469; **Felix v. New York City Transit Authority**, 32 AD3d 527. However, the Court may consider the MRI reports of Drs. Rizzuti and Lefkowitz because the reports were submitted by defendants and prepared by physicians of plaintiff. *See* **Kearse v. NYC Transit Authority**, 16 AD3d 45; **Meely v. 4 G's Truck Renting Co., Inc.**, 16 AD3d 26; **Mantila v. Luca**, 298 AD2d 505; **Pagano v. Kingsbury**, 182 AD2d 268.

Dr. Katz found normal range of motion, comparing the results to normal, of plaintiff's cervical spine, thoracolumbosacral spine, lower extremities, left elbow and left and right hands and shoulders and found no muscle spasms, and normal muscle strength, sensation and reflexes. Dr. Katz also provides results from numerous other orthopedic tests including the following: negative Babinski test, negative straight leg raising test, normal gait and negative Lachman's test. Dr. Katz diagnosed "cervical radiculopathy now resolved, thoracolumbosacral radiculopathy resolved, bilateral shoulder contusion resolved, left elbow contusion resolved [and] bilateral hand contusion now resolved." Dr. Katz noted that the MRI of the cervical spine revealed a preexisting Chiari malformation which could affect recovery.

Dr. Ender found normal range of motion, comparing the results to normal, of plaintiff's cervical spine and back and provides the results of motor, sensory and coordination examinations which also revealed normal results. Dr. Ender diagnosed "resolved cervical and lumbosacral paraspinal muscle sprain." Dr. Ender concluded that plaintiff had a "normal neurological examination" and that "he can continue with his current activities at work, as well as activities of daily living without restriction."

Dr. Berkowitz reviewed an MRI of plaintiff's lumbar spine, performed on October 4, 2006, and concluded that plaintiff had a "minimal disc bulge, L4-L5" and "no evidence

of acute traumatic injury to the lumbar spine, such as vertebral fracture, asymmetry of the disc spaces, ligamentous rupture or epidural hematoma." Dr. Berkowitz also reviewed an MRI of plaintiff's cervical spine, performed on September 29, 2006, and concluded that it revealed "straightening of the normal cervical lordosis", diffuse disc bulges and spondylosis [from] C3-C4 through C6-C7" and a "minimal central disc herniation [at] C4-C5." Dr. Berkowitz opined that the disc bulges are chronic and degenerative in origin and that such a disc herniation is "common [in] the general asymptomatic population and [is] unlikely to be related to an acute traumatic injury." The unaffirmed MRI reports covering plaintiff's thoracic spine, brain and left shoulder of plaintiff's radiologists submitted by defendants revealed normal results.

The Court finds that the reports of defendants' examining physicians, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, so as to satisfy the Court that an "objective basis" exists for their opinions. Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff Tinson K. Peter did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiff submits (1) an affirmation of neurologist Cecily Anto, MD, dated May 13, 2008, covering examinations conducted between September 26, 2006 and July 11, 2007 and examinations on March 21, 2008 and April 22, 2008; (2) affirmation of radiologist Richard J. Rizzuti, MD, dated April 8, 2008, covering MRIs of plaintiff's cervical and lumbar spines performed at All County Open MRI & Diagnostic Radiology, P.C. on September 29, 2006 and October 4, 2006, respectively; (3) affidavit, of physical therapist Michael Leogrande, PT, sworn to on May 6, 2008, covering physical therapy received by plaintiff between August 29, 2006 and December 26, 2006; (4) unaffirmed records covering treatment rendered to plaintiff as an inpatient at Punarnava Ayurveda Hospital in

India between May 1, 2007 and May 18, 2007; (5) affidavit of physical therapist Christopher Ostling, PT, sworn to on May 1, 2008, covering physical therapy received by plaintiff between April 7, 2008 and April 28, 2008; and (6) affidavit of plaintiff, sworn to on April 30, 2008.

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not he sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. "Even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury–such as a gap in treatment, an intervening medical problem or a pre-existing condition–summary dismissal of the complaint may be appropriate." **Pommells v. Perez**, 4 NY3d 566, 572.

The Court finds that plaintiff has failed to provide sufficient evidence that plaintiff's alleged injuries are causally related to the accident of August 21, 2006. *See* **Pommells v. Perez**, 4 NY3d 566. Although Dr. Rizzuti's report covering plaintiff's cervical spine MRI indicates "subligamentous posterior disc herniations from C3 through C7 abutting the anterior aspect of the spinal cord[;] Chiari malformation" and his report covering plaintiff's lumbar spine MRI indicates "posterior disc herniations at L4-5 and at L5-S1 impinging on the anterior aspect of the spinal canal and abutting the nerve roots bilaterally," the Court notes that the existence of a radiologically confirmed disc injury alone will not suffice to defeat summary judgment. *See* **Pommells v. Perez**, at 574; **Bravo v. Rehman**, 28 AD3d 694; **Howell Reupke**, 16 AD3d 377; **Kearse v. New York City Transit Authority**, *supra*. The affirmation of Dr. Rizutti covering said MRI reports, fails to indicate that plaintiff's injuries were causally related to the accident. **Albano v. Onolfo**, 36 AD3d 728; **Chan v. Casiano**, 36 AD3d 580; **Collins v. Stone**, 8 AD3d 321. Plaintiff also fails to present evidence to refute the findings of Dr. Berkowitz that plaintiff has degenerative changes in his cervical and lumbar spines. This lack of evidence as to

causation renders Dr. Anto's statement in her affirmation of May 13, 2008, that plaintiff's alleged injuries were proximately caused by the accident highly speculative. "Plaintiff had the burden to come forward with evidence addressing defendant's claimed lack of causation." **Pommells v. Perez**, *supra* at 580; *See* **Siegel v. Sumaliyev**, 46 AD3d 666; **Roman v. Fast Lane Car Service, Inc.**, 46 AD3d 535; **Abreu v. Bushwick Building Products & Supplies, LLC**, 43 AD3d 1091; **Young Soo Lee v. Troia**, 41 AD3d 469; **Gomez v. Epstein**, 29 AD3d 950; **Bycinthe v. Kombos**, 29 AD3d 845; **Kaplan v. Vanderhans**. 26 AD3d 468; **Giraldo v. Mandanici**, 24 AD3d 419. Dr. Anton's conclusory statements that plaintiff's neck and back injuries were "proximately caused by the automobile accident on August 21, 2006," fail to adequately establish a causal relationship between the accident and plaintiff's injuries. *See* **Howell Reupke**, 16 AD3d 377. Plaintiff also fails to address the findings of defendants' radiologist Dr. Berkowitz which are inconsistent with the findings of plaintiff's radiologist Dr. Rizutti with respect to their review of MRIs of plaintiff's cervical and lumbar spines. The Court notes further that in Dr. Anto's affirmation covering her treatment of plaintiff, Dr. Anton does not address her statement in a Neurological Progress Note of March 21, 2008 that plaintiff is "advised to have blood work to rule out other systemic condition, which can cause radiculitis."

It is also the determination of this Court that the "gap in treatment" may be fatal to plaintiff's claim that the evidence submitted is sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law § 5102(d)**. There is a gap in treatment between the purported end of plaintiff's physical therapy treatments in July 2007 and his visit to Dr. Anton on March 21, 2008, after service upon plaintiff of the within motion for summary judgment. The record contains several contradictory explanations for this gap in treatment. In her May 13, 2008 affirmation, Dr. Anton states that on April 12, 2007, one week prior to his trip to India, she examined plaintiff and determined that plaintiff "had reached maximal medical benefit and

improvement from conservative medical management and physical therapy treatment, and that continuing ongoing medical treatment at that time would not substantially improve [plaintiff's] medical condition." The Court notes that Dr. Anton made an inconsistent assertion in her "Neurological Progress Report" of April 12, 2007, wherein she states that she "will follow up with this patient in six weeks." Dr. Anto also reports in her affirmation that plaintiff returned to her office on July 11, 2007, after his trip to India, and that she diagnosed "cervical radiculopathy with multiple disc herniations and recent exacerbation, as well as thoracic strain with exacerbation." Dr. Anto states that she advised plaintiff to "consider" physical therapy to the cervical, thoracic and lumbar spines two to three times a week for eight weeks and that it was her opinion that no fault should cover these repeated physical therapy visits due to plaintiff's exacerbated symptoms. The Court notes that the only evidence of subsequent physical therapy treatments is an affidavit of Christopher Ostling, PT, sworn to on May 1, 2008, attaching physical therapy records and stating that plaintiff had physical therapy from April 7, 2008 to April 28, 2008.

Plaintiff asserts in his affidavit that "although my treating physician, Dr. Cecily Anto recommended a repeated regimen of physical therapy during a follow-up office visit on July 11, 2007, I was unable to schedule such treatment since my no-fault carrier had previously stopped coverage, thereby causing economic hardship to pay for these expenses." Plaintiff further claims that he was able to resume treatments in April 2008 as he was now earning a higher salary and, as a result, was in a "better financial position to afford the costs of physical therapy." "While a cessation of treatment is not dispositive–the law surely does not require a record of needless treatment in order to survive summary judgment–a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so." **Pommells v. Perez**, *supra* at 574. Although an explanation that no-fault coverage was terminated may be sufficient to explain a gap in treatment (*See* **Francovig v. Senekis Cab Corp.**, 41 AD3d 643. *See also* **Black v. Robinson**, 305 AD2d 438), the

Court finds it is unnecessary to determine whether plaintiff's explanation for his eight month gap in treatment is reasonable (**Pommells v. Perez**, *supra*), as the Court has found that plaintiff failed to raise an issue of fact even without considering this gap.

There is also insufficient evidence that plaintiff's alleged injuries are permanent **§5102(d)**((7)). Dr. Anton's assertion that plaintiff sustained a permanent consequential limitation is conclusory as she fails to offer any evidence of permanency. "Mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury' and [summary judgment] should be granted for defendant where plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements." **Lopez v. Senatore**, 65 NY2d 1017, 1019. *See also*, **Grossman v. Wright**, 268 AD2d 79; **Lincoln v. Johnson**, 225 AD2d 593; **Orr v. Miner**, 220 AD2d 567. Any statements of permanency of plaintiff's injuries are belied by his deposition testimony that he only missed three weeks plus several days of work. *See* **Relaford v. Valentine**, 17 AD3d 339.

Moreover, plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. **Scheer v. Koubek**, 70 NY2d 678; **Ranzie v. Abdul-Massih**, 28 AD3d 447; **Picott v. Lewis**, 26 AD3d 319; **Nelson v. Amicizia**, 21 AD3d 1015; **Kivlan v. Acevedo**, 17 AD3d 321; **Rudas v. Petschauer**, 10 AD3d 357; **Barrett v. Howland**, 202 AD2d 383. Plaintiff has also failed to submit competent medical evidence that the injuries that he sustained rendered him unable to perform all of his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident.

The Court has examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, defendants RUTH N. PALENCIA, ESTUARDO PALENCIA and RUTH M. PALENCIA d/b/a RNP LANDSCAPPING's motion for summary judgment dismissing the complaint of plaintiff TINSON K. PETER, on the grounds that plaintiff

failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**.

Defendants shall serve plaintiff with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the Order of the Court.

Dated: Sept 16, 2008 ENTER:

J.S.C.

ENTERED

OCT 10 2008

NASSAU COUNTY

COUNTY CLERK'S OFFICE