SHORT FORM ORDER

INDEX No. 05-2115
CAL. No. 08-00411-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 5-23-08
CAL. DATE 7-21-08
MNEMONIC: # 002 - MG; CASEDISP

HUMBERTO RODRIGUEZ,

Plaintiff,

- against -

JESSICA RIVERA,

Defendant.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross-Motion and supporting papers__; Answering Affidavits and supporting papers 16 - 20 ; Replying Affidavits and supporting papers 21 - 22 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment in her favor on the grounds that the plaintiff did not sustain a "serious injury" as defined in New York Insurance Law § 5102 (d) (hereinafter Insurance Law), is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on July 10, 2004 in a rear-end motor vehicle accident that occurred on Wicks Road at or near its intersection with Yarnell Street in Islip, New York. By his bill of particulars, the plaintiff alleges that as a result of said accident, he sustained serious injuries including, herniated disc at C4-5 impinging the existing left C5 nerve root; cervical radiculopathy; cervicalgia; cervical spine sprain; internal derangement of the right knee; contusion of the right knee; right knee sprain; thoracic spine sprain; disc bulge L5-S1; lumbago; contusion of the sternum; and chest contusion. In addition, the plaintiff alleges that following said accident he received emergency room treatment at Southside Hospital and remained confined to bed and home up to about September 2004. The plaintiff also alleges that during that period he was incapacitated from his employment as a shipper for L & K International. The plaintiff also seeks to recover economic loss in excess of basic economic loss as defined in Insurance Law §5102(a).

The defendant now moves for summary judgment in her favor on the grounds that the plaintiff did not sustain a "serious injury" as defined in Insurance Law.

Insurance Law 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (**Oberly v Bangs Ambulance Inc.**, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (see, **Toure v Avis Rent A Car Systems, Inc.**, 98 NY2d 345, 746 NYS2d 865 [2000]; **Mejia v DeRose**, 35 AD3d 407, 825 NYS2d 722 [2nd Dept 2006]).

Here, the defendant made a prima facie showing through the plaintiff's deposition testimony, emergency room records, and the affirmed medical reports of the defendant's examining orthopedic surgeon, neurologist and radiologist that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see, **Morris v Edmond**, 48 AD3d 432, 850 NYS2d 641 [2nd Dept 2008]). The Court initially notes that sprains and strains and contusions are not serious injuries within the meaning of Insurance Law § 5102 (d) (see, **Rabolt v Park**, 50 AD3d 995, 858 NYS2d 197 [2nd Dept 2008]; **Washington v Cross**, 48 AD3d 457, 849 NYS2d 784 [2nd Dept 2008]; **Maenza v Letkajornsook**, 172 AD2d 500, 567 NYS2d 850 [2nd Dept 1991]). In addition, the mere existence of a herniated or bulging disc, or even of radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (see, **Furrs v Griffith**, 43 AD3d 389, 841 NYS2d 594 [2nd Dept 2007]; **Mejia v DeRose**, 35 AD3d 407, 825 NYS2d 722 [2nd Dept 2006]).

The x-ray reports from Southside Hospital on the date of the accident indicate that there was no evidence of fracture of the plaintiff's sternum and no evidence of fracture or dislocation of the plaintiff's right knee. The report of x-rays performed five days after the accident show that there was no fracture of the plaintiff's thoracic spine, lumbar spine, right knee, cervical spine, and left and right ribs. In addition, said report indicated that the plaintiff's chest was normal. The plaintiff also had normal EMG/NCS results of the lower extremities.

The affirmed reports of the defendant's examining radiologist indicate that she reviewed the MRI films of the plaintiff's cervical spine and lumbar spine that were performed on August 6, 2004. With respect to the MRI films of the plaintiff's cervical spine, the defendant's examining radiologist noted extremely minimal disc bulges at C3-C4 and C4-C5 and opined that the findings were chronic and degenerative in origin. The defendant's examining radiologist added that there was no evidence of acute traumatic injury to the plaintiff's cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma. In conclusion, the defendant's examining radiologist opined that there was no causal relationship between the plaintiff's accident and the MRI findings. Regarding the MRI films of the plaintiff's lumbar spine, the defendant's examining radiologist noted hypertrophic facet joint changes at L4-L5 and diffuse disc bulge and dessication at L5-S1 and explained that said findings were chronic and degenerative in origin. She added that there was no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous rupture or epidural hematoma. The defendant's examining radiologist opined in conclusion that there was no causal relationship between the plaintiff's accident and the MRI findings.

The affirmed report of the defendant's examining orthopedist, based on an examination of the plaintiff on December 1, 2008, three years and four months after said accident, indicated the results of range of motion testing of the plaintiff's lumbar spine and cervical spine. The defendant's examining orthopedist reported the plaintiff's lumbar spine results as 80 degrees forward flexion (normal 90 degrees), 30 degrees backward extension (normal 30 degrees), side-to-side tilt of 30 degrees (normal 30 degrees),and side-to-side rotation of 45 degrees (normal 45 degrees). The plaintiff's cervical spine results were 70 degrees forward flexion (normal 70 degrees), backward extension 50 degrees (normal 60 degrees), side-to-side tilt of 30 degrees (normal 30 degrees), and side-to-side rotation of 45 degrees (normal 45 degrees). The defendant's examining orthopedist noted that there was no evidence of radicular or referred pain during the range of motion testing. In addition, the examination of the plaintiff's right knee indicated normal results, including negative McMurray and Drawer signs. The defendant's examining orthopedist diagnosed cervical sprain and lumbar sprain with no clinical evidence of neuromotor deficits, herniated discs, radiculitis or radiculopathy; and right knee contusion with no clinical evidence of internal derangement, resolved. The defendant's examining orthopedist found an insignificant limitation in lumbar forward flexion and cervical spine backward extension only (see, **Morris v Edmond**, supra). In conclusion, the defendant's examining orthopedist opined that the plaintiff had no evidence of ongoing orthopedic disability related to the subject accident.

The defendant's examining neurologist indicated in his affirmed report dated February 12, 2008 that he had examined the plaintiff one day before and found that the plaintiff had normal passive ranges of motion of the cervical spine and lumbar spine when test results were compared with normal ranges of motion. Among the other findings of the defendant's examining neurologist, the plaintiff had no Babinski sign; Romberg test was negative; no atrophy or fasciculations were noted; and Tinel's sign was negative at the wrist and elbows. The defendant's examining neurologist diagnosed cervical and lumbosacral sprain and opined that there were no objective findings to indicate neurological injury or disability.

The plaintiff's deposition transcript from December 2007 reveals that after his vehicle was struck in the rear, its air bags did not deploy, his body moved forward, the seat belt tightened against his chest, and his right shin contacted the inside of the vehicle. The plaintiff testified that his cousin took him from the scene of the accident to the hospital emergency room where the plaintiff complained of pain in his chest, entire back and right foot and x-rays were taken and he was released with prescriptions for pain medication. In addition, the plaintiff testified that a few days after the accident, he repeated these complaints to the staff at Liberty Orthopedics and the plaintiff commenced chiropractic care a number of times a week and the treatment continued for two months or a little more. The plaintiff stated that he still feels a constant dull pain in his neck and that he only feels pain in his lower back while at work and lifting heavy objects. He added that his left knee now bothers him more than his right knee[1]. The plaintiff stated that he was involved in a prior motor vehicle accident in 1999 and injured his neck and back, that he received medical treatment for less than six months, and that the case settled. According to the plaintiff, he did not have any neck pain or back pain within two or three months prior to the subject accident. The plaintiff further testified that he worked at a vitamin distribution company and could not remember when he returned to work after the subject accident but thought it was in September 2004. According to the plaintiff, he worked "light duty," by not lifting heavy objects and instead checked packing lists and compared them with the actual products that came in, for one year until his supervisor changed and he returned to his pre-accident duties. The plaintiff added that he had no other activities besides work.

Here, the defendant succeeded in making a prima facie showing with respect to the 90/180-day category of serious injury (see, **Hemsley v Ventura**, 50 AD3d 1097, 857 NYS2d 642 [2d Dept 2008]). Although the plaintiff testified at his deposition that as a result of the accident he did not return to work until approximately two months later, and had a self-imposed restriction of his work activities upon his return so as to avoid heavy lifting, there is no competent medical evidence indicating that he was unable to perform substantially all of his daily activities for not less than 90 out of the first 180 days as a result of the subject accident (see, id.).

In opposition to the motion, the plaintiff contends that he did sustain a "serious injury" as defined in Insurance Law § 5102 (d).

In support of his opposition to the motion, the plaintiff submits the various reports of the medical providers who treated him at Liberty Orthopedics. Initially, the Court notes that the report of the plaintiff's chiropractor was not in affidavit form, and therefore was without probative value (see, CPLR 2106; **Casas v Montero**, 48 AD3d 728, 853 NYS2d 358 [2nd Dept 2008]; **Kunz v Gleeson**, 9 AD3d 480, 781 NYS2d 50 [2nd Dept 2004]). In addition, although the plaintiff submits the MRI reports dated August 9, 2004 of the plaintiff's cervical spine and lumbar spine, only the lumbar spine MRI report had an attached affirmation, rendering it the

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[1]The plaintiff cannot seek to recover damages based on injuries to his left knee inasmuch as he failed to allege such damages in the complaint or bill of particulars (see generally, **Zapata v Dagostino**, 265 AD2d 324, 696 NYS2d 194 [2nd Dept 1999]).

only MRI report in admissible form (see, **Casas v Montero**, supra). Also, the unsworn report of the EMG test results of the plaintiff's cervical spine was without probative value (see, **Benavides v Peralta**, 52 AD3d 755, ___ NYS2d ___, 2008 WL 2522498, 2008 N.Y. Slip Op. 05868 [N.Y.A.D. 2 Dept. Jun 26, 2008]). However, the unsworn report of the EMG/NCS test results of the plaintiff's lower extremities is properly relied upon by the plaintiff since the defendant submitted said report in support of her motion (see, **Casas v Montero**, supra).

The admissible lumbar spine MRI report indicated posterior subligamentous disc bulge at L5/S1 as well as straightening of the lumbar lordosis indicative of reflex muscle spasm. However, said report by itself was not probative since it lacked an opinion as to causation (see, **Collins v Stone**, 8 AD3d 321, 778 NYS2d 79 [2nd Dept 2004]).

The initial medical evaluation report dated July 14, 2004, affirmed by the plaintiff's treating orthopedist Harshad C. Bhatt, M.D. (hereinafter Bhatt), indicated in the prior history portion of the report that the plaintiff had a prior motor vehicle accident in 2000 without any injury and that on initial examination, the plaintiff had positive results for Jackson Compression, Kemp's, Milgram's and Soto Hall testing. In addition, the initial report noted unspecified decreased ranges of motion in all directions of the plaintiff's cervical spine, and thoracic and lumbar spine as well as moderate pain. The affirmed report dated August 16, 2004 of another treating orthopedist, Luz Del Carmen Cespedes, M.D. (hereinafter Cespedes), noted the results of the plaintiff's MRI of the lumbar spine and EMG of the cervical spine; indicated that examination of the plaintiff's cervical spine revealed mild pain on cervical range of motion testing and mild decreased range of motion in all directions, especially on the left, but that there was no pain on thoracic or lumbar range of motion testing as well as no pain and no loss of range of motion of the extremities. Cespedes noted in said report that the plaintiff had returned to work as a warehouse worker. On follow-up examination of the plaintiff on August 31, 2004, Bhatt quantified range of motion testing results for the cervical and lumbar spine and noted positive results for various tests, including the straight leg raising test. Bhatt diagnosed cervical and lumbar radiculopathy and muscle spasm; sciatica; and internal derangement of the right knee and opined that the plaintiff's injuries were causally related to the subject accident and that the plaintiff had moderate and total disability.

The sworn reports of the plaintiff's treating orthopedists were insufficient to raise a triable issue of fact in the absence of a recent examination (see, **Cornelius v Cintas Corp.**, 50 AD3d 1085, 857 NYS2d 637 [2nd Dept 2008]; see also, **Landicho v Rincon**, ___ NYS2d ___, 2008 WL 2747174, 2008 N.Y. Slip Op. 06287 [N.Y.A.D. 2 Dept. Jul 15, 2008]; **Rabolt v Park**, 50 AD3d 995, 858 NYS2d 197 [2nd Dept 2008]). In addition, the plaintiff's treating orthopedists failed to address the finding of the defendant's expert radiologist attributing the condition of the plaintiff's cervical and lumbar spine to chronic degenerative changes, which would render speculative any opinion of the plaintiff's treating orthopedist, Bhatt, that the plaintiff's cervical and lumbar conditions were caused by the subject motor vehicle accident (see, **Abreu v Bushwick Bldg. Products & Supplies, LLC**,43 AD3d 1091, 841 NYS2d 788 [2nd Dept 2007]). Moreover, the plaintiff's treating orthopedist acknowledged the fact that the plaintiff had been in an accident a few years prior to the subject one, but reported in the previous significant history portion of the report that the plaintiff had no injuries from said prior

accident. The failure to acknowledge injuries from the prior accident rendered speculative the plaintiff's treating orthopedist's conclusions that the observed injuries and limitations of the plaintiff's cervical and lumbar spine were the result of the subject accident (see, **Silla v Mohammad**, 52 AD3d 681, 861 NYS2d 83 [2d Dept 2008]).

Thus, the plaintiff's admissible medical submissions were insufficient to establish that he sustained a medically-determined injury of a nonpermanent nature which prevented him from performing his usual and customary activities for 90 of the 180 days following the subject accident (see, **Casas v Montero**, supra; **Roman v Fast Lane Car Serv., Inc.**, 46 AD3d 535, 846 NYS2d 613 [2nd Dept 2007]).

Finally, the plaintiff submitted no evidence that his alleged economic loss exceeded the statutory amount of basic economic loss (see, **Moran v Palmer**, 234 AD2d 526, 651 NYS2d 195 [2nd Dept 1996]; **Rulison v Zanella**, 119 AD2d 957, 501 NYS2d 487 [3rd Dept 1986]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: August 25, 2008

J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION