[* 1]

SHORT FORM ORDER

INDEX No. 05-21931
CAL. No. 08-01197-MV

SUPREME COURT - STATE OF NEW YORK
IAS PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. MARTIN J. KERINS
Justice of Supreme Court

MOTION DATE 6-26-08
ADJ. DATE 9-25-08
Mot. Seq. # 002 - MG; CASEDISP

EUGENE R. HEATH, Plaintiff, - against - RYAN M. HIGGINS and SFR ENTERPRISES CORP., Defendants.	CHRISTOPHER J. CASSAR, P.C. Attorney for Plaintiff 13 East Carver Street Huntington, New York 11743 SCHONDEBARE & KORCZ Attorneys for Defendants 3555 Veterans Memorial Highway, Suite P Ronkonkoma, New York 11779

Upon the following papers numbered 1 to 14 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 9 - 12; Replying Affidavits and supporting papers 13 - 14; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Ryan Higgins and SFR Enterprises Corp. seeking summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Eugene Heath as a result of a motor vehicle accident that occurred at or near the intersection of Plainview Road and Evelyn Road in Plainview, New York on November 6, 2002. The collision allegedly occurred when the vehicle operated by defendant Ryan Higgins and owned by defendant SFR Enterprises Corp. was struck by the vehicle operated by plaintiff. Plaintiff, by his bill of particulars, alleges that he sustained various personal injuries due to the accident, including injuries to his cervical spine, right lateral epicondylitis and cervical ligament damage.

Defendants now move for summary judgment on the basis that plaintiff did not sustain a "serious injury" as required by Insurance Law §5102 (d). Defendants, in support of the motion, submit the pleadings, plaintiff's deposition testimony, and a sworn medical report prepared by Dr. Lawrence Robinson, a neurologist. Dr. Robinson, at defendant's request, conducted an independent medical

examination of plaintiff on December 27, 2007 and reviewed various other medical records related to the alleged injuries. Plaintiff opposes the instant motion on the ground that defendants failed to make out a prima facie case that he did not meet the "serious injury" threshold required by Insurance Law §5102 (d). Plaintiff, in opposition to the motion, submits his deposition testimony and a sworn medical report of Dr. James Cassillo, plaintiff's treating physician.

On a motion for summary judgment where the proponent of the motion has presented a prima facie case that the plaintiff's claimed injury is not a "serious injury" by the statutory definition, the burden then shifts to the plaintiff to demonstrate that a "serious injury" was sustained by the plaintiff or that questions of fact exist as to whether the injury sustained was "serious" (*see* ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [1992]; ***Lowe v Bennett***, 122 AD2d 728, 511 NYS2d 603 [1986]). A defendant seeking summary judgment based on lack of a serious injury, relying on the findings of the defendant's own witnesses, must submit those findings in admissible form, such as, affidavits and affirmations, and not unsworn reports, in order to demonstrate entitlement to judgment as a matter of law (*see* ***Pagano v Kingsbury***, *supra*). A defendant may also establish entitlement to summary judgment, using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v Kingsbury***, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra)*. Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, *supra*). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "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."

Further, to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 299, 727 NYS2d 378 [2001]). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement that are based on a recent examination (*see* ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra*; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*).

The deposition testimony, as well as the affirmed medical report of defendants' expert examining physician, Dr. Robinson, sufficiently established defendants' prima facie case that plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Pommells v Perez***, *supra*; ***Gaddy v Eyler***, *supra*; ***Martin v Schwartz***, *supra*) and that he suffered from pre-existing injuries to his cervical and lumbar spines. Plaintiff testified that he injured his neck and left shoulder at least once or twice before the subject accident. Plaintiff testified that in 1986, he injured his neck and left shoulder when he fell from a ladder at work. He testified that this incident caused a bulging disc in his neck and that he received orthopedic and chiropractic treatments for this condition for approximately six months. He testified that in the 1980's he also treated with a chiropractor for one month for pain in the "area between his head and shoulder" from holding the telephone. Plaintiff testified that he also sought treatment from a chiropractor in either 1999 or 2000 for pain in his right arm after a work-related injury. Plaintiff testified that this work-related injury resulted in a torn rotator cuff and that he had surgery to correct the problem in 2002 prior to the date of the subject accident. Plaintiff further testified that he missed six months from work after the shoulder surgery.

Additionally, Dr. Robinson in his medical report states that an examination of plaintiff's spine revealed a normal range of motion in both the cervical and lumbar regions. Dr. Robinson states that plaintiff's muscle development was good and that there was no abnormal movement, though plaintiff appeared to be controlling his efforts during the examination. Dr. Robinson states that plaintiff's gait was normal, and that there is no ataxia, antalgia or deformity in his gait. Dr. Robinson opines that

plaintiff's complaints are subjective complaints "because there is no objective evidence of an ongoing neurological dysfunction or impairment." Thus, defendants have shifted the burden to plaintiff to come forward with evidence showing that he did in fact sustain a serious injury (*see* ***Gaddy v Eyler***, *supra*; ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Plaintiff, in opposition, relies primarily upon the affidavit of his treating physician, who treated him from November 8, 2002 through July 21, 2004. Dr. Cassillo states in his affidavit that plaintiff had "cervical kyphosis associated with flexion mallpositions of occiput, C1 and C2. C1 is ASL. C2 is spinous right and severe DDD is seen from C4 to C7." Dr. Cassillo opines that these findings are indicative of "cervical ligament damage." Dr. Cassillo further states that "with this type of injury, healing is often incomplete and results in an overall weakness of the affected portion of the spine" and that plaintiff "is predisposed to future exacerbation without any causal relationship." Here, Dr. Cassillo's affidavit is insufficient to defeat defendant's motion for summary judgment (*see* ***Colvin v Maille***, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]). Dr. Cassillo's affidavit fails to provide any information regarding the nature of the treatment that plaintiff received for his alleged injuries, other than the generalized statement that he provided plaintiff with "spinal manipulation, physical therapeutic modalities, three times per week" and other "uncovered therapy for seven sessions"(*see* ***Bandoian v Bernstein***, 245 AD2d 205, 679 NYS2d 123 [1998]; ***Smith v Askew***, 264 AD2d 834, 695 NYS2d 405 [1999]; ***Williams v Ciamamella***, 250 AD2d 763, 673 NYS2d 186 [1998]). Dr. Cassillo in his affidavit also failed to set forth any objective tests or range of motion measurements that led him to his conclusions (*see* ***Gastaldi v Chen***, __ AD3d __, 866 NYS2d 750 [2008]; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2005]; ***Ersop v Variano***, 307 AD2d 851, 763 NYS2d 482 [2003]). Consequently, Dr. Cassillo's statement in his affidavit that plaintiff "received minor relief" from his treatments is conclusory and unsubstantiated (*see* ***Pommells v Perez***, *supra*; ***Mullings v Huntwork***, 26 AD3d 214, 810 NYS2d 443 [2006]; *cf.* ***Paz v Wydrzynski***, 41 AD3d 453, 837 NYS2d 312 [2007]). "Conclusions, even of an examining doctor, that are unsupported by acceptable objective proof, are insufficient to defeat a motion for summary judgment directed to the threshold issue of whether the plaintiff has suffered serious physical injury" (***Merisca v Alford***, 23 AD2d 613, 614 *citing* ***Antoniou v Duff***, 204 AD2d 670, 670, 612 NYS2d 430 [1994]).

Moreover, Dr. Cassillo's affidavit fails to address any of the prior injuries plaintiff sustained to his cervical and lumbar regions, and how, in light of his past medical history, plaintiff's current medical problems are causally related to the subject accident (*see* ***Style v Joseph***, 32 AD3d 212, 214, 820 NYS2d 26 [2006]). Once a defendant presents evidence of a pre-existing injury, it is incumbent upon the plaintiff to present proof to address the defendant's lack of causation (*see* ***Sky v Tabs***, __ AD3d __, 2008 NY Slip Op 9475, *2 [2008]; ***Carter v Full Serv., Inc.***, 29 AD3d 342, 815 NYS2d 41 [2006]; ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [2006]). In view of this omission, Dr. Cassillo's conclusion that plaintiff's condition is causally related to the subject accident is mere speculation and insufficient to defeat defendants' motion for summary judgment (*see* ***Pommells v Perez***, *supra*; ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Rodriguez v Abdallah***, 51 AD3d 590, 858 NYS2d 169 [2008]).

Additionally, contrary to plaintiff's assertions, neither plaintiff nor Dr. Cassillo reasonably explained the extensive gap in treatment following the cessation of treatment on July 21, 2004 (*see*

Pommells v Perez, *supra*; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]; ***Cornelius v Cintas Corp.***, 50 AD3d 1085, 857 NYS2d 637 [2008]; ***Mullings v Huntwork***, 26 AD3d 214, 810 NYS2d 443 [2006]). In fact, Dr. Cassillo's affidavit appears to be in direct contradiction with itself and plaintiff's deposition testimony. In the beginning, Dr. Cassillo states that he treated plaintiff from November 8, 2002 through July 21, 2004, but later in his affidavit he states that he treated plaintiff until December 10, 2004, when plaintiff moved out-of-state to Virginia. Plaintiff testified that he only received weekly massage therapy session through his employer for approximately three months prior to moving to Virginia in January 2005. Plaintiff also testified that he did not recall how long he received treatment from the doctor or how often he went to the chiropractor.

Further, plaintiff's testimony that he still experiences "tightness in the shoulders and neck," which may show that he still experiences some levels of pain, this does not support plaintiff's claim that he has sustained an injury of a permanent nature (*see* ***Gaddy v Eyler***, *supra*; ***King v Johnson***, 211 AD2d 907). The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [1988]). Significantly, no proof has been offered by plaintiff to establish that his alleged ailment goes beyond temporary discomfort or is not relieved by an aspirin. In fact, plaintiff testified that he does not take any medication for the "tightness" that he experiences in his neck and shoulders. Thus, the subjective complaints of pain and impaired joint function expressed by plaintiff during his deposition and in Dr. Cassillo's affidavit are insufficient to raise a triable issue of fact (*see* ***Sheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Rudas v Petschauer***, 10 AD3d 357, 781 NYS2d 120 [2004]; ***Barrett v Howland***, 202 AD2d 383, 608 NYS2d 681 [1994]).

Finally, plaintiff's submissions are insufficient to raise a triable issue of fact as to whether he was substantially curtailed from all of his usual and customary activities for 90 of the first 180 days following the accident (*see* ***Toure v Avis Rent A Car Sys.*** *supra*; ***Eldrainy v Hassain***, __ AD3d __, 866 NYS2d 749 [2008]; ***Casas v Montero*** , 43 AD3d 728, 853 NYS2d 358 [2008]). Despite the fact that Dr. Cassillo's affidavit states that he permitted plaintiff to return to work as a "partial disability" because of "financial necessity and [plaintiff's] employer was willing to work around [plaintiff's] disability; plaintiff testified that he does not recall "being out of work" from his union construction job after the accident. Plaintiff, who currently is employed as a supervisor for a construction company in Virginia, also testified that his doctors only informed him to "lighten up, that [he] was not getting any younger." Accordingly, defendants' motion for summary judgment is granted.

Dated: Dec. 11, 2008
RIVERHEAD, NY

J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**