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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 20 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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PARVIZ KAZI and MINARI KAZI,

Plaintiff(s),

-against-

NANCY PARISI,

Defendant(s).

---x

Index No. 19665/06

Motion Submitted: 12/3/08
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant moves this Court for an Order pursuant to CPLR §3212 and Article 51 of the Insurance Law of the State of New York granting summary judgment in her favor dismissing the complaint in its entirety, on the ground that plaintiff Parviz Kazi ("Plaintiff") did not sustain a "serious injury" as a result of the motor-vehicle accident with Defendant. Plaintiffs oppose the requested relief.

On August 31, 2006, at or about 8:55 p.m., the vehicle operated by Defendant collided with Plaintiff's vehicle at the intersection of Pine Hollow Road and Berry Hill Road in the Town of Oyster Bay, County of Nassau. Defendant was stopped at a red light on Pine Hollow Road when Defendant's vehicle collided with the rear bumper of Plaintiff's vehicle. Plaintiff did not require or receive any medical treatment at the scene of the accident. Six (6) days after the accident, Plaintiff complained of neck and back pain and sought treatment with

Dr. Ronda Bachenheimer of East Meadow. Plaintiff is seeking damages as a result of the accident for sustaining economic loss in excess of basic economic loss as defined by §5102 of the Insurance Law. Minara Kazi, Plaintiff's wife, brought a derivative action.

Defendant contends that Plaintiff did not suffer the requisite "serious injury" under §5102(d) of the Insurance Law. Additionally, Defendant claims that any neck or back injuries Plaintiff may be suffering from were the direct result of a prior motor vehicle accident Plaintiff was a part of on September 30, 2000, and not causally related to the instant action.

Plaintiff, in his Verified Bill of Particulars paragraph sixteen (16), concedes that he did not suffer a "serious injury" under the first five categories. Plaintiff claims that he suffered "a personal injury which has resulted in: 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; a medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing substantially all of the material acts which constituted his usual customary daily activities for at least 90 of the 180 days immediately following the occurrence."

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Nassau Diag. Imag. & Radiation Oncology Assoc. V. Winthrop-University Hosp.***, 197 A.D.2d 563, 602 N.Y.S.2d 650 [2d Dept., 1993]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

The Defendants must in the first instance establish their *prima facie* entitlement as a matter of law by demonstrating that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident. (***Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). This Court is satisfied that they have done so.

The Insurance Law defines serious injury to mean, in relevant part, a personal injury which results in "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 customary daily activities for not

less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." Insurance Law Section 5102(d).

In support of Defendant's claim of a pre-existing condition, Defendant submitted a number of unsworn and unaffirmed reports from Plaintiff's treating physicians from the accident on September 30, 2000. A defendant may submit unsworn medical reports and records of the injured Plaintiff's physicians in support of a motion for summary judgment in order to demonstrate the lack of a serious injury within the meaning of the no-fault law. ***(see Kearse v. New York City Transit Authority,*** 16 A.D3d 45, 789 N.Y.S.2d 281 [2d Dept., 2005]).

Defendant submitted the report of Dr. Steven Prufer M.D., dated October 9, 2000, who performed an MRI of Plaintiff's Cervical Spine. Dr. Prufer's impressions were "1) Multiple anterior disc bulges at C4-C5 and C5-C6; 2) Posterior disc herniation at C5-C6; 3) Straightening of the cervical lordotic curvature probably secondary to soft tissue injury or muscle spasm." In a second report dated December 1, 2000 following an MRI of Plaintiff's Lumbar Spine, Dr. Prufer's impression was "Small posterior disc bulge at L4-L5.

Defendant also submitted the medical report of Mihir Bhatt, M.D., a Diplomat of the American Board of Physical Medicine and Rehabilitation. Dr. Bhatt performed a Nerve Conduction Study ("NCS") on Plaintiff on November 25, 2000. The doctor's report directly references the date of injury as September 30, 2000, the date of Plaintiff's first motor-vehicle accident. The NCS are "used to assess the objective functional status of the peripheral neuromuscular system." "NCS is sensitive and specific in identifying the diseases affecting the peripheral nerves." ***(See Dr. Bhatt's NCS Report)***. Dr. Bhatt's impression was that " the findings are consistent with left nerve root dysfunction/irritation at the level of C6-C7. The electrodiagnostic findings are consistent with left Carpal Tunnel Syndrome. Delay median onset and Median sensory peak onset and delayed left F-wave and EMG findings supported the diagnosis. Clinical follow up is suggested." Defendant also submitted the report prepared following a NCS administered by Dr. Bhatt on January 13, 2001 and referencing the date of injury as September 30, 2000. The doctor's impression was that the electrodiagnostic findings were consistent with left nerve root dysfunction/irritation at the level of C6-C7. The electrodiagnostic findings were also consistent with left Carpal Tunnel Syndrome. Delayed Median onset and Median sensory peak onset and delayed left F-wave and EMG findings supported the diagnosis.

Defendant submitted a narrative report from Dr. Randy R. Stephan dated November 30, 2000. The report makes reference to Plaintiff's motor vehicle accident from September 30, 2000. As part of Dr. Stephan's report, he administered Range of Motion studies. For the range of motion study of Plaintiff's Cervical Spine, the study showed moderate, mild, and

slight restriction. For the analysis of the Lumbar Spine, the study showed marked and severe restriction. Dr. Stephan opines that Plaintiff was injured as a result of this 2000 accident. Plaintiff's response to treatment, Dr. Stephan reported, was significant in that all symptoms subsided in severity. However, some conditions were found still active and may disable him in the future. It was Dr. Stephan's opinion that the subjective complaints and objective findings were active and would restrict the patient from many physical activities involving primarily the cervical and lumbrosacral spine. The prognosis of that injury is guarded and Dr. Stephan considered Mr. Kazi's condition as permanent partial disability, which may be aggravated at any time in the future, affect his work and social activities, and require future medical attention, and may further disable him.

Defendant also submitted Plaintiff's patient records from his podiatrist, Dr. Robert J. Gottlieb, who treated Plaintiff prior to the subject ancient. The records indicate that Plaintiff has been treated by Dr. Gottlieb since August 14, 2002 for "diabetic foot care." The records are from thirteen (13) visits from August 14, 2002 until December 3, 2007. All of the reports from August 14, 2002, leading up until the time of the accident, show increased complications with Plaintiff's left foot due to Diabetes. Dr. Gottlieb's first report from August 14, 2002 shows "xerosis bilat plantar, Hyperkeratotic lesions times three, NIDDM non controlled with no complications."

Additionally, Defendant submitted a report from radiologist, Dr. Jessica F. Berkowitz. Dr. Berkowitz's report dated June 24, 2008, is a review of the radiological films of Plaintiff's cervical spine, which were taken on Ocotober 2, 2006 at Island Diagnostic Imaging Associates. In the report, Dr. Berkowitz references the date of injury as August 31, 2006. The doctor's impressions were:

> [s]traightening of the normal cervical lordosis. This is a nonspecific finding and may be due to positioning. Very small central disc herniation and associated spondylosis, C2-3. The spondylosis confirms the chronic nature of the disc herniation. Minimal disc bulges, C3-4 and C4-5. Disc bulges are chronic and degenerative in origin. Diffuse disc bulges are chronic and degenerative in origin. Diffuse disc bulge and extensive spondylosis, C5-6 with slight bilateral neural foraminal narrowing. The disc/ridge complex comes close to and may impinge on the ventral aspect of the spinal cord. The findings at C3-4 through C5-6 are also chronic in origin. There are minimal bulges or protrusions at T2-3 and T3-4 which are not adequately evaluated on this study. There is no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma.

> This report is partially in agreement with the original radiology report.

Defendant also submitted a report from Dr. Berkowitz reviewing the radiology report of Plaintiff's Lumbar spine. In the doctor's report dated June 24, 2008, the doctor's impressions were: "Hemangioma of the L2 vertebral body. This is developmental. There is no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous tear or epidural hematoma. This report is in agreement with the original radiology report."

Finally, Defendants submit a report from neurologist, Dr. Maria Audrie DeJesus, a Diplomate of the American Board of Psychiatry and Neurology. Dr. DeJesus's dated November 1, 2007 and referencing the date of accident as August 31, 2006. Doctor DeJesus' diagnosis was "1) status-post cervical and lumbar sprain, resolved, and 2) [n]ormal neurological examination." The doctor's impressions were as follows "[b]ased on my examination, there is no indication of a neurological disability. It is my professional opinion that this claimant can work and perform all of his usual daily activities without any neurological limitations."

Defendant, by submitting affirmed medical reports from examining physicians and a copy of Plaintiff's deposition testimony, was able to establish her prima facie entitlement to summary judgment as a matter of law. The burden of proof of raising an issue of fact now shifts to Plaintiff. (see ***Park v. Orellana***, 49, A.D.3d 721, 854 N.Y.S.2d 447 [2d Dept., 2008]). This Court finds Plaintiff did not meet his burden.

In opposition, Plaintiff submitted an affidavit from Plaintiff's Chiropractor, Rhonda Bachenheimer, D.C. and his own affidavit. Both the affidavits fail to prove that Plaintiff suffered a "serious injury" under §5102(d) of New York Insurance Law. Dr. Bachenheimer's affidavit fails for two reasons: 1) Dr. Bachenheimer, in administering her most recent examination relied on an unsworn or unaffirmed report from Dr. Mitchell Goldstein, which is not part of the record; and 2) fails to explain the one (1) year and eight (8) month gap in treatment. "[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***, 4 N.Y.3d 566, 830 N.E.2d 278, 797 N.Y.S.2d 380 [2005]; ***Cruz v. Calderone***, 49 A.D.3d 798, 853 N.Y.S.2d 909 [2d Dept., 2008]). Plaintiff, by his own admission during his deposition stated that he ceased seeking treatment from Dr. Bachenheimer in March 2007 because he was to busy at work to continue treatment. Taking Plaintiff's own testimony into account along with the lack of explanation from Dr. Bachenheimer as to the gap in treatment, fails to prove "serious injury."

Moreover, Plaintiff's self-serving affidavit is not objective evidence to prove the extent of "serious injury" suffered absent other objective evidence and thus does raise a triable issue of fact that would preclude summary judgment on the ground that plaintiff did not suffer a "serious injury." (***see Luna v. Mann***, 58 A.D.3d 699, 872 N.Y.S.2d 467 [2d Dept., 2009]). Plaintiff also failed to set forth any competent medical evidence to establish that he suffered a medically-determined injury of a nonpermanent nature which prevented him from performing his usual and customary activities for not less than 90 of the 180 days following the subject accident. Plaintiff stated that he only missed two (2) weeks of work and was able to continue recreational activities such as gardening following his accident. Plaintiff claims that he attempted to play Badminton five (5) or six (6) times after the accident but had to stop due to neck stiffness and being out of breath but provides no timetable for when he attempted to play.

The Second Cause of Action by Plaintiff's wife is a derivative action and dismissal of the primary causes of action necessitates dismissal of this action (***Parsley v. Coin Device Corp.,*** 5 A.D. 3d 748, 773 N.Y.S.2d 582 [2d Dept., 2004]).

The motion is granted and the Complaint is granted in its entirety.

The foregoing constitutes the Order of this Court.

Dated: March 31, 2009
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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