Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - PART TT-34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T :

HON. ROBERT J. McDONALD,
Justice

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CARLOS IBARRA,	:	Index. No.: 28226 / 2008
	:	
Plaintiff(s),	:	Motion: 03.05.10
- against -	:	
	:	Cal: 24
LEONORA GIRAGOSIAN,	:	
	:	Sequence No. 1
Defendant(s).	:	

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The following papers numbered 1 to 7 read on this motion by the defendant for summary judgment pursuant to CPLR 3212(b),(i) on the ground that the plaintiff has not sustained "serious injury" as defined in Insurance Law 51202

	Papers Numbered
Defendant's Notice of Motin, Affidavit, and Exhibits.....	1 - 4
Affirm in Opposition.....	5 - 7

Upon the foregoing papers it is ordered that this motion is determined as follows:

The moving defendants assert that the plaintiff has not sustained a "serious injury" as a result of the accident.

In order to maintain an action for personal injury in an automobile case a plaintiff must establish, after the defendant has properly demonstrated that it is an issue, that the plaintiff has sustained a "serious injury" which is defined as follows:

"Serious Injury" Insurance Law §5102(d)

In order to maintain an action for personal injury in an automobile case a plaintiff must establish that he has sustained a "serious injury" which is defined as follows:

Serious injury means a personal injury which result in ... 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 constitutes 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.

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott,* 57 NY2d 230). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.,* 98 NY2d 345; *Lowe v Bennett,* 122 AD3d 718 *aff'd* 69 NY2d 701; Grossman *v Wright,* 268 AD2d 79). If the defendant 's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler,* 79 NY2d 955; *Bryan v Brancato,* 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.,* 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

The defendant relies on the affirmation of Dr. Eial Faierman, M.D., dated November 10, 2009. The plaintiff allegedly had prior arthroscopy of his right knee and ulnar nerve laceration which was treated in 1990. The examination of his neck was unremarkable. The examination of his back showed that the plaintiff had "mild limited range of motion of the lumbar spine to 70 degrees flexion (normal 90 degrees), 30 degrees right and left rotation (normal 40 degrees) with some pain on extremes of motion" all other measurements were normal. The plaintiff was found to have had a full range of motion of his shoulders with Dr. Faireman noting a "mild left anterolateral shoulder tenderness." Dr. Fairmeman's assessment was that the plaintiff had "[l]eft shoulder internal derangement, status post arthoscopy (resolved)." Dr. Faierman writes as part of his summary "However, the operative photos of the left shoulder show findings which are likely degenerative and may have been exacerbated in the accident. There are no objective physical findings of any significant pathology in the cervical spine, lumbar spine, or left shoulder. The claimant has mild limited motion in the lumbar spine actively due to pain." Dr. Faierman notes that in his review of the operative photos of the left shoulder that he saw a "fraying of the anterior and superior labrum which is likely degenerative."

The defendant submits the affirmation of Michael D. Winn, M.D., a Board Certified Radiologist, dated February 25, 2010. Dr. Winn examined the MRI of the plaintiff's cervical spine

taken July 26, 2008. Dr. Winn found the MRI to be unremarkable other then a "mild diffuse and concentric bulge on the intervertebral disc" at the C5-6 level. It was Dr. Winn's opinion that this disc desiccation and degenerative spondylosis at the C5-6 level was degenerative and preceded the date of the accident. Dr. Winn also examined the MRI of the plaintiff's lumbar spine taken July 14, 2008. This MRI was generally unremarkable, however, Dr. Winn noted that the "intervertebral discs at L3-4 and L5-S1 are mildly diminished in height and demonstrate some loss of the normal hyperintense signal on the T2-weighted images, consistent with disc desiccation." He also noted that at "L5-S1, there is a mild diffuse and concentric bulge of the intervertebral disc, without evidence of focal herniation." Dr. Winn stated "I see mild endplate osteophtye formation, consistent with degenerative spondylosis from L1-2 through L5-S1. In addition. There is disc desiccation and disc space narrowing at L3-4 and L5-S1, with mild diffuse and concentric bulging of the intervertebral disc at L5-S1. These findings all represent typical manifestations of degenerative disc disease" and would have been present before the accident. Dr. Winn did disagree with the original report which described disc bulging at L3-4 and herniation at L4-5 as well as the described limatentum flavum hypertrophy and spinal stenosis at both levels. He also disagreed with the initial finding that there was a central disc herniation at L5-S1 which he felt did not demonstrate any focal disc herniation. He writes "I also see absolutely no evidence of the described spinal stenosis or narrowing of the left neural foramen at L5-S1." He further notes that the initial report should have mentioned the mild degenerative spondylosis throughout the lumbar spine was indicative of a "long-standing preexisting degenerative" changes in the plaintiff's lumbar spine.

Here the defendant has come forward with sufficient evidence to support her claim that the plaintiff has not sustained a "serious injury" (*Gaddy v Eyler,* 79 NY2d 955).

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller,* 258 AD2d 783; *Burnett v Miller,* 255 AD2d 541). Resolution of the issue of whether "serious injury" has been sustained 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,* 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has raised triable factual issue as to whether the plaintiff has "permanent consequential" and "significant limitation" categories.

Where a plaintiff alleges soft-tissue injury to the spine, range-of-motion testing is used to determine whether the plaintiff has sustained a "serious injury". In order to demonstrate that the plaintiff has not sustained a serious injury the defendant must initially demonstrate that the plaintiff's range-of-motion is "normal" (*Chiara v Dernago,* AD3d [2010 NY Slip Op 915]; *Knopf v Sinetar,* 69 AD3d 809).

The question presented as to the difference between the conflicting measurements of plaintiff's ability to move creates an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.,* 48 AD3d 306). When the findings reported by one physician are assessed by application of

the standard of "normal" stated by the other, the reports present "contradictory proof" (*Dettori v Molzon,* 306 AD2d 308). The use of the word "normal" should not differ between physicians (*Ortiz v S&A Taxi Corp,* 68 AD3d 734).

Generally, an unexplained cessation of medical treatment may be fatal to the plaintiff's claim of a significant or permanent consequential limitation *(Baez v Rahamatali,* 24 AD3d 256 *aff'd* 6 NY2d 868) A diagnosis of permanency having been sustained by the plaintiff obviates the need for further treatment and, therefore, there is no "gap" in treatment (*Pommells v Perez,* 4 NY3d 566). Also, a finding by the treating physician that continued treatment would be merely palliative can be considered a sufficient explanation for cessation of treatment (*Toure v Avis Rent A Car Systems,* 98 NY2d 345; *Turner-Brewster v Arce,* 17 AD3d 189).

The plaintiff has failed to demonstrate that he has a "medically determined" injury or impairment which has prevented his from performing all of his usual and customary daily activities for at least 90 of the first 180 days following the accident. (*Ayotte v Gervasio,* 81 NY2d 1062; *Johnson v Berger,* 56 AD3d 725;*Roman v Fast Lane Car Service, Inc.,* 46 AD3d 535).

With regard to the 90/180 rule, the defendant's medical expert must relate specifically to the 90/180 claim made by the plaintiff before dismissal is appropriate (*See, Scinto v Hoyte,* 57 AD3d 646; *Faun Thau v Butt,* 34 AD3d 447; *Lowell v Peters,* 3 AD3d 778). However, upon the defendant's properly raising this issue the plaintiff must submit competent medical evidence that the injuries sustained rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*Vicers v Francis,* 63 AD3d 1150; *Roman v Fast Lane Car Service, Inc,* 46 AD3d 535).

Regarding the "permanent loss of use" of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff's life (*Oberly v Bangs Ambulance, Inc.,* 96 NY2d 295). The finding of "Permanency" is established by submission of a recent examination (*Melino v Lauster,* 195 AD2d 653 *aff'd* 82 NY2d 828). The mere existence of a herniated disc even a tear in a tendon is not evidence of serious physical injury without other objective evidence (*Sapienza v Ruggiero,* 57 AD3d 643; *Piperis v Wan,* 49 AD3d 840; *Meely v 4G's Truck Rental Co, Inc.,* 16 AD3d 26). Merely referring to the plaintiff's "subjective quality of the plaintiff's pain does not fall within the objective definition of serious physical injury" (*Saladino v Meury,* 193 AD2d 727, *see, Craft v Brantuk,* 195 AD2d 438).

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang,* 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyler,* 79 NY2d 955). Once the question has been raised, in order for the plaintiff to sustain proof of permanency, he must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (*Gobas v Dowigiallo,* 287 AD2d 690).

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green,* 84 NY2d 795; *Fung v Uddin,* 60 AD3d 992; *Hoxha v McEachern,* 42 AD3d 433; *Barrett v Howland,* 202 AD2d 383).

A physician may not base his conclusion upon unsworn MRI reports (*see, Vickers v Francis ,supra*; *Magid v Lincoln Services Corp,* 60 AD3d 1008)

The unaffirmed medical reports of a physician are without any probative value and therefore may not be considered (*Grasso v Angerami,* 79 NY2d 813; *Maffei v Santiago,* 63AD3d 1011; *Niles v Lam Pakie Ho,* 61 AD3d 657). The report must indicate that its contents are made under penalty of perjury in order to be admissible (*Niazov v Corlean Cab Corp,* 71 AD3d 749).

Accordingly the defendant's motion to dismiss is granted and the plaintiff's motion is dismissed.

So Ordered.

Dated: March 11, 2009

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Robert J. McDonald, J.S.C.