STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

FREDERICK STOVER,

Plaintiff,

-against-

CANDACE BENOIT, DIANA BENOIT and DANIEL BENOIT,

Defendants.

DECISION and ORDER
INDEX NO. 09-0027
RJI NO. 19-09-4081

Supreme Court Greene County All Purpose Term, February 28, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Basch & Keegan, LLP
Derek Spada, Esq.
Attorneys for Plaintiff
307 Clinton Avenue
PO Box 4235
Kingston, New York 12402

Kaplan, Hanson, McCarthy, Adams, Finder & Fishbein
Paul Hanson, Esq.
Attorneys for Defendants
725 Broadway
Albany, New York 12207

TERESI, J.:

On June 21, 2008, Frederick Stover (hereinafter "Plaintiff") parked his pickup truck on Spring Street in the Village of Catskill, New York. As he was exiting his vehicle Candace Benoit, while driving a vehicle owned by Diana and Daniel Benoit (hereinafter collectively referred to as "Defendants"), struck Plaintiff's driver's side door. Plaintiff claims that Candace Benoit negligently struck his door and caused him to sustain a serious injury.

Plaintiff commenced this action, seeking to recover for his claimed injuries. Issue was

joined by Defendants, discovery is complete and a trial date certain is set. Defendants now move for summary judgment claiming that Plaintiff suffered no causally related "serious injury" as required by New York's No Fault Law. (Insurance Law §5102[d]). Plaintiff opposes the motion[1]. Because Defendants demonstrated their entitlement to judgment as a matter of law, and Plaintiff raised no genuine issue of fact, Defendants' motion is granted.

It is well established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries." (Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345, 350 [2002]). However, "[s]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

On this motion for summary judgment, Defendants bear the initial "burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident." (Howard v. Espinosa, 70 AD3d 1091 [3d Dept. 2010], Tracy v. Tracy, 69 AD3d 1218[3d Dept. 2010], Nowak v. Breen, 55 AD3d 1186 [3d Dept. 2008]; Wolff v. Schweitzer, 56 AD3d 859, 860 [3d Dept. 2008]; Pommells v. Perez, 4 NY3d 566 [2005]; Franchini v. Palmieri, 1 NY3d 536 [2003]). And, the evidence must be viewed "in a light most favorable to plaintiffs." (Hildenbrand v. Chin, 52 AD3d 1164, 1166 [3d Dept. 2008]).

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[1] Plaintiff's counsel's letter to this Court, dated January 29, 2010, adjourned the initial return date of this motion to February 28, 2010, with Plaintiff's "opposition papers being served by February 15, 2010." However, according to Plaintiff's affidavit of service for his opposition papers, dated February 16, 2010, Plaintiff did not serve Defendants until February 16, 2010. As such, Plaintiff's opposition papers were untimely served. Because Defendants neither objected to the untimely service nor were prejudiced by it, the date of service of Plaintiff's opposition is hereby extended, one day, to February 16, 2010 pursuant to CPLR §2004. Accordingly, Plaintiff's opposition will be considered, to the extent it is admissible as set forth below.

If the movants establish their right to judgment as a matter of law, the burden then shifts to the Plaintiff to "set forth competent medical evidence based upon objective medical findings and tests to support [his] claim of serious injury and to connect the condition to the accident." (Tracy, supra, quotiong Blanchard v. Wilcox, 283 AD2d 821[3d Dept. 2001]; Breen, supra).

The "serious injury" at issue in this action is defined by Plaintiff's Bill of Particulars. (Lee v. Laird, 66 AD3d 1302, 1303 [3d Dept. 2009], Seymour v. Roe, 301 AD2d 991 [3d Dept. 2003], MacDonald v Meierhoffer, 13 AD3d 689 [3d Dept. 2004]). In his bill of particulars he alleges suffering tarsal tunnel syndrome (nerve impingement in the foot), and injuries to his left hip, groin, foot and ankle. He further alleges aggravation of a chronic back injury. He claims that such injuries constitute a 90/180 day injury, a "significant limitation" and a "permanent consequential limitation" pursuant to Insurance Law §5102(d).

In support of their motion, Defendants properly offered Plaintiff's medical records. (Parks v. Miclette, 41 AD3d 1107 [3d Dept. 2007]; Tuna v. Babendererde, 32 AD3d 574, 575 [3d Dept. 2006]; Seymour v. Roe, 301 AD2d 991 [3d Dept. 2003]). Such records amply demonstrate the preexisting injuries Plaintiff was suffering prior to this motor vehicle accident.

Defendants introduced the medical records of Plaintiff's treating physician, Dr. Sturges. Dr. Sturges saw Plaintiff at least once every month for the twelve months leading up to the motor vehicle accident. In each of those twelve months' records, Dr. Sturges chronicled Plaintiff's lower back pain, his suffering radiating pain into his lower extremities and a burning sensation in his legs and feet (the burning sensation was limited to his right leg and foot only in April and May 2008). Additionally, for the ten months preceding the motor vehicle accident, Dr. Sturges noted Plaintiff's complaints of tingling in his legs. Also, in June, July, August and September of

2007, Dr. Sturges noted that Plaintiff was "unable to walk for more than 200 feet."

Significantly, in March of 2008 (only three months before the accident) Dr. Sturges noted that Plaintiff "[a]voided caring for self during the past month due to pain. Avoided work during the past month due to pain. Avoided driving during the past month due to pain." Similarly, in April and May 2008 (the two months prior to the motor vehicle accident) Plaintiff "[a]voided yard work / shopping during the past month due to pain. A recent decrease in activity due to pain in the affected area[.] Lie down during the day often." Such notations clearly demonstrate Plaintiff's inability to perform normal activities of daily living for the three months immediately preceding the motor vehicle accident herein.

Then, on June 25, 2008, four days after the motor vehicle accident, Dr. Sturges' records show no significant change in Plaintiff's symptoms. As before, Dr. Sturges noted Plaintiff's chronic lower back pain, the radiating pain and tingling in both legs, and burning sensation in the right leg and foot. Conspicuously absent is any mention of left foot pain. Again Dr. Sturges found that Plaintiff "[a]voided socializing during the past month due to pain. Avoided work during the past month due to pain. Avoided yard work / shopping during the past month due to pain." Such limitations were not correlated to the motor vehicle accident, but rather appear to be a continuation of Plaintiff's preexisting condition.

On June 27, 2008, only six days after the motor motor vehicle accident, Dr. Sturges' records again show no significant change in Plaintiff's medical condition pre and post accident. His June 27, 2008 report notes left hip, thigh and ankle pain, but observes that there was no left ankle joint swelling, "resolved". Additionally, although there was tingling of the left "2 - 3rd toe", there was "no tingling of the left foot cramping noted, no numbness of the left foot no

numbness of the left toes." Again, just as before the accident, Dr. Sturges noted that Plaintiff "[a]voided yard work / shopping during the past month due to pain. A recent decrease in activity due to pain in the affected area[.] Lie down during the day often" Also significant was Dr. Sturges' finding that Plaintiff's left ankle's motion was normal, although tender on palpatation of the "medial aspect" and "lateral aspect slight." Additionally, Dr. Sturges specifically found "[n]o abrasion on Left ankle. Left ankle showed no contusion. Left ankle showed no laceration. Left ankle showed no scar. Some discomfort left 2nd and 3rd toes."

Moreover, within a week of the motor vehicle accident Plaintiff's left hip was X-rayed, which showed "no evidence of fracture, dislocation, or other bone or joint abnormality."

By the end of July 2008, Dr. Sturges noted normal heel and toe walking, but observed a limp. Then in August 2008, Dr. Sturges' notes no longer mention a limp with Plaintiff's normal heel and toe walk, but did note an antalgic gait and "pain left foot". By the end of December 2008, Dr. Sturges no longer noted a limp, an antalgic gait or "pain left foot". Rather, he again specifically noted that heel and toe walking were normal.

In addition to Dr. Sturges' records, Defendants also properly submitted Plaintiff's medical records maintained by the Veteran's Hospital located in Albany, New York (hereinafter "VA"). These records also amply demonstrate Plaintiff's preexisting conditions and chronic back pain. Specifically demonstrative of Plaintiff's preexisting injuries is an April 23, 2008 "Orthopaedic Surgery Note". Such note recounts the left knee arthroscopic surgery Plaintiff had on August 16, 2007, almost a year prior to the motor vehicle accident herein. The note recognizes the Plaintiff's continued post-surgery pain, that the pain was radiating into his left foot's toes and the "numbness and tingling in his 2nd and 3rd toes of his left foot." These findings

were also noted in the VA's Neurosurgery and Neurology notes from early 2008.

From Plaintiff's own medical records, set forth above, Defendants demonstrated that Plaintiff was suffering the exact same symptoms before the motor vehicle accident as he was after the accident. All of the symptoms of his post accident left foot nerve damage, his tarsal tunnel syndrome claim, his leg and hip pain were all readily observed and noted pre-accident. As was his lack of functional ability. Accordingly, Defendants met their burden of demonstrating a clear lack of causation.

In opposition, with the burden shifted, Plaintiff failed to distinguish his post accident serious injury claims from his preexisting conditions, with objective medical evidence. First, because Plaintiff's attorney's affirmation is not based upon "personal knowledge of the operative facts [it is of no]... probative value." (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392 [3d Dept. 2009], Zuckerman v. City of New York, 49 NY2d 557 [1980]). Likewise, because Plaintiff's Affidavit is not signed or sworn and his Physician's Affirmation (Louis Mendoza, MD) is neither signed nor affirmed, such documents are "of no probative value."[2] (Slavenburg Corp. v. Opus Apparel, Inc., 53 NY2d 799 [1981]). The only admissible evidence Plaintiff submits is the Affidavit of Michael Keller, a licensed doctor of podiatry, and its attachments. However, such affidavit fails to demonstrate the existence of an issue of fact.

Keller's Affidavit establishes that he began treating Plaintiff almost seven months after

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[2] After the return date of the motion and without an affidavit of service, Plaintiff filed his own sworn Affidavit and his Physician's Affirmation, now duly affirmed. Such late filing was done without Defendants' consent or leave of court, and objected to by Defendant. This practice is unauthorized by the CPLR. (*see* Rosenman Colin Freund Lewis & Cohen v. Edelman, 165 AD2d 533 [1st Dept. 1991]). As such, both Plaintiff's Affidavit, dated March 3, 2010, and his Physician's Affirmation, dated February 18, 2010, are being returned.

the motor vehicle accident herein, and it incorporates the contents of a letter he wrote almost one year and seven moths post accident. The letter's diagnosis assumes, without discussion, that the motor vehicle accident was the cause of Plaintiff's claimed injuries. It fails to distinguish plaintiff's pre-accident left foot symptoms from those injuries Plaintiff claims were caused by the motor vehicle accident. Nor does it even acknowledge Plaintiff's extensive prior medical history. As such, Plaintiff raised no issue of fact by this affidavit or on this motion.

Lastly, Plaintiff's contention that "because he incurred medical expenses and lost wages beyond his exhausted no fault insurance limits... he does not need to prove that he sustained a serious injury" is unsupported on this record. First, the document Plaintiff relies upon to establish such "exhaustion" is inadmissible on this record, because no foundation was laid for its introduction. Nor are any admissible factual representations made to support such claim. As such, Plaintiff failed to raise an issue of fact as to whether he exhausted his no fault benefits. Nor may Plaintiff now pursue such a claim, because he did not plead it in his complaint.

Accordingly, Defendants' motion for summary judgment is granted in its entirety.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 26, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated November 17, 2009, Affidavit of Paul Hanson, dated November 17, 2009, and attached Exhibits A - I.
2. Affirmation of Derek Spada, dated February 15, 2010, Affidavit of Frederick Stover, unsigned and undated, Affidavit of Michael Keller, dated February 8, 2010, Affirmation of Luis Mendoza, unsigned and undated, with attached Exhibits A-I.
3. Affidavit of Paul Hanson, dated February 25, 2010.