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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

ANTHONY TRIMBOLI,

INDEX NO.: 19960/07

Plaintiff,

MOTION DATE:1-5-10
SUBMIT DATE:3-30-10
SEQ. NUMBER - 001

-against-

GLADIS HERNANDEZ and FELIPE MALDONADO,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 12-8-09.....1
Affirmation in Opposition, dated 3-4-10.....2
Reply Affirmation, dated 3-19-10.....3

This motion by the defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that the plaintiff has not suffered a "serious injury" as that term is defined by the Insurance Law is granted and the complaint is dismissed.

This is an automobile accident case stemming from a collision that occurred on May 15, 2006. The defendants now move for summary judgment based upon their contention that the plaintiff has not suffered a "serious injury" as defined by Insurance Law § 5102(d), and thus cannot maintain this action pursuant to Insurance Law § 5104(a).

In his Bill of Particulars, at paragraph 2, the plaintiff alleges that he has suffered the

following injuries: bulging discs at L3-4, L4-5; weakness, proximal muscle, right and left shoulder; cerivical radiculopathy to both upper extremities; lumbar radiculopathy; sprain, cervical spine; cervical paraspinal muscular strain; muscle movement sprain, left arm; ligament strain, left arm; acute cervical, thoracic and lumbar vertebragenity radiculitis; spasms, left wrist, left shoulder, left arm, left thumb and neck; decreased range of motion of the cervical, lumbar and thoracic spine, and of the left shoulder and left thumb.

Based on the foregoing, the plaintiff contends at paragraphs 5 and 10 that he suffered "one or more" of the following categories of injuries specified by Insurance Law § 5102(d) as constituting a "serious injury":

> ...significant disfigurement, a fracture; 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 persons' usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment.

In support of their motion, the defendants offer the plaintiff's examination before trial, records of Dr. Robert D. Fabrizio, plaintiff's treating chiropractor, and medical records from other medical service providers, including those of a radiologist. Defendants also submit the affirmed reports of Dr. Steven M. Newman, M.D., a neurologist, and Frank M. Hudak, M.D., an orthopedist, who examined the plaintiff on behalf of the defendants.

These records are sufficient as *prima facie* proof that the plaintiff has not suffered a serious injury under any of the categories claimed. Specifically, during his deposition

plaintiff testified that following the accident he missed approximately 35 days of work in 2006, which absences were intermittent, and Dr. Fabrizio released him to return to full duties as of June 1, 2006, only two weeks after the event. This demonstrates that there was no "serious injury" under the "90/180" category. *See, Annan v Abdelaziz,* 68 AD3d 794 (2d Dept. 2009); *Linton v Nawaz,* 62 AD3d 434 (1st Dept. 2009).

Further, even without the examinations conducted by Dr. Newman and Dr. Hudak, these records reveal the absence of significant disfigurement, or a fracture. Indeed, such specific injuries are not among those listed in the bill of particulars in paragraph 2.

Defendants' expert proof also demonstrates the absence of any injury except strains and sprains, which do not rise to the level of a "serious injury". *Byam v Waltuch,* 50 AD3d 939 (2d Dept. 2008); *Washington v Cross,* 48 AD3d 457 (2d Dept. 2008).

On September 21, 2009, Dr. Newman performed a neurological examination of the plaintiff, including cranial nerves and a motor examination. All tests were described. Aside from plaintiff's own statements of pain in the lower back when supine upon leg raising at 45 degrees (left) and 60 degrees (right), the examination was normal. There was reduced pin, temperature and vibratory senses in the left upper extremity, with normal joint position sense, but Dr. Newman stated that this does not demonstrate physiologic sensory loss. His conclusion was that the plaintiff had no objective abnormalities and did not suffer any neurologic injury as a result of the May 15, 2006 accident.

On October 1, 2009 the plaintiff was examined by Dr. Hudak. Palpation of the cervical spine revealed tenderness at C4 to C6. Voluntary range of motion (flexion, extension, right and left rotation, and tilting) of the head and neck were all within stated

numerical normal limits. No spasm was palpated in either right or left paraspinous or trapezial muscle groups of the cervical spine. Abduction and flexion of the shoulders also were within stated normal limits. Range of motion of both elbows was within normal limits, as was range of motion of the left and right wrists and thumbs. Motor power to both upper extremities was noted to be good, and reflexes of the biceps, triceps, and brachioradialis were equal bilaterally. There was intact sensation to light touch to both upper extremities.

Prior to the examination, plaintiff complained to Dr. Hudak of pain in his neck radiating into the dorsal and lumbosacral spines, that he had tightness in his ribs, felt weakness in his left upper extremity on strenuous activity, and had pain radiating from his left elbow into his left thumb and palm of his left hand. He also complained that if he sits for more than 15 or 20 minutes, he gets numbness in his calves, but that it goes away when he walks.

During the course of the examination, plaintiff noted slight pain in the right trapezial muscle group area of the head and neck area, clicking in right and left shoulders (not heard or palpated by Dr. Hudak). There was slight tenderness over the distal left forearm, left wrist and left thumb, and plaintiff complained of a little pain in the left wrist. Tenderness was noted over the volar aspect of the left thumb, with no redness, swelling or deformity.

Dr. Hudak's diagnosis was post cervical strain, left upper extremity strain, and lumbosacral strain causally related to the acccident of May 15, 2006. There were no objective findings to confirm any disability. Dr. Hudak noted that the plaintiff was able to work until approximately three weeks before the examination, but was fired for an "unknown cause." The conclusion was that the plaintiff required no further orthopedic care, therapy or

testing, and was capable of normal activities of daily living, including work.

As noted above, this demonstrates that the injuries were no more than strains and sprains. *Byam v Waltuch,* 50 AD3d 939, *supra; Washington v Cross,* 48 AD3d 457, *supra.* The only other indicators of a permanent injury were the plaintiff's own subjective reports of pain, which also are insufficient as proof of a "serious injury" when unaccompanied by verified objective medical findings. *Sham v B & P Chimney Cleaning and Repair Co., Inc.,* _AD3d_, 2010 WL 1077910 (2d Dept. 2010); *Dantini v Cuffie,* 59 AD3d 490 (2d Dept. 2009).

The burden thus shifts to the plaintiff to demonstrate that issues of fact exist on the issue of whether he suffered a "serious injury" under the Insurance Law. Initially, it should be noted that there is no contrary proof offered with respect to an injury of a non-permanent nature falling within the "90/180" category, and the defendants' showing that no such "serious injury" exists therefore has been established for purposes of this motion.

With respect the other, permanent injury categories, the plaintiff offers the affirmation of Mark S.Shapiro, M.D., a radiologist, and several affirmed reports by Ernesto S. Capulong, M.D., stated to be the Medical Director of SMART (Sports Medicine And Rehabilitation Therapy) Center, apparently affiliated with South Nassau Communities Hospital in Oceanside, New York. None are sufficient to stave off this motion.

Dr. Shapiro reviewed MRI images of the lumbar spine, and stated that they showed broad-based disc bulges at L3-4 and L4-5. However, these bulges are not related to the accident of May 15, 2006, and are not associated with any permanent restriction of motion; the bulges thus do not serve to place in issue the conclusions of defendants' experts. *See,*

Mejia v DeRose, 35 AD3d 407 (2d Dept. 2006); *Byam v Waltuch,* 50 AD3d 939, *supra.*

Dr. Capulong's reports too fail to create an issue of fact as to serious injury. The only report that is based on a recent examination is that dated January 8, 2010. In that report, he notes bulging discs, but does not associate them with the accident. A small avulsion fracture of the periosteum, distal tip of the fibula is mentioned, but this too is not stated to be caused by the accident (*see, O'Bradovich v Mrijaj,* 35 AD3d 274 [1st Dept. 2006]) and, as noted above, was never pled by the plaintiff in any event. Dr. Capulong further states that there have been "recurrent flare-up of his pain due to the physical activities that he is doing" but does not establish a nexus between these reports of pain and significant restrictions on motion, compared to what is normal. They are thus insufficient. *Johnson v Tranquille,* 70 AD3d 645 (2d Dept. 2010); *Morris v Edward,* 48 AD3d 432 (2d Dept. 2008). Indeed, the diagnosis is "neck and back pain with degenerative disks and bulging disks as stated above causing recurrent pain in the neck and back region, fracture of the right ankle, healed." [1] There is no mention of their having been caused by the May, 2006 accident. Accordingly, the Court finds that there is no proof of any permanent injury resulting from this event.

In sum, the plaintiff has failed to demonstrate that an issue of fact exists with regard to either a non-permanent or permanent injury that would satisfy any of the stated categories of "serious injury" pled in the bill of particulars. The motion should therefore be granted.

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[1] It should be noted that in a work-related accident in December of 2006, subsequent to the automobile accident in May of that year, plaintiff injured his right ankle, which is the same area of the fracture described by Dr. Capulong. This is a different area of the body from those described in the bill of particulars, and is not associated by Dr. Capulong with the automobile accident in any event.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 5, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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