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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	:	Index. No.: 13353 / 2008
STEVE KOUROMICHELAKIS,	:	
Plaintiff(s),	:	Motion: 04.29.10
- against -	:	
	:	Cal: 14
MARIA FINAZZO and "JOHN DOE" ,	:	
	:	
Defendant(s).	:	Sequence No. 1

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The following papers numbered 1 to 9 read on this motion by defendant Maria Finazzo (hereafter "Finazzo") for summary judgment pursuant to CPLR 3212 on the basis that the plaintiff has not sustained "serious injury" as defined in Insurance Law 5102(d):

	Papers Numbered
Defendants motion, Affirm. and Exhibits.....	1 - 4
Plaintiff's Affirmation in Opposition and Exhibits.....	5 - 7
Reply Affirm and Exhibit.....	8 - 9

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

The underlying accident allegedly occurred when the plaintiff and a vehicle owned by the defendant Finazzo collided at 21st Avenue and Hazen Street in Queens County, New York on December 4, 2007.

The moving defendant asserts 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; *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 submits the affirmation of Dr. Alan J. Zimmerman, M.D., a Board Certified Orthopaedic Surgeon affirmed October 13, 2009. Dr. Zimmerman. Dr. Zimmerman relates that in August 2007 the plaintiff was involved in another accident in which he was hit "from the rear, again injuring his neck and back." The plaintiff was in fact injured on his way to therapy related to the first accident. Using a hand-held goniometer Dr. Zimmerman found that "[t]enderness is noted in the trapezius region." The plaintiff 's range-of-motion in his cervical spine was generally normal except that his "Extension" was 35○ while the normal reading was 45-60○. The movement in his lumbar spine was normal as was the muscle strength. "DIAGNOSIS: Cervical sprain, resolved. Lumbar sprain, resolved." Dr. Zimmerman's conclusion was that "[t]he claimant is presently working and may continue to do so at his pre-accident occupation."

Dr. Sheldon Feit, M.D., a Board Certified Radiologist, submitted an affirmation dated September 21, 2009. Dr. Feit reviewed the MRI study of this plaintiff's MRI of the lumbosacral spine conducted at Standup MRI of East Elmhurst on September 17, 2007 and December 27, 2007. The first date predates the instant accident and the second was taken after the instant accident. Dr. Feit notes that with regard to the MRI of September 17, 2007 that "[t]here is a small central herniation at L5-S1 effacing the epidural fat and slightly indenting on the thecal sac." Dr. Feit notes that with regard to the MRI of December 27, 2007 that "[t]here is a stable small herniation at L5-S1." There was no abnormal areas of T2 brightening. It was his conclusion that "a small pre-existing herniation at L5-S1 unchanged on the later scan." No abnormalities were causally related to the accident on December 4, 2007.

Dr. Sheldon Feit, M.D., a Board Certified Radiologist, submitted an affirmation dated September 21, 2009. Dr. Feit reviewed the MRI study of this plaintiff's MRI of the cervical spine conducted at Standup MRI of East Elmhurst on September 17, 2007 and December 27, 2007. The first date predates the instant accident and the second was taken after the instant accident. Dr. Feit notes that with regard to the MRI of September 17, 2007 that "[d]esiccatory change is identified at the C3-4, C4-5 and C5-6 discs. Evaluation of the sagittal images demonstrates a ventral epidural defect at the C3-4, C4-5, and C5-6 levels." It was his impression that the plaintiff had sustained degenerative spondylosis. Dr. Feit notes that with regard to the MRI of December 27, 2007 that "[t]here is a stable small herniation at L5-S1." There was no abnormal areas of T2 brightening. "Desiccatory change is again identified at the C4-5, C5-6 and C6-7 levels. Evaluation of the sagittal images demonstrates ventral epidural defect at the C4-5, C55-6 and C6-7 levels corresponding to bulging discs, which encroach on the subarachnoid space with slight indentation of the cervical cord. " No significant abnormalities are identified within the cervical cord." His review of the two MRI studies "are unchanged on the two scans." "Therefore, there are no abnormalities causally related to the injury of December 4, 2007."

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).

The plaintiff submits the affidavit of Dr. Emmanuel Lambrakis, M.D., dated April 1, 2010. Dr. Lambrakis conducted a "complete and thorough" examination of the plaintiff on March 13, 2010. His affidavit is made after reviewing all the medical records and diagnostic reports relating to the instant accident as well as those of the plaintiff's prior accident. Dr. Lambrakis opined that the injuries which the plaintiff had sustained "as a result of August 22, 2007 [accident], had almost completely resolved." The extension of the plaintiff's cervical spine was 10○ of motion with a normal range is 45○; Flexion was limited to 10○ of motion with a normal range being 45○. Right and left rotation of the cervical spine was limited to 15○ on the right and 20○ on the left when the normal rotation is 60○. Lateral flexion of the cervical spine was limited on both the right and left to 5○ where the normal range of motion is 45○. Dr. Lambrakis found the plaintiff to have "significant and severe" muscle spasms in the cervical spine at 4+ when the normal is 0. Dr. Lambrakis examined the plaintiff's lumbar spine and found "major" losses in his range of motion. Lateral flexion of the lumbar spine was 5○ to the right and 10○ to the left side when the normal range of motion is 45○. Rotation of the lumbar spine was limited to 10○ on the right and left with

the normal range of motion being 45○. In the supine position the plaintiff's Straight Leg test was "positive on the right at 25 degrees and at 30 degrees on the left, when the normal result on either leg would be negative." The plaintiff's right shoulder was limited to an extension of 110○ with the normal being 180○. Abduction of the right shoulder was limited to 120 ○ with the normal reading being 180○. The plaintiff's left shoulder extension was limited to 100 with the normal range of motion being 180○. Abduction of the left shoulder was 120○ with the normal being 180○.

It was Dr. Lambrakis' opinion that the plaintiff had sustained injures that "are serious and permanent." That the plaintiff is suffering from "significant and serious losses of range of motion to various portions of his body." That the pain and loss of motion in the plaintiff's spine are "highly consistent with the complaints" the plaintiff made after the accident. Dr. Lambrakis stated that the plaintiff "may require endoscopic or open surgery on the lumbar spine." The plaintiff will continue to suffer from a "severe permanent partial disability especially with relation to his cervical spine, lumbar spine, right shoulder and left shoulder." It is Dr. Lambrakis' opinion that the "medical and physical condition of the plaintiff will not improve by any significant measure and his present condition must considered permanent" and "the injuries complained [of] were contemporaneous with the accident and/or exacerbated by the instant accident."

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.

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).

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). The defendant's medical report do not specifically relate to the plaintiff's claim of being unable to perform 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

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). 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). It is apparent from Dr. Lambrakis' affidavit of April 1, 2010 that there are questions of fact as to whether the plaintiff has sustained a "permanent loss of use" of a body organ, member or system.

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). Dr. Lambrakis' affidavit of April 1, 2010 indicate that there are questions of fact as to whether the plaintiff has sustained a "permanent limitation."

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). Dr. Lambrakis' affidavit of April 1, 2010 indicates that there are questions of fact as to whether the plaintiff has sustained a "significant limitation of use of a body function or system".

Accordingly, the defendant's motion to dismiss the plaintiff's instant action because he has not sustained a "Serious Injury" as defined in Insurance Law §5102(d) is denied.

So Ordered.

Dated: May 3, 2010

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Robert J. McDonald, J.S.C.