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SUPREME COURT OF THE STATE OF NEW YORK **Index No.:103487/07**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:003**

LOUIS CATAPANO,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

ATLAS FLORAL DECORATORS, INC.,
HUB TRUCK RENTAL CORP., and
GEORGE GONZALEZ,

Defendants

The following items were considered in the review of the following motion for summary judgmgent.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants moves for an order granting them summary judgment dismissing the plaintiff's complaint pursuant to CPLR § 3212. The defendants' motion is denied in its entirety.

Facts

This is an action for personal injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident. According to the testimony of the plaintiff during his examination before trial on December 11, 2006 a truck owned and operated by the defendants pinned his left hand to the driver's side door. As a result of the motion of the truck the plaintiff allegedly was pulled and dragged completely out of his vehicle. In an attempt to free himself and his hand after the accident plaintiff asserts that he attempted to pull himself free using his free right arm and in the

process injured his right shoulder.

The defendants made a motion for summary judgment originally returnable on February 20, 2009. That motion was subsequently withdrawn on June 10, 2009 after it was determined that the plaintiff underwent a surgery for his right shoulder on March 27, 2009. This court certified that discovery was complete in this case on December 10, 2009. And a note of issue was filed on December 15, 2009.

The defendants submit the expert affidavits of Arnold Berman, M.D., an orthopedic surgeon; and George Smith, M.D., a hand surgery medical expert. Dr. Berman examined the plaintiff on December 17, 2008, while Dr. Smith examined the plaintiff on September 11, 2008. During Dr. Berman's examination the doctor concluded that the plaintiff had a full range of motion in his right shoulder. Dr. Berman's examination compared the normal range of motion with the his observations of the plaintiff's range of motion. Dr. Berman's report states, "There was full range of motion with pain on the extremes of motion." Dr. Berman concluded that, "The claimant's rotator cuff tendinitis was related to the accident of record, however it was fully resolved at the time of my examination." Dr. Smith's examination of the plaintiff's hand revealed the following diagnosis, "A supple scar, ICD-9 code 709.2, with stiffness and weakness and mild limitation in range of motion, ICD-9 cod 719.44, 718.44." But, neither doctor reexamined the plaintiff after his surgery.

The plaintiff's treating physician, Dr. DeMarco, a board certified orthopedic surgeon, reviewed the MRI film from August 14, 2007 that showed a "partial rotator cuff tear and single abnormality in the labrum as well as glenoid remodeling as consistent with the prior MRI." After ordering a new MRI on March 6, 2009, Dr. Charles DeMarco concluded that based on his review of the plaintiff's medical records that the plaintiff "suffered a high-grade partial tear involving the distal supraspinatous tendon at the insertion without complete tear or retraction." On March 27, 2009 the plaintiff underwent surgery for his right arm. Dr. DeMarco asserts that the rotator cuff tear clearly shown in the is causally related to the accident in this case.

Discussion

Defendants Atlas Floral Decorators, Inc., Hub Truck Rental Corp. and George Gonzalez, seek summary judgment on the ground that the plaintiffs have not sustained a "serious injury" as defined in Insurance Law §5102(d).[1] The serious injury threshold set forth in Insurance Law §5104(a) can only be established under these categories.[2] Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[3] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness or disease (11 NYCRR §65-2.1[e]), that results in one of the nine serious injury threshold categories.[4]

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law *§5102*(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations.[5] The burden, in other words, shifts to

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[1] A serious injury must be a personal injury, "[W]hich results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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 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" (Insurance Law *§5102* [d]).

[2] *Coon v. Brown*, 192 AD2d 908 [3rd Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3rd Dept 1982].

[3] *Jones v. Sharpe*, 98 AD2d 859 [3rd Dept 1989], *aff'd* 63 NY2d 645 [1984].

[4] *See, Van Norstrand v. Regina*, 212 AD2d 883 [3rd Dept 1995].

[5] *See*, *Kordana v. Pomellito*, 121 AD2d 783, appeal dismissed, 68 NY2d 848.

plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury.[6] The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient.[7] Additionally, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings which are based on a recent examination of the plaintiff.

Here, defendants' experts failed to examine the MRI report from March 6, 2009. This MRI report along with the plaintiff's subjective complaints of pain led to the March 27, 2009 shoulder surgery. As such, the defendants' failed to meet its initial.[8]

Accordingly, it is hereby:

ORDERED, that the defendants motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the parties return to DCM Part 3 on **Monday, July 12, 2010 at 9:30 a.m.** for a Pre-Trial conference.

ENTER,

DATED: June 8, 2010

Joseph J. Maltese

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[6] See, *Gaddy v. Eyler*, 79 NY2d 955; *Grossman v. Wright* 268 AD2d 79 [2nd Dept 2000].

[7] *Id.*

[8] *Shumway v. Bungerroth*, 58 AD3d 431, [1st Dept 2009]; *See also, Patterson v. Rivera*, 49 AD3d 337, [1st Dept 2008].

Justice of the Supreme Court