SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

JAEMIN KIM,

Plaintiff,

-against-

EDWARD J. MURPHY PLUMBING AND HEATING INC., EDWARD J. MURPHY, LAUREN J. MURPHY and YOON HEE KIM,

Defendant.

Decision and Order

MOTION SUBMITTED:
May 14, 2010
MOTION SEQUENCE:02, 03
INDEX NO. 006027-08

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Notice of Cross Motion	2
Reply Affirmation	3
Affirmation in Opposition to all Motions	4

In an action to recover damages for personal injuries sustained in a motor vehicle accident on June 8, 2003, Defendants move for summary judgment, pursuant to CPLR 3212, dismissing the Plaintiff's complaint.

In branch "a" of the motion, Defendants seek dismissal on the ground that Plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d). In support of their motion, Defendants submit the deposition testimony of the Plaintiff as well as the affirmations of two medical doctors. More specifically, in his affirmation, Dr. Michael Katz, a board certified orthopedic surgeon, opines that, based upon his review of the medical records and examination of the Plaintiff on July 24, 2009, Plaintiff "shows no signs or symptoms of permanence relative

to the musculoskeletal system and relative to 06/08/03. He is currently not disabled. He is capable of his full time studies. He is capable of his activities of daily living. He is capable of all pre-loss activities" (Ex. "F" to Defendants' Motion). This conclusion was based on, *inter alia*, the following factors discovered during the examination: Plaintiff denied significant medical problems; Plaintiff was not taking any medications; Plaintiff did not use canes or walkers; Plaintiff walked "briskly" into and out of the examination room; Plaintiff changed positions normally; and, most importantly, he exhibited normal range of motion in the lumbar spine. (Ex. "F" to Defendants' Motion). Dr. Katz did make reference to a lumbosacral strain with radiculitis which was, at the time of examination, resolved (Ex. "F" to Defendants' Motion).

In further support of their motion, Defendants also submitted the report of Dr. Alan Greenfield, a board certified radiologist, whose report was based upon the MRI conducted of the Plaintiff on August 28, 2003. Based upon Plaintiff's MRI, Dr. Greenfield found normal physiological disc bulging from L3 through S1 with no significant compromise or deformity. This disc bulging, according to Dr. Greenfield, was "normal in a 14-year-old patient" which was the age of Plaintiff at the time the MRI was taken. (Ex. "G" to Defendants' Motion). Dr. Greenfield concluded that there were "no significant abnormalities" and no findings which can be attributed to an accident occurring on 06/08/03 with any degree of medical certainty" (Ex. "G" to Defendants' Motion).[1]

The testimony elicited at Plaintiff's deposition further supports Defendants' contention that Plaintiff did not sustain a serious injury. In this regard, Plaintiff testified that he missed only two days of school because of the accident (Ex. "E" to Defendants' Motion at pg 12); immediately following the accident an ambulance was offered but Plaintiff refused it and, further, Plaintiff did not ask for any medical assistance (Ex. "E" to Defendants' Motion at pgs 35-37, 41). In fact, the Plaintiff proceeded to go to a car show immediately following the accident where he walked around for three hours (Ex. "E" to Defendants' Motion at pg 39). Plaintiff also testified that he never went to the hospital but went to a doctor one week later, where he received physical therapy consisting of hot packs, massages and electric therapy. Plaintiff received no other treatment for his injuries (Ex. "E" to Defendants' Motion at pg 41-45). Moreover, although Plaintiff testified he feels pain when he sits for a long time, jumps, bends, or lays down a certain way, he stated that he can do everything that de did prior to the accident (Ex. "E" to Defendants' Motion at pg 56).

Contrary to the Plaintiff's contentions, Defendants submissions make a prima facie showing that Plaintiff did not sustain a serious injury as that term is defined under Insurance Law § 5102(d). The burden then shifted to Plaintiff to demonstrate, by objective proof, that a serious injury was sustained (*Toure v Avis Rent-A-car Systems, Inc.*, 98 NY2d 345 [2002]). The Plaintiff has failed to meet his burden.

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[1] Even Plaintiff's own doctor, Sung Pahng, indicated that Plaintiff had a "normal lumbar spine" which showed "no bony abnormality" (Ex. "H" to Defendants' Motion).

In opposition to Defendants' motion for summary judgment, Plaintiff alleges that his injuries fall within the meaning of the Insurance Law's definition of "serious injury" as Plaintiff has "sustained a permanent consequential limitation of use of a bodily organ or member; a significant limitation of use of a bodily organ or member; a significant limitation of use of a bodily function or system, and same has been medically determined to have sustained an injury which has impaired [his] ability to perform [his] customary activities in excess of 90 days immediately following the accident. Specifically, plaintiff is no longer able to perform [his] customary activities of daily living without being restricted by pain." (Affirmation in Opposition at ¶ 49).

In support of his contentions, Plaintiff notes that he received physical therapy by Dr. Pahng two to three times a week for approximately three months. This therapy consisted of hot packs, massages, and electrical stimulation (Ex. "B" to Plaintiff's Opposition at ¶ 9). As a result of Dr. Pahng's re-examination of the Plaintiff conducted on December 4, 2009, six and one-half years later, Dr. Pahng concluded, with a reasonable degree of medical certainty, that Plaintiff's injuries were causally related to the June 8, 2003 accident (Ex. "B" to Plaintiff's Opposition at ¶ 11). Dr. Pahng further concluded that Plaintiff is permanently partially disabled with regard to the functioning of his lumbar spine and that the injuries diagnosed,[2] including the limitations of motion and disc pathology, will inhibit Plaintiff's ability to carry out his normal activities of daily life (Ex. "B" to Plaintiff's Opposition at ¶ 12).

Plaintiff also submitted the report of Dr. Richard Rizzuti, the radiologist who conducted the MRI of Plaintiff in August, 2003, just three months after the accident (Ex. "C" to Plaintiff's Opposition). Dr. Rizzuti reported that the MRI showed posterior disc bulges at L3-4, L4-5, and L5-S1 impinging on the anterior aspect of the spinal canal and neural foramina bilaterally. The remaining discs were unremarkable and no abnormality was shown in the lower spinal cord or in the alignment. Lastly, Dr. Rizzuti found that the bony structures were normal and that there was no evidence of spinal stenosis (Ex. "C" to Plaintiff's Opposition at ¶ 2).

Lastly, Plaintiff offers his own affidavit as to how the alleged injuries affect his daily life. According to Plaintiff's affidavit, he must take constant breaks at work, where he is a host/waiter; he can no longer do basic chores around the house; he can no longer play sports without experiencing pain; he can no longer sit for a long period of time; he has difficulty sleeping; he must avoid long trips; and he experiences dull pain in his lower back periodically throughout the day (Ex. "A" to Plaintiff's Opposition at ¶¶ 9, 10).

Based on the foregoing, the court concludes that Plaintiff's submissions are insufficient to sustain his burden with respect to the serious injury threshold.

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[2] This Court notes that Dr. Pahng's affidavit submitted in Plaintiff's opposition papers is apparently incomplete as paragraph 11 of his affidavit seems to have been cut off, thereby leaving the Court to guess as to any other injuries diagnosed by Dr. Pahng.

First, the Plaintiff's own deposition testimony fails to allege any serious injury. The Plaintiff testified that he can do everything that he was able to do prior to the accident (Ex. "E" to Defendants' Motion at pg 56). Moreover, Plaintiff missed only two days of school following the accident (Ex. "E" to Defendants' Motion at pg 12). Equally telling of the absence of serious injury were Plaintiff's actions immediately after the accident. Rather than seeking medical assistance and an ambulance (Ex. "E" to Defendants' Motion at pgs 35-37, 41), the Plaintiff proceeded to go the car show where he walked around for three hours (Ex. "E" to Defendants' Motion at pg 39). The Plaintiff never did go to the hospital but, rather, sought medical attention from Dr. Pahng one week later, who provided physical therapy and nothing more (Ex. "E" to Defendants' Motion at pgs 44-45).

Moreover, the numerous contradictions between Plaintiff's deposition testimony and his later affidavit suggest a tailored affidavit in an effort to create an issue of fact where one does not exist (*Sougstad v Meyer*, 40 AD3d 839 [2d Dept 2007]). In his affidavit, Plaintiff stated that he went to the car show immediately after the accident but that he was "unable to walk around"(Ex. "A" to Plaintiff's Opposition at ¶ 3), yet Plaintiff testified at his deposition that he did walk around and look at cars for three hours (Ex. "E" to Defendants' Motion at pg 39). Plaintiff also indicated in his affidavit that he ceased physical therapy because his no fault insurance was "cut off" (Ex. "A" to Plaintiff's Opposition at ¶ 5) which is directly contradicted by Plaintiff's earlier deposition testimony where he testified that he ceased therapy because the pain went away and he felt better (Ex. "E" to Defendants' Motion at pg 56). Additionally, Plaintiff indicated in his affidavit that because of the accident he was not able to spend the following summer in Korea as he had planned (Ex. "A" to Plaintiff's Opposition at ¶ 7), yet Plaintiff testified in his deposition that he did go to Korea that summer and, in fact, received hot packs and electrical therapy while there (Ex. "E" to Defendants' Motion at pg 50). Plaintiff also indicated in his affidavit that he now avoids long trips because of the pain (Ex. "A" to Plaintiff's Opposition at ¶ 9), yet Plaintiff testified that he has traveled to Korea three times since the accident (Ex. "E" to Defendants' Motion at pg 51).

In addition, the Plaintiff failed to provide a sufficient account as to why he terminated treatment after only three months of hot packs, massages, and electrical therapy. A plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so (*Pommellis v Perez*, 4 NY3d 566, 574 [2005]). Absent a reasonable explanation, the gap in treatment is considered a factor that interrupts the chain of causation between the accident and the claimed injury (*Id.*) Here, Plaintiff claims that he terminated his physical therapy with Dr. Pahng because his no fault insurance benefits were "cut off and [he] could not afford to pay for the medical bills on [his] own." (Ex. "A" to Plaintiff's Opposition at ¶ 5). However, with respect to this allegation, the Plaintiff fails to provide any substantiation of the discontinuance of no fault benefits other than the conclusory statements in his own affidavit and in the affirmation of Dr. Pahng (Exhibit "B" to Plaintiff's Opposition at ¶ 9). *(see Maffei v Santiago*, 63 AD3d 1011 [2d Dept 2009]; *Bonillla v Tortiello*, 62 AD3d 637 [2d Dept 2009]; *Williams v Ciaramella*, 250 AD2d 763 [2d Dept 1998]). To the contrary, and as previously noted, Plaintiff testified at his deposition that he stopped physical

therapy with Dr. Pahng "[b]ecause the pain that I had on the day of the accident went away. I did feel that it got better, and it was a far trip to get there" (Ex. "F" to Defendants' Motion at pg 56).

Dr. Rizzuti's recent affirmation dated December 18, 2009, which reports of bulging discs, is similarly deficient as it is based on an MRI conducted of the Plaintiff six and one-half years ago. Moreover, the mere existence of a bulging disc is "not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*D'Onofrio v Floton, Inc.*, 45 AD3d 525, 525-26 [2d Dept 2007]; *Cerisieri v Thibiu*, 29 AD3d 507 [2d Dept 2006]).

Given Plaintiff's numerous contradictions between his deposition testimony and subsequent affidavit, coupled with the absence of any treatment since Plaintiff's three-month physical therapy session with Dr. Pahng, Plaintiff has failed to raise a triable issue of fact as to whether he suffered a permanent injury under the Insurance Law (*Sougstad v Meyer*, 40 AD3d 839 [2d Dept 2007]; *Williams v Ciaramella*, 250 AD2d 763 [2d Dept 1998]).

Lastly, the Plaintiff's submissions are insufficient to establish that he sustained a medically-determined injury of a nonpermanent nature which prevented him from performing his usual and customary activities for 90 of the 180 days following the subject accident (*Casas v Montero*, 48 AD3d 728 [2d Dept 2008]). In this regard, following the accident Plaintiff missed only two days of school, he finished the school year with his class, and went to Korea, as planned.

Based on the reasons set forth above, Plaintiff has not provided sufficient evidence to raise a triable issue of fact as to establish a prima facie showing of serious injury. Accordingly, it is hereby ordered branch "a" of the Defendants' motion for summary judgment dismissing the complaint on the ground that Plaintiff did not sustain a serious injury (CPLR 5102(d)) is granted and the complaint is dismissed.

It is further ordered that the branch of Defendants' motion seeking, in effect, summary judgment dismissing the complaint insofar as asserted against Edward J. Murphy, is denied as academic. The court notes that this branch of the motion, which was not opposed by the Plaintiff, is, in fact, meritorious, it being undisputed that the "offending" vehicle was owned and registered by Edward J. Murphy Plumbing and Heating, Inc. and not Edward J. Murphy personally (Ex. "I" to Defendants' Motion). Notwithstanding, given that the court has ordered dismissal of the complaint as against all defendants, branch "b" of the motion is hereby denied.

This constitutes the decision and order of the court.

Dated: July 6, 2010

Hon. Vito M. DeStefano, J.S.C.