SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

X

SEBASTIAN LEWICKI ,

Plaintiffs,

-against

Index No.: 013077/09
Motion Sequence...01
Motion Date...05/19/10

STEPHEN P. MCDONOUGH and MARILYN A. MCDOUNOUGH,

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the Defendants' motion seeking an order granting summary judgment, pursuant to CPLR §3212 dismissing the complaint of the Plaintiff on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), is determined as hereinafter provided[1].

[1] While the opposition papers submitted by the Plaintiff's counsel state that they are submitted "in support of Plaintiff's summary judgment motion on liability", there is no such motion or cross-motion. Therefore, said issue is not considered by the Court herein.

The Plaintiff's personal injury action arises out of a motor vehicle accident that occurred on September 22, 2006 at or near the intersection of Round Swamp Road and Bethpage Road, Old Bethpage, New York. At the time of the accident, the Plaintiff was the driver of a vehicle which was struck by a vehicle owned and operated by the Defendants. The Plaintiff and the Defendants dispute liability in this case.

Shortly after the accident, an ambulance transported the Plaintiff to New Island Hospital where he was treated in the emergency room and discharged the same day. On September 26, 2006, the Plaintiff came under the care of Dr. Dominic Fitzsimons, a chiropractor. The Plaintiff has submitted a report from Dr. Fitzsimons, dated April 21, 2008, and sworn to on March 12, 2010, setting forth the Plaintiff's injuries and treatment. *See* Sworn Report of Dr. Dominic Fitzsimons, dated April 21, 2008, attached to Plaintiff's Affirmation in Opposition as Exhibit "C". The report states that on September 26, 2006, the Plaintiff presented to Dr. Fitzsimons and first complained of pain to his left knee, low back, neck, head and that pain was radiating to both of his hands as a result of the motor vehicle accident on September 22, 2006. The Plaintiff stated that the pain was aggravated by movement and was worse in the morning and was aggravated by activities of daily living and the demands of his employment as a service technician. The report indicates that the Plaintiff lost one day of work as a result of the injuries. *Id.*

At the Plaintiff's last date of treatment with Dr. Fitzsimons on April 21, 2008, the Plaintiff continued to complain of pain to his neck, mid and low back and right leg. Dr.

Fitzsimons' report indicates that the pain was ongoing and continuous from the date of the accident. Dr. Fitzsimons' examination of the Plaintiff on April 21, 2008 revealed the following:

> range of motion of cervical spine: flexion 45 degrees (normal 50 degrees); extension 50 degrees (normal 60 degrees); right leg flexion 45 degrees (normal 45 degrees); left leg flexion (45 degrees (normal 45 degrees); right rotation 80 degrees (normal 80 degrees); left rotation 80 degrees (normal 80 degrees).
>
> range of motion of lumbosacral spine: flexion 75 degrees (normal 90 degrees); extension 20 degrees (normal 25 degrees); right leg flexion 20 degrees (normal 25 degrees; left leg flexion 20 degrees (normal 25 degrees); right rotation 20 degrees (normal 30 degrees); left rotation 20 degrees (normal 30 degrees).

See Sworn Report of Dr. Dominic Fitzsimons, dated April 21, 2008, attached to Plaintiff's Affirmation in Opposition as Exhibit "C".

Dr. Fitzsimons states in his report that the above referenced range of motion results were ascertained as per AMA Guides to Evaluation of Permanent Impairment, 4th Edition. Dr. Fitzsimons' diagnosis on April 21, 2008 was as follows:

> Cervical neurospinal compression syndrome with associated dysfunction and myofascial syndrome; and a lumbosacral neurospinal compression syndrome with associated radiculopathy, dysfunction and myofascial syndrome.
>
> Further, Dr. Fitzsimons noted the following complaints by the Plaintiff:
>
> Patient continues to complain of limitation in movement of the low back on the right and left, limitation in left and right hip movement, numbness in his hip, numbness in the upper leg, numbness in the lower leg and numbness in the foot on the right.

> He complains of lower back weakness, moderately so, upper leg and lower leg weakness, moderately so on the right, and left ankle/foot weakness. He continues to complain of difficulty bending, kneeling, lifting, trunk twisting, tying his show laces, grooming his toe nails, putting on his shoes and socks, sleeping - pain in the lower back, and his sexual desire. *Id.*

The Plaintiff further states that he is not able to do most of his housework, including working on his car and simple house cleaning. Additionally, the Plaintiff claims that his hobbies and family activities were eliminated after the accident. He alleges that he gave up most of his outdoor activities including mountain biking, jet skiing and water skiing. Further, at the time of the accident, the Plaintiff was employed as a service technician and his job duties changed from traveling long distances to mostly simple maintenance at one of the local facilities at which the Plaintiff works. He claims that his overtime was drastically reduced due to the lower back pain he suffered as a result of the accident.

Dr. Fitzsimons also reviewed the Plaintiff's medical records, including diagnostic impressions by other physicians and diagnostic testing. A review of the diagnostic testing revealed the following:

> MRI of lumbar spine without contrast dated December 5, 2006: degenerative changes at L3-L4, L4-L5 and L5-S1 with a small/moderate size posterior central disc herniation at L3-4, a mild/moderate concentric disc bulge at L4-L5 and a broad based right posterolateral disc herniation at L5-S1 that effaces the thecal sac and right L5 and S1 nerve root. The MRI testing of the cervical spine on December 5, 2006 was normal.
>
> MRI of lumbar spine without contrast dated March 6, 2008: spondylosis defects at L3, L4 and L5. Degenerative disc disease L3-L4 through L5-S1. Broad based central and left paracentral

> disc herniation L3-L4 with compression of the ventral thecal sac. Diffuse disc bulging L4-L5 with annular tear and mass effect upon the ventral thecal sac. Right foraminal disc herniation L5-S1 with compression of the right L5 nerve root and mild compression of the right S1 nerve root.

See Sworn Report of Dr. Dominic Fitzsimons, dated April 21, 2008, attached to Plaintiff's Affirmation in Opposition as Exhibit "C"; *see also* MRI reports, dated December 5, 2006 and March 6, 2008 attached to Plaintiff's Affirmation in Opposition as Exhibit "D".

The Plaintiff was seen by Dr. Ahmed Elfiky, a neurologist, on six separate occasions. Dr. Elfiky's reports revealed the following:

January 10, 2006 impression:	paravertebral nerve block report
September 30, 2006 impression:	cervical sprain/strain, lumbar sprain/strain, left knee sprain.
October 28, 2006 impression:	cervical radiculitis, lumbar radiculitis and left knee sprain.
November 29, 2006 impression:	cervical radiculitis, lumbar radiculitis, left knee sprain, improving slowly with therapy.
January 20, 2007 impression:	cervical radiculitis, normal MRI and EMG/NCV study; lumbar L3-L4, L4-L5 and L5-S1 disc herniations/bulging with radiculopathy.
June 9, 2007 impression:	cervical radiculitis, normal MRI and EMG studies, L3-L4, L4-L5 and L5-S1 disc herniations/bulging with radiculopathy.

On July 24, 2008, the Plaintiff underwent a lumbar selective nerve root block on the right, L3-L4 through L5-S1. Dr. Craig L. Shalmi performed the procedure at Good Samaritan Hospital. *See* Report of Operation, dated July 24, 2008, attached to Plaintiff's Affirmation in Opposition as Exhibit "E".

After the aforementioned procedure, the Plaintiff saw Dr. Reuben S. Ingber, a pain management specialist. At the time of his examination on October 28, 2009, the Plaintiff still complained of pain and decreased range of motion. Dr. Ingber performed a physical examination of the lumbar spine of the Plaintiff which revealed a decreased range of motion by 25% of his right leg and 56.25% of his left leg. The range of motion was limited by 17% of the right hip and 25% of the left hip. The range of motion of flexion was limited by 25% on the right side of the Plaintiff's back and 50% on the left side of his back. Dr. Ingber concluded that the limited range of motion and other injuries were a direct and proximate result of the motor vehicle accident of September 22, 2006. *See* Report of Dr. Reuben S. Ingber, dated January 7, 2010, attached to the Plaintiff's Affirmation in Opposition as Exhibit "F".

The Plaintiff, LEWICKI claims that because of the accident, he has suffered personal injuries. He contends that these personal injuries qualify as "serious injuries," pursuant to Article 51 of the New York State Insurance Law, which is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of body organ or member, function or system; (7) permanent

consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute his usual and customary daily activity for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury. *See McKinney's Consolidated Laws of New York*, Insurance Law §5102(d). Specifically, the Plaintiff contends that his injuries fall within one of the aforementioned final three categories, permanent consequential limitation, significant limitation, or substantial limitation for the first ninety out of the one hundred eighty days following the accident.

On July 22, 2009, the Plaintiff was examined by Dr. John C. Killian, an orthopedic surgeon, at the request of the Defendants. Based on Dr. Killian's visual observations, he found a full range of motion of the Plaintiff's lumbar and cervical spine regions. *See* Report of Dr. John C. Killian, dated July 22, 2009, attached to Defendants' Affirmation in Support as Exhibit "K". Dr. Killian concluded the following:

> "There were no positive objective physical findings in [his] examination to confirm Mr. Lewicki's subjective complaints. Based on this examination I would conclude that he has recovered fully from the problems for which he was treated after this accident. There is no residual impairment or disability. He is capable of working at his normal capacity and performing all of his usual activities of daily living without limitations due to injuries caused by this accident. He requires no further orthopedic evaluation, follow-up or treatment."

On July 31, 2009, the Plaintiff was also examined by Dr. Jeffrey T. Kessler, a neurologist. Dr. Kessler's report details the medical history of the Plaintiff following the accident on September 22, 2006. Dr. Kessler's examination of the Plaintiff revealed that there were no sensory, cerebellar, gait, station, speech, or reflex abnormalities. Dr. Kessler further opined that there was full range of motion of both his cervical and lumbar spine. Notably, Dr. Kessler does not reference any objective tests that were utilized to support the conclusion that the Plaintiff had full range of motion in his cervical and lumbar spine. Dr. Kessler concluded that he was unable to find any evidence of neurological dysfunction in the Plaintiff. *See* Report of Dr. Jeffrey T. Kessler, dated July 31, 2009, attached to Defendant's Affirmation in Support as Exhibit "L".

The Defendants argue that, based upon the independent medical examinations of Dr. Killian and Dr. Kessler, the Plaintiff's injuries do not meet any definition of "serious injury" as defined in any part of Insurance Law § 5102 (d) and, therefore, the Plaintiff's complaint must be dismissed in its entirety. First, with respect to the permanent consequential and significant limitation categories of the "serious injury" definition of the Insurance Law, the Defendants argue that based upon the conclusions of Dr. Killian and Dr. Kessler, that the Plaintiff has full range of motion in his lumbar and cervical spine. The Defendants also contend that the mere fact that the Plaintiff underwent epidural steroid injections does not overcome the serious injury threshold.

Next, with regard to any claim that the Plaintiff sustained an injury that significantly limited him in his daily activities for the first ninety out of one hundred eighty days following the accident, the Defendants contend that the Plaintiff missed no time from work following the incident. Due to the Plaintiff's ability to resume his employment, the Defendants claim that the Plaintiff cannot satisfy the "serious injury" threshold in the "90/180" category.

In moving for summary judgment, the Defendant must make a prima facie showing that the Plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the Plaintiff to come forward with evidence to overcome the Defendant's submissions by demonstrating a triable issue of fact that a serious injury" was sustained. *Pommels v. Perez*, 4 N.Y.3d 566 (2005); *see also Grossman v. Wright*, 268 A.D.2d 79, 84 (2nd Dept. 2000).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the Plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102 (d). *Gaddy v. Eyler*, 79 N.Y.2d 955 (1992). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury". *Licari v. Elliot*, 57 N.Y.2d 230 (1982).

Within the scope of the Defendant's burden, a Defendant's medical expert must specify the objective tests upon which the stated medical opinions are based and when rendering an opinion with respect to the Plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *Qu v. Doshna*, 12 A.D.3d 578 (2nd Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747 (2nd Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506 (2nd Dept. 2006).

Applying the aforesaid criteria to the reports of Dr. Killian and Dr. Kessler, this Court finds that the moving Defendants have not established a prima facie case that the Plaintiff failed to sustain a serious injury within those categories of a permanent loss of use of a body organ, member, function or system, a significant limitation of use of a body organ or member or the 90/180 category. *Gaddy v. Euler*, 79 N.Y.2d 955 (1992), *supra*. With respect to the categories of a significant limitation of use of a body function or system and a permanent consequential limitation of use of a body organ or member, this Court notes that Dr. Kessler and Dr. Killian opined that the Plaintiff's range of motion was within normal limits. Dr. Kessler and Dr. Killian also both concluded that there was no orthopedic or neurological disabilities present in the Plaintiff with regard to the subject accident. However, the affirmed medical report of the Defendants' examining orthopedist, Dr. Killian, merely noted that the Plaintiff had "full" range of motion in the cervical and lumbar regions of his spine, tested by visual observation, without setting forth the objective test or tests performed supporting these conclusions. *See Nembhard v. Delatorre*, 16 A.D.3d 390 (2005); *Black v.*

Robinson, 305 A.D.2d 438 (2003). Similarly, Dr. Kessler, the Defendants' examining neurologist, simply states that the Plaintiff has "full" range of motion of the cervical and lumbar spine without setting forth any objective tests utilized. Since the Defendants failed to establish their prima facie entitlement to judgment as a matter of law in the first instance, it is unnecessary to consider whether the plaintiff's papers, submitted in opposition, raised a triable issue of fact. *See Coscia v. 938 Trading Corp.*, 283 A.D.2d 538 (2001).

Even if this Court were to determine that the Defendants established a prima facie case, the Plaintiff has come forward with sufficient evidence to raise issues of fact.

In order for the Plaintiff to satisfy the statutory serious injury threshold, the legislature requires objective proof of a Plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345 (2002), stated that a Plaintiff's proof of injury must be supported by objective medical evidence...paired with the doctor's observations during the physical examination of the Plaintiff.

In opposition to the Defendant's instant application, the Plaintiff has submitted medical reports and an affidavit from his chiropractor, Dr. Fitzsimons. According to the affidavit, the Plaintiff has sustained a permanent disability and significant limitation of motion of his cervical and lumbar spine as a result of the accident that occurred on September 22, 2006. *See* Report of Dr. Fitzsimons, dated April 21, 2008, attached to the Plaintiff's Affirmation in Opposition as Exhibit "C".

Additionally, according to a October, 2009 examination by the Plaintiff's expert physician, Dr. Ingber, the Plaintiff has a limited range of motion of the cervical and lumbar spine ranging from 17% to 56.25%. Dr. Ingber opined that the accident of September 22, 2006 is the proximate cause of the lumbar injury. (*See* Report of Dr. Ingber, dated January 7, 2010, annexed to the Plaintiff's Affirmation in Opposition as Exhibit "F").

When examining medical evidence offered by a Plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a Plaintiff's subjective claims as to pain or limitations of motion are sustained by verified objective medical findings *Grossman v. Wright*, 268 A.D.2d 79 (2nd Dept 2000).

Further, in addition to providing medical proof contemporaneous with the subject accident, the Plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury. *Kauderer v. Penta*, 261 A.D.2d 365 (2nd Dept. 1999); *Constantinou v. Surinder*, 8 A.D.3d 323 (2nd Dept. 2004); *Brown v. Tairi Hacking Corp.*, 23 A.D.3d 323 (2nd Dept. 2005).

Applying the foregoing principles to the medical evidence proffered by the Plaintiff, the Court finds that the Plaintiff has raised a triable issue of fact. Dr. Fitzsimons quantified his findings of restricted motion with regard to the Plaintiff's range of cervical and lumbar motion and further opined that this condition is permanent and due to the accident.

Additionally, Dr. Ingber also set forth in his expert opinion that the Plaintiff's lumbar injury was a result of the accident.

The Defendants argue in their Reply that Dr. Fitzsimons' report should be disregarded by this Court because he relied, at least in part, upon unaffirmed medical records in reaching his conclusions. The seminal case of *Toure v. Avis*, *supra*, supports the principle that a plaintiff's treating physician's conclusion based upon MRI films and reports can provide objective evidence of a serious injury. The cases relied upon by the Defendants are distinguishable in that the treating physician's own reports were insufficient to support a conclusion that the Plaintiff sustained a serious injury. For instance, in *Dominguez-Gionta v. Smith*, 306 A.D.2d 432 (2nd Dept. 2003), the plaintiff's treating physician's affidavit submitted in opposition to the defendant's motion for summary judgment was insufficient on its own in that it failed to provide any evidence of the extent or degree of the plaintiff's physical limitations and their duration. In addition to the defects in the treating physician's own affidavit, the doctor had relied on unsworn reports of other physicians.

To the contrary, here, the Plaintiff's treating chiropractor, Dr. Fitzsimons, quantified and qualified the loss of range of motion in the Plaintiff's lumbar and cervical spine. In addition, Dr. Fitzimons also relied upon MRI films and reports, most of which were affirmed, to further support his conclusion that the Plaintiff's injuries were permanent and proximately caused by the subject accident. Indeed, the Defendants acknowledge in their papers that the Dr. Fitzsimons based his opinions only "in part" on unsworn records of the

Plaintiff's various medical providers. *See* Defendants' Affirmation in Support, page 5. Further, Dr. Fitzsimons referenced that the loss of range of motion was ascertained as per AMA Guides to Evaluation of Permanent Impairment, 4th Edition. Considering the totality of the evidence presented by the Plaintiff, the Court finds that the Plaintiff has submitted sufficient evidence to raise a triable issue of fact as to whether he met the threshold regarding the significant limitation of use of a body function or system or permanent consequential limitation categories.

Accordingly, based on the foregoing, the motion by the Defendants for summary judgment dismissing the claims against them must be **DENIED**.

This constitutes the decision and order of the court

DATED: Mineola, New York
August 19, 2010

Hon. Randy Sue Marber, J.S.C.