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SHORT FORM ⌣ ⅁ER

INDEX No. 08-36543
CAL. No. 10-00439-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 8-17-10
ADJ. DATE 9-17-10
Mot. Seq. # 001 - MD

STEVEN D. GAGLIANO, Plaintiff, - against - DONALD J. SHARPE and LINDY'S LIMO INC., Defendants.	CANNON & ACOSTA, LLP Attorney for Plaintiff 1923 New York Avenue Huntington, New York 11746 BAKER, McEVOY, MORRISSEY, et al. Attorney for Defendants 330 West 34th Street, 7th Floor New York, New York 10001

Upon the following papers numbered 1 to 19 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-12; Notice of Cross-Motion and supporting papers_____; Answering Affidavits and supporting papers 13-19; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants, Donald J. Sharpe and Lindy's Limo, Inc., pursuant to CPLR §3212 for summary judgment because the plaintiff, Steven D. Gagliano, has failed to sustain a serious injury as defined in Insurance Law §5102(d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on April 10, 2008 arising from a motor vehicle accident involving the defendants.

In his verified bill of particulars, the plaintiff claims that he sustained the following injuries in the accident: rotator cuff tear of the left shoulder requiring surgery; impingement syndrome of the left shoulder requiring surgery; herniated disc at L2-3 which flattens the thecal sac; herniated disc at L3-4 with hypertrophic change and thecal sac impression and foramina narrowing; herniated disc at L4-5 with thecal sac impression and foramina narrowing and hypertrophic change; herniation at L5-S1 with hypertrophic change and impression on the nerve roots; bulging disc at L4-5 encroaching the thecal sac and lateral recesses bilaterally; bulging disc at C2-3 encroaching the thecal sac; bulging disc at C3-4 encroaching the thecal sac; bulging disc at C4-5 encroaching the thecal sac; bulging disc at C6-7 encroaching the thecal sac; disc bulge at T1-2 encroaching the thecal sac and lateral recesses bilaterally; left knee joint effusion; left shoulder bursitis; cervical radiculopathy; lumbar radiculopathy; and post concussion syndrome.

The defendants now seek summary judgment because the injuries claimed by the plaintiff do not fall within the definition of serious injury as stated in Insurance Law §5102(d). In support of the application, the defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings; affidavits/reports of David L. Milbauer, M.D. (hereinafter Milbauer), dated December 1, 2008, concerning his review of the MRI's of plaintiffs left shoulder, cervical spine and lumbar

spine; sworn report of Julio V. Westerband, M.D. (hereinafter Westerband), dated October 15, 2009, concerning the independent orthopedic examination of the plaintiff; uncertified copy of the Huntington Hospital emergency department record, dated August 28, 2009; Hunt City Chiropractic report, dated April 16, 2008; Sima Anand, M.D. (hereinafter Anand) reports, dated May 1, 12, June 27, and July 29, 2008; letter, dated May 30, 2008, from Jimmy U. Lim, M.D. to Anand; reports of Ahmed Elfiky, M.D., dated May 31, and July 12, 2008; operative report, dated July 31, 2008, from North Shore University Hospital; MRI reports of the left knee, dated May 27, 2008, and of the brain, dated May 12, 2008; neurology report of Edward Weiland, M.D. (hereinafter Weiland), dated November 19, 2009; and two pages of the transcript of the examination before trial of the plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law §5102(d), " '[s]erious injury' means a personal injury which 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 constitute 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action"

(***Rodriquez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [1990]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of Insurance Law §5102(d) (***Licari v Elliott***, supra).

The Court determines in the first instance whether a prima facie showing of "serious injury" has been established (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]).

Here the defendants have not established prima facie entitlement to summary judgment that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d).

Milbauer, the defendants' expert radiologist, reviewed the MRI, dated May 8, 2008, of the plaintiff's left shoulder and opined that the films revealed shoulder impingement secondary to hypertrophic changes of the acromioclavicular joint with associated rotator cuff tendinosis and bony degenerative changes of the greater tuberositiy of the humerus. Milbauer stated in a conclusory manner which was unsupported by the facts upon which he based his conclusion that the examination demonstrated, inter alia, no specific findings to indicate that a traumatic injury of the left shoulder was sustained in the accident and that the shoulder impingement was secondary to hypertrophic degenerative changes of the acromioclavicular joint which was longstanding in nature. He stated the rotator cuff tendinosis was most likely secondary to shoulder impingement resulting in chronic tendon deterioration predating the accident.

Milbauer's review of the MRI of the plaintiff's cervical spine, dated May 15, 2008, stated his finding of degenerative posterior disc bulging noted at C4-C5 and minimal degenerative changes noted elsewhere in the cervical spine, but he did not indicate where, or give a basis for his opinion that the disc bulges and hypertrophic changes of the uncovertebral joints were degenerative and longstanding, pre-existing the accident. He also did not give a basis for his opinion that there

were no areas of significant compromise of the canal or neural foramina or impingement of the spinal cord or exiting nerve roots, and did not rule out such compromise or opine as to what constituted a significant compromise.

Milbauer, in his review of the MRI of the plaintiff's lumbar spine, dated June 10, 2008, opined that his impression was degenerative posterior disc bulges at each level from L3-L4 through L5-S1, and minimally at L1-2, with a more asymmetric posterior disc protrusion/herniation at L2-L3 larger to the left of the midline, which finding of herniation was of uncertain age and etiology. Therefore, he has not ruled out that the herniation was not caused by the accident. He also opined that the findings were not associated with significant compromise but did not indicate the degree of compromise or his basis for finding that said compromise was not significant.

Westerband stated in his report, dated October 15, 2009, that he conducted an independent orthopedic examination of the plaintiff. He stated that the records and reports he reviewed, including the above mentioned MRI reports as well as the MRI of May 24, 2008 of the plaintiff's left knee revealed small joint effusion. Westerband conducted range of motion evaluation of the plaintiff's cervical spine and lumbar spine, left shoulder, right shoulder and both knees and compared his findings to the normal range of motions and set forth no deficits. Westerband stated there was no finding of permanent orthopedic disability. He did not comment on the surgery to the plaintiff's shoulder on July 31, 2008 and did not rule out that such surgery was not related to injuries caused by the accident. Nor did he opine as to the cause of the effusion in the plaintiff's knee and did not rule out that such condition was not caused by the accident.

Weiland stated he saw the plaintiff on neurological consultation on behalf of the defendant on November 19, 2009. Although Weiland conducted range of motion evaluations of the plaintiff's cervical, thoracic and lumbar spine, he did not state the method he used to obtain the range of motion values he reported (see, ***Vomero et al v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Supreme Court of New York, Nassau County 2008]***; Martin et al v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2nd Dept 2000]). Weiland stated normal range of motion values with variable ranges which leaves it to this Court to speculate under what circumstances the variable ranges were applicable. Further, many of the normal range of motion values used to compare his findings differ from those values set forth by Westerband, also leaving it to this Court to speculate as to which values are correct.

The defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendants' physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident, ***Blanchard v Wilcox,*** 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]).

Here, the moving parties have failed to meet the prima facie burden of showing that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2nd Dept 2009]; ***Kelly v County of Suffolk***, 62 AD3d 837, 878 NYS2d 636 [2nd Dept 2009]); and do not

exclude the possibility that the plaintiff suffered a serious injury in the accident (*see*, ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]). To prevail on the motion for summary judgment dismissing the complaint, the defendants were required to make a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see,* ***Toure v Avis Renta A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865 [2000]; ***Gaddy v Eyler,*** 79 NY2d 955, 582 NYS2d 990 [1992]. Here, the defendants failed to satisfy that burden of establishing, prima facie, that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law §5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 33 AD3d 737, 822 NYS2d 766 [2nd Dept 2006]; *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).

Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury", the Court need not consider whether the opposing papers are sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2nd Dept 2008]); ***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]***; Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motion (001) for summary judgment dismissing the complaint because the plaintiff did not sustain a serious injury is denied.

Dated: October 5, 2010

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**