SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

MG

GREGORY WARING,

Plaintiff,

-against-

METROPOLITAN SUBURBAN BUS AUTHORITY, MTA LONG ISLAND BUS and TERENCE THOMAS,

Defendants.

Motion Sequence #2
Submitted September 14, 2010
XXX

INDEX NO: 21174/08

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....1-13
Affs in Opposition.....14-17
Affs in Reply.....18&19
Memorandum of Law.....20

Motion by defendants, Metropolitan Suburban Bus Authority, MTA Long Island Bus and Terence Thomas (collectively referred to herein as the "MTA"), for an order, granting summary judgment in their favor dismissing plaintiff's complaint on the grounds that Gregory Waring's injuries do not satisfy the "serious injury" threshold as defined in Insurance Law § 5104(a) and required by Insurance Law §5102(d) is granted. The plaintiff's complaint is dismissed.

This in an action to recover money damages for serious personal injury allegedly sustained as the result of defendants' negligence which arises from an occurrence that

took place on July 4, 2008 at approximately 2:45 p.m. while plaintiff, Gregory Waring ("Waring") was a passenger on an MTA-Long Island Bus that was being operated by the defendant, Terence Thomas. Waring claims that he fell from his seat inside the bus when the bus' brakes were applied as the bus was turning from Merrick Road into the Freeport Station of the Long Island Rail Road. Plaintiff does not allege that there was any contact between the bus and another vehicle or object.

Following this occurrence, plaintiff was examined at South Nassau Communities Hospital on the date of the accident and was released the same day.

At his Public Authority Hearing ("PAH") and at his examination before trial ("EBT"), Waring stated that he was involved in prior and subsequent accidents including a motor vehicle accident in 2000 where he injured his back and neck and treated for a year and a half with a chiropractor. Waring also admitted that he was involved in a bicycle accident that occurred in 2001 that resulted in hip injury that required medical treatment. Waring acknowledged that following the accident, he also had arthroscopic knee surgery in December, 2008 that ultimately improved the condition of his knee.

At the time of the subject occurrence, the 27-year old plaintiff was neither employed nor a student. He states in his bill of particulars that he was neither confined to his bed nor to his home as a result of this accident. At his EBT, plaintiff testified that as a result of this accident, he is no longer able to take long walks or have sexual relations as often as he was able to prior to the subject accident. In addition, he confirmed that the daily activities before the accident have not changed in any way subsequent to this occurrence. He stated that there is nothing that he could not do before that he cannot do now.

In his bill of particulars, plaintiff alleges, that he sustained disc bulges at the C3-4 and C4-5 level causing impinging on the neural canal; straightening of the cervical spine; muscle spasms; derangement; post traumatic cephalgia; bilateral trapezius pain with a tightness sensation; hypoesthesia on the right at dermatome level of C6 to T1; cervico-brachial syndrome; central herniations at the L1-2 level impinging on the neural canal; right foraminal herniation at the L2-3 level impinging on the neural canal; right knee joint effusion; right knee diffuse tenderness over the articular cartilage at the medial and lateral condyle; pain at the medial and lateral joint line; right shoulder tendinosis; tendinopathy; tenderness to palpation at the bilateral trapezius muscles; contusion; and bilateral trapezius muscle myofascial pain syndrome. Plaintiff claims in his bill of particulars that he is not totally disabled and is only permanently partially disabled.

Plaintiff asserts that his injuries fall within the following five categories of the serious injury statute: to wit, significant disfigurement; 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; and 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.

Initially, it must be noted that plaintiff has failed to allege and claim that he has sustained a "total loss of use" of a body organ, member, function or system, therefore, his injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v Bangs Ambulance, Inc.,* 96 NY2d 295). Similarly, plaintiff's claims of serious injury

under the 90/180 category of Insurance Law § 5102(d) is contradicted by his own testimony wherein he states that he was not confined to his bed or home as a result of this accident and that he is not curtailed in his usual activities "to a great extent rather than some slight curtailment" (*Licari v Elliott*, 51 NY2d 230; *see also Sands v Stark*, 299 AD2d 642). According to his own sworn testimony, other than being unable to take long walks, there is nothing that he cannot do. Thus the plaintiff has failed to sustain his 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion (*Joseph v Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Plaintiff's claim that his injuries fall within the "significant disfigurement" category must be dismissed. The standard by which significant disfigurement is to be determined within the meaning of the statute is whether a reasonable person would view the condition as unattractive, objectionable, or as the subject of pity or scorn (see, *Tugman v PJC Sanitation Service, Inc.*, 23 AD3d 457; *Sirmans v Mannah*, 300 AD2d 465). A disfigurement may be considered "significant" and thus constitute a "serious injury" if a reasonable person viewing the injured party's body in its altered state would regard the condition as unattractive, objectionable, or a subject of pity or scorn (*Spevak v Spevak*, 213 AD2d 622). In the absence of any claim to that effect in his bill of particulars or his deposition and/or the PAH hearing referencing any "unattractive, objectionable" condition, it is clear that the plaintiff has failed to sustain his claim that his alleged injuries left his body in an altered state that is a "subject of pity or scorn."

Thus, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, "permanent consequential limitation of use of a body organ or member"; and, "significant limitation of use of a body function or system."

In order to establish the existence of a significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v Eyler*, 79 NY2d 955; *Scheer v Koubeck*, 70 NY2d 678; *Licari v Elliot*, *supra*). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*id.*; *see also Grossman v Wright*, 268 AD2d 79, 83).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v Avis Rent A Car Systems, Inc.,* 98 NY2d 345). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*id.*).

In support of this motion, the defendants submit, *inter alia*, the un-notarized report of Wayne, P. Wagner, M.S., D.C., a chiropractor; the unsworn, unaffirmed x-ray report of plaintiff's right knee and shoulder dated July 12, 2008; the affirmed to report dated September 24, 2008 of Dr. Francisco H. Santiago, M.D. who performed a physical medicine and rehabilitation examination of the plaintiff on behalf of defendants; the affirmed to report dated September 30, 2008 of Dr. Edward M. Weiland, MD, a Board Certified Neurologist who performed a neurological examination of the plaintiff; the affirmed to report of Dr.

Salvatore Corso, MD, an orthopedist who performed an orthopedic examination of the plaintiff; four separate affirmed to reports of Dr. Robert Tantleff, MD, a radiologist who performed a radiology review of the MRI of plaintiff's cervical spine, lumbar spine, right shoulder and right knee on behalf of defendants; the affirmed to report dated August 13, 2009 of Dr. Julio V. Westerband, MD, an orthopedist who performed an orthopedic evaluation of the plaintiff on behalf of defendants; and, the affirmed to report dated August 13, 2009, of Dr. Charles Bagley, MD, a neurologist who performed a neurological evaluation of the plaintiff on behalf of defendants.

It is noted at the outset that the unsworn un-notarized report of Wayne, P. Wagner, M.S., D.C., is without any probative value and will not be considered by this Court in support of defendants' motion. Mr. Wagner's attempt to affirm the contents of his reports concerning the plaintiff is insufficient. Pursuant to CPLR 2106, since he is a chiropractor, he can not avail himself of that statute to affirm the contents of his reports; for a chiropractor, only an affidavit containing the requisite findings will suffice (CPLR 2106; *see also Pichardo v Blum,* 267 AD2d 441).

Similarly, the unsworn, unaffirmed x-ray report of plaintiff's right knee and shoulder dated July 12, 2008 as well as the four separate affirmed to reports of Dr. Robert Tantleff, MD, a radiologist who performed a radiology review of the MRI of plaintiff's cervical spine, lumbar spine, right shoulder and right knee are also inadmissible. While unlike the x-ray report, the radiologist's reports are affirmed, all reports, x-ray and radiologist's reports alike, do not constitute competent medical evidence herein. While defendants' are clearly permitted to rely upon plaintiff's unsworn, unaffirmed x-ray report in support of their *prima facie* showing of entitlement to judgment as a matter of law (albeit at the risk of permitting

the plaintiff to do the same in opposition to defendants' *prima facie* showing) (*Gonzalez v Vasquez*, 301 AD2d 438), said report, like Dr. Tantleff's reports do not constitute competent medical evidence. It is unclear from both the x-ray and the radiologist's reports as to whether the respective physicians signing off on the reports had the x-rays and MRIs taken under their supervision and thereafter read the x-ray and MRI scans or whether the physicians merely reviewed plaintiff's "x-rays" and "MRIs." In either case, said reports are incompetent and inadmissible.

It is well settled that in order to constitute competent medical evidence, a radiologist is required to have the x-ray/MRI taken under his or her supervision and he or she also has to be the physician to read the x-ray/MRI (*Fiorillo v Arriaza,* 24 Misc.3d 1215(A) [Sup. Ct. Nassau 2007];see also *Sayas v Merrick Transportation*, 23 AD3d 367). Under these circumstances, while the radiologist need not pair the findings of the x-ray/MRI films with a physical examination, he or she, as the radiologist performing the x-ray/MRI, must nevertheless also report an opinion as to the causality of the findings (*Collins v Stone*, 8 AD3d 321; *Betheil-Spitz v Linares*, 276 AD2d 732). In this case, there is no indication in the report that the doctors directed the x-ray/MRIs of the plaintiff. In any event, both physicians fail to report an opinion as to the causality of their findings.

X-ray/MRI reports may also be admissible if another radiologist, i.e., not the radiologist who performs the x-ray/MRI scan, avers that he or she personally reviewed either the actual x-rays and/or MRI films or the sworn x-ray and/or MRI reports of the prescribing radiologist, rather than just the unsworn x-ray/MRI reports of another physician (*Porto v Blum*, 39 AD3d 614; *Beyel v Console*, 25 AD3d 636; *Dioguardi v Weiner*, 288 AD2d 253). If, however, another physician avers that he personally reviewed the

prescribing radiologist's sworn reports (not the actual x-ray and MRI films), then in order to constitute competent medical evidence, that physician must also pair up his findings with a recent physical examination (*Silkowski v Alvarez*, 19 AD3d 476). In this case, as neither physician avers that he read either the actual x-ray/MRI films or the sworn x-ray/MRI reports of another radiologist, their reports will not be considered by this Court in support of defendants' motion for summary judgment.

Nevertheless, based upon the defendants' remaining proof, this Court finds that defendants have established their *prima facie* entitlement to judgment as a matter of law. Dr. Santiago's area of expertise is "Physical Medicine and Rehabilitation." Based upon his examination of the plaintiff on September 24, 2008, which included objective range of motion testing wherein he compared the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system, his diagnosis of the plaintiff was that of resolved cervical sprain/strain, resolved right shoulder sprain/strain; resolved lumbosacral sprain/strain and resolved right knee sprain/strain. In that regard, it cannot be overlooked that sprains/strains are not serious injuries within the meaning of Insurance Law §5102(d) (*Washington v Cross*, 48 AD3d 457; *Hasner v Budnik*, 35 AD3d 366). Dr. Santiago's diagnoses of the plaintiff with resolved sprains, and his conclusion that the plaintiff does not require further physical medicine treatments including physical therapy, and can perform his activities of daily living and seek gainful employment with no physical restrictions, establishes defendants' *prima facie* burden of showing that the plaintiff's alleged injuries do not satisfy the "permanent consequential limitation of use of a body function or system" or "significant limitation of use of a body organ or member"

categories of Insurance Law §5102(d) (see *Franchini v Palmieri*, 1 NY3d 536; see *also Luciano v Luchsinger*, 46 AD3d 634).

Similarly, the neurological examination conducted by Dr. Weiland on September 30, 2008, just 86 days after the subject accident, reveals that the plaintiff has absolutely no limited range of motion. After extensive medical testing, including objective range of motion testing, Dr. Weiland's diagnosis was also that of: resolved cervical sprain/strain; resolved thoracic sprain/strain; and resolved lumbosacral sprain/strain. Dr. Weiland opined that this was a normal neurologic examination and that the plaintiff is able to perform his activities of daily living without restrictions. The fact that within the first 90 days after the accident, an independent neurologist was able to determine that the plaintiff no longer demonstrated any impairment from the subject accident is significant and further helps establish defendants' *prima* facie entitlement to judgment as a matter of law.

In fact, Dr. Corso who performed an orthopedic examination of the plaintiff on September 30, 2008, also just 86 days after the subject accident, also found that the plaintiff had full range of motion in both the cervical and lumbar spine, as well as the plaintiff's right shoulder and right knee. Dr. Corso also diagnosed the plaintiff with a resolved cervical sprain, resolved right shoulder contusion, resolved lumbar sprain, and resolved right knee contusion. Dr. Corso also found that the plaintiff did not need any further orthopedic treatment or physical therapy and that he could perform his normal activities of daily living without restrictions.

Finally, the orthopedic examination by Dr. Julio V. Westerband and the neurological examination by Dr. Charles Bagley also help establish that the plaintiff did not sustain a serious injury. Specifically, Dr. Westerband's examination demonstrated that the plaintiff

had full range of motion in his cervical and lumbar spines with no muscle spasm or tenderness in his back. Plaintiff's shoulders and knees did not have any swelling, effusion, eythema or crepitus and both, the shoulders and the knees, had full range of motion as well. Dr. Westerband noted that his examination of the right knee revealed "arthroscopic surgical portals" but his ultimate conclusions were that of: resolved cervical spine sprain/strain; resolved lumbar spine sprain/strain; resolved right shoulder sprain/strain; and status post right knee arthroscopic surgery. Clearly, Dr. Westerband's report establishes by objective medical evidence that the plaintiff had no restrictions to his cervical spine, lumbar spine, right shoulder or right knee and that he requires no further medical treatment or testing concerning any injuries sustained by the plaintiff.

Similarly, Dr. Bagley's examination confirms that the plaintiff had full range of motion in his cervical and lumbar spine with no muscle spasms or tenderness in either area of his back. Overall, Dr. Bagley found that this was a normal neurological examination and he opined that the plaintiff exhibited no objective evidence of a neurological disability and that the plaintiff required no further medical treatment.

Based upon the foregoing, this Court finds that the defendants have satisfied their *prima facie* burden of judgment as a matter of law (*Franchini v Palmieri*, *supra*; see *also Luciano v Luchsinger*, *supra*). Having made a *prima facie* showing that the injured plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v Perez,* 4 NY3d 566; *see also Grossman v Wright,* supra at p. 84).

In opposition, plaintiff submits the unsworn, un-notarized report of chiropractor, Wayne, P. Wagner, M.S., D.C., which, for the reasons stated above, is without any probative value and will not be considered by this Court (CPLR 2106). Plaintiff also relies upon the unsworn, unaffirmed MRI reports of plaintiff's right knee, cervical spine, lumbar spine and right shoulder signed by Dr. Mark Shapiro, MD. Again, inasmuch as said reports do not indicate whether Dr. Shapiro had the MRI scans performed under his supervision or whether he read the actual MRI films or the sworn reports of another physician, said MRI reports do not constitute admissible evidence herein (*Sayas v Merrick Transportation*, *supra*; *Dioguardi v Weiner*, *supra*).

Plaintiff's reliance upon the unsworn "Patient Ledger" from Total Wellness and Medical Health is equally inadmissible and will not be considered by this Court in opposition to defendants' *prima facie* entitlement to judgment as a matter of law. Said billing ledger is neither sworn to as accurate by anyone, physician or not, and has not been established to qualify under any hearsay exception.

In opposition, plaintiff also submits a letter from his own attorney encouraging him to speak to his physicians regarding medical treatment and billing options. Clearly, this does not and cannot create triable issues of fact on this motion.

Plaintiff also attempts to submit the unsworn operative report of Dr. Peter Langan, M.D. Not only is plaintiff precluded from relying upon unsworn medical evidence to defeat defendants' summary judgment motion (*see Pagano v Kingsbury*, 182 AD2d 268), but this Court cannot overlook the fact the report is not signed in the first place.

Similarly, plaintiff's reliance upon the affirmed to report of Dr. Leon Bernstein, MD, dated July 15, 2010 is equally misplaced. First, it is noted that Dr. Bernstein's report does

not comply with CPLR 2106 which requires a physician's statements to be "affirmed to be true under the penalties of perjury." Here, Dr. Bernstein's submissions, wherein he "submit[s] this report as being accurate to the best of my knowledge" falls short of meeting the requirements of CPLR 2106. Moreover, Dr. Bernstein's report wherein he states that he first examined the plaintiff on July 14, 2010 is inadmissible because not only is it based upon an examination of the plaintiff made more than two years after the accident, but it is also clearly offered solely for the purpose of opposing defendants' summary judgment motion made on April 23, 2010 (*Vereczkey v Sheik*, 57 AD3d 527; *Soldano v Bayport-Blue Point Union Free School Dist.*, 29 AD3d 891).

Plaintiff's sole remaining proof, while admissible and competent, nevertheless fails to present a triable issue of fact as to whether he sustained a serious injury. In opposition, plaintiff submits the affirmation of Dr. David Khanan, MD who first examined him on July 9, 2008, merely five days after the accident.

However, Dr. Khanan's failure to provide any explanation of how he can distinguish the plaintiff's limited range of motion as being caused by the subject accident rather than the plaintiff's two prior accidents, renders Dr. Khanan's findings as mere speculation and his report incompetent (*Bell v Ramean*, 29 AD3d 839). Where plaintiff has admittedly sustained injuries as a result of accidents or incidents that preceded the subject accident giving rise to the litigation, plaintiff's expert is required to adequately address how plaintiff's current medical problems, in light of his past medical history, are causally related to the subject accident (*Legendre v Bao*, 29 AD3d 645). This he failed to do.

Accordingly, in light of plaintiff's failure to raise any triable issue of fact, defendants' motion for summary judgment dismissal of plaintiff's complaint is granted.

Settle judgment on notice.

Dated: November 19, 2010

UTE WOLFF LALLY, J.S.C.

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