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SHORT FORM ORDER

INDEX No. 08-36696
CAL. No. 10-00830MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 09-09-10
ADJ. DATE 11-15-10
Mot. Seq. # 001 - MG; CASE DISP

JAN SAKOWSKI,

Plaintiff,

- against -

AURORA PANDOLFO and ZESEAN QURAISHI,

Defendant.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 20 ; Replying Affidavits and supporting papers 21 - 22 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted.

The instant action arises from a motor vehicle accident which occurred on April 2, 2007 at the intersection of North Erie Avenue and Frank Street in the Town of Babylon, New York. The accident purportedly occurred when a vehicle owned by defendant Aurora Pandolfo and operated by defendant Zesean Quraishi collided with the plaintiff's vehicle. The plaintiff alleges that he sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, by way of the bill of particulars he alleges he sustained serious and permanent injuries including herniated discs at C3-4, C4-5, C5-6, C6-7 and L5-S1, cervical spine sprain, aggravation and/or exacerbation of previously asymptomatic degenerative disc disease of the lumbar spine, cerebral concussion, headaches and vertigo. He alleges that he received emergency room treatment on April 3, 2007, remained confined to bed and home until April 4, 2007, and was incapacitated from employment from April 2, 2007 through April 4, 2007. He

alleges that he was totally disabled from April 2, 2007 through April 4, 2007 and remains partially disabled to date.

The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

A "serious injury" is defined as 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 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]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008] *affd* 12 NY3d 750, 876 NYS2d 700 [2009]).

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 demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant may satisfy this burden by submitting, among other things, the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2006]). Once this showing has been made the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d dept 2000]; ***Pagano v Kingsbury***, *supra*; *see also*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of their motion for summary judgment, the defendants submit, *inter alia*, the plaintiff's emergency room records, the affirmed report of Michael J. Katz, M.D., the affirmed MRI reports of Alan B. Greenfield, M.D., and the plaintiff's deposition testimony. The plaintiff's emergency room records document, *inter alia*, that immediately following the accident the plaintiff was diagnosed with a minor head injury and a neck strain.

Dr. Katz avers that he examined the plaintiff on March 2, 2010. Upon examination of the plaintiff's cervical spine he found no tenderness or paravertebral muscle spasm. He performed Adson's test and obtained negative results. He measured the range of motion of the plaintiff's cervical spine, compared it to normal values, and found it to be normal in all respects. Upon examination of the plaintiff's thoracolumbar spine, Dr. Katz found no paravertebral muscle spasm. He performed straight leg raising test, Babinski's test and Patrick's test and obtained negative results. He measured the range of motion of the plaintiff's thoracolumbar spine, compared it to normal values, and found it to be normal in all respects. Upon examination of the plaintiff's right and left shoulder, Dr. Katz found no swelling and no joint line tenderness. He found no dislocation, clicking or grating with movement. The apprehension test was negative and there was no impingement. He measured the range of motion of the plaintiff's shoulders, compared them to normal values, and found them to be normal. Upon examination of the plaintiff's right and left knee, Dr. Katz found no swelling, effusion, or joint line tenderness. He performed Lachman's test and obtained negative results for anterior/posterior instability. He performed patellar apprehension test and obtained negative results. He found the knees stable to varus and valgus stress. He performed the pivot shift test, the posterior drawer sign, and the posterior sag sign and obtained negative results. He measured the range of motion of the plaintiff's knees, compared them to normal values, and found them to be normal in all respects. Dr. Katz concluded that the plaintiff sustained a cervical strain, thoracolumbosacral strain, bilateral shoulder contusions and bilateral knee contusions, all of which had resolved. He found that the plaintiff showed no signs or symptoms of permanence relative to the musculoskeletal system, was not currently disabled, was capable of gainful employment as a carpenter in a demanding capacity without restrictions, and was capable of his pre-loss activities of daily living.

Dr. Greenfield affirms that he reviewed MRIs performed on the plaintiff's lumbar spine dated April 26, 2007 and May 14, 2007 and reviewed an MRI performed on the plaintiff's cervical spine dated May 14, 2007. With respect to the lumbar spine MRI performed on April 26, 2007, Dr. Greenfield found that it showed, *inter alia*, normal lordosis, multilevel degenerative bone spurs with suspected degenerative facet arthropathy from L4 through S2. He concludes that these findings were clearly longstanding, degenerative in origin and unrelated to the accident. He states that there was no evidence of fracture or other abnormality which could be attributed to the subject accident.

With respect to the lumbar spine MRI performed on May 14, 2007, Dr. Greenfield found that it showed a normal lordosis, diffuse degenerative disc disease which was greatest at L3-4 and L4-5, and degenerative bony osteophytic ridging and degenerative disc bulging from L3 through S1 with degenerative facet arthropathy at L5-S1 greater than L4-5 on both sides. He concludes that these findings are clearly longstanding, degenerative in origin, and unrelated to the accident. Dr. Greenfield further notes a small coexistent central disc herniation at L5-S1 seen on the background of degenerative disc disease, degenerative disc bulging, and degenerative bony osteophytic ridging with degenerative facet arthropathy. He states that this can be explained on the basis of longstanding degenerative discopathy, culminating in degenerative disc herniation at this level, and cannot be attributed to the subject accident. In summary, Dr. Greenfield concludes that there were no findings on this exam which can be attributed to the subject accident.

With respect to the cervical spine MRI performed on May 14, 2007, Dr. Greenfield finds that it showed the presence of diffuse degenerative disc disease at all levels with associated multilevel degenerative bony osteophytic ridging and degenerative disc bulging. He opined that these findings were clearly longstanding, degenerative in origin, and could not be attributed to the subject accident. Dr. Greenfield further found multilevel coexistence central disc herniations at C3-4, C5-6 and C6-7. He states that these can be explained on the basis of the longstanding degenerative disc disease, culminating in degenerative disc herniations and that they cannot be attributed to the subject accident. In addition, he finds the diffusely narrowed spinal canal, compounded by the disc findings in C3-4 represent a congenital developmental finding existing over a period of years and is unrelated to the subject accident. In summary, Dr. Greenfield concludes that there were no findings on this examination which can be attributed to the subject accident.

During his deposition, the plaintiff testified that he hit his head on the steering wheel during the accident. Immediately following the accident he went to the emergency room and complained of pain in his neck and back and dizziness. He was prescribed medication and discharged. He next went to see his primary care physician two days later complaining of neck and back pain. The primary care physician referred him to a chiropractor and acupuncturist. The same day he began treating at Duke Acupuncture and Copiague Chiropractic. He received chiropractic care and acupuncture at the facility three times a week until July. From July to present, he continues to receive chiropractic care once a week. The chiropractor referred him for MRIs and told him that the MRI images showed damage to the vertebras in his neck and to one disc in his back. The chiropractor also referred him to a neurologist, Dr. Elfikey. The plaintiff testified that he saw Dr. Elfikey immediately following the accident and was given injections in his neck and spine. He treated with Dr. Elfikey on four occasions and was given injections in his neck and spine on each occasion. The plaintiff testified that he did not sustain any prior injuries to the parts of his body injured in the subject accident. As a result of the accident he suffers pain in his right leg and right arm. He also suffers intermittent pain in his neck and back. He can no longer cut grass, sleep, walk, and have sexual relations with his wife. The plaintiff testified that the work he performs as a carpenter is also lighter because he does not have as much power and energy as he did prior. The plaintiff further testified that he missed two days of work as a result of the accident.

The evidence submitted established the defendants *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating 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* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, *supra*; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2010]; ***Euvino v Rauchbauer***, 71 AD3d 820, 897 NYS2d 196 [2010]; ***Casella v New York City Transit Auth.***, 14 AD3d 585, 787 NYS2d 883 [2005]; ***Hodges v Jones***, 238 AD2d 962, 661 NYS2d 159 [1997]; ***Pagano v Kingsbury***, *supra*). In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether he sustained such an injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra* at 350). The plaintiff failed to meet this burden.

In opposition to the motion, the plaintiff relies on the affirmed reports of Ahmed Elfiky dated April 18, 2007, August 8, 2007, April 1, 2009 and October 21, 2009, the certified treatment records of the Copiague Chiropractic Office and Rehabilitation Center, the affidavit and certified acupuncture records and reports of Kepin Du, L.Ac., the affirmed MRI reports of David Panasci, M.D., and his own affidavit and deposition testimony. This evidence is insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury. Significantly, the evidence does not include any objective medical findings based on a recent examination of the plaintiff (*see* ***Jean v Labin-Natochenny***, 77 AD3d 623, 909 NYS2d 103 [2d Dept 2010]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Clarke v Delacruz***, 73 AD3d 965, 900 NYS2d 669 [2d Dept 2010]; ***Kin Chong Ku v Baldwin-Bell***, 61 AD3d 938, 880 NYS2d 76 [2d Dept 2009]; ***Ciancio v Nolan***, 65 AD3d 1273, 885 NYS2d 767 [2d Dept 2009]). While the plaintiff submits medical evidence indicating that he suffered from, *inter alia*, herniated and bulging discs, those findings are not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Simanovskiy v Barbaro***, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; ***Ciancio v Nolan***, *supra*; ***Caraballo v Kim***, 63 AD3d 976, 882 NYS2d 211 [2d Dept 2009]; ***Sealy v Riteway-1, Inc.***, 54 AD3d 1018, 865 NYS2d 129 [2d Dept 2008]; ***Kilakos v Mascera***, 53 AD3d 527, 862 NYS2d 529 [2d Dept 2008]). Moreover, the plaintiff failed to submit evidence addressing the conclusions of the defendants' expert, that these injuries were in fact longstanding and degenerative and not causally related to the subject accident (*see* ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]; ***Larson v Delgado***, 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]; ***Rodriguez v Grant***, 71 AD3d 659, 896 NYS2d 143 [2d Dept 2010]). The plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*see* ***Toure v Avis Rent a Car Sys.***, *supra*; ***Maffei v Santiago***, 63 AD3d 1011, 886 NYS2d 29 [2d Dept 2009]; ***Joseph v A & H Livery***, 58 AD3d 688, 871 NYS2d 663 [2d Dept 2009]; ***Kauderer v Penta***, 261 A.D.2d 365, 689 NYS2d 190 [2d Dept 1999]).

Lastly, the plaintiff failed to submit any competent medical evidence that the injuries he allegedly sustained in the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*see* ***Clarke v Delacruz***, *supra*; ***Ciancio v Nolan***, *supra*; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]).

Based on the foregoing, the motion by the defendants for summary judgment dismissing the complaint is granted.

Dated: 1/20/11

THOMAS F. WHELAN, J.S.C.