SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MICHAEL ROTHSTEIN,

Plaintiff,

-against-

FAROQUE HARIS,

Defendant.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 11316/09
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

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The defendant Faroque Haris moves for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint against him on the grounds that plaintiff did not sustain a serious injury as defined by Insurance Law §5102(d). The plaintiff cross-moves for an order pursuant to CPLR §3212 granting him summary judgment on the issue of liability.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff in a motor vehicle accident on June 24, 2006 at approximately 8:45 a.m. The accident occurred at Hill Avenue at its intersection with Hempstead Turnpike, Hempstead, New York.

Plaintiff alleges that he was stopped at a red light when the vehicle owned and operated by defendant Haris rear-ended plaintiff's vehicle. The police accident report states that "motor vehicle #1 [Haris] in collision with motor vehicle #2 [Rothstein]."

In his bill of particulars, plaintiff alleges that he sustained the following injuries:

subligamentous central posterior disc herniation at C4-5
subligamentous central posterior disc hernation at C5-6
impinging on the anterior aspect of the spinal canal
posterior lumbar herniation at L4-5
straightening of the lumbar curvature

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

In support thereof, defendant relies upon, *inter alia*, plaintiff's deposition testimony and an affirmed medical report of Salvatore Corso, M.D. At his examination-before-trial, plaintiff testified to his inability to perform activities due to his injuries sustained in the accident. Specifically, plaintiff was physically restricted and not able to swim, mountain bike and exercise. (Plaintiff's EBT pgs. 66, 68 and 69).

On June 8, 2010, Dr. Corso performed an independent orthopedic evaluation of plaintiff. Dr. Corso's examination of the cervical spine revealed "maintenance of the normal cervical lordosis. Range of motion reveals flexion to 50 degrees (50 normal), extension to 45 degrees (45 normal), right and left lateral bending to 45 degrees (45 normal) and right and left rotation to 80 degrees (80 normal). There is right and left sided paracervical tenderness. There is no spasm noted upon palpation. Compression and Spurling tests are negative. Deep tendon reflexes are 2+ and equal in the upper extremities. Upper extremity strength is 5/5. There is no noted atrophy. Sensation is intact."

Dr. Corso's examination of the thoracolumbar spine revealed "maintenance of the normal lumbar lordosis. Range of motion of flexion is to 90 degrees (90 degrees normal), extension to 30 degrees (30 degrees normal), right and left lateral bending to 30 degrees (30 degrees normal) and right and left rotation to 30 degrees (30 degrees normal). Straight leg raise testing is negative, performed to 90 degrees bilaterally in the sitting position. There is no paralumbar tenderness. There is no spasm

noted upon palpation. Lasegue and Fabere tests were negative. Deep tendon reflexes are 2+ and equal. Lower extremity strength is 5/5. Sensation is intact. There are no signs of lower extremity atrophy."

Dr. Corso's impression was: cervical sprain, resolved; lumbar sprain, resolved.

Finally, Dr. Corso opined that plaintiff has "no orthopedic disability at this time and that there is no residual or permanency."

As a proponent of the summary judgment motion, defendant had the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories. (*See Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]). 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 plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. (*Browdame v Candura*, 25 AD3d 747, 748 [2nd Dept 2006]).

The defendants established their *prima facie* entitlement to judgment as a matter of law by submitting, *inter alia*, the affirmed medical reports of Dr. Corso who examined plaintiff in 2010 and found no significant limitations in the ranges of motion with respect to any of his claimed injuries, and no other serious injury within the meaning of Insurance Law § 5102(d) causally related to the collision (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

The burden now shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that she sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious. *Flores v Leslie*, 27 AD3d 220, 221 [1st Dept 2006].

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury

that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys., Inc.*, *supra*; *Scheer v Kioubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth*, 18 AD3d 278, 279 [1st Dept 2005].

Plaintiff must come forth with objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 AD3d 978 [2nd Dept 2010]; *Cornelius v Cintas Corp.*, 50 AD3d 1085 [2nd Dept 2008]; *Moore v Edison,* 25 AD3d 672 [2nd Dept 2008]; *Sharma v Diaz*, 48 AD3d 442 [2nd Dept 2007]; *Amato v Fast Repair, Inc.*, 42 AD3d 477 [2nd Dept 2007]) and upon medical proof contemporaneous with the subject accident. *(Perl v Meher*, 74 AD3d 930 [2nd Dept 2010]; *Ferraro v Ridge Car Service,* 49 AD3d 498 [2nd Dept 2008]*; Manning v Tejeda,* 38 AD3d 622 [2nd Dept 2007]*; Zinger v Zylberberg*, 35 AD3d 851 [2nd Dept 2006]).

Even where there is medical proof, when contributory factors interrupt the chain of causation between the accident and the claimed injury, summary dismissal of the complaint may be appropriate. *Pommells v Perez*, 4 NY3d 566, 572 [2005]. Whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of a body part. *Dufel v Green*, 84 NY2d 795, 798 [1995].

It has been repeatedly held that "[t]he mere existence of herniated or bulging discs, and even radiculopathy, 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" (*Catalano v Kopmann*, 73 AD3d 963 [2nd Dept 2010]; *Vilomar v Castillo*, 73 AD3d 758 [2nd Dept 2010]; *Oritz v Iania Taxi*

Services, Inc., 73 AD3d 721 [2nd Dept 2010]; *Stevens v Sampson*, 72 AD3d 793 [2nd Dept 2010]; *Luizzi-Schwenk v Singh,* 58 AD3d 811, 812 [2nd Dept 2009]).

Moreover, " '[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), despite the existence of an MRI which shows herniated or bulging discs' " (*Johnson v County of Suffolk*, 55 AD3d 875, 877 [2nd Dept 2008], quoting from *Kearse v New York City Transit Authority*, 16 AD3d 45, 49-50 [2nd Dept 2005]).

In opposition to the motion and in support of his cross-motion, plaintiff submits, *inter alia*, the parties' deposition testimony; the police accident report; an "affirmation" of Glenn H. Whitney, dated January 11, 2011, a chiropractor who examined plaintiff on June 29, 2006; an "affirmation" of George Ruggi, D.C., dated January 11, 2011, a chiropractor who examined plaintiff on December 10, 2009; an unaffirmed medical report of John T. Rigney, a radiologist who performed an examination of plaintiff's lumbosacral spine on August 25, 2006; and an unaffirmed medical report of Richard Rizzuti, a radiologist who performed an MRI of plaintiff's cervical spine on or about August 16, 2006.

Contrary to plaintiff's contention, he has not raised a triable issue of fact as to whether he sustained a serious injury as defined by Insurance Law §5102(d).

The affirmations from plaintiff's chiropractors lack probative value as they are not in proper form (CPLR §2106). Moreover, these chiropractors do not set forth any foundation or objective medical basis supporting the conclusions they reached. *Exilus v Nicholas*, 26 AD3d 457 [2nd Dept 2006]; *Vasquez v Basso*, 27 AD3d 728 [2nd Dept 2006]; *Franchini v Palmieri*, 1 NY3d 536 [2003]; *Spanos v Harrison,* 67 AD3d 893 [2nd Dept 2009].

The remaining submissions of plaintiff, which consisted of unaffirmed magnetic resonance imaging reports of plaintiff's lumbosacral spine and cervical spine are also without probative value as they are unaffirmed. *Grasso v Angerami*, 79 NY2d 813 [1991]; *Husbands v Levine*, 79 AD3d 1098 [2nd Dept. 2010]; *Cohen v A One Products, Inc.*, 34 AD3d 517 [2nd Dept 2006]. They also fail to discuss whether the injuries were causally related to the accident. *Franchini v Palmieri, supra; Taranto v McCaffrey*, 40 AD3d 626 [2nd Dept 2007].

In addition, plaintiff failed to explain or address the prolonged gap in medical treatment.

Finally, plaintiff has not sustained his burden under the 90/180 day category which requires plaintiff to submit objective evidence of a "medically determined injury or enforcement of a non-permanent nature which prevents the injured person from performing substantially all of the natural 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." (Insurance Law § 5102[d]).

"When construing the statutory definition of a 90/180 day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment." (*Thompson v Abbasi*, 15 AD3d 95 [1st Dept 2005]; *Gaddy v Eyler, supra*).

Specifically, plaintiff has no admissible medical reports stating that plaintiff was disabled, unable to work or unable to perform daily activities for the first ninety (90) days out of one hundred eighty (180) days. *Judd Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]. Plaintiff is only able to proffer his own self-serving proof that he missed 3-4 days of work (Par. 10-11 Bill of Particulars); that he couldn't go swimming in the ocean while on a working trip to Mexico (Plaintiff's EBT, p. 66); that

he couldn't go mountain biking anymore; (*Id.* at p. 68) or exercise as frequently as he used to (*Id.* at 69).

In light of our determination, plaintiff's motion for summary judgment on the issue of liability has been rendered moot.

The plaintiff's motion is **denied**.

The Defendant's motion is **granted**. It is hereby

ORDERED, that the plaintiff's Complaint is **dismissed**.

This constitutes the Decision and Order of the Court.

DATED: March 14, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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