Short Form Order

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SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

x

OSNER SOLON,

Plaintiff(s),

-against-

LORENA GONZALEZ,

Defendant(s).

x

Index No. 14177/09

Motion Submitted: 1/21/11
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant moves this Court for an Order granting summary judgment in her favor, and dismissing plaintiff's complaint. Plaintiff opposes the requested relief.

This action arises from a motor vehicle accident that occurred on February 19, 2009. As a result of the accident, plaintiff claims to have suffered multiple injuries, including bulging discs in his lumbar spine and tearing of the lateral meniscus of his left knee. As a result of his injuries, plaintiff underwent knee surgery, and claims that he has limitations in range of motion in those areas, and persistent pain. Defendant asserts that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d).

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v. New York Univ. Med. Center,*** 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Here, the defendant must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident ***(Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). Defendant has failed to meet her burden.

In support of her motion, defendant has submitted the affirmed medical reports of Maria A. DeJesus, M.D., the examining neurologist, Joseph Y. Margulies, M.D., the examining orthopedic surgeon, and Richard A. Heiden, M.D., the examining radiologist. Drs. Margulies and DeJesus each examined plaintiff in June and July 2010, respectively. Dr. DeJesus found no neurological deficits, and concluded that plaintiff's lumbar spine sprain/strain was resolved. Dr. DeJesus deferred evaluation of plaintiff's left shoulder and knees to the orthopedic surgeon.

Dr. Margulies concluded that plaintiff did not suffer from any functional disability at the time of the examination. Specifically, Dr. Margulies found that plaintiff had complete range of motion in both knees. Although acknowledging that plaintiff underwent left knee arthoscopic surgery on May 20, 2009, Dr. Margulies never addressed plaintiff's surgery, which occurred three months after the accident.

In each of their reports, the doctors noted plaintiff's range of motion as compared to "normal" range of motion for various areas of plaintiff's body; however, neither doctor stated by what means or device they measured plaintiff's ranges of motion.[1]

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[1]This Court finds that defendant's reference to ***Nicholson v. Allen***, 62 A.D.3d 766, 879 N.Y.S.2d 164 (2d Dept., 2009) is inapposite to the determination of this motion, as there is no finding or determination stated in that decision which is related to differing norms for orthopedic tests. This Court will not consider the attached medical reports contained in defendant's Exhibit A of her reply papers, as the furnishing of medical reports concerning an individual unrelated to

Furthermore, a comparison of the reports of Drs. Margulies and DeJesus reveal that they utilize different "normal" ranges of motion for flexion and extension of the lumbar and cervical spine areas. Thus, plaintiff's range of motion for the flexion and extension of his cervical spine is "normal" by Dr. Margulies' standard, but deficient by Dr. DeJesus' standard. Conversely, plaintiff's flexion and extension of his lumbar spine is "normal" by Dr. DeJesus' standard, but deficient by Dr. Margulies' standard. These discrepancies, in addition to the fact that it is not known how the doctors measured ranges of motion, render their respective results unsupported by objective tests.

Moreover, upon examination of plaintiff's lumbar spine, Dr. DeJesus actually found a deficiency with respect to plaintiff's ability to perform right and left lateral bending. Approximately two weeks earlier, Dr. Margulies found plaintiff's range of motion in this regard to be normal.[2]

In addition, Drs. Margulies and DeJesus each noted in their respective reports that plaintiff stated that he had missed six months of work due to the accident. Also, plaintiff's Supplemental Bill of Particulars, which was served on defendant approximately one month prior to the aforementioned independent medical examinations, states that plaintiff was incapacitated from work and daily activities for a period of eight months following the accident. Yet, neither doctor related his or her medical findings to this category of serious injury for the period of time immediately following the accident. In view of this deficiency, and considering that plaintiff underwent surgery on his left knee three months after the accident, for this reason as well, defendant has failed to meet her burden (see ***Takaroff v. A.M. USA, Inc.***, 63 A.D.3d 1142, 882 N.Y.S.2d 265 (2d Dept., 2009); ***Greenidge v. Righton Limo, Inc.***, 43 A.D.3d 1109, 841 N.Y.S.2d 791 (2d Dept., 2007).

Dr. Heiden's radiological review of plaintiff's MRI films, which were taken approximately three weeks after the accident, is equally deficient. Specifically with respect to plaintiff's left knee, Dr. Heiden drew contradictory conclusions. He stated that the left knee MRI examination was "entirely normal," and that no post-traumatic abnormalities were identified. Later in the same paragraph, Dr. Heiden wrote, "[t]here are recent or post-traumatic changes seen to the left knee attributable to the 02/19/09 incident." Defendant has failed to explain this discrepancy; however, if Dr. Heiden's statement regarding post-traumatic changes is correct, such a finding may explain plaintiff's need for surgical intervention. In any event, Dr. Heiden did not address the fact that plaintiff underwent left knee arthoscopic surgery on May 20, 2009.

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this case may be a violation of applicable medical privacy acts, e.g. HIPAA.

[2]Both doctors utilized the same "normal" standard range of motion for this function, which they each state to be 30 degrees.

With respect to plaintiff's lumbar spine, Dr. Heiden confirms that the MRI, taken approximately one month after the accident, shows several bulging discs, but Dr. Heiden relies on the fact that the original radiologist saw those same bulging discs as further confirmation that the disc changes are degenerative. Although Dr. Heiden cited a lack of post-traumatic changes to the lumbar spine, his reliance on the fact that another radiologist found the same bulging discs in an MRI taken after the accident is unpersuasive evidence that the bulging discs are evidence of a degenerative process, rather than due to the accident.

Thus, defendant has failed to meet her burden in establishing that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d) (See ***Smith v. Hartman***, 73 A.D.3d 736, 899 N.Y.S.2d 648 (2d Dept., 2010); ***Quiceno v. Mendoza***, 72 A.D.3d 669, 897 N.Y.S.2d 643 [2d Dept., 2010]).

Since the defendant failed to meet her prima facie burden, it is unnecessary to determine whether the plaintiff's papers submitted in opposition were sufficient to raise a triable issue of fact (See ***Levin v. Khan***, 73 A.D.3d 991, 904 N.Y.S.2d 73 (2d Dept., 2010); ***Kjono v. Fenning***, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept., 2010]).

The defendant's motion for summary judgment is denied.

The foregoing constitutes the Order of this Court.

Dated: March 28, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
APR 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE