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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

MATTHEW ALCORN,

Plaintiff(s),

-against-

MOTION DATE: 2/1/11
INDEX NO.: 21732/09
SEQ. NO. 1

WILLIAM FIEGER and VIVIAN A. FIEGER,

Defendant(s)

The defendants' motion, pursuant to CPLR 3212, for summary judgment due to the plaintiff's failure to incur a serious injury within the meaning of Insurance Law §5102(d) is determined as hereinafter provided.

This personal injury action arises out of a March 28, 2009 "rear end" motor vehicle accident that occurred at or near the intersection of Hempstead Turnpike and Glen Curtis Boulevard in Uniondale. Upon the completion of disclosure, the case was certified for trial on September 16, 2010 (McCarty, J.) and on September 24, 2010 a note of issue was filed. The defendants' November 8, 2010 motion is therefore timely (see CPLR 3212[a]).

During a July 27, 2010 deposition (see defendants' Exhibit E), the plaintiff, who was thirty-three (33) years of age at the time of the incident, testified, inter alia, that he drove home after the accident (p.32,L24). He did not visit the hospital. Rather, the following day he retained counsel (p.36,L10) who referred him to a chiropractor, Shawn A. Sosnik, D.C., whom he saw the next day (i.e., 3/30/09) (p.35,L20). The chiropractor examined the plaintiff and began treating him three times a week (p.36,L25; p.37,L21)). In addition, he underwent physical therapy (p.38,L10) and visited an unspecified neurologist (p.42,L14) on three occasions (p.42,L24). Both the physical therapist and neurologist are "within the [chiropractor's] office" (p.38,L10) or "in the same practice" (p.42,L18). In addition, he was referred to a

radiologist, Mark Shapiro, M.D., for May 4, 2009 and June 1, 2009 cervical and lumbar MRI examinations (p.39,L6;p.39,L25) and the chiropractor (Shawn A. Sosnik's 1/24/11 affidavit; see plaintiff's Exhibit C) references an unidentified orthopedist to whom the plaintiff was also referred (para.7).

At the time of the July 27, 2010 deposition, the plaintiff had no scheduled medical appointments apart from his ongoing chiropractic treatment (p.47,L4). Those visits were reduced to twice a week after about a year (p.40,L23). The plaintiff is an Adjunct Professor of Sports Law (p.49,L21) who missed no time from work (p.50,L17). Therefore, no claim for lost earnings is made (p.51,L20). Indeed, the accident had no effect on his employment (p.58,L13). Conversely, although he has no household chores or duties (p.56,L18) with his parents, with whom he resides (p.6,L20), and he does not cook (p.57,L10), the plaintiff's recreational activities were reportedly restricted. More specifically, he was allegedly unable to swim for about six months (p.54,L13) whereas, prior to the accident, he swam five (5) times a week (p.52,L21). Moreover, he likewise stopped his three visits per week (p.53,L12) to the gym for approximately six months (p.55,L2) and thereafter was reduced from utilizing "heavy" (i.e., over 300 pounds) to "maybe 100" pound weights (p.55,L15-p.56,L4). Finally, he was unable to play golf during the summer of 2009 (p.55,L5) and, as of the July 27, 2010 deposition, was allegedly unable to "play a full nine or eighteen holes" (p.56,L7) because of low back pain.

The defendants' motion is premised upon the aforementioned testimony and medical history as well as the August 20, 2010 affirmation of an orthopedist, Michael J. Katz, M.D., (see defendants' Exhibit F) and the August 5, 2010 affirmation of a radiologist, David A. Fisher, M.D. (see defendants' Exhibit G). Dr. Katz avers, inter alia, based upon a contemporaneous examination utilizing objective medical criteria (e.g., a goniometer and Jamar dynameter) that the plaintiff sustained only cervical and lumbar strains with radiculitis, each of which have resolved. Similarly, Dr. Fisher reviewed the plaintiff's May 4, 2009 and June 1, 2009 MRI films and concludes that, while "[t]here is clear evidence of degenerative changes throughout the cervical spine in this 33 year old, most pronounced at the C5/6 level" ... "[t]here are no active disc herniations [and] no radiographic

evidence of recent traumatic or causally related injury".

These affirmations, when coupled with the plaintiff's medical history and testimony, are sufficient to establish a prima facie entitlement to summary judgment as a matter of law by demonstrating that he did not incur a serious injury within the meaning of Insurance Law §5102(d) (see Pommells v Perez, 4 NY3d 566; Toure v Avis Rent A Car Sys., 98 NY2d 345; Albano v Onolfo, 36 AD3d 728). In opposition, the plaintiff has failed to establish a triable issue of fact.

The January 24, 2011 affidavit of the plaintiff's chiropractor, Shawn A. Sosnik, D.C. (see plaintiff's Exhibit C) asserts, inter alia, that on April 3, 2009, approximately a week after the March 28, 2009 accident, his cervical (80% flexion, 75% extension, 94% left rotation, 90% right rotation, 65% left lateral flexion and 92% right lateral flexion) and lumbar (49% flexion, 84% extension, 92% left lateral flexion and 16% right lateral flexion) range of motion was substantially restricted. A year and a half later on December 10, 2010 - despite regular, uninterrupted chiropractic treatment - the plaintiff's cervical (92% flexion, 84% extension, 88% right lateral flexion, 55% left lateral flexion, 94% [left] rotation and 87% right rotation) and lumbar (66% flexion, 80% extension, 80% left lateral flexion and 60% right lateral flexion) was still allegedly severely restricted (see paras. 8-10 and 13-14). However, these enormous purported restrictions in range of motion - which appear to conflict with the plaintiff's alleged ability, inter alia, to work and participate, albeit in a limited fashion, in various recreational activities, are simply reported to have been measured "using a computer" (paras. 8 & 13) without further explanation. No objective medical evidence is proffered which reveals that these restrictions were, inter alia, contemporaneous with the accident (see Rivera v Bushwick Ridgewood Properties, Inc., 63 AD3d 712,713; Leeber v Ward, 55 AD3d 563).

Moreover, the plaintiff's treating chiropractor has failed to address the finding of the defendants' expert radiologist attributing the condition of the plaintiff's cervical and lumbar spine to degenerative changes. This renders the opinion that the condition was caused by trauma speculative (see Albreu v Bushwick Building Products & Supplies, LLC, 43 AD3d 1091, 1092; Phillips v

Zilinsky, 39 AD3d 728,729). In addition, he impermissibly incorporated Dr. Shapiro's findings without reviewing the actual MRI films (see Umanzor v Pineda, 39 AD3d 539,540; Friedman v Uhaul Truck Rental, 216 AD2d 266).

Dr. Shapiro has affirmed the findings of his May 4, 2009 and June 1, 2009 MRI examinations (see plaintiff's Exhibit D), although his affirmations are undated. In any event, he does not proffer an opinion as to causation (see Collins v Stone, 8 AD3d 321; Albano supra at 729) and the mere existence of a herniated or bulging disc 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 (see Umanzor supra at 540; Whitfield-Forbes v Pazmino, 36 AD3d 901).

Finally, the plaintiff's conclusory and self-serving assertions are insufficient to create a triable issue of fact as to whether he was unable to perform substantially all of his normal daily activities for not less than 90 of the first 180 days after the accident (see Doyaga v Teleeba, Inc., 35 AD3d 798; Felix v New York City Trans. Auth., 32 AD3d 527). This is particularly true since he missed no time from work (see Ranford v Tims Tree and Lawn Service, Inc., 71 AD3d 973,974; Saetia v VIP Renovations Corp., 68 AD3d 1092,1093; Richards v Tyson, 64 AD3d 760,761).

Accordingly, the defendants' motion, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint due to his failure to sustain a serious injury as defined by Insurance Law §5102(d) is granted.

Dated: APR 06 2011

A.J.S.C.

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