SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------X

RONALD S. KRANTZ,

Plaintiff(s),

-against-

ATRIUM BUS CO., INC., and CHARLES L. RABBENA,

Defendant(s).

----------X

DCM PART 5

Present :
HON. JUDITH MCMAHON

DECISION AND ORDER

Index No. 101119/2008
Motion No. 002

The following papers numbered 1 to 4 were used on this motion this 29th day of March, 2011:

[002]Notice of Motion [Defendants](Affirmation in Support) …….....	1
Affirmation in Opposition [Plaintiff] …….....	2
Amended Affirmation in Opposition [Plaintiff]	3
Reply Affirmation…….....	4

On April 15, 2005, the plaintiff was involved in a motor vehicle accident with a vehicle owned by defendant Atrium Bus Co., Inc., and operated by defendant Charles L. Rabbena. The accident occured near the intersection of Narrows Road North and Little Clove Road in Staten Island, New York. On or about March 17, 2008, the plaintiff commenced this action for personal injuries. Presently, discovery has been completed and defendants are now moving for summary judgment, pursuant to CPLR § 3212, on the ground that plaintiff's injuries do not constitute a serious injury under New York State Insurance Law § 5102.

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Herrin v Airborne Freight Corp., 301 AD2d 500, 500-501 [2d Dept., 2003]). The party moving for summary judgment bears the initial burden of establishing its right to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]), and in this regard " the evidence is to be viewed in a light most favorable to the party

opposing the motion, giving [it] the benefit of every favorable inference" (Cortale v Educational Testing Serv., 251 AD2d 528, 531 [2d Dept., 1998]). Nevertheless, upon a prima facie showing by the moving party, it is incumbent upon the party opposing the motion to produce "evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d at 324; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

New York Insurance Law § 5102(d) defines "serious injury" as

> 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 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.

Here, the defendants have established their prima facie entitlement to summary judgment as a matter of law by submitting evidence that plaintiff has not sustained a "serious injury" as defined by Insurance Law § 5102(d) (Caraballo v. Kim, 63 AD3d 976, 977-978 [2d Dept., 2009]; Yun v. Barber, 63 AD3d 1140, 1141 [2d Dept., 2009]). Defendants have submitted the medical reports of Drs. Robert J. Orlandi and Sondra J. Pfeffer. Dr. Orliandi opined that plaintiff suffered no permenant or significant limitation as a result of the accident and can perform all of his usual and customary daily acitivites. Dr Pfeffer, in interpreting the MRI results, noted that plaintiff has only minor disc bulging which was also present on an MRI done 4-5 years *before the subject accident*. In addition, plaintiffs only medical treatment allegedly as a result of this accident occurred over four years ago, which consisted of physical therapy for two-three months.

In opposition, the plaintiff has failed to raise a triable issue of fact (Yunatanov v. Stein, 69 AD3d 708, 710 [2d Dept., 2010]). It is essential that this court takes note of the unreasonable delay which plaintiff took in retaining an expert report in opposition to this motion. In an effort to accomodate reasonable requests for an adjourment this court adjourned the matter from its intial hearing date, July 20, 2010, six subsequent times[1] over a period of *nine* months. Upon plaintiff's counsel submitting an "Affirmation in Opposition" without a medical expert in late January, they subsequently requested further time to retain a medical expert and put in amended opposition, which this court graciously permitted, but marked the adjournment final on March 15, 2011. On that date, the medical expert was still not retained and the court gave one last adjourment to March 29, 2011. On March, 29, 2011, the plaintiffs submitted the medical expert report of Dr. David Drucker who examined the plaintiff for *injuries sustained over five years ago*, on March 25, 2011[2].

However, irrespective of plaintiffs attorneys lenghty delays and assurances to this court in retaining an expert, the report still fails to raise a triable issue of fact. Not only does the meager report indicate only a minor reduction in plaintiff's range of motion but it also fails to address plaintiff's prior accident in 1999 (Vidor v. Cavila, 37 AD3d 826, 827 [2d Dept., 2007][stating "[t]he mere existance of a bulding or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations

---

[1]Dates of adjournment are as follows: July 20, 2010, September 14, 2010, October 26, 2010, January 18, 2011, February 15, 2011, March 15, 2011, and March 29, 2011.

[2]The court notes that the case was also adjourned by the Jury Coordinating Judge to accomodate hearing the summary judgment motion on the merits. The case is now marked for "Direct Select" on June 27, 2011.

resulting from the disc injury and its duration"]). The report, dated a mere three days prior to the final adjourn date of the motion, fails to provide any competent medical evidence of the alleged significant limitations (Carabello v. Kim, 63 AD976, 977 [2d Dept., 2009][holding that the doctors recent examination of the plaintiff is insufficent without competent medical evidence]; Rivera v. Bushwick Ridgewood Prop., Inc., 63 Ad3d 712, 713 [2d Dept., 2009]). As a result, this renders the doctors report speculative and insufficent to defeat summary judgment (Yun v. Barber, 63 AD3d 1140, 1141-1142 [2d Dept., 2009][finding plaintiff had failed to raise a triable issue of fact where the doctor's report failed to address the prior injury]; Vidor v. Cavila, 37 AD3d at 826-827 [holding summary judgment is appropriate where the "[t]here is nothing in his affirmation to indicate that he reviewed, or attempted to review, any of the medical records from that prior accident"]).

In addition, the plaintiff also failed to submit competent medical evidence that the injuries he allegedly sustained in the subject accident rendered him unable to perform substantially all of his usual and customary daily activities for not less than 90 days of the first 180 days subsequent to the accident (Garcia v. Lopez, 59 AD3d 593 [2d Dept., 2009]; Sainte-Aime v. Ho, 274 AD2d 569 [2d Dept., 2000][finding that the plaintiffs subjective complaints of her inability to perform her customary activities for 90 out of 180 days following the accident was insufficient to create a triable issue of fact]). Here, the plaintiff testified at his deposition that he was only unable to do gardening and home repairs which does not meet the statutory requirement of 'usual and customary daily activities' under the 90/180 category of Insurance Law § 5102. As a result, the plaintiff has failed to rebut the defendant's prima facie showing of entitlement to summary judgment as a matter of law.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is hereby granted in its entirety, and it is further

ORDERED that the complaint is hereby dismissed, and it is further

ORDERED that the Clerk enter Judgment Accordingly.

Dated: April 6, 2011 E N T E R,

_____
Hon. Judith N. McMahon
Justice of the Supreme Court