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SHORT FORM ORDER

INDEX No. 09-3004
CAL. No. 10-02265MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 1-18-11
ADJ. DATE 4-27-11
Mot. Seq. # 002 - MD

SANTOS R. ROSA,

Plaintiff,

- against -

VIVIAN D. DOYLE,

Defendant.

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 14 -17 ; Replying Affidavits and supporting papers 18 - 19 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendant Vivian D. Doyle pursuant to CPLR §3212 for summary judgment dismissing the complaint because the plaintiff Santos T. Rosa has not sustained a serious injury as defined by Insurance Law §5120(d) is denied.

The plaintiff's complaint seeks damages for personal injuries allegedly sustained in an auto mobile accident on July 25, 2008 on the North Service Road, at or near the intersection with Locust Avenue, Town of Islip, County of Suffolk, New York.

In his bill of particulars, the plaintiff claims that he sustained injuries consisting of disc protrusions at C6-7; disc bulges at C4-5, C5-6; hemangioma at C7; cervical radiculitis; cervical sprain; cervicalgia; left wrist sprain; left lateral epicondylytis; left shoulder sprain, contusion of the left forearm; and post traumatic anxiety.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979], ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (002), the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer and bill of particulars; an unsigned copy of the transcript of the examination before trial of the plaintiff, dated May 21, 2010; the affirmed report, dated July 9, 2010, by Vartkes Khachadurian, M.D. (hereinafter Khachadurian) concerning his independent orthopedic examination of the plaintiff; the affirmed report, dated July 9, 2010, by Mathew M. Chacko, M.D. (hereinafter Chacko) concerning his independent neurological examination of the plaintiff; and a copy of the report of A. Robert Tantleff, M.D. (hereinafter Tantleff),dated October 8, 2010, concerning his independent radiology review of the MRI of the cervical spine conducted on the plaintiff on October 2, 2008.

The plaintiff opposes this motion with, inter alia, the plaintiff's affidavit, dated January 31, 2011, and the certified report by Joseph Leadon, M.D, dated March 2, 2011, stating his findings upon review of the MRI films of the plaintiff's cervical spine, which was conducted on October 2, 2008.

Pursuant to Insurance Law § 5102(d), "'[s]erious injury' means 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 medical 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." The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to state a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v***

Goldstein, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Catatini v Novkovic***, 243 AD2d 252, 651 NYS2d 327 [2nd Dept 1996]; ***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]). The Court determines in the first instance whether a prima facie showing of "serious injury" has been established (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]).

In order to recover under the "permanent loss of use" category, the plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of the plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** (supra).

Upon a review of the defendant's submissions, the Court finds the defendant has failed to establish prima facie entitlement to summary judgment dismissing the plaintiff's complaint because he did not sustain a serious injury within the meaning of Insurance Law §5102(d). The transcript of the plaintiff's examination before trial is unsigned, and, therefore, is not in admissible form to be considered on a motion for summary judgment (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), and it is not accompanied by an affidavit pursuant to CPLR §3116. The defendant's examining physicians have not submitted any of the MRI reports or medical records upon which they based their opinions (see, CPLR §3212), leaving it to this Court to speculate as to the contents of the records and reports.

In searching the record, this Court finds that the MRI report of the plaintiff's cervical spine, submitted by the plaintiff, reveals a broad bulging disc with slight spinal stenosis at C4-5; a broad bulging disc with slight spinal stenosis at C5-6, and a left parcentral disc protrusion with slight spinal stenosis at C6-7. Although Khachadurian conducted an orthopedic examination of the plaintiff, he does not opine as to whether or not the injuries to the plaintiff's cervical spine and left shoulder claimed by the plaintiff were caused by the within accident. Khachadurian does not indicate what the injuries were in the medical records provided to him. He states in a conclusory manner that the plaintiff did not suffer radiculitis or radiculopathy, but does not set forth the examinations he conducted which support that conclusion.

Chacko has not indicated the examinations he performed and simply states that the plaintiff exhibited normal active range of motion of the neck in all directions. Chacko concludes that there is no objective clinical evidence of a neurological sequelae attributable to the accident of July 25, 2008, but he does not state the tests he performed and upon which he bases that conclusory opinion. Nor

does he rule out that the plaintiff's claimed injuries were not causally related to the accident. Chacko does not state his range of motion findings, nor does he indicate the normal range of motion values to which he compared his findings. By failing to compare the unreported findings to the unreported normal range of motion, this Court is left to speculate as to basis of Chacko's conclusion (*see,* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], lv denied 89 NY2d 810, 656 NYS2d 738 [1997]), and as to the actual values for the plaintiff's range of motion (*see,* ***Hypolite v International Logistics Management, Inc.,*** 43 AD3d 461, 842 NYS2d 453 [2nd Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2nd Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2nd Dept 2006]; *see also,* ***Rodriguez v Schickler***, *supra*.

Neither Khachadurian nor Chacko have stated the objective method each used and employed to obtain range of motion measurements of the plaintiffs' cervical spine, such as the goniometer, inclinometer or arthroidal protractor (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2nd Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup. Ct., Nassau County 2008]), leaving it to this Court to speculate as to how they determined such range of motion when examining the plaintiff.

Although Tantleff has stated his opinion concerning his review of the MRI of the plaintiff's cervical spine, the defendant has not provided a copy of that report with the moving papers. Tantleff states that the image quality and detail is extremely variable on the CD-ROM, leaving this court to speculate as to whether the quality and detail was adequate for him to state his opinion with a reasonable degree of medical certainty. Tantleff's report raises a factual issue with the certified report by Joseph Leadon, M.D. Tantleff states that there is no evidence of thecal sac, cord, exiting nerve or nerve root compression, displacement or deviation; no evidence of disc bulge, protrusion, or herniation; and no evidence of central canal, lateral recess or neural foraminal stenosis at any level. Tantleff concludes that the examination depicts normal degenerative changes which are age-appropriate. He has not correlated his conclusion with any clinical findings and impressions. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2nd Dept 2002]). There are factual issues as to whether or not the plaintiff sustained the claimed cervical disc herniations which preclude summary judgment.

Additionally, the plaintiff was not examined during the statutory period of 180 days following the accident, thus rendering the examining physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether he was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident. The defendant's experts, Khachadurian and Chacko, do not comment on the plaintiff's condition during this statutory period (***Lopez v Geraldino,*** 35 AD3d 398, 825 NYS2d 143 [2nd Dept 2006]; ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]; *see*, ***Uddin v Cooper,*** 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006];***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), precluding summary judgment on that issue.

Based upon the foregoing, the defendant has failed to satisfy the burden of establishing prima facie that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 3 AD3d 737, 822 NYS2d 766 [2nd Dept 2006]; *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Since the defendant has failed to establish entitlement to judgment as a matter of law, it is not necessary to consider whether the

plaintiff's papers in opposition to defendant's motion were sufficient to raise a triable issue of fact (*see*, ***Agathe v Tun Chen Wang***, supra; ***Walters v Papanastassiou***, supra).

Accordingly, the defendant's motion (002) for summary judgment on the issue of serious injury is denied.

Dated: JUN 15 2011

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**