SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

FITZGERALD CARELUS,

Plaintiff(s),

ORIGINAL RETURN DATE:06/01/11
SUBMISSION DATE: 07/26/11
INDEX No.: 007922/09

-against-

ACTION #1

MTA BUS COMPANY, ALLAN J. LEWIS and MARK A. CAMERON,

MOTION SEQUENCE #2, 3

Defendant(s). *

* Joint Trial With *Hightower v. MTA*, Action #2, index # 017711/09

The following papers read on this motion:

Notice of Motion.....	1, 2
Answering Papers.....	3
Reply.....	4
Reply Memorandum of Law.....	5
Defendants' Memorandum of Law.....	6

Defendants' motions for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint based upon the ground that plaintiff failed to sustain a serious injury as required under New York Insurance Law Section 5102(d) are granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of the negligence of defendants in the ownership and operation of their motor vehicles on or about December 12, 2008. Plaintiff was a passenger in the bus owned by defendant, MTA Bus Company ("MTA"), at the time of the accident.

Defendants, Allan J. Lewis and Mark A. Cameron, adopt and incorporate the facts and legal arguments set forth by defendant MTA. Defendants submit the affirmed report C.M. Sharma, M.D., as well as the deposition testimony of plaintiff, and contend that they do not disclose the presence of a serious injury arising out of the subject accident. It is submitted that plaintiff does not suffer from permanent consequential limitations or significant limitations as a result of this accident.

To meet the threshold "significant limitation of use of a body function or system" or "permanent consequential limitation of a body organ or member"categories, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

Plaintiff's complaints, as alleged in the Bill of Particulars, consist of, among other things, L4-L5 and L5-S1 disc herniation with impingement; lumber and cervical derangement; lumbar and lumbosacral and cervical sprain/strain; lumbosacral radiculopathy; restriction of motion of lumbar and lumbosacral and cervical spines; right latissimus strain (Movant's Ex. C).

Plaintiff sought treatment at St. John Hospital the day after the subject accident. No x-rays, MRI's or cat scans were taken at that time.

In his report dated October 8, 2010, Dr. Sharma, a neurologist, notes that his independent neurological examination reveals normal range of motion of both the cervical and lumbar spines. Ranges of motion were measured with a hand-held goniometer. The diagnosis was "[s]ubjective lumbar pain. Normal neurological examination" (Movant's Ex. E). Dr. Sharma commented that "there are no causally related neurological problems. There is no need for neurological treatment or testing, follow up and physical therapy. There are no neurological limitations to usual work and activities. There is no permanent neurological problem" (Id.)

Although plaintiff testified that someone from Baldwin Medical Services told him not to return to work and that he could not return to work for three months, "there was no competent medical evidence which would support a claim that the plaintiff was unable to perform substantially all of h[is] daily activities for not less than 90 of the first 180 days as a result of the subject accident (citation omitted)" (*Boyle v. Gundogan,* 19 AD3d 351 [2d Dept. 2005]). The unaffirmed Notice of Disability of Baldwin Medical Services, P.C. dated February 9, 2009, (Pl's Ex. H) is without probative value (*see, Endzweig-Morov v. MV Transp., Inc.,* 50 AD3d 946, 947 [2d Dept. 2008]). Defendants, therefore, conclude that plaintiff was not prevented from performing all of his usual and customary activities for 90 out of the first 180 days following the accident.

Where, as here, defendants have provided evidence demonstrating the lack of serious injury, the burden shifts to plaintiff to present sufficient evidence to defeat the motion (*see, Gaddy v. Eyler,* 79 NY2d 955 [1992]; *Tabacco v. Kaster,* 229 AD2d 526 [2d Dept. 1996]). "To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and must make his showing by producing evidentiary proof in admissible form (citation omitted)" (*Seyfeid v. Greenspan,* 92 AD2d 563, 564 [2d Dept. 1983]; *see, Alvarez v. Prospect Hosp.,* 68 NY2d 320 [1986]).

In opposition, plaintiff submits the affirmations of David N. Lifschutz, M.D., Josephine Brawner, M.D., Lev Aminov, M.D. and Qiang Sun, M.D. and affidavit of Marc Jacobs, D.C. Defendant submits that with the exception of Dr. Aminov, the above reports were not based on recent examinations of plaintiff. The court notes that plaintiff last presented on March 18, 2009, to his chiropractor, Dr. Jacobs. Plaintiff did not appear for medical re-evaluation until May 19, 2011, after this motion was made.

Plaintiff first presented himself to Dr. Lifschutz on December 17, 2008. Dr. Lifschutz avers that examinations of plaintiff's cervical and lumbar spines demonstrated some limitation of full range of motion and that EMG/NCS testing indicated bilateral L5 radiculopathy. There is no indication in Dr. Lifschutz's report with regard to the method used to measure the range of motion. "[T]he failure of plaintiff's medical expert to demonstrate the objective tests performed to determine the loss of range of motion renders these [] findings insufficient to demonstrate serious injury" (*Parreno v. Jumbo Trucking, Inc.,* 40 AD3d 520 [1st Dept. 2007]).

Plaintiff sought chiropractic treatment at MLJ Chiropractic on December 17, 2008. Dr. Jacobs avers that range of motion studies of the cervical and lumbar spine performed via hand-held goniometer revealed limitations and abnormal findings. Plaintiff treated at MLJ Chiropractic for three months ending when he achieved maximum chiropractic improvement despite complaints of pain (Jacobs Aff. ¶7).

Plaintiff was initially evaluated by Josephine Brawner, M.D., a board certified physiatrist, on January 5, 2009. Dr. Brawner's initial impression was post-traumatic cervical, thoracic and lumbar sprain/strain. Plaintiff treated for approximately four months when he reached the maximum medical level of improvement although his symptoms persisted (Brawner Aff. ¶9). He was discharged from supervised physical therapy and advised to follow a home exercise program.

These submissions failed to raise a triable issue of fact. The affirmations and affidavit of plaintiff's treating doctors, Dr. Lifschutz, Dr. Jacobs and Dr. Brawner were "based upon examinations that were made more than [two] year[s] before the motion for summary (citation omitted)" (*Boyle v. Gundogan,* 796 NYS2d 157, 158 [2d Dept. 2005]).

The affirmation of Qiang Sun, M.D., a radiologist, reveals the following results from the MRI performed on February 16, 2009, at Stand Up MRI of Lynbrook: "Disc herniations at L4/5 and L5/S1, causing spinal/foraminal stenosis, and impingement of the nerve roots in the lateral recesses at these two levels" (Ex. A). Defendants submit that Dr. Sun failed to causally relate his findings to the subject accident. Moreover, "[t]he 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 (citations omitted)" (*Catalano v. Kopmann,* 73 AD3d 963 [2d Dept. 2010]).

Upon his re-examination of plaintiff on May 19, 2011, Dr. Aminov reached the following diagnosis: post-traumatic cervical sprain, multiple lumbar disc bulges at L4-S1 and L5-S1 and bilateral L5-S1 radiculopathy. Plaintiff "failed to proffer any recent medical evidence regarding any range of motion limitations in [his] spine (citations omitted). Accordingly, in the absence of recent findings of range-of-motion limitations, the plaintiff failed to meet [his] burden in opposing the [defendants'] showing of prima facie entitlement to judgment as a matter of law

(citation omitted)" (*Rovelo v. Volcy,* 83 AD3d 1034, 1035 [2d Dept. 2011]).

Accordingly, plaintiff's complaint is dismissed, without costs.

This decision constitutes the order and judgment of the court.

Dated: 9-26-11

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.
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