SHORT FORM ORDER

INDEX No. 08-32668
CAL. No. 10-02140MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 2-28-11
ADJ. DATE 7-6-11
Mot. Seq. # 001 - MD

GEORGE M. FABER, Plaintiff, -against- KENT F. GAUGLER and EASTERN MACHINE and MANUFACTURING INC., Defendants.	FABER & TROY Attorney for Plaintiff 180 Froehlich Farm Boulevard Woodbury, New York 11797 SCHONDEBARE & KORCZ Attorney for Defendants 3555 Veterans Memorial Highway, Suite P Ronkonkoma, New York 11779

Upon the following papers numbered 1 to 13 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 10 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 11-13 ; Replying Affidavits and supporting papers __; Other __; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (001) by the defendants Kent F. Gaugler and Eastern Machine and Manufacturing, Inc. pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff has not sustained a serious injury within the meaning of Insurance Law §5102 (d) is denied.

This negligence action was commenced to recover for the personal injuries allegedly sustained by the plaintiff, George M. Faber in an automobile accident which occurred on September 14, 2005, on Main Street at its intersection with Hedges Lane, in East Hampton, New York, when the vehicle operated by the plaintiff and the vehicle owned by Eastern Machine and Manufacturing, Inc. and operated by Kent F. Gaugler, came into contact.

As a result of this accident, the plaintiff alleges that he sustained injuries consisting of hypoesthesia in the bilateral L4-5 and bilateral L5-S1 dermatome; tenderness in the lumbar paravertebral muscles; tenderness in the cervical and thoracic paravertebral muscles; mild to moderate bilateral foraminal narrowing at L2-3 related to a combination of broad-based bulge, end-plate spondylosis and facet arthrosis; central, left paracentral and left foraminal disc osteophyte complex at T9-10; lower extremity sensory neuropathy; moderate chronic multilevel lumbosacral radiculopathy; and mild right acute and chronic L5 radiculopathy.

The defendants seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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 offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party 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 [2d Dept 1981]).

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 set forth 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 the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***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 [2d 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 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a 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 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*).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; copies of

the pleadings and plaintiff's bill of particulars; a copy of the transcript of the examination before trial of the plaintiff dated March 17, 2010; and the sworn reports of Michael J. Katz, M.D. dated June 8, 2010 concerning his independent orthopedic examination of the plaintiff, and Sheldon P. Feit, M.D. dated October 27, 2009 concerning his independent radiology review of pre and post accident MRI's.

Although the plaintiff has claimed lower extremity sensory neuropathy, moderate chronic multilevel lumbosacral radiculopathy, and mild right acute and chronic L5 radiculopathy, as set forth in his bill of particulars, the defendants have not submitted a report from a neurologist who examined the plaintiff to rule out the claimed neuropathy and radiculopathy (*see,* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]).

Dr. Katz set forth that he interviewed and examined Mr. Faber relative to injuries he claims resulted from a motor vehicle accident on September 14, 2005. A history of prior laminectomies in 2001 and 2002 were noted, but the level at which they were performed was not set forth. Mr. Faber also had a history of a cervical discectomy 20 to 30 years prior. According to Dr. Katz's report, there was some hostility between Dr. Katz and Mr. Faber during the examination. Dr. Katz used a goniometer to obtain cervical and thoracolumbar spine ranges of motion. Deficits of 20 degrees were noted in the right and left cervical rotation when compared to the normal values set forth by Dr. Katz. There was a ten degree deficit in both lumbar forward flexion and extension when compared to the normal values set forth by Dr. Katz.

Although Dr. Katz reviewed the MRI reports of the lumbar spine dated March 6, 2003, August 7, 2002, and September 27, 2000, and the cervical spine MRI of June 6, 2000 with the addendum of Dr. Mindy Pfeffer, all of which predate the instant accident, the reports have not been submitted in support of this motion for summary judgment. Although Dr. Katz reviewed various medical records as set forth in his report, as well as the lumbar MRI reports of September 16, 2005 and March 8, 2007, the thoracic spine MRI of December 12, 2005, and the EMG/NCV reports of the plaintiff's lower extremities dated June 14, 2007 and April 2, 2008, said reports have not been submitted in support of Dr. Katz's report. The court is therefore left to speculate as to the findings on the reports, raising factual issues which preclude summary judgment on the issue of whether or not the plaintiff sustained a serious injury.

Dr. Katz notes in his report that he reviewed the radiology reports prepared by Dr. Sheldon Feit, all dated October 27, 2009. He set forth Dr. Feit's findings upon his review of the following MRI's as follows:

> <u>pre-accident of September 14, 2005</u>:
>
> the lumbosacral spine MRI of June 6, 2000 reveals bulging discs at L1-2, L2-3, L3-4, L4-5, and L5-S1, and degenerative spondylosis with associated stenosis;
>
> the lumbosacral spine MRI of September 27, 2000 reveals bulging discs at L1-2, L2-3, L3-4, L4-5, and L5-S1, and degenerative spondylosis with associated stenosis;
>
> the lumbosacral spine MRI of August 7, 2002 reveals post-surgical changes, status post laminectomy at L3-4 and L4-5 with posterior enhancing scar tissue, multilevel degenerative disc disease with bulging discs at L1-2, L2-3, L3-4, L4-5, and L5-S1, with right sided herniation at L3-4 and degenerative spondylosis;
>
> the lumbosacral MRI of March 6, 2003 reveals bulging discs at L1-2, L2-3, L3-4, L4-5, and L5-S1, with right sided herniation at L3-4, post-surgical

changes at L3-4 and L4-5 with no evidence of new herniations;
the lumbosacral spine MRI of September 16, 2005 reveals bulging discs at L1-2, L2-3, L3-4, L4-5, and L5-S1, with stable right sided herniation at L3-4, and post-surgical changes at L3-4 and L4-5;

post-accident of September 14, 2005
the lumbosacral spine MRI of March 8, 2007 reveals bulging discs at L1-2, L2-3, L3-4, L4-5, and L5-S1 and stable right-sided herniation atL3-4, and degenerative spondylosis.

It is Dr. Katz' diagnosis that the plaintiff had a cervical strain, resolved, with pre-existing cervical radiculopathy unrelated to the events of September 14, 2005. However, the plaintiff has made no claim with regard to cervical spine injury. Dr. Katz also states that the plaintiff had a lumbosacral strain, resolved, with pre-existing surgery unrelated to the accident. Although Dr. Katz has set forth in his comments that the plaintiff's current limitations in range of motion of the lumbosacral and cervical spine are due to the prior surgery and disc degeneration unrelated to the accident, he does not set forth the basis for this opinion. Dr. Katz has not set forth the pre-accident cervical and lumbar ranges of motion for comparison, thus leaving this court to speculate as to the same. Dr. Katz does not set forth the findings documented in the original radiology reports concerning these aforementioned MRI's, thus raising factual issue concerning whether or not there are inconsistencies in the readings by the original radiologist and the reports by Dr. Feit upon which Dr. Katz relied in writing his report and rendering his opinions. Dr. Katz does not address the findings of the thoracic spine of December 12, 2005. Nor does he set forth the findings of the EMG/NCV reports of the plaintiff's lower extremities dated June 14, 2007 and April 2, 2008, raising further factual issues. Dr. Katz does not comment upon Mr. Faber's claims of radiculopathy and does not rule out that the accident caused or exacerbated Mr. Faber's radiculopathy. Thus, this court is left to speculate as to the foregoing. Such factual issues further preclude summary judgment.

Dr. Katz continues that Mr. Faber is not currently disabled due to the accident, and is capable of performing his retirement activities as well as his activities of daily living. Mr. Faber testified, however, that on the date of the accident, he was a semi-retired attorney, still doing some work at his office one or two days a month. On the date of the accident, he was assisting someone on trial. The accident occurred when his vehicle was struck from behind by a truck which pushed the back of his car almost into his back seat. He was seen at Southside Hospital emergency room after the accident and complained of pain in his lower back and numbness down his legs. He had MRIs taken of his back, and nerve conduction studies performed, which, he stated, demonstrated right and left leg neuropathy and ruled out diabetic neuropathy. Mr. Faber testified that before the accident, he had numbness in his right side, and after the accident, he had numbness in both legs radiating down to his toes, which he now experiences every day. Prior to the accident, he golfed two to four times a week, swam and walked a lot. He was able to resume playing golf again about two months after the accident, but could only golf one to two times a week due to the problems with his back and walking. He stated that he can no longer walk when he golfs. His swimming is limited now due to the pain and numbness. Based upon the foregoing, the moving papers raise factual issues concerning whether or not Mr. Faber is capable of performing his retirement activities and activities of daily living after the accident, thus precluding summary judgment.

Additionally, the defendants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether either plaintiff 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 (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d 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]).

Dr. Feit set forth in his report that he performed an independent radiology review of the MRI's performed on Mr. Faber, pre-dating and post-dating the accident. He set forth his findings based upon his interpretations of the MRI's of June 6, 2000, September 27, 2000, August 7, 2002, March 6, 2003, September 16, 2005, and March 8, 2007. He states that his review demonstrated that there was extensive pre-existing degenerative change and post-surgical findings, disc bulges associated with degeneration due to annular degeneration and/or ligamentous laxity, and degenerative disc herniation. It is his opinion that there are "no significant new findings on the two studies following the accident." In that Dr. Feit has not submitted the original reports for the MRI studies for comparison, and in that he states there are no significant new findings, rather than there being no new findings, this court is left to speculate as to the findings set forth in the original reports and what Dr. Feit means by his statement that there were "no significant new findings."

These factual issues raised in defendant's moving papers preclude summary judgment. The defendants failed to satisfy their 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***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motion (001) by the defendants for dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) is denied.

Dated: 29 Sept. 2011

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**