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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

x

MARIO A. MORALES,

Plaintiff(s),

Index No. 20353/09

Motion Submitted: 8/11/11
Motion Sequence: 001

-against-

ASHLEY D. BRYANT,

Defendant(s).

x

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant moves this Court for an order granting summary judgment in her favor and dismissing the instant complaint on the ground that the plaintiff has not suffered a "serious injury" within the meaning of Insurance Law § 5102(d). Plaintiff opposes the requested relief.

This action arises from a motor vehicle accident that occurred on April 16, 2009. Plaintiff alleges that, as he was waiting to make a left-hand turn, defendant's vehicle struck plaintiff's vehicle in the rear. As a result of this accident, plaintiff claims to have suffered serious and permanent injuries, including significant restricted range of motion in his lumbar spine.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. ***(Winegrad v. New York Univ. Med. Center,*** 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Here, the defendant must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident ***(Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). Defendant has not met her burden with respect to the category of significant limitation of use of plaintiff's lumbar spine.

In support of her motion for summary judgment, defendant has submitted, *inter alia*, the affirmed medical reports from the examining physicians, Arnold M. Illman, M.D., an orthopedist, and Lawrence J. Robinson, M.D., a neurologist. Although both physicians report upon plaintiff's ranges of motion, neither physician has set forth by what means, or with what instrument, plaintiff's range of motion in the cervical and lumbar spine areas was measured.[1] Thus, defendant has failed to establish an objective basis so that the respective qualitative assessments of plaintiff could readily be challenged by any of plaintiff's expert(s) during cross examination at trial, and be weighed by the trier of fact ***(Toure v. Avis Rent A Car Systems, Inc.,*** 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002); ***Gaddy v. Eyler,*** 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

Moreover and with respect to plaintiff's lumbar spine, Dr. Illman stated that the normal range of motion for "right and left lateral rotation and flexion" to be 60 degrees. Dr. Robinson reported for the same area of plaintiff's body that "extension, rotation and lateral flexion all performed 30 degrees/30 degrees, all normal." Thus, there appears to be an issue

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[1]Dr. Robinson states, without more, that "[r]ange of motion was performed using inspection and hands-on movement of the necessary parts of the spine according to protocol." Dr. Robinson has failed to advise as to the particulars of the "protocol."

of fact created by defendant's own examining physicians as to what the normal range of motion is for those movements of the lumbar spine.

Also, Dr. Illman determined that plaintiff's lumbosacral and cervical sprains were resolved, but that, "[i]f history is correct, there is causal relationship." On the other hand, Dr. Robinson stated in his report that "[t]here is no objective evidence to establish causality to the 04/16/09 incident based on today's exam."

Thus, defendant has failed to meet her burden in establishing that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d), with respect to the significant limitation category of injury (*See* ***Smith v. Hartman***, 73 A.D.3d 736, 899 N.Y.S.2d 648 (2d Dept., 2010); ***Quiceno v. Mendoza***, 72 A.D.3d 669, 897 N.Y.S.2d 643 [2d Dept., 2010]).

Since defendant has failed to meet her *prima facie* burden, it is unnecessary to determine whether the plaintiff's papers submitted in opposition are sufficient to raise a triable issue of fact (*See* ***Levin v. Khan***, 73 A.D.3d 991, 904 N.Y.S.2d 73 (2d Dept., 2010); ***Kjono v. Fenning***, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept., 2010]).

Defendant's motion for summary judgment pertaining to the significant limitation of use category of injury is denied.

With respect to that aspect of defendant's motion addressed to plaintiff's "90/180" claim of injury, defendant has submitted plaintiff's Bill of Particulars, as well as plaintiff's deposition testimony.

A defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature, which prevented plaintiff from performing substantially all of the material acts, which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (***Kuperberg v. Montalbano***, 72 A.D.3d 903, 899 N.Y.S.2d 344 (2d Dept., 2010); ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 A.D.3d 664, 852 N.Y.S.2d 287 [2d Dept., 2008]).

In the first instance, plaintiff's Bill of Particulars states that he was incapacitated for only one week following the accident. At his deposition, plaintiff testified that he missed approximately ten days of work. Plaintiff was working full-time prior to the accident and, according to his testimony, continued to work full-time after the accident. When he went back to work, plaintiff stated that he can no longer stand as long, or lift as much weight as he could prior to the accident. Other than those complaints, plaintiff does not experience other limitations at work.

Plaintiff further testified that there are no activities that he can no longer participate in as a result of the accident. Plaintiff testified that he cannot lift his three-year-old son "as [he] did before," but he did not state that he cannot lift the child at all. Further, plaintiff continues to play basketball every weekend, although, according to his testimony, only for approximately thirty to forty minutes, and then he has to stop.

Accordingly, defendant has met her prima facie burden with respect to plaintiff's "90/180" injury claim.

Plaintiff is now required to come forward with viable, valid objective evidence to verify his complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 A.D.3d 458, 802 N.Y.S.2d 706 [2d Dept., 2005]). Plaintiff has failed to meet his burden.

Specifically, a plaintiff must set forth competent medical evidence to establish that he sustained a medically determined injury or impairment of a nonpermanent nature, which prevented him from performing substantially all of the material acts, which constituted his usual and customary daily activities for 90 of the 180 days following the subject collision (***Ly v. Holloway***, 60 A.D.3d 1006, 876 N.Y.S.2d 482 [2d Dept., 2009]).

According to plaintiff's employer's affidavit, plaintiff is a monument designer, which entails plaintiff performing graphics and hand work, repairing stones, and restoring historical monuments, "and his specialty is the artistic preparation of the stones." While other employees perform the heavy lifting for plaintiff, plaintiff is apparently able to perform his artistic preparation of the stones, and is characterized by his employer as a "hard worker."

Plaintiff's affidavit submitted in opposition to defendant's motion confirms that his "niche in the company has been performing work on the artistic side of stone design," and he offers no evidence that his occupation in that regard has been impacted by the subject accident. Apart from his employment, plaintiff now avers that he cannot lift his four-year-old son. Aside from these statements, plaintiff does not claim that he is unable to care for his son, or to perform other duties and/or chores related to his home life. In his affidavit, plaintiff does not address the fact that he is still able to play basketball every weekend.

Thus, the Court finds that plaintiff's affidavit is insufficient to defeat defendant's motion, and plaintiff has failed to raise triable issues of fact as to whether he sustained a serious injury for the 90/180 category of loss (*see* ***Wu v. City of New York***, 42 A.D.3d 451, 839 N.Y.S.2d 548 (2d Dept., 2007); ***Semple v. Sterling Estates, LLC***, 300 A.D.2d 297, 751 N.Y.S.2d 306 (2d Dept., 2002); ***Regina v. Friedman***, 272 A.D.2d 461, 707 N.Y.S.2d 674 [2d Dept., 2000]).

Defendant's summary judgment motion pertaining to the "90/180" category of injury is granted.

The foregoing constitutes the Order of this Court.

Dated: October 24, 2011
Mineola, N.Y

Karen V. Murphy
J. S. C.