SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

WAYNE M. ELLISON,

Plaintiff,

-against-

MICHAEL E. KORFHAGE and AMANDA C. KORFHAGE,

Defendants.

MOTION DATE: 9/7/11

MOTION SEQ. NO.: 001

INDEX NO.: 23057/09

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Motion by defendants MICHAEL E. KORFHAGE and AMANDA C. KORFHAGE for summary judgment on grounds that plaintiff WAYNE M. ELLISON failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**, is determined as follows.

Plaintiff, age 45, alleges that on September 22, 2008, at approximately 6:20 p.m., he was the operator of a motor vehicle which came into contact with a vehicle operated by defendant AMANDA C. KORFHAGE and owned by defendant MICHAEL E. KORFHAGE. The accident occurred on Hempstead Turnpike, approximately six hundred feet east of its intersection with Oak Street, Uniondale, Town of Hempstead.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7) or a significant limitation of use of a body function or system (8).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated January 21, 2011, of orthopedist Michael J. Katz, MD, covering an examination conducted on that date [Motion Exh. E].

Dr. Katz reported that physical examination of plaintiff's lumbar spine and left knee revealed normal range of motion results, comparing the results to norms. Dr. Katz's other reported findings, which specified the tests performed, also revealed normal findings. Dr. Katz diagnosed resolved sprain of the lumbar spine and resolved left knee contusion, and stated that plaintiff has no disability based on the accident. Dr. Katz commented that plaintiff had surgery to the lumbar spine prior to the accident, and that he had an injury to his left knee as a result of a Go-Kart accident in the 1990s. Dr. Katz also noted that plaintiff suffers from multiple sclerosis.

The defendants also submit the deposition testimony of plaintiff conducted on November 16, 2010. Following the accident, plaintiff went by ambulance to the emergency room of Nassau University Medical Center and was released with painkillers and with instructions to "follow up." Plaintiff testified that at the time of the accident, he was undergoing physical therapy for his lower lumbar spine and legs and that, allegedly as a result of the accident, he continued therapy until June 2009. Plaintiff testified that since June 2009, he has not received any medical treatment as a result of the accident and has no future medical appointments. Plaintiff testified that he was involved in prior motor vehicle accidents, in 1998 and 2006, where he injured parts of his body claimed injured in this accident, and received treatment as a result. Plaintiff also had back surgery in June of 2008. Plaintiff testified that as a result of his multiple sclerosis, he was on disability at the time of the accident.

Plaintiff testified at his deposition that there are no activities he can no longer engage in at all since the accident, but that he is limited in his ability to walk long distances, run, bike, play sports, engage in landscaping activities and ski (although he admitted that he had not skied since prior to the motor vehicle accident of 2006).

The Court finds that the report of defendants' examining physician, is sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examination, to satisfy the Court that an "objective basis" exists for his

opinion. Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff WAYNE M. ELLISON did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

In opposition, plaintiff submits (1) an undated affirmation of radiologist Jonathan E. Lerner, MD, affirming an attached MRI report, dated January 10, 2009, covering an MRI of plaintiff's left knee conducted on that date [Plaintiff's Opposition Exh. D]; and (2) an affidavit of plaintiff, sworn to on May 20, 2011 [Plaintiff's Opposition Exh. C].

Dr. Lerner's MRI report makes findings of degeneration, a sprain and osteoarthritis. Dr. Lerner also notes that post traumatic and degenerative findings should be considered with respect to his finding of a "focal marrow edema within the anterolateral femoral condyle." In his affidavit, plaintiff attests that his knee "was 100% and that now [he] gets pain on the right side of the knee cap which pain does not go away."

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**.

The findings by Dr. Lerner are insufficient by themselves to establish that plaintiff suffered a serious injury. Dr. Lerner's report found no evidence of a meniscal tear but only degenerative changes, and osteoarthritis. Dr. Lerner's statement that one of the etiologies may have post traumatic origins is insufficient by itself to defeat summary judgment. The Court notes that even a radiologically confirmed tear will not defeat summary judgment "in the absence of objective medical evidence of the extent of the alleged physical limitations resulting from the injury and its duration." **McCloud v. Reyes**, 82 AD3d 848, 849. *See* **Pommells v. Perez**, 4 NY3d 566 at 574; **Bamundo v. Fiero**, 88 AD3d 831; **Resek v. Morreale**, 74 AD3d 1043; **Acosta v. Alexandre**, 70 AD3d 735; **Byrd v. J.R.R. Limo**, 61 AD3d 801.

The Court notes that plaintiff's affidavit is self serving and insufficient to raise an issue of fact. *See* **Riley v. Randazzo**, 77 AD3d 647; **Villante v. Miterko**, 73 AD3d 757; **Lozusko v. Miller**, 72 AD3d 908; **Stevens v. Sampson**, 72 AD3d 793; **Keith v. Duval**, 71 AD3d 1093; **Singh v. City of New York**, 71 AD3d 1121; **Larson v. Delgado**, 71 AD3d 739; **Acosta v. Alexandre**, 70 AD3d 735. Plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. *See*

Scheer v. Koubek, 70 NY2d 678; **Rovello v. Volcy**, 83 AD3d 1034; **Calabro v. Petersen**, 82 AD3d 1030; **Catalano v. Kopmann**, 73 AD3d 963; **Sham v. B&P Chimney Cleaning & Repair Co., Inc.**, 71 AD3d 978; **Ambos v. New York City Transit Authority**, 71 AD3d 801.

The Court also notes further that the "gap in treatment" is fatal to plaintiff's claim that the evidence submitted is sufficient to raise a triable issue as to whether or not he sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. "Even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury–such as a gap in treatment, an intervening medical problem or a pre-existing condition–summary dismissal of the complaint may be appropriate." **Pommells v. Perez**, 4 NY3d 566 at 572. Plaintiff has not submitted any medical evidence to explain the cessation of his medical treatment. *See* **Pommells v. Perez**, *supra*; **Lively v. Fernandez**, 85 AD3d 981; **Vasquez v. John Doe #1**, 73 AD3d 1033; **Haber v. Ullah**, 69 AD3d 796.

On the basis of the foregoing, it is

ORDERED, that the motion by defendants MICHAEL E. KORFHAGE and AMANDA C. KORFHAGE for summary judgment pursuant to **CPLR §3212** dismissing the complaint of plaintiff WAYNE M. ELLISON on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**.

This constitutes the Order of the Court.

Dated: November 21, 2011

J.S.C.

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COUNTY CLERK'S OFFICE