NEW YORK SUPREME COURT - COUNTY OF BRONX

Mot. Seq. 01

FEB 03 2011

Case Disposed ☒
Settle Order ☐
Schedule Appearance ☐

PART 19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

COPELAND, DONALD E.

- against -

PIERRE-LOUIS, LUYCES, et ano

----------X

Index Nº. **308279/2009**

Hon. **LUCINDO SUAREZ,**
Justice.

The following papers numbered 1 to **8** read on this motion, **SUMMARY JUDGMENT (DEFENDANT)**, noticed on **September 30, 2010** and duly submitted as No. **44** on the Motion Calendar of **December 20, 2010**

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3	
Answering Affidavit and Exhibits	5, 6, 7	
Replying Affidavit and Exhibits	8	
Sur-replying Affidavit and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	4	

Upon the foregoing papers, the motion of defendants for summary judgment is granted, in accordance with the annexed decision and order.

Dated: **01/10/2011**

Hon. _____
LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

----------X

DONALD E. COPELAND,

Plaintiff,

- against -

LUYCES PIERRE-LOUIS and DANGELO CORP.,

Defendants.

----------X

DECISION AND ORDER

Index No. 308279/2009

PRESENT: Hon. Lucindo Suarez

Upon defendants' notice of motion dated September 3, 2010 and the affirmation, exhibits and memorandum of law submitted in support thereof; plaintiff's affirmation in opposition dated December 10, 2010 and the affidavit and exhibits submitted therewith; defendants' affirmation in reply dated April 2, 2010 [*sic*]; and due deliberation; the court finds:

Defendants move for summary judgment on the ground that plaintiff did not sustain a serious injury, as defined in Insurance Law § 5102(d), in the subject May 23, 2007 motor vehicle accident. Plaintiff's bill of particulars alleges five cervical and one thoracolumbar herniations with foraminal encroachment at two cervical levels; four lumbar bulges with foraminal stenosis; and synovitis, bursitis and effusion of the left hip. It is further alleged that plaintiff was confined to bed and home and unable to attend to employment and domestic duties for six months after the accident. Plaintiff claims serious injuries under the Insurance Law § 5102(d) categories of permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and 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 ("90/180"). In support of the motion, defendants submit the affirmed reports of neurologist Jean-Robert Desrouleaux, M.D., orthopedic surgeon Lisa Nason, M.D. and radiologist David A. Fisher, M.D., as well as the transcript of plaintiff's May 21, 2010 deposition testimony.

Dr. Desrouleaux conducted a normal examination of plaintiff's mental status, cranial nerves, deep tendon reflexes, motor capability, sensory capability, coordination and gait on July 8, 2010. He found full ranges of motion without spasm in all planes of movement of plaintiff's cervical, thoracic and lumbar spine, and straight-leg raising was negative bilaterally to ninety degrees, although Dr. Desrouleaux failed to disclose an objective method of measurement. Dr. Desrouleaux determined that plaintiff's spinal injuries were resolved without anticipation of permanency or residual effect. Plaintiff could engage in daily activities without restriction. Dr. Nason found similarly, and measured full ranges of motion without tenderness or spasm in all planes of movement in plaintiff's cervical, thoracic and lumbar spine and left hip, although she, too, failed to disclose an objective method of measurement. Cervical distraction, clonus, compression, forward flexion, Kernig's, Laguere's, Lasegue's, Patrick's, Phalen's, shoulder depression, straight-leg raising, Soto Hall, Spurling's, Trendelenburg and Waddell's tests yielded negative results.

Dr. Fisher reviewed MRI films of plaintiff's left hip, taken one month post-accident; cervical spine, taken 1 ½ months post-accident; and lumbar spine, taken 7 ½ weeks post-accident. The left hip films yielded a normal study without fracture, edema, effusion or evidence of recent trauma. Dr. Fisher found no evidence of recent cervical traumatic injury and no herniations. He found diffuse degenerative cervical changes, most pronounced at the C2-C3 and C3-C4 levels, manifested by disc dehydration, disc space narrowing and endplate spurring. Stenosis at C2-C3 and C3-C4 was attributable to posterior disc ridge osteophytes. His examination of the lumbar films yielded a

normal study without evidence of herniation, bulge or recent trauma.

Plaintiff testified that he was not confined to bed or home and stayed out of work for six months following the accident. Aside from the emergency room visit on the day of the accident, the only medical care sought was six months of chiropractic care, acupuncture and physical therapy. He testified that he continues to experience neck stiffness, back pain and muscle spasm. He "has trouble" standing for a long period of time without back pain. He cannot lift weights or play basketball or other sports. He "cannot do proper bending," and the frequency of his sexual intercourse has been reduced from up to four times daily to once daily.

In response to this *prima facie* showing, *see e.g. Charley v. Goss*, 54 A.D.3d 569, 863 N.Y.S.2d 205 (1st Dep't 2008), *affirmed*, 12 N.Y.3d 750, 904 N.E.2d 837, 876 N.Y.S.2d 700 (2009), plaintiff submitted the affirmed report of neurologist Peter Kwan, M.D., who examined plaintiff on October 6, 2010, ostensibly in response to the motion, as well as Dr. Kwan's affirmation. Plaintiff also attached an ambulance call report, emergency room records, physical therapy records and unsworn MRI reports, none of which were in admissible form. *See e.g. Pinkhasov v. Weaver*, 57 A.D.3d 334, 869 N.Y.S.2d 445 (1st Dep't 2008). Plaintiff also submitted excerpts of the transcript of the deposition testimony of defendant Luyces Pierre-Louis, but such testimony cannot be considered competent objective medical evidence of a serious injury. Plaintiff appears to have abandoned the left hip injury, and in any event has failed to present admissible objective medical evidence of any hip impairment that could be qualified as permanent, consequential, significant or otherwise serious under Insurance Law § 5102(d).

According to his report, Dr. Kwan found cervical and lumbosacral tenderness and moderate spasm, with straight-leg raising positive bilaterally at forty degrees. Dr. Kwan did not find that plaintiff's ranges of motion were diminished; he reported merely evidence of "muscle guarding"

beyond particular ranges of motion, without stating the significance or effect of "muscle guarding," if any, upon plaintiff's range of motion. He stated that plaintiff's signs and symptoms were causally related to the subject accident based upon the examination and the history as provided by plaintiff, and that plaintiff's injuries were considered permanent in light of cervical and lumbar MRI findings.

Dr. Kwan's review of various medical records, including those annexed in opposition, does not necessarily render them admissible, as there is no indication that they were relied upon in reaching his medical conclusions. *See Hernandez v. Almanzar*, 32 A.D.3d 360, 821 N.Y.S.2d 30 (1st Dep't 2006). In this regard, review is to be distinguished from reliance, *see e.g. Pommells v. Perez*, 4 N.Y.3d 566 n5, 830 N.E.2d 278, 797 N.Y.S.2d 380 (2005); *Byong Yol Yi v. Canela*, 70 A.D.3d 584, 895 N.Y.S.2d 397 (1st Dep't 2010), and Dr. Kwan stated that his opinion was based upon the history given by the patient and his findings at examination. Dr. Kwan did, however, base his conclusion as to the permanency of plaintiff's injuries on MRI findings of the cervical and lumbar spine. Thus, while the MRI reports remain inadmissible, Dr. Kwan's conclusions in reliance upon them are not incompetent. *See Pommells*, *supra*; *Byong Yol Yi*, *supra*. However, it is clear that Dr. Kwan never reviewed the actual films and relied solely on the unsworn reports. *See Perez v. Rodriguez*, 25 A.D.3d 506, 809 N.Y.S.2d 15 (1st Dep't 2006).

Dr. Kwan's affirmation, in contrast with his report, stated that he was fully familiar with plaintiff's treatment and diagnosis based upon his review of "applicable treatment records, including the sworn/certified MRIs of the plaintiff, which I incorporate herein by reference." As stated above, there are no sworn or certified MRI reports, and the physical therapy reports are not in admissible form, *see Offman v. Singh*, 27 A.D.3d 284, 813 N.Y.S.2d 56 (1st Dep't 2006). Dr. Kwan's statement that treatment was discontinued because plaintiff had reached maximum benefit and because plaintiff could not afford treatments upon cessation of No-Fault benefits is conclusory and

gratuitous hearsay without stated basis, offered only "upon information and belief," and is thus insufficient to explain the three-year gap in plaintiff's treatment. *Cf. Peluso v. Janice Taxi Co., Inc.*, 77 A.D.3d 491, 909 N.Y.S.2d 699 (1st Dep't 2010).

Furthermore, given Dr. Kwan's report, his attempt in his affirmation to translate his findings into explicit and definitive decreases in range of motion appears tailed for the motion, particularly in light of the fact that the report clearly indicated guarding "beyond" the stated ranges of motion. There is, accordingly, no contemporary evidence of a limitation which may be quantified as consequential or significant, and no probative evidence of permanence. *See Hernandez, supra.* Dr. Kwan's findings, made three and one-half years after the accident, are too remote in time to warrant the inference that plaintiff's limitations are attributable to the accident. See *Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660, 905 N.Y.S.2d 31 (1st Dep't 2010). He furthermore failed to address Dr. Fisher's opinion that plaintiff's cervical condition was degenerative. *See Marsh v. City of New York*, 61 A.D.3d 552, 877 N.Y.S.2d 65 (1st Dep't 2009).

The uncertified ambulance, medical and physical therapy records are not in admissible form. *See* CPLR 4518(c); *Copeland v. Kasalica*, 6 A.D.3d 253, 775 N.Y.S.2d 276 (1st Dep't 2004). Nor are the MRI and other diagnostic testing reports. *See Pinkhasov, supra.* Inasmuch as defendants did not rely on, refer to or submit these records, Dr. Kwan's conclusions made in reliance upon them are inadmissible. *See Clemmer, supra*; *see also Hernandez, supra.* "[E]vidence, otherwise excludable at trial, may be considered to deny a motion for summary judgment provided that this evidence does not form the *sole* basis for the court's determination." *Wertheimer v. N.Y. Prop. Ins. Underwriting Ass'n*, 85 A.D.2d 540, 541, 444 N.Y.S.2d 668, 669 (1st Dep't 1981) (emphasis added).

Plaintiff's deposition testimony unequivocally negates any claim that he suffered "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." *See Lopez v. Abdul-Wahab*, 67 A.D.3d 598, 889 N.Y.S.2d 178 (1st Dep't 2009); *Becerril v. Sol Cab Corp.*, 50 A.D.3d 261, 854 N.Y.S.2d 695 (1st Dep't 2008). "Pain" is not a serious injury. *See Scheer v. Koubek*, 70 N.Y.2d 678, 512 N.E.2d 309, 518 N.Y.S.2d 788 (1987); *Shaw v. Looking Glass Assocs., LP*, 8 A.D.3d 100, 779 N.Y.S.2d 7 (1st Dep't 2004); *Puentes v. Martinez*, 309 A.D.2d 675, 765 N.Y.S.2d 864 (1st Dep't 2003). Sports are not considered material acts of one's usual and customary daily activities. *See Blake v. Portexit Corp.*, 69 A.D.3d 426, 893 N.Y.S.2d 28 (1st Dep't 2010); *Simmons v. New York City Transit Auth.*, 66 A.D.3d 432, 888 N.Y.S.2d 7 (1st Dep't 2009). The fact that plaintiff did not work for six months is not dispositive. *See Amamedi v. Archibala*, 70 A.D.3d 449, 895 N.Y.S.2d 42 (1st Dep't 2010), *leave denied*, 2010 N.Y. LEXIS 3307 (Nov. 17, 2010). Plaintiff's statements regarding limitations were otherwise inspecific.

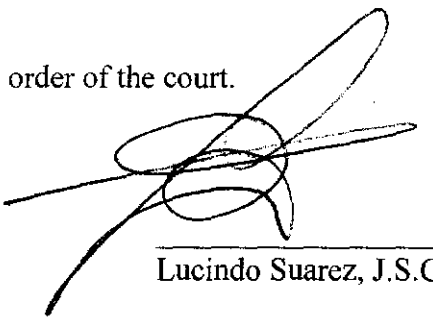
Accordingly, it is

ORDERED, that the motion of defendants Luyces Pierre-louis and Dangelo Corp. for summary judgment on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d) is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants dismissing plaintiff's complaint.

This constitutes the decision and order of the court.

Dated: January 10, 2011



Lucindo Suarez, J.S.C.