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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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JOAQUIN GONCALVES,

Plaintiff(s),

-against-

MARIE KRISTINA SPINELLI AND RICHARD P. SPINELLI,

Defendant(s).

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Index No. 17114/10

Motion Submitted: 12/23/11, 1/31/12
Motion Sequence: 002, 003

The following papers read on this motion:

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

Defendants move this Court for an Order granting summary judgment in their favor and dismissing the complaint on the ground that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff opposes the requested relief (Motion Sequence 2).

Plaintiff moves this Court for an order granting him summary judgment against defendants on the issue of liability for the accident giving rise to this action, and setting this matter down for an immediate inquest on damages. Defendants oppose the requested relief (Motion Sequence 3).

The motor vehicle accident giving rise to this action occurred on June 6, 2010. Plaintiff was a passenger in a stopped motor vehicle when the vehicle in which he was riding was impacted in the rear by defendants' vehicle. Defendants' vehicle was being driven by defendant Marie Kristina Spinelli at the time of the accident.

According to plaintiff's Bill of Particulars,[1] which is attached as Exhibit C to defendants' motion for summary judgment, plaintiff is asserting claims of permanent consequential and significant limitation of use of a body function or system, and a medically determined injury or impairment of a non-permanent nature, which prevented him from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the accident ("90/180") claim. In addition, plaintiff asserts, "in the alternative, that the injuries are of a pre-existing nature and were exacerbated or aggravated by this occurrence."

Specifically, plaintiff alleges that he suffered injuries to his cervical and lumbar spine areas, including herniations and bulges, and that he has endured three epidural steroid injections to 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]). With respect to Motion Sequence 2, 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 defendants 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]). Defendants have met their burden.

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[1]The Bill of Particulars is not verified by plaintiff as required by CPLR § 3044, and it appears from the summons that plaintiff's residence and plaintiff's counsel's office are located on the same street in Mineola, New York.

In support of their motion, defendants have submitted, *inter alia*, plaintiff's bill of particulars, plaintiff's deposition testimony, and the affirmed reports of defendants' examining orthopedic surgeon and radiologist.

On or about July 2, 2011, defendants' examining radiologist, David A. Fisher, M.D., reviewed the cervical and lumbar spine MRI studies taken on July 27, 2010. In addition, Dr. Fisher compared the lumbar spine study taken on July 27, 2010 with an earlier lumbar spine study performed on January 25, 2007. Upon review, Dr. Fisher set forth his impressions that plaintiff's cervical MRI study was normal, and that there are no disc herniations or bulges present. Dr. Fisher also stated that there is no radiographic evidence of traumatic or causally related injury to the cervical spine in this study performed seven and one-half weeks after the date of the accident.

With respect to plaintiff's lumbar spine, Dr. Fisher concluded that plaintiff suffers from multi-level degenerative disc disease in his lumbar spine area, and that the degenerative condition was evident in the 2007 MRI study, which predated the subject accident by more than three years. Dr. Fisher stated that there are no new disc herniations and that there is no evidence of traumatic or causally related injury to the lumbar spine.

Plaintiff was examined by Leon Sultan, M.D., defendant's examining orthopedic surgeon, on August 16, 2011. Dr. Sultan reviewed a number of plaintiff's medical records, including emergency room records, physical therapy notes, a report from Dr. Lattuga, plaintiff's treating orthopedist, lumbar spine epidural injection reports, and MRI reports of the cervical and lumbar spine from 2007 and 2010. Dr. Sultan measured range of motion in plaintiff's cervical and lumbar spine areas, with a goniometer. Dr. Sultan also conducted various other tests, which were negative. Dr. Sultan set forth his specific findings, comparing those findings to normal range of motion.

With respect to plaintiff's cervical spine, plaintiff's range of motion was documented as being approximately in the middle of what Dr. Sultan states is normal range of motion. Dr. Sultan's examination of the lumbar spine also revealed normal range of motion.

Dr. Sultan notes the preexisting disc herniations appearing on the lumbar spine MRI performed in 2007, more than three years prior to the accident, but states that those lumbar herniations "are not reflected in today's examination." Dr. Sultan concludes that "[t]oday's orthopedic examination in regard to his cervical spine and thoracolumbar spine reveals him to be orthopedically stable without any true functional impairment in regard to his neck and lower back," and that the examination "does not confirm any need for additional testing or treatment on a causally related basis."

Based on the foregoing, defendants have established their prima facie entitlement to summary judgment with respect to the permanent consequential and significant limitation of use categories of injury.

Neither of defendants' examining physicians address plaintiff's 90/180 claim. As to whether or not defendants have sustained their burden on the 90/180 claim, the Court considers plaintiff's deposition testimony submitted by defendants.

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]).

Moreover, a plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the accident (***Omar v. Goodman***, 295 A.D.2d 413, 743 N.Y.S.2d 568 (2d Dept., 2002); ***Lauretta v. County of Suffolk***, 273 A.D.2d 204, 708 N.Y.S.2d 468 [2d Dept., 2000]).

Plaintiff's deposition testimony establishes that he was not working at the time of the accident, but was on disability due to his eye condition. With regard to his daily activities relative to himself and his children, plaintiff testified that he cannot walk very far, cannot play with his children, and has some difficulty brushing his teeth. Aside from this testimony, plaintiff did not establish that which he asserted in his Bill of Particulars, which is that he was "confined to bed and house for the most part, for a period of ninety out of one hundred eighty days following the accident . . . ." Plaintiff admitted that he walked into the building for his deposition, without the assistance of any medical devices, and that he walked up the stairs by himself, albeit slowly. Plaintiff also testified that he can walk for one block before he has to sit down or experiences problems, and he is still able to visit with friends at a local café, although his wife has to drop him off and pick him up. According to plaintiff, he takes Motrin, a pain reliever, which is "sometimes" over-the-counter, "but other times it's through prescription."

Thus, defendants' submission of plaintiff's deposition testimony (***Jackson v. Colvert***, 24 A.D.3d 420, 805 N.Y.S.2d 424 (2d Dept., 2005); ***Batista v. Olivo***, 17 A.D.3d 494, 795 N.Y.S.2d 54 [2d Dept., 2005]), is sufficient herein to make a *prima facie* showing that the

plaintiff did not sustain a serious injury under the 90/180 category of the law.

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 raised a triable issue of fact insofar as the permanent consequential and significant limitation of use categories of injury.

Plaintiff has submitted an affirmed report of P. Leo Varriale, M.D., an orthopedic surgeon, dated April 4, 2011. Plaintiff claims that this report was made pursuant to an Independent Medical Examination (IME) conducted on that same date, and requested by defendants. Defendants deny having retained Dr. Varriale, but do not deny having seen Dr. Varriale's report prior to the making of the instant motion.

It is clear from plaintiff's testimony, as well as from plaintiff's submissions, that he treated with Drs. Jocelyn Cervantes, Sebastian Lattuga and Giovanni Angelino. Dr. Lattuga, plaintiff's treating orthopedic surgeon saw plaintiff between the period from July 22, 2010 through approximately October 21, 2010. Plaintiff's next follow-up visit with Dr. Lattuga occurred on March 10, 2011, and then not again until October 31, 2011. All of Dr. Lattuga's reports are addressed to Dr. Cervantes, the referring physician.

On the other hand, Dr. Varriale's report, dated April 4, 2011, is addressed "To Whom It May Concern," just as Dr. Sultan's report is addressed.[2] Thus, the Court is perplexed as to Dr. Varriale's role in this matter. Furthermore, nowhere in the submissions to this Court is it established that Dr. Varriale ever saw plaintiff in the capacity of a "treating physician." In fact, Dr. Varriale states in his affirmed report that plaintiff "presented to [his] office in Garden City on April 4, 2011, for the purpose of an *independent orthopedic reevaluation*. For prior history and examination findings, please refer to the report of December 8, 2010 (emphasis added)." The December 8, 2010 report is referred to by Dr. Varriale as an "Orthopedic IME Narrative," but has not been presented to this Court by either party.

Although Dr. Varriale's affirmed report fails to set forth the means by which he took measurements of plaintiff's ranges of motion, Dr. Varriale noted certain restrictions in the cervical and lumbar spine areas, and stated that "the injuries are partly causally related to the accident of June 6, 2010 and partly related to preexisting degenerative disc disease of the cervical spine and lumbar spine."

The fact that Dr. Varriale's report has surfaced in plaintiff's opposition to the instant

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[2]Dr. Fisher's report is addressed to defendants' counsel.

motion, combined with the findings affirmed therein, raises a triable issue of fact with respect to the permanent consequential and significant limitation of use categories of injury.

Furthermore, defendants' assertion that Dr. Varriale's examination is too remote in time relative to the subject accident is not only unavailing, but that assertion serves to undermine the findings of defendants' own examining physicians, who did not review MRI reports or examine plaintiff until July and August, 2011. In any event, contemporaneous quantitative measurements are not a prerequisite to recovery (***Perl v. Meher***, 18 N.Y.3d 208, 217, 960 N.E.2d 424, 936 N.Y.S.2d 655 [2011]).

Insofar as plaintiff's 90/180 claim, plaintiff has failed to raise a triable issue of fact sufficient to overcome defendants' prima facie entitlement to summary judgment on that category of injury.

In view of the foregoing, defendants' motion for summary judgment as to plaintiff's 90/180 claim is granted, but defendants' motion for summary judgment as to the permanent consequential and significant limitation of use categories of injury is denied.

The Court now turns its attention to plaintiff's motion for an Order granting him summary judgment against defendants on the issue of liability for the accident giving rise to this action.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to rebut the inference of negligence by providing a non-negligent explanation for the collision (***McCoy v. Zaman***, 67 A.D.3d 653, 886 N.Y.S.2d 916 (2d Dept., 2009); ***Velasquez v. Denton Limo., Inc.***, 7 A.D.3d 787, 776 N.Y.S.2d 874 [2d Dept., 2004]).

In support of his summary judgment motion, plaintiff has submitted a signed, notarized copy of his deposition transcript.[3] Plaintiff testified that he was seated in the front passenger seat of the vehicle his wife was driving when it was struck in the rear by

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[3]The transcript submitted to the Court is signed and notarized, contrary to defendants' counsel's assertion that it is not. In any event, CPLR § 3116(a) provides that if the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. The Notice of Motion and Affirmation in Support of plaintiff's motion for summary judgment submitted to the Court are each signed by plaintiff's counsel. The Court notes that defendants' counsel was more than willing to rely on plaintiff's unsigned deposition transcript in order to support defendants' motion for summary judgment (Exhibit F).

defendants' vehicle. The vehicle in which plaintiff was riding as a passenger was stopped at the time the impact occurred. Plaintiff further testified that he did not hear the sound of any tires screeching, or horns sounding prior to impact.

Plaintiff has also submitted the deposition testimony of defendant Kristina Marie Spinelli, a/k/a Marie Kristina Spinelli.[4] Defendant Spinelli admitted that the vehicle in which plaintiff was riding as a passenger was stopped at the time the front of her car made contact with plaintiff's car. Further according to defendant, the traffic light at the location where the accident occurred was red, and there was a car in front of plaintiff's car. The light turned green, and defendant took her foot off the brake of her vehicle notwithstanding the fact that plaintiff's car remained stopped. Thereafter, defendants' vehicle's front bumper came into contact with plaintiff's vehicle's rear bumper. Defendant also apologized to plaintiff's wife at the scene of the accident.

Based upon plaintiff's submissions in support of the instant motion, plaintiff has established his *prima facie* entitlement to summary judgment as a matter of law.

In order to defeat plaintiff's motion for summary judgment, defendants must provide a non-negligent explanation for the rear-end collision sufficient to raise an issue of fact as to whether the possibly negligent operation of plaintiff's car caused or contributed to the accident (***Foti v. Fleetwood Ride, Inc.***, 57 A.D.3d 724, 871 N.Y.S.2d 215 (2d Dept., 2008); ***Boockvor v. Fischer***, 56 A.D.3d 405, 866 N.YS.2d 767 [2d Dept., 2008]).

Aside from defendants' objections to consideration of the parties' deposition transcripts as noted above, defendants have failed to submit any proof controverting plaintiff's version of the accident. Rather, defendant's version of the accident comports with plaintiff's version of this rear-end collision.

Accordingly, plaintiff's summary judgment motion is granted on the issue of liability, and this matter shall proceed to a trial on the issue of damages.

A Certification Order is being signed simultaneously herewith.

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[4]It is beyond cavil that defendants' counsel objects to the testimony of his own client being submitted upon the instant motion when plaintiff's counsel has affirmed that the transcript was sent to defense counsel on August 11, 2011, but has not been returned within sixty (60) days, as provided in CPLR § 3116(a). Defense counsel does not deny receiving said transcript for signature by his client. Thus, the Court will consider the transcript as if signed.

The foregoing constitutes the Order of this Court.

Dated: March 6, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.