SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

DANUEL DEMETRIUS,

Plaintiff,

ORIGINAL RETURN DATE: 12/30/11
SUBMISSION DATE: 03/15/12
Index No. 015962/2010

-against-

NASSAU COUNTY, NASSAU COUNTY POLICE DEPARTMENT and SCOTT THOMAS,

Defendants.

MOTION SEQUENCE #001

The following papers read on this motion:

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

Defendants' motion for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint based upon the ground that plaintiff failed to sustain serious injuries as required under New York Insurance Law Section 5102(d) is granted.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a *prima*

facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.*, 68 NY2d at 324).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of the negligence of defendants in the ownership and operation of their vehicle on or about February 5, 2010.

Defendants allege that plaintiff has failed to proffer competent medical evidence to show the existence of a serious injury arising out of the subject accident. It is submitted that plaintiff's injuries do not satisfy the definition of "serious injury." Defendants submit that it is clear that plaintiff does not suffer from permanent consequential limitations or significant limitations as a result of this accident.

To meet the threshold "significant limitation of use of a body function or system" or "permanent consequential limitation of a body organ or member"categories, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]).

Plaintiff's complaints, as alleged in his Bill of Particulars, consist of, among other things, the following:

CERVICAL SPINE
Posterior disc bulges at C4-5 and at C6-7
Posterior disc herniation at C5-6
Posterior osteophytes
C7 radiculopathy
Partial ilnar motor demyelination
Sensory demyelinating peripheral poly-neuropathic dysfunction

On June 22, 2010, plaintiff underwent an anterior diskectomy C5/C6, intervertebral implant, arthrodesis C5/C6 and anterior instrumentation C5/C6.

LUMBOSACRAL SPINE
Subligamentous posterior disc herniation at L4-5
Mild L4-5 retrolisthesis
L5 radiculopathy

Plaintiff received lumbar epidural steroid injections on June 16, 2010, and August 25, 2010.

RIGHT WRIST
Tear through the mid portion of the triangular fibrocartilage
Fluid in the distal radoulnar joint.

On May 28, 2010, plaintiff underwent arthroscopy, TFCC debridement and synovectomy.

TEETH
Injuries on left side #12 and #21 teeth are loose

On March 31, 2010, plaintiff underwent an electomyographic procedure on his neck and lower back and upper and lower limbs.

(Movant's Ex. C).

On the day of the accident plaintiff sought emergency room treatment at Nassau University Medical Center where x-rays were taken. A CT examination of the cervical spine without contrast revealed that there "are predominately mild multilevel degenerative changes, most prominent at C5-C6 where there is moderate endplate osteophytosis, disc space narrowing, and intervertebral foraminal narrowing, especially on the right" (Movant's Ex. D). Defendants submit that degenerative changes and osteophytosis do not develop in one day.

Plaintiff testified at his deposition that two year's prior to the subject accident he was involved in a bus accident, where he injured his back and left shoulder (see

Movant's Ex. L). On March 16, 2008, plaintiff sought emergency room treatment at Nassau University Medical Center for those injuries (Movant's Ex. E). Defendants argue that plaintiff's complaints predate the subject accident.

In support of their motion for summary judgment, defendants submit the affirmed reports of Ravi Tikoo, M.D., Jeffrey Warhit, M.D., a radiologist, Robert Israel, M.D., Barry C. Cooper, D.D.S. and Jerrold M. Gorski, M.D.

Jeffrey Warhit, M.D. affirmed that he reviewed the MRI films taken of the brain on October 11, 2010. His impression after reviewing the MRI film was: "Negative for traumatic injury to the brain" (Movant's Ex. H). Dr. Warhit also affirmed that he reviewed the lumbosacral and cervical spine MRI films taken on March 2, 2010. His impression after reviewing the MRI film was: "Degenerative changes at the L4-L5 and L5-S1 levels. In view of the associated degenerative changes, the small disc herniation noted at the L4-L5 level appears degenerative in etiology. There is no evidence of a traumatic injury to the lumbosacral spine" (Id.)

Dr. Warhit's impression after reviewing the MRI film of the cervical spine was: "Degenerative changes throughout the cervical spine. In view of the associated degenerative changes, the mild disc bulging noted at the C3/C4 and C4-C5 levels and the small disc herniations at the C2-C3, C5-C6 and C6-C7 levels, appear to be degenerative in etiology. There is no evidence of a traumatic injury to the cervical spine" (Id.).

Dr. Israel, a board certified orthopedic surgeon, performed an independent orthopedic examination of plaintiff on August 6, 2010. Ranges of motion of the cervical and lumbar spine were normal. Dr. Israel found limitations in the range of motion of the right wrist and hand which he later attributed to a "ganglion cyst and not due to the accident" (Movant's Ex. I). His impression was as follows:

- Resolved sprain of the cervical spine.
- Resolved sprain of the lumbar spine.
- Resolved sprain of the right hand.
- SP arthroscopy of the right wrist.

(Id.)

Dr. Israel opined that: "Based upon my examination, the claimant would benefit from physical therapy at a frequency of three times a week for four weeks with a re-evaluation after four weeks. There is no need for surgery, durable medical equipment or diagnostic testing" and that the "claimant is capable of work activities and ADLs without restrictions" (Id.)

Based upon his independent neurological evaluation of plaintiff on July 13, 2010, Dr. Tikoo made the following diagnoses: "(1) Post-traumatic Headaches, (2) History of Cervical Strain, (3) History of Lumbosacral Strain, and (4) History of Soft Tissue Injuries of the right wrist" (Movan'ts Ex. G). Dr. Tikoo opined that: "There is currently no neurological disability due to the accident in question. The claimant is able to function in his pre-accident capacity and carry out his day-to-day activities without restriction. He is able to work" (Id.).

In his affirmed report based upon a review of the records provided and on his examination of plaintiff, Barry C. Cooper, D.D.S. opined that "the diagnosis of a dental injury involving the maxillary left first bicuspid tooth #12 and a mandibular left bicuspid tooth #12, reportedly sustained in the accident on 2/5/10 is not supported . . . the amount of alveolar tooth supporting bone loss around teeth #12 and 21 represents a pre-existing advanced state of periodontal disease" (Movant's Ex. J).

Dr. Gorski, an orthopaedic surgeon, examined plaintiff on August 15, 2011, and reviewed the medical records, after which he concluded:

> "The man has undergone arthroscopy surgery on the right wrist. His own treating doctor indicates improvement post operatively. Mr. Demetrius has scant complaints and no significant findings regarding the right wrist. Clearly no further orthopedic attention is indicated. The man had on the date of accident underlying and degenerative arthritis in his cervical spine region. He underwent surgery on the neck which he says he would not repeat. He is only perhaps a little bit better and now his surgeon is proposing back surgery which clearly is not indicated and certainly nothing causally related to this motor vehicle accident. In my opinion Mr.

> related to this motor vehicle accident. In my opinion Mr. Demetrius is qualified to return to gainful employment perhaps as a dental assistant. No further physical therapy is indicated. He may require arthritis medicine for his underlying arthritis in the neck. In my opinion there is no causally related disability at this time" (Movant's Ex. K).

Based upon plaintiff's deposition testimony, defendants conclude that plaintiff was not prevented from performing all of his usual and customary activities for 90 out of the first 180 days following the accident. Moreover, "there was no competent medical evidence which would support a claim that the plaintiff was unable to perform substantially all of [his] daily activities for not less than 90 of the first 180 days as a result of the subject accident (citation omitted)" (*Boyle v. Gundogan,* 19 AD3d 351 [2d Dept. 2005]).

Where, as here, defendants have provided evidence demonstrating the lack of serious injury, the burden shifts to plaintiff to present sufficient evidence to defeat the motion (*see, Gaddy v. Eyler,* 79 NY2d 955 [1992]; *Tabacco v. Kaster,* 229 AD2d 526 [2d Dept. 1996]). "To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial and must make his showing by producing evidentiary proof in admissible form (citation omitted)" (*Seyfeid v. Greenspan,* 92 AD2d 563, 564 [2d Dept. 1983]; *see, Alvarez v. Prospect Hosp.,* 68 NY2d 320 [1986]).

In opposition, plaintiff submits the affirmations of Sebastian Lattuga, M.D. and Barry Katzman, M.D., Board Certified Orthopedic Surgeons, as well as the affidavit of plaintiff.

Plaintiff first presented to Dr. Lattuga on June 3, 2010, at which time plaintiff indicated that he was asymptomatic prior to this accident (Pl's Ex. A). At the time of the initial consultation, Dr. Lattuga found impaired ranges of motion of plaintiff's cervical spine. Dr. Lattuga administered a series of three epidural steroid injections to plaintiff's lumbar spine and performed an anterior cervical diskectomy at C5-C6, an intervertebral implant, arthrodesis at C5-C6 and anterior instrumentation at C5-C6 and continued to treat plaintiff (Id.).

On January 13 and July 25, 2011, Dr. Lattuga found significant limitations of

series of three epidural steroid injections (Id.) Dr. Lattuga opines that plaintiff's condition has remained substantially the same and that plaintiff has been symptomatic since the accident; plaintiff's prognosis for recovery to his pre accident state in his cervical and lumbar spine is poor. Dr. Lattuga further opined that these injuries are causally related to plaintiff's accident of February 5, 2010 (Id.).

There is no indication in Dr. Lattuga's report with regard to the method used to measure the range of motion. "[T]he failure of plaintiff's medical expert to demonstrate the objective tests performed to determine the loss of range of motion renders these numerical findings insufficient to demonstrate serious injury" (*Parreno v. Jumbo Trucking, Inc.*, 40 AD3d 520 [1st Dept. 2007]).

Dr. Latugga also failed to acknowledge that he was aware that plaintiff was suffering from degenerative disc disease (*see, Ginty v. MacNamara,* 300 AD2d 624 [2d Dept. 2002]) and also failed to address the prior accident of plaintiff (*Geliga v. Karibian, Inc.*, 56 A.D.3d 518 [2d Dept. 2008]).

Dr. Katzman first treated plaintiff on March 10, 2010, with regard to injuries to plaintiff's hand and wrist. Dr. Katzman avers that he performed surgery on plaintiff to repair the tear of his TFCC.

The existence of "bulging discs and torn ligaments is not evidence of a serious injury in the absence of objective evidence of the extent and duration of the alleged physical limitations resulting from these injuries (*Simanovskiy v. Barbaro,* 72 AD3d 930 [2d Dept. 2010]).

Plaintiff "did not submit any competent medical evidence to support [his] claim that [he] was unable to perform substantially all of [his] daily activities for not less than 90 of the 180 days immediately following the accident as a result of the subject accident (citations omitted)" (*Kearse v. New York City Transit Auth.*, 16 AD3d 45, 50, 52 [2d Dept. 2005]).

Plaintiff argues that defendant's motion must be denied because defendant failed to plead the no fault serious threshold defense in its answer and, therefore, waived that defense. This argument fails as defendant asserted the defense as its eighth affirmative defense.

Plaintiffs' submissions failed to raise a triable issue of fact.

Accordingly, plaintiff's complaint is dismissed, without costs.

This decision constitutes the order and judgment of the court.

Dated: May 14th, 2012

HON. THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C. XXX

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ENTERED
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