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At an IAS Trial Term, Part 21, of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse, located at 1 Court Street, Riverhead, New York, on the 18 day of ~~May~~ October, 2012

PRESENT:
Hon. ~~JEFFREY A. SPINNER~~ JEFFREY ARLEN SPINNER
Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X Index No. 20910/10

RICHARD LELLA,

Plaintiff(s),

DECISION/ORDER

- against -

LINCOLN GENERAL INSURANCE CO. and AMERICAN COUNTRY INSURANCE CO.,

MOTION SEQUENCE # 002-MG CASE DISP
RETURN DATE 3-07-2012
FINAL SUBMITTED DATE

Defendant(s).

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Recitation, as required by CPLR §2219(a) of the papers considered in the review of this motion to dismiss:

PAPERS	NUMBERED
Notice of Motion-Affidavits-Exhibits	1
Affirmation in Opposition (Plaintiff)	2
Reply Affirmation (Defendants)	3

This action arises from plaintiff's claim that he sustained personal injuries as the result of an automobile accident which occurred on July 17, 2008 near the intersection of Pulaski Street and Greenwich Avenue, City of Stamford, State of Connecticut.

Where a motion for summary judgment is predicated on a determination of "serious injury," the Court must determine whether, prima facie, a "serious injury" exists.

See Licari v.Elliott. 57 N.Y.2d 230,237, 455 N.Y.S.2d 570; *see also Caruso v. Hall,* 101 A.D.2d 967, 968, 477 N.Y.S.2d 722 (3rd Dept.), aff'd 64 N.Y.2d 843, 487 N.Y.S.2d 322 (1984). The moving party has the initial burden of submitting sufficient evidentiary proof in admissible form to warrant the finding that the plaintiff has not suffered "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728, 511 N.Y.S.2d 603 (1st Dept. 1986), aff'd 69 N.Y.2d 701, 512 N.Y.S.2d 364 (1986). An attorney's affirmation supported by admissible documentary evidence and exhibits establishing movant's right to relief is sufficient to support a motion for summary judgment. id. at 511 N.Y.S.2d 604.

Defendants have come forward with sufficient evidence in admissible form to warrant a finding that the plaintiff, in the within case, has not suffered a "serious injury." *See Lowe*, 122 A.D.2d 728. The defendants submitted the sworn report of orthopedist, Dr Isaac Cohen, M.D. In his summary, Dr. Cohen finds that the plaintiff sustained soft tissue injuries as a consequence of the accident of record, that healed uneventfully with the passage of time. No evidence of sequelae or permanency was documented. There was no evidence of any functional disability present. He has a completely normal functional capacity of both upper and lower extremities, as well as the cervical and thoracolumbosacral spine areas. Dr. Cohen found that the MRI findings documented are of no clinical significance but demonstrate ongoing degenerative changes of a long term duration. Upon Dr. Cohen's completion of his examination, the plaintiff offered no complaints as a result of this examination and left the examination area stable unchanged. See Exhibit "D" attached to defendants' moving papers.

The defendants also came forward with the sworn report of radiologist Dr. Jessica Berkowitz, M.D., who reviewed the MRIs of the plaintiff RICHARD LELLA's cervical

spine, lumbar spine, and left shoulder, which MRIs were performed on September 2, 2008 at Islandia MRI Associates, PC. Dr. Berkowitz's evaluation of all MRIs revealed no causal relationship between the claimant's alleged accident and the findings on the MRI examination. See Exhibit "E" attached to defendants' moving papers.

Furthermore, the defendants came forward with admissible evidence that the plaintiff did not suffer from medically determined injuries or impairments of a non-permanent nature that substantially curtailed his usual and customary activities for 90 days' during the first 180 days following the accident. By plaintiff's own testimony, he only remained out of work for five (5) days following the accident. See Exhibit "F" attached to defendants' moving papers, page 45, lines 20-25, page 46, lines 2-10. In order to establish a claim under the 90/180 category, there must be proof that the plaintiff's usual and customary activities were impaired in some significant way for 90 days of the first 180 days after the accident. *See Cruz v. Calabiza*. 226 A.D.2d 242, 641 N.Y.S.2d 255 (1st Dept. 1996). There is no such proof before the Court.

The Court of Appeals has also held that "certain factors may override a plaintiff's objective medical proof of such limitations and permit dismissal of the complaint." Specifically, in *Pommels v. Perez*, the Court of Appeals recently held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury. *See Berete v. Ford Motor Co.*, 10 Misc. 3d 1067A (Sup. Bronx 2006) (*citing Pommells v. Perez*, 4 N.Y.3d 56 (2005). In the case at hand, defendants sufficiently pointed out to the Court that the plaintiff testified that he stopped treating in December 2008, over three (3) years ago. See Exhibit "F" attached to defendants'

moving papers, page 51, lines 15-18. There is no explanation for the plaintiff's gap in treatment of about three (3) years. Plaintiff failed to come forward with a reasonable explanation for this cessation of treatment. *Coleman v. New Ridgewood Car Serv.*, 19 Misc. 3d 1136A, (Sup. Kings 2008).

In reviewing the plaintiff's opposition to the defendants' motion, it is clear that plaintiff failed to rebut defendants' prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d). *See McMillian v. Naparano*, 61 A.D.3d 943, 879 N.Y.S.2d 152 (2nd Dept. 2009). The plaintiff did not submit an Affidavit to support his position that he is allegedly still in pain or that his daily activities are still limited or that his daily life has changed. The plaintiff only submitted his deposition testimony, which was taken approximately one (1) year ago. The plaintiff presented to Dr. Acaru in March 2012 for a re-evaluation, not for treatment. Furthermore, the plaintiff failed to submit any recent MRI or EMG studies or any other diagnostic examination to prove his alleged permanent injuries. Rather, the reports of Dr. Acaru and Dr. Himelfarb, attached to his opposition papers, rely on diagnoses/impressions from MRIs dated September 2, 2008 and September 9, 2008 - over three (3) years ago. See Exhibit "D" attached to plaintiff's opposition papers. There is also no evidence of any significant limitation of use to a body function or system of the plaintiff related to the accident. Each and every range of motion test performed by Dr. Acaru proves that the plaintiff's alleged loss of range of motion is less than nine percent (9%) in all parts of the body tested. See Exhibit "C" attached to the plaintiff's opposition papers. There is no evidence in admissible form which would support the plaintiff's claims that he is currently disabled or that his injuries are permanent in nature. *See Alvarez v. Prospect*

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Hospital, et al, 68 N.Y.2d 320 (1986).

The defendants LINCOLN GENERAL INSURANCE CO. and AMERICAN COUNTRY INSURANCE CO. Notice of Motion to dismiss the plaintiff's Complaint pursuant to CPLR §3212, is granted.

Dated: OCT 18 2012

Entered

HON. ~~JEFFREY A. SPINNER~~
JEFFREY ARLEN SPINNER

GRANTED
OCT 18 2012
JUDITH A. PASCALE
Clerk of Suffolk County