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SHORT FORM ORDER

INDEX No. 10-22825
CAL No. 12-00714MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 9-10-12
ADJ. DATE 12-12-12
Mot. Seq. # 002 - MD

ANYELO ROSARIO-VINAS and EDUARDO VINAS-MORONTA,

Plaintiffs,

- against -

VIRGINIA M. HALL,

Defendant.

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Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 22; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 23-31; Replying Affidavits and supporting papers 32-33; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendant, Virginia M. Hall, pursuant to CPLR 3212 for summary judgment on the basis that the plaintiffs, Anyelo Rosario-Vinas and Eduardo Vinas-Moronta, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal serious injuries allegedly sustained by the plaintiffs on September 2, 2009, on Broadway (Route 110) approximately feet from Wasner Place, in Amityville, New York, when the plaintiffs' vehicle, operated and owned by Anyelo Rosario-Vinas, and the vehicle operated by defendant, Virginia M. Hall came into contact. Eduardo Vinas-Moronta was a passenger in the plaintiff's vehicle seated in the front passenger seat at the time of the accident.

Pursuant to Insurance Law § 5102 (d), " '[s]erious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a

body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of this application, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer with counterclaim for judgment over for any injuries sustained by Eduardo Vinas-Moronta, reply to counterclaim, and plaintiff's bill of particulars; various uncertified medical records, transcript of the examinations before trial of Anyelo Rosario-Vinas dated December 12, 2011, and Eduardo Vinas-Moronta dated December 12, 2011; an unauthenticated narrative report of Gary DiCanio, D.O. dated January 19, 2010 concerning the examination of plaintiff Rosario-Vinas; uncertified report of the MRI of Rosario-Vinas's lumbar spine dated November 18, 2009; the sworn reports of Alan B. Greenfield, M.D. dated November 18, 2009 concerning his independent radiology review of said MRI; the sworn report of Jay Nathan, M.D. dated January 9, 2012 concerning his independent orthopedic examination of Anyelo Rosario-Vinas; the unauthenticated narrative report of Patrick J. Hannon, D.C. dated September 12, 2007 concerning his consultation and examination of plaintiff Vinas-Moronta; unauthenticated narrative report by Joseph Perez, M.D. dated September 18, 2007

concerning his consultation and examination of plaintiff Vinas-Moronta; unauthenticated narrative report of Gario DiCanio, D.O. dated January 19, 2010 concerning his consultation and physical examination of plaintiff Vinas-Moronta; and the sworn reports of Jay Nathan, M.D. concerning his independent orthopedic examination of the plaintiff Vinas-Moronta on January 9, 2010, and Alan B. Greenfield dated June 27, 2012 concerning his independent radiology review of the lumbar spine MRI dated November 18, 2009 of plaintiff Vinas-Moronta.

ANYELO ROSARIO-VINAS

By way of the bill of particulars, the plaintiff, Anyelo Rosario-Vinas has alleged that as a result of this accident, he sustained injuries consisting of bulging discs at L2-3, L3-4, L4-5, and L5-6; levoconves scoliosis; straightening of the normal lumbar lordosis; cervical sprain/strain; thoracic sprain/strain; and lumbar sprain/strain.

The records reviewed by Dr. Nathan have not all been provided to this court as required pursuant to CPLR 3212. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which evidence has not been provided in this case as set forth. Many of the exhibits are either unauthenticated or uncertified. Thus, defendants' moving papers are insufficient as a matter of law. It is determined that even if such records were provided and in admissible form, that the defendant has not established prima facie entitlement to summary judgment dismissing the complaint as asserted by plaintiff Rosario-Vinas

The MRI report of plaintiff Rosario-Vinas' lumbar spine, submitted by the defendant, set forth the impression that the plaintiff has levoconvex scoliosis with straightening of the normal lumbar lordosis; diminished disc space height with hydradation loss, and anterior disc extension and anterior spurring with posterior subligamentous disc bulge, and posterior subligamentous disc bulges at L3-4 through L5-6.

Jay Nathan, M.D. set forth in his report of January 12, 2012 that the plaintiff, Rosario-Vinas is a 22 year old male driver who stated he injured his neck, back, and right hand in the accident of September 2, 2009, and thereafter received physical therapy for six months, and that CT and MRI scan testing was performed. He had no serious illness or similar conditions or accidents prior to the subject accident. He was employed full time in shipping and receiving at the time of the accident. Dr. Nathan did not indicate that he reviewed the MRI or CT scan of the plaintiff's lumbar spine, thus leaving this court to speculate as to how he reached his final impression, and if his impression would in any way be altered upon reviewing those studies. As an orthopedist, Dr. Nathan has not commented upon these studies. However, he does opine that the injuries diagnosed and documented in the clinical records are to the neck and thoracolumbar spine, that treatment was consistent with the injuries documented in the clinical records; the etiology of the condition or injuries is the motor vehicle accident, and that the diagnosis can typically occur by trauma, thus establishing that the plaintiff sustained such alleged injuries included in his medical records and reports due to the subject motor vehicle accident.

The narrative report of Gary DiCanio, D.O. dated January 19, 2010, submitted by the moving defendant indicates that there is no prior history contributory to the plaintiff's present condition. It is noted that the normal range of motion values set forth by Dr. DiCanio relative to examination of the plaintiff's cervical, thoracic, and lumbar spine differ from those set forth by Dr. Nathan, raising factual issues which preclude summary judgment.

The impression set forth by Jay Nathan is inconsistent with the radiology report of Dr. Alan B. Greenfield who has set forth that the disc bulging at L4-5, L2-3, L4-5, and L5-S1 are clearly longstanding and degenerative, evolving over a period of years, and are entirely unrelated to the accident. However, Dr. Greenfield's opinion does not correlate his findings with clinical examination, and he stated in a conclusory and unsupported opinion that muscular spasm is not a consideration with this examination performed months after the accident, without knowing whether or not the plaintiff was experiencing muscle spasms. Additionally, Dr. Greenfield does not set forth the basis for his conclusory opinion that the series of bulging lumbar discs are longstanding and are unrelated to the accident, especially in light of the finding by Dr. Nathan that there were no prior injuries to the plaintiff's back and neck, and that the documented findings are causally related to the subject accident. Thus, these factual issues preclude summary judgment.

Additionally, the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant's physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the examining physician does not comment on this time period. The plaintiff testified that following the accident, he treated at Health One for physical therapy/treatment and acupuncture four times a week for six months, until his No-Fault Insurance terminated. Prior to the accident, he worked six days a week, and after the accident worked five days a week due to his back pain as he cannot stand for long periods. He can no longer lift heavy objects at his job and can no longer work six days a week. He had no prior or subsequent injuries to those parts of his body he claims to have injured in this accident, and he had no history of scoliosis in his back.

Based upon review and consideration of the evidentiary submissions, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff Rosario-Vinas did not sustain a serious injury as defined by Insurance Law § 5102 (d) in either category of injury. The moving papers raise factual issues which preclude summary judgment.

EDUARDO VINAS-MORONTA

By way of his bill of particulars, the plaintiff, Eduardo Vinas-Moronta, alleges that as a result of this accident he sustained injuries consisting of disc herniation at L4-5, disc bulges at L1-2, L2-3, L3-4 with flattening of the thecal sac; cervical sprain/strain; left shoulder sprain/strain; right hand contusion; thoracic spine sprain/strain; lumbar spine sprain/strain, and left knee sprain/strain.

Dr. Nathan preformed an independent orthopedic examination of the plaintiff on January 12, 2012 and indicates that the 26 year old plaintiff was involved in a prior motor vehicle accident in 2007 with injuries to his neck, back and left shoulder. Subsequent to the subject accident, the plaintiff received six months of physical therapy, and had MRI and EMG testing. He reported difficulty walking, bending, and lifting. Dr. Nathan set forth the materials and records he reviewed for his independent orthopedic examination of the plaintiff, including the MRI report of the Vinas-Moronta's lumbar spine on November 23, 2009. He set forth the ranges of motions obtained upon examination of the plaintiff relative to his cervical, thoracolumbar spine, upper extremities, lower extremities, left hip, right knee, and found no deficits when compared to the normal ranges of motion set forth in his report. It is noted, however, that Dr. Nathan does not address the claims that the plaintiff sustained a herniated disc at L4-5 and disc bulges at L1-2 through L3-4, and does not rule out, as the examining orthopedist, that such injuries exist. Further, there are no evidentiary submissions by the defendant establishing that the plaintiff had been previously diagnosed with any lumbar herniated or bulging discs. Thus, while, Dr. Nathan opined that as a result of this accident, the plaintiff sustained a pre-existing and exacerbated cervical sprain, resolved, and a pre-existing and exacerbated lumbar sprain, resolved, he fails to comment as to whether there were any herniated or bulging discs which were pre-existing or exacerbated, thus raising factual issues which preclude summary judgment.

Dr. Alan Greenfield set forth in his independent review of the plaintiff's MRI films of his lumbar spine dated November 18, 2009 that there was straightening of the lordotic curvature which is a nonspecific finding which may be constitutional in origin, related to position, or due to restricted range of motion. Muscular spasm is not considered likely in that the accident was on September 2, 2009. This conclusory opinion is unsupported by evidentiary proof of no spasms on the date of the study, or by clinical correlation. Dr. Greenfield continued that there is degenerative disc disease and degenerative disc bulging along with degenerative bone spur formation from L4 through S1 which are clearly longstanding, and entirely unrelated to the subject accident as the findings evolved over a period of years. However, Dr. Greenfield does not set forth the basis for such conclusory assertion, raising factual issue, as he does not set forth the duration of such degeneration. Dr. Greenfield also found a small coexistent disc herniation near the mildline at L4-L5, with minimal indentation of the dural sac. However, he does not indicate the amount of indentation on the dural sac, and the consequence of such finding, correlating to clinical findings and examination. He indicated that this condition is chronic, as there is no focal bright signal in the region of the disc herniation to indicate a recently torn annulus fibrosus or other recent posttraumatic inflammatory edema, and merely stated that this injury cannot be related to the subject accident. Again, he does not set forth the duration of such degeneration or relate it to any other cause, supported by evidentiary proof. These aforementioned conclusory opinions preclude summary judgment.

Dr. Hannon, upon examination of the plaintiff on September 12, 2007, noted that the foraminal compression test was positive for left cervical nerve root compression; that the Jackson's compression test was positive for bilateral cervical nerve root compression; and that the Soto-Hall test was positive for cervico-dorsal vertebral trauma. Dr. Joseph Perez, upon examination of the plaintiff on September 18, 2007, also found that the Jackson compression, foraminal compression, Kemp's, Laseque, and Soto-Hall tests were positive, and diagnosed him as having lumbar nerve root injury. Dr. DiCanio also diagnosed the plaintiff as having L4-5 disc herniation with nerve root compression upon examination of the plaintiff on January 19, 2010 and review of the plaintiff's lumbar MRI of November 18, 2009. However, the defendant has failed to submit the report of an examining neurologist to address these radicular findings (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issue precluding summary judgment.

Additionally, the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant's physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the examining physician does not comment on this time period. The plaintiff testified that the day following the accident, he received medical care and treatment at Health One and received physical therapy four times a week for about five or six months. Thereafter, he went two or three times a week for about a month and a half, until his No-Fault Insurance stopped. He had been laid off from his job with Airflex Industries about three or four months prior to the accident. He drove a forklift, and loaded and unloaded trucks. He received unemployment for about seven months, then started working with Compare Food Supermarket stocking shelves and taking customers food shopping and returning them to their home afterward. He had difficulty finding a job as he could not longer do heavy lifting after the subject accident. He has pain in his back and left knee when standing for a long time, or in sitting. He used to do push-ups and exercise prior to the accident and has pain in his right hand. He lives with his sister who takes care of the house.

Based upon review and consideration of the evidentiary submissions, it is determined that the defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff Vinas-Moronta did not sustain a serious injury as defined by Insurance Law § 5102 (d) in either category of injury. The moving papers raise factual issues which preclude summary judgment.

These factual issues raised in defendant's moving papers preclude summary judgment. The defendant failed to satisfy the burden of establishing, prima facie, that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish its prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury", it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (002) by the defendant for summary judgment dismissing the complaint is denied.

Dated: 2/8/13

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**