SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 20

Index Number : 106047/2010
HOCHROTH, DAVID
vs.
ROLLERSON, NOLAN
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Serious injury

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

OCT 16 2013

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/8/13

_____, J.S.C.
HON. ARLENE P. BLUTH

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

----------x

David Hochroth,

Plaintiff,

-against-

Nolan Rollerson and Valorie Rollerson,

Defendants.

----------x

Motion Seq 02

Index No. 106047/10

DECISION AND ORDER

Hon. ARLENE P. BLUTH, JSC

Defendants' motion for summary judgment dismissing the complaint on the grounds that plaintiff has not demonstrated that his injuries meet the serious injury threshold pursuant to Insurance Law § 5102(d) is granted, and the case is dismissed.

Plaintiff, self-represented, claims that he was injured in a motor vehicle accident involving defendants' vehicle on May 11, 2007 on the westbound service road of the Long Island Expressway. Plaintiff claims that he injured his back and neck[1]; he also claims that he was incapacitated from work for 3-4 months following the accident.

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v*

[1]Although the bill of particulars, which was verified by plaintiff's former attorney, claimed injuries to plaintiff's back, both shoulders, both wrists, neck, right knee and both hips, at his deposition, plaintiff testified only about neck and back injuries (exh D, T 63, 93-94).

Catanzaro, 1 AD3d 195, 197 [1st Dept 2003], *quoting Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010], *citing Pommells v Perez*, 4 NY3d 566 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 2009 NY Slip Op 43 [1st Dept]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see*

Valentin v Pomilla, 59 AD3d 184 [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

In support of their motion, defendants annex two affirmed medical reports. The first is from Dr. Israel, an orthopedist, who examined plaintiff on April 4, 2012, and found normal range of motion in plaintiff's cervical, thoracic and lumbar spine, both wrists and right knee. He opined that plaintiff's sprains had resolved and that he had no orthopedic disability. Defendants also submit the affirmed MRI reports of Dr. Lastig, a radiologist, who reviewed films of plaintiff's cervical and lumbar spine taken approximately two months after the subject accident, and found evidence of advanced multi-level degenerative disc disease in both areas. Dr. Lastig supported his conclusions by noting the presence of marginal end-plate osteophytes and uncinate osteophytes in the cervical spine, and disc desiccation and disc space narrowing in the lumbar spine.

As for any 90/180 claim, defendants note that plaintiff has not provided any medical evidence that which confirms that he was unable to engage in normal activities, including work during the relevant period.

Thus, defendants have met their prima facie burden of showing that plaintiff has not suffered a serious injury pursuant to the insurance law, and the burden shifts to plaintiff to raise a triable factual question sufficient to defeat the motion.

Plaintiff's opposition to the motion consists of an unsigned 6 page narrative (exh 1), and an unsigned document from a massage therapist (Kimberli Monk), along with her bills (exh 2). Neither of these documents is in admissible form and were not considered by the Court.

Plaintiff also submits the affirmed report of Dr. Delman dated November 1, 2007, an unaffirmed MRI report of plaintiff's lumbar spine from Stand -Up MRI of Manhattan, PC and page 1 of a letter (unsigned) from State Farm regarding a property damage claim (exh 3). Although Dr. Delman's report is in proper form to the extent that it is affirmed, it does not raise a triable factual question. The report is incomplete; only pages 1,2 and 5 were submitted (see numbering at the bottom of the pages). In this November 1, 2007 "follow-up evaluation", Dr. Delman makes a passing reference to the fact that he last saw plaintiff on May 29, 2007, 18 days after the accident, but he does not provide any records from that exam or give any details about that visit. Significantly, plaintiff has not submitted any report from any doctor who examined him shortly after the accident. "Absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that his injuries were caused by the accident" *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 922 NYS2d 381 (1st Dept 2011). Additionally, while Dr. Delman refers to the findings of MRI reports of plaintiff's cervical and lumbar spine, he does not say that he reviewed the films himself and the radiology reports submitted are not affirmed. Dr. Delman's recitation of the findings in the unaffirmed reports does not put the findings of those of inadmissible reports before the Court. *See Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013). There is nothing in his affirmation to establish that any of plaintiff's physical conditions were caused by the subject accident.

On the return date, plaintiff handed up two additional documents which were not attached to his opposition, without proof that these papers were served on defendants– a document signed by a chiropractor (Bruce Lambert) but not sworn to before a notary,

and an August 23, 2011 letter from Daniel Einhorn, vice-president of a company that employed plaintiff, in which Mr. Einhorn approximated the time that plaintiff missed from work as "three to four months", without stating specific dates. Neither of these documents is in admissible form, and neither was considered by the Court.

Finally, the Court notes that plaintiff has not raised a triable issue of fact as to significant limitation of use or permanent consequential limitation of use because he did not submit an affirmed report of a recent physical examination and therefore did not rebut the findings of defendants' doctors, who affirmed that any sprains were resolved (Dr. Israel), and that plaintiff has evidence of widespread degenerative disc disease (Dr. Lastig). Nor has plaintiff raised a triable question of fact on his 90/180-day claim because he did not submit proof that he was directed by a doctor to stayed home. *See Shu Chi Lam v Wang Dong*, 84 AD3d 515, 516, 922 NYS2d 381 (1st Dept 2011).

For the foregoing reasons, plaintiff has failed to raise an issue of fact and summary judgment is granted to defendants. The complaint is dismissed.

Accordingly, it is

ORDERED that defendants' motion is granted. The case is dismissed.

This is the Decision and Order of the Court; copies mailed to both sides.

Dated: October 8, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC