NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 10

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

MARTINEZ JR.,ERNESTO O.

Index №. **0301809/2009**

-against-

Hon. HON. LIZBETH GONZÁLEZ

GRAHAM,RUSSELL L.

Justice.

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The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **July 03 2012** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Defendant's motion for summary judgment is granted in accordance with the annexed Decision and Order dated 3-1-13.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 3/1/13

Hon. _____
J.S.C.

HON. LIZBETH GONZÁLEZ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART PP4

Ernesto O. Martinez, et al

Plaintiffs,

-against-

Russell L. Graham, et al.,

Defendants.

DECISION and ORDER
Index No. 301809/2009

In this personal injury action, defendants move to dismiss plaintiff Ernesto O. Martinez's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d).

Plaintiff's claims arise from a motor vehicle accident that occurred on June 25, 2007 in the County of Westchester while plaintiff Martinez was riding in a vehicle owned and operated by co-plaintiff Jesus M. Morillo that was allegedly hit by the vehicle operated by defendant Russell L. Graham and owned by defendant R & L Carriers. On the day of the accident plaintiff was transported by ambulance to the emergency room of Mount Vernon Hospital where he complained of pain in his neck, back, leg and arm. An x-ray of his neck showed straightening of the cervical spine with no evidence of fracture, dislocation or swelling; however, the x-ray of the lumbosacral spine revealed "chronic deformity of the left . . . L1 vertebral body" and "two metallic objects overlying the sacrum." The x-ray reports do not indicate that the findings were casually related to the accident. Plaintiff was released

the same day and prescribed pain medication to alleviate his complaint but he did not fill the prescription and only took over the counter pain medication (Motrin). On June 27, 2007, plaintiff visited Morris Medical PC., where he received medical treatment and therapy for approximately three (3) months.

The proponent of a motion for summary judgment must present evidence sufficient to show that no material issues of fact exist with regard to the threshold issue. (*Bray v. Rosas* 29 A.D.3d 422 [1st Dept 2006]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851 [1985].) Here, the burden rests on the defendant to establish by the submission of proof in admissible form that plaintiff did not suffer a serious injury. When a defendant's motion is sufficient to raise the issue as to whether a serious injury has been sustained by the plaintiff, the burden shifts to the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. (*Perez v. Rodriguez*, 25 A.D.3d 506 [1st Dept 2006]; *Licari v Elliot,* 57 NY2d 230 [1982]; *Lopez v Senatore*, 65 NY2d 1017[1985].) Disc bulges and herniated discs alone do not automatically fulfill the requirements of Insurance Law §5102 (d). Objective proof of the nature and degree of a plaintiff's injury is required to satisfy the statutory threshold for serious injury. (*Cortez v Manhattan Bible Church*, 14 AD3d 466 [1 st Dept 2005].) Plaintiff must still establish the extent of his purported limitations and its duration. (*Arjona v Calcano*, 7 AD3d 279 [1st Dept 2004].)

The bill of particulars sets forth the plaintiff's injuries as follows:

> Posterior bulge of the L4/5 intervertebral disc impinging upon the thecal sac; straightening of the cervical lordosis which may be secondary to the presence of biomechanical abnormality pain and/or muscle spasm and posterior subluxation of C3 on C4 approximating 2mm in neutral position, reduced in flexion.

Defendants contend that plaintiff's injuries do not meet the statutory mandate of a serious injury. In support of the motion to dismiss defendants submit a copy of the pleadings, plaintiff's deposition transcript, plaintiff's bill of particulars and the affirmed medical report of Dr. Daniel J. Feuer, the neurologist retained by the defendants. Dr. Feuer examined the plaintiff on May 17, 2012, finding full ranges of motion in plaintiff's cervical and lumbar spine. After a review plaintiff's medical records consisting of Dr. Chess' x-ray report of plaintiff's spine, shoulder, wrist and elbows; plaintiff's medical records from Morris Medical PC.; Mount Vernon Hospital medical records; and Dr. Zarhin's medical findings, Dr. Feuer concluded that there was no evidence of a neurological injury, disability or permanence as a result of the accident and that plaintiff was able to engage in full active employment as a car salesman. He opined that plaintiff was able to perform his normal daily activities without restriction. Defendants also point to plaintiff's deposition transcript and bill of particulars which demonstrate that plaintiff missed only two weeks from work and was confined to home and bed for one week. Defendants have met their burden of proof through the submission of admissible evidence thus shifting the burden of proof to the plaintiff to support his claim of serious injury.

Plaintiff's opposition consists of his affidavit, the medical records from Morris

Medical PC., the x-ray report from Mount Vernon Hospital, the MRI and x-ray reports from Dr. Jeffrey S. Chess, plaintiff's deposition transcript and the affidavit of Dr. Peter C. Kwan, a neurologist, who examined the plaintiff on July 13, 2012. Plaintiff in his affidavit dated July 25, 2012 states that from the day of the accident until the present, he continues to experience pain to his neck, back and shoulder and is unable to perform his daily activities. He states that as a result of the accident he is unable to lift and carry " heavy things," jog, run, sit for a long time and play sports. Plaintiff affirms that he underwent physical therapy two times a day for approximately three months and that he stopped treatment because he started a new job that he did not want to risk. He also states that although he missed two weeks from work and his job responsibilities did not change, he was able to return only on a part-time basis and had difficulty performing his duties.

Dr. Jeffrey Chess, a radiologist, performed plaintiff's x-ray exam on June 28, 2007 which revealed posterior subluxation of C3 on C4 reduced in flexion; however, no narrowing of the discs, fracture, abnormal soft tissue calcification or swelling was noted. Dr. Chess also interpreted two MRI reports dated August 7, 2007 that showed straightening of the cervical lordosis and a bulging disc at L4/L5 with impingement on the thecal sac. Plaintiff also submits the unsworn reports of Dr. Humprey A. Iroku from Morris Medical P.C. dated June 27 and July 30, 2007, respectively. Plaintiff may rely on these unsworn reports since defendants referred to these documents in support of their motion. (*Lazarus v Perez,* 73 AD3d 528 [1st Dept 2010].) Dr. Iroku upon his examination of the plaintiff found restriction

on both plaintiff's lumbar and cervical spine. He described the cervical limitation plaintiff was experiencing upon flexion, extension, rotation and lateral flexion as follows:

Range of motion (Cervical Spine Region)

	Normal	Examination
flexion	45 degrees	30 degrees
extension	55 degrees	35 degrees
left rotation	70 degrees	65 degrees
right rotation	70 degrees	65 degrees
lt. lat. flex.	40 degrees	30 degrees
rt. lat. flex	40 degrees	30 degrees

Dr. Iroku also described the lumbosacral limitation plaintiff was experiencing upon flexion, extension, rotation and lateral flexion as follows:

	Normal	Examination
flexion	75 degrees	65 degrees
extension	30 degrees	25 degrees
left rotation	30 degrees	25 degrees
right rotation	30 degrees	25 degrees
lt. lat. flex.	35 degrees	25 degrees
rt. lat. flex	35 degrees	25 degrees

Dr. Iroku also found tenderness in plaintiff's right shoulder and neck. He referred the plaintiff for weekly therapy for four weeks and a re-evaluation in four weeks. He referred the plaintiff for x-ray exams. He deemed the plaintiff temporarily disabled and opined that the cervical, thoracic and lumbar spine "may be weakened for an indefinite period of time, possibly resulting in significantly restricted mobility." He diagnosed sprains and strains of the neck, back, shoulder, elbow and wrist.

Although plaintiff states in his affidavit that he received physical therapy for three

months immediately after the accident, no corroborating records are submitted. Plaintiff's records establish that he was last treated on July 30, 2007 and examined on July 13, 2012 by Dr. Peter C. Kwan, a neurologist. Dr. Kwan states that upon examination of the plaintiff, he noted that plaintiff still complains of pain to his neck and back. Dr. Kwan found the presence of muscle spasms and tenderness with a decreased range of motion of plaintiff's spine. The straight leg test was positive. He described the limitations of motion of plaintiff's cervical and lumbar spine as follows:

Range of motion (Cervical Spine Region)

	Normal	Examination
flexion	45 degrees	30 degrees
extension	30 degrees	25 degrees
lateral bending	30 degrees	25 degrees

Range of motion (Lumbar Spine Region)

	Normal	Examination
flexion	90 degrees	30 degrees
extension	30 degrees	10 degrees
lateral bending	35 degrees	15 degree

In his report, Dr. Kwan reviewed the sworn MRI reports dated August 7, 2007 of Dr. Jeffrey S. Chess that show straightening of the cervical lordosis and a bulging disc at L4/L5 with impingement on the thecal sac. Dr. Kwan concluded that plaintiff's injuries are permanent, causally related to the accident and that his future prognosis is poor. His diagnosis is traumatic cervical injury and a bulging disc at L4/L5 impinging on the thecal sac.

It is not disputed that Dr. Kwan did not initially treat the plaintiff and his first contact with the plaintiff was five (5) years after the accident. Dr. Kwan reviewed the MRI results,

examined the plaintiff and detailed his symptoms including recurring pain and limitation of movements in the cervical and lumbar spine. A recent examination that indicates significant limitations in the lumbar and cervical spine can be deemed sufficient to raise a triable issue of fact. (*Rosario v Universal Truck & Trailer Service*, 2 AD3d 362 [1st Dept 2003]; *Campbell v Cloverleaf Trans Inc.*, 5 AD3d 169[1st Dept 2004].) The Court of Appeals has held, however, that certain factors such as a gap in treatment, an intervening medical problem, or a preexisting condition may override a plaintiff's objective medical proof of significant limitations and permit dismissal of the complaint. (*Pommels v Perez*, 4 NY3d 566 [2005]; *Ramkumar v Grand Style Transp. Enterprises Inc.* 94 AD3d 484 [1st Dept 2012].) In this case, there is a five-year gap in treatment running through approximately three months after the accident until the preparation of the medical affidavit relied upon by plaintiff in opposition to the motion for summary judgment. The Court of Appeals in *Pommels v Perez* held that while "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment," a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment. (*Pommels v Perez*, 4 NY3d 566 [2005]; *Colon v Kempner*, 20 AD3d 372 [1st Dept 2005].) Here, the plaintiff fails to meet his burden. Plaintiff testified that he stopped treatment because he feared losing his new job. The probative value of the plaintiff's explanation is diminished since the gap in treatment spans five years. Just as significantly, the plaintiff's report from Morris Medical PC., which was based upon plaintiff's examination

before the cessation of treatment, does not indicate that plaintiff had reached maximum benefit from therapy. The medical records indicate that a reassessment of the plaintiff's injuries and course of treatment would be made after four weeks of therapy. Plaintiff does not provide any follow-up reassessment.

The plaintiff does not fall under the 90/180 day category wherein serious injury is defined as a plaintiff's inability to perform "substantially all of the material acts which constitute[d][her] usual and customary activities" for not less than 90 of the 180 days immediately following the date of the accident. (Insurance Law § 5102[d].) To prevail under this category, a plaintiff must demonstrate through competent, objective proof that he sustained a "medically determined injury or impairment of a nonpermanent nature" (Insurance Law § 5102[d]) which would have caused the alleged limitations on the plaintiff's daily activities, and a curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment." (*Berk v Lopez*, 278 AD2d 156 [1st Dept 2000]; *Licari v Elliott*, 57 NY2d 230 [1982].)

Here, the evidence submitted by defendants, which includes plaintiff's deposition transcript, bill of particulars and medical records, demonstrates that plaintiff cannot establish an inability to perform the requisite acts within the prescribed period. The plaintiff failed to meet his shifting burden as his affidavit was conclusory and failed to establish a question of fact with respect to whether he was prevented from performing "substantially all" of the materials acts constituting his usual and customary daily activities during the requisite

period. (*Beatty v Miah*, 83 AD3d 610[1st Dept 2011].) Plaintiff's bill of particulars and affidavit indicate that plaintiff missed only two weeks from work and plaintiff's reduced work schedule was insufficient to raise a triable issue of fact on this claim. (*Perez v Corr*, 84 AD3d 646[1st Dept 2011].) The defendants have accordingly met their burden of establishing that plaintiff did not sustain a 90/180-day serious injury.

After careful consideration and review, the defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed.

This constitutes the decision and order of this Court.

Dated: Bronx, New York
March 1, 2013

Hon. Lizbeth González
Justice, Supreme Court