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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 25 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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JOSE ABARCA,

Plaintiff(s),

-against-

STEPHEN R. FOURNIER,

Defendant(s).

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Index No. 13877/09

Motion Submitted: 9/23/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X

Defendant moves this Court for an Order granting summary judgment in his favor and dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff opposes the requested relief.

The motor vehicle accident giving rise to this action occurred on September 4, 2008. Defendant's motor vehicle struck plaintiff's motor vehicle in the rear. Plaintiff alleges that he sustained injuries to his cervical and lumbar spine areas, resulting in restricted range of motion and pain. Plaintiff claims that he has suffered serious injury within the meaning of the Insurance Law's permanent consequential limitation, significant limitation of use, and 90/180 categories of injury.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594

[2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York Univ. Med. Center***, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Here, defendant must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident (***Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]).

In support of his motion, defendant relies on, *inter alia*, plaintiff's deposition testimony, plaintiff's verified Bill of Particulars, and the affirmed medical report of his examining orthopedic surgeon, John Leppard, M.D. Defendant's examining physician conducted his examination of plaintiff on January 26, 2011, almost two and one-half years post-accident.

Plaintiff testified at deposition held on November 19, 2010 that he received frequent chiropractic treatment as a result of the accident for at least four months following the accident and, with less frequency, for up to approximately one year following the accident. Although plaintiff accompanied his son to the hospital following the accident, he did not receive any treatment there. Plaintiff is presently employed as a cook, and he works thirty-five to forty hours per week. Immediately after the subject accident, plaintiff missed only one week from work. He testified that he has trouble lifting heavy things, and experiences pain upon sitting, standing up, and walking. Plaintiff also testified that his neck is much better, and that he takes Tylenol when he has pain. As a result of his injuries sustained in the accident, plaintiff works less hours than he did before the accident and he can no longer play soccer. Aside from this testimony, plaintiff does not report any other specific restrictions of his daily activities.

A defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (***Kuperberg v. Montalbano***, 72 A.D.3d 903, 899 N.Y.S.2d 344 (2d Dept., 2010); ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 A.D.3d 664, 852 N.Y.S.2d 287 [2d Dept., 2008]).

Thus, as noted, defendants' submission of plaintiff's deposition testimony (***Jackson v. Colvert***, 24 A.D.3d 420, 805 N.Y.S.2d 424 (2d Dept., 2005); ***Batista v. Olivo***, 17 A.D.3d 494, 795 N.Y.S.2d 54 [2d Dept., 2005]) is sufficient herein to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (***Paul v. Trerotola***, 11 A.D.3d 441, 782 N.Y.S.2d 773 [2d Dept., 2004]), under the 90/180 category of that law.

With respect to that aspect of defendant's motion for summary judgment relative to the permanent consequential limitation and significant limitation categories of the Insurance Law regarding plaintiff's lumbar spine area, Dr. Leppard's affirmed report establishes defendant's entitlement to that relief.[1]

Dr. Leppard's examination of plaintiff revealed normal range of motion in plaintiff's lumbar spine. Dr. Leppard used a hand held goniometer to obtain the measurements, and he compared his findings to normal range of motion, setting forth all ranges of motion in his report. Dr. Leppard also conducted other orthopedic tests, which were negative, and plaintiff did not exhibit any neurological symptoms.

Examining the report of defendant's physician, there are sufficient tests conducted set forth therein to provide an objective basis so that their respective qualitative assessments of plaintiff could readily be challenged by any of plaintiff's expert(s) during cross examination at trial, and be weighed by the trier of fact (***Toure v. Avis Rent A Car Systems, Inc.,*** 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002); ***Gaddy v. Eyler,*** 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

Although Dr. Leppard did not discuss the MRI findings upon which he relied in rendering his professional evaluation of plaintiff's physical condition, it is undisputed that plaintiff underwent two MRI examinations that reveal the existence of, *inter alia*, herniated discs in plaintiff's lumbar spine, with impingement on the neural canal.

It is well settled that the mere existence of a herniated or bulging disc is not conclusive evidence of a serious injury in the absence of objective evidence of a related disability or restriction (***Knox v. Lennihan***, 65 A.D.3d 615, 884 N.Y.S.2d 171 (2d Dept., 2009); ***Kearse v. New York City Transit Authority***, 16 A.D.3d 45, 789 N.Y.S.2d 281 (2d

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[1]Apparently, Dr. Leppard did not examine plaintiff's cervical spine on January 26, 2011. During his deposition, plaintiff gave equivocal testimony as to whether his neck continued to bother him. It is noteworthy that plaintiff's chiropractor, Michael S. Roth, D.C., did not conduct a cervical spine range of motion study when he re-examined plaintiff on August 4, 2011. Thus, it appears that plaintiff has abandoned his claim with respect to his alleged cervical spine injury.

Dept., 2005); *see also* ***Little v. Locoh***, 71 A.D.3d 837, 897 N.Y.S.2d 183 [2d Dept., 2010]).

Accordingly, and based upon Dr. Leppard's findings that plaintiff has normal range of motion in his lumbar spine, and does not suffer from a disability, defendant has established his entitlement to summary judgment as a matter of law with respect to the permanent consequential limitation and significant limitation categories of injury within the meaning of Insurance Law § 5102(d) (***Kearse, supra*** at 50).

The plaintiff is now required to come forward with viable, valid objective evidence to verify his complaints of pain and limitations of motion with respect to those three categories of injury (***Farozes v. Kamran***, 22 A.D.3d 458, 802 N.Y.S.2d 706 [2d Dept., 2005]).

As to plaintiff's 90/180 claim, the Court notes that a plaintiff must set forth competent medical evidence to establish that he sustained a medically determined injury or impairment of a nonpermanent nature, which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for 90 of the 180 days following the subject collision (***Ly v. Holloway***, 60 A.D.3d 1006, 876 N.Y.S.2d 482 [2d Dept., 2009]).

Aside from his own affidavit attesting to a six-month period of restricted daily activities following the accident, plaintiff only missed one week of work immediately following the accident, and he has not provided any medical determination restricting him from performing heavy lifting, or playing soccer. Plaintiff has also not provided any evidence whatsoever recommending that he remain confined to his home for any period of time immediately following the accident.

Plaintiff also offers the affidavit of Michael S. Roth, D.C. and the MRI reports affirmed by Mark Shapiro, M.D.[2]

Dr. Roth merely states that it is his opinion that the injuries sustained by plaintiff "would inhibit the patient's ability to carry out normal activities of daily living such as sitting, standing, bending, lifting and other strenuous activities," but not that plaintiff should refrain from specific activities. Thus, plaintiff's opposition is insufficient to raise an issue of fact sufficient to defeat defendant's summary judgment motion with respect to the 90/180 category of injury.

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[2]The Court will consider all reports on plaintiff's motion which were listed as being relied upon by defendant's expert (*see* ***Williams v. Clark***, 54 A.D.3d 942, 864 N.Y.S.2d 493 (2d Dept., 2008); ***Barry v. Valerio***, 72 A.D.3d 996, 902 N.Y.S.2d 97 [2d Dept., 2010]).

Dr. Roth examined plaintiff on September 8, 2008, four days after the subject accident, finding restricted range of motion in plaintiff's lumbar spine. Dr. Roth set forth his findings, comparing plaintiff's range of motion measurements to normal range of motion measurements. Following the initial examination, Dr. Roth treated plaintiff from September 8, 2008 through March 4, 2009, and he directed plaintiff to undergo an MRI of his lumbar spine on December 10, 2008. Dr. Roth states that plaintiff ceased treatment in March 2009 because insurance no-fault benefits ceased, and because plaintiff had received the maximum chiropractic improvement for what Dr. Roth characterized as a chronic condition resulting from the subject accident.

Dr. Roth again examined plaintiff on August 4, 2011. Based on the lumbar range of motion study and other tests performed on plaintiff, Dr. Roth found restricted lumbar range of motion nearly three years post-accident. Based on his examinations and treatment of plaintiff, as well as upon the results of the lumbar spine MRI revealing herniated discs, Dr. Roth concluded that the injuries sustained by plaintiff are causally related to the subject accident and are permanent, inhibiting plaintiff's ability to carry out his normal daily activities and causing him pain. Dr. Roth also concluded that the injuries are "not subject to resolution without surgery."

Based on the foregoing, the Court finds that plaintiff has raised an issue of fact sufficient to defeat defendant's summary judgment motion with respect to the permanent consequential limitation and significant limitation categories of injury relative to his lumbar spine. Furthermore, plaintiff has provided a reasonable explanation of cessation of treatment (see ***Pommels v. Perez***, 4 N.Y.3d 566, 574, 830 N.E.2d 278, 797 N.Y.S.2d 380 [2005]).

Accordingly, plaintiff has met his burden with respect to the permanent consequential limitation and significant limitation categories of injury, but not with respect to the 90/180 category of injury.

Defendants' summary judgment motion is granted as to the 90/180 category of injury, and that claim is dismissed. Defendant's summary judgment motion with respect to the permanent consequential limitation and significant limitation categories of injury is denied.

The foregoing constitutes the Order of this Court.

Dated: November 30, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.