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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x

MICHAEL VAILES,

Plaintiff,

-against-

SHAUN A. SUKHRAJ and REX B. SUKHRAJ,
Defendants.

----------x

TRIAL PART: 14
NASSAU COUNTY

INDEX NO: 013862-10

MOTION SEQ. NO:1

SUBMIT DATE: 11/1/11

The following papers having been read on this motion:

Notice of Motion.....1
Opposition.....2
Reply.....3

Motion by defendants, Shaun A. Sukhraj and Rex B. Sukhraj, for an Order, awarding them summary judgment dismissing the plaintiff, Michael Vailes' complaint on the grounds that his injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d), is granted.

This action arises out of a motor vehicle accident that occurred on November 4, 2008 at approximately 9:45 p.m. at the intersection of Sunrise Highway and N. Bergen Road in Freeport, New York. The impact allegedly occurred as plaintiff's vehicle, attempting to make a left turn onto N. Bergen Avenue, was struck by the vehicle being operated by the defendant who purportedly also made a left turn onto N. Bergen Avenue.

Plaintiff Michael Vailes claims that, as a result of the subject accident, he sustained, *inter alia*, the following serious injuries: bilateral C8 radiculopathy; cervical derangement; cervical strain/sprain; post traumatic cervical myofascitis; cervical somatic dysfunction; disc herniation at T7-8 and T11; thoracic strain/sprain; post traumatic thoracic myofascitis; thoracic somatic dysfunction; disc herniation L2-3 with impression on the left ventral margin of the thecal sac and narrowing the left neural foramina; disc bulge L3-4; disc herniation L4-5 with impression on the ventral margin of the thecal sac; disc herniation at L5-S1 with annular tear that contacts the ventral margin of the thecal sac; post traumatic lumbar myofascitis; lumbar somatic dysfunction; lumbar

derangement; lumbar strain/sprain; peripheral nerve injury and dysfunction; occipital headaches; adjustment disorder with anxiety (Bill of Particulars, ¶9).

Although in his Bill of Particulars, plaintiff claims that he was confined to his bed and home from the date of the accident through November 8, 2008 and intermittently thereafter (*Id.* at ¶11), at his oral examination before trial (EBT), he stated that he was not confined at all to his bed and/or home as a result of this accident (Vailes Tr., p. 51).

Plaintiff testified that at the time of this accident, he was employed as a bartender as part of the Special Services Department at the Long Island Rail Road. He testified that he only missed "a couple of days here and there" from work as a result of this accident (*Id.* at p. 49).

As to activities, plaintiff testified that while he is unable to go bowling, play pick-up football or play with his son (*Id.* at pp. 50-51), he was not instructed by any doctor to limit said activities (*Id.* at 50).

Plaintiff, who was 34-years old at the time of the accident, claims that his injuries fall within the following four categories of the serious injury statute: to wit, 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; and 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 (Bill of Particulars, ¶9).

However, in the absence of any claim that his injuries as a result of this accident resulted in a "total loss of use" of a body organ, member, function or system, plaintiff's claim that his injuries satisfy the "permanent loss of use" category of the "serious injury" statute cannot be sustained (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]).

Furthermore, plaintiff's claims that his injuries satisfy the 90/180 category of Insurance Law §5102(d) are also unsupported and contradicted by his own testimony wherein he states that he only missed a "couple of days here and there" from work as a result of this accident and that there is no activity that he was "medically impaired" from performing. Plaintiff has thus failed to provide any evidence that he was "medically" impaired, "to a great extent rather than some slight curtailment,"

from doing any activities as a result of this accident for 90 days within the first 180 days following this accident. Therefore, this Court determines that plaintiff has also effectively abandoned his 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion (*Joseph v. Forman*, 16 Misc. 3d 743 [Sup. Ct. Nassau 2007]).

Accordingly, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, permanent consequential limitation of use of a body organ or member; and, significant limitation of use of a body function or system.

In support of a claim that the plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of their examining physician or the unsworn reports of the plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept. 1992]). When a defendants' motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff, in opposition to defendants' motion, to produce prima facie evidence in admissible form to support the claim for serious injury (*Licari v. Elliot*, 57 NY2d 230 [1982]). However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of the plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*see Reid v. Wu*, 2003 WL 21087012, *citing O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept.1998]). That is, in order to be sufficient to establish a prima facie case of serious physical injury, the physician's affirmation or affidavit must contain medical findings, which are based on the physician's own examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints.

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems,* stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003]). Further, even MRI and CT scan tests and reports must also be paired with the

doctor's observations during his/her physical examination of the plaintiff (*Toure v. Avis Rent A Car Systems,* supra).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals has held in *Pommels v. Perez*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, could interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez,* 4 NY3d 566 [2005]). As a result, the Court requires the plaintiff in these cases to proffer some reasonable explanation for the additional contributing factor (*Id*).

Under the no-fault statute, to meet the specific threshold significant limitation of use of a body function or system or permanent consequential limitation categories of the statute, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v. Elliot*, supra; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation is deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]).

That is, when, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*Toure v. Avis Rent A Car Systems, Inc.,* supra). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id*).

Recently, the Court of Appeals in *Perl v. Meher*, 2011 WL 5838721, reconciled the need to require both quantitative proof of a "serious injury" and "contemporaneous" evidence of a "serious injury." There, the Court stated, in pertinent part, as follows:

***[A] rule requiring "contemporaneous" numerical measurements of range of motion could have perverse results. Potential plaintiffs should not be penalized for failing to seek out, immediately after being injured, a doctor who knows how to create the right kind of record for litigation. A case should not be lost because the doctor who cared for the patient initially was primarily, or only, concerned with treating the injuries. We therefore reject a rule that would make contemporaneous quantitative measurements a prerequisite to recovery.

With these guidelines in mind, this Court will now turn to the merits of defendant's motion.

In support of their motion, the defendants submit, *inter alia*, the sworn report of Dr. Iqbal Merchant, M.D., a neurologist who performed an independent neurological examination of the plaintiff on May 27, 2011; the "affirmed" report of M.H. Rosenfeld, Psy. D., a New York State Licensed Psychologist who purportedly conducted an independent "psychological" examination of the plaintiff on November 16, 2009; and, the sworn report of Dr. Robert Simon, M.D., a physician who performed an independent physical examination of the plaintiff on April 27, 2009.

Initially it is noted that the "affirmed" report of M.H. Rosenfeld, Psy. D., does not constitute competent medical evidence in support of defendants' motion for summary judgment. CPLR 2106 is very clear:

The statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit.

The intent of the statute is also clear: the persons currently eligible to submit affirmations in lieu of affidavits all have professional obligations of honesty.

A psychologist does not come within scope of the statute allowing affirmations by certain persons to be given the same force and effect as an affidavit; to make a competent, admissible affirmation, a psychologist, like most other persons, must first appear before a notary or other such official and formally declare the truth of the contents of the document (*Doumanis v. Conzo*, 265 AD2d 296 [2nd Dept. 1999]; *Casas v. Montero*, 48 AD3d 728 [2nd Dept. 2008]). Accordingly, this Court will not consider Mr. Rosenfeld's statements in support of defendants' motion.

Further, while the sworn report of Dr. Robert Simon, M.D. constitutes competent evidence in support of defendants' motion, it is nonetheless insufficient. Dr. Simon's failure to specify the degrees of range of motion in the plaintiff's cervical and lumbar spine, merely stating that the "[r]ange of motion of the upper and lower extremities including the cervical and lumbar spine was normal" obviously falls short of demonstrating the absence of a serious injury (*Connors v. Flaherty*, 32 AD3d 891 [2nd Dept. 2006]; *Whittaker v. Webster Trucking Corp.*, 33 AD3d 613 [2nd Dept. 2006]).

Nonetheless, defendants' remaining proof, to wit, the sworn report of Dr. Iqbal Merchant, M.D., is sufficient to establish their prima facie entitlement to judgment as a matter of law.

Specifically, Dr. Merchant, examined the plaintiff, performed quantified range of motion testing on his cervical and lumbar spine with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal. Dr. Merchant also performed motor and sensory testing and found no deficits, and based on his clinical findings and medical records review, concluded that plaintiff has a resolved cervical, thoracic and lumbar sprain with no permanent or residual disability (*Staff v. Yshua*, 59 AD3d 614 [2nd Dept. 2009]; *Cantave v. Gelle*, 60 AD3d 988 [2nd Dept. 2009]).

Thus, having made a prima facie showing that the injured plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v. Perez,* supra; *see also Grossman v. Wright*, supra).

In opposition, counsel for plaintiff submits a variety of fourteen un-tabbed exhibits (including one report of a different patient) none of which establish that plaintiff has sustained a serious injury within the meaning of Insurance Law §5102(d).

Specifically, with the exception of plaintiff's own affidavit and the sworn affidavit of Dr. Lam Quan, M.D., the plaintiff's remaining proof constitutes incompetent medical evidence for they are all unsworn records of the plaintiff's physicians. As stated above, in opposing defendants' motion, plaintiff is precluded from relying upon the unsworn reports of his own doctors (*Grasso v. Angerami*, supra; *see also*, *Bravo v. Rehman*, 28 AD3d 694 [2nd Dept. 2006]; *Burgos v. Vargas*, 33 AD3d 579 [2nd Dept. 2006]). Said evidence is without any probative value and thus will not be

considered by this Court in opposition to defendants' motion.

Specifically, plaintiff's hospital records, Dr. Robert Fisch's unsworn reports, Dr. Ahmed Elemam's unsworn reports and Dr. Stephen Roberts's unsworn reports (which also fail to indicate any comparative range of motion findings) are all inadmissible herein. In fact, Dr. Elemam's report is also unsigned.

Further, the "affirmation" of Jason T. Birnhak, D.C., C.S.C.S., a chiropractor, the unsworn report of Alan Ng, an acupuncturist, and the "sworn" report of Jeffrey Rubin, Ph.D, a psychologist are all incompetent evidence for none of these reports are presented in the form of a sworn affidavit as is required by the CPLR, *supra* (CPLR 2106; *see also Pichardo v. Blum,* 267 AD2d 441 [2nd Dept. 1999]).

Finally, plaintiff's reliance upon his unsworn MRI reports is also fatal to his opposition. As stated above, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, supra). In any event, in the absence of any opinion by the radiologists therein as to causation of their findings, said MRI reports are insufficient to present an issue of fact herein (*Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]).

As to the sole medical proof submitted by the plaintiff that can and will be considered by this Court, to wit, the affidavit of Lam Quan, M.D., said report is also insufficient to present an issue of fact. Initially, it is noted that Dr. Quan states that he reviewed the unaffirmed and inadmissible MRI reports noted above in preparing his affidavit. As these reports are unaffirmed and otherwise inadmissible, *supra*, Dr. Quan's reliance upon them in diagnosing plaintiff's condition, also renders his conclusions inadmissible (*Kreimerman v. Stunis*, 74 AD3d 753 [2nd Dept. 2010]). Furthermore, Dr. Quan baldly states in his affidavit that he has been "treating" the plaintiff for his injuries sustained in the within accident and that the plaintiff has "received exhaustive treatment." Yet, Dr. Quan never specifies for example the date that he commenced treatment, what said treatment consisted of, or what his findings were on his previous examinations. In his affidavit, Dr. Quan merely reports his findings for his examination of the plaintiff on October 12, 2011, nearly three years after the accident. Thus, plaintiff's sole medical proof is not evidence of an injury contemporaneous with this accident (*Resek v. Morreale*, 74 AD3d 1043 [2nd Dept. 2010]; *Jack v.*

Acapulco Car Servs., Inc., 72 AD3d 646 [2nd Dept. 2010]).

Therefore, in the absence of any competent or admissible evidence supporting a claim for serious injury, defendants' motion seeking summary judgment dismissal of Michael Vailes' complaint is herewith granted (*Licari v. Elliot*, supra).

The complaint is dismissed.

This shall constitute the decision and order of this Court.

Settle Judgment on Notice.

ENTER

DATED: December 9, 2011

HON. ARTHUR M. DIAMOND
J. S.C.

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