SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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MICHAEL A. CELENTANO and NANCY G. CELENTANO,

Plaintiffs,

-against-

ERIK F. MCINTYRE,

Defendant.

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TRIAL/IAS PART 21

INDEX # 17215/09

Motion Seq. 2
Motion Date 8.4.11
Submit Date 11.10.11

XXX

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

Motion by defendant, Erik F. McIntyre, for an Order, awarding him summary judgment dismissing the plaintiffs', Michael A. Celentano and Nancy G. Celentano's complaint on the grounds that Michael A. Celentano's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d), and as such, neither plaintiff has a cause of action, is **GRANTED**.

This action arises out of a motor vehicle accident that occurred on May 8, 2008 at approximately 12:00 p.m. at the intersection of Main Street and Grant Avenue in Farmingdale, New York.

Plaintiff Michael A. Celentano claims that, as a result of the rear end collision to his vehicle, he sustained, *inter alia*, the following serious injuries: cervical sprain, cervical radiculopathy, disc herniations, lumbar sprain, lumbar radiculopathy, disc dessication, right knee sprain, left knee sprain/strain, and shoulder sprains/strains (Bill of Particulars, ¶4). Plaintiff, Nancy G. Celentano's claims are derivative in nature.

Plaintiff claims that he was confined to his bed for four days and to his home for approximately one month following this accident (*Id.* at ¶7).

At his oral examination before trial, plaintiff testified that although at the time of this accident, he was employed as a high school English teacher by the New York City Board of Education, he was on an approved leave of absence due to pre-existing issues relating to depression, and thus he makes no claim for loss of earnings; indeed, plaintiff alleges that he did not lose any time from work as a result of this accident (*Id.*, ¶¶8-11).

As to activities, plaintiff testified that as a result of this accident he can no longer sit for prolonged periods of time without experiencing pain. He testified that he has difficulties going up and down the stairs, standing, getting dressed, walking, bending, turning and squatting. He testified that he is no longer able to participate in his hobbies, including performing work on classic cars as he used to be able to do before this accident or go bowling. He stated that he has difficulty shoveling and clearing the snow as well as taking care of his children and performing household activities like vacuuming and carrying groceries.

Plaintiff, who was 38 years old at the time of the accident, has failed to identify the specific categories of the serious injury statute into which his injuries fall. Nevertheless, whether he can demonstrate the existence of a compensable serious injury depends upon the quality,

quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 [1st Dept. 2002]). Based upon a plain reading of the papers submitted herein, it is obvious that plaintiff is not claiming that his injuries fall within the first five categories of "serious injury" to wit, death; dismemberment; significant disfigurement; a fracture; or loss of a fetus.

Further, inasmuch as the plaintiff has failed to allege and claim that he has sustained a "total loss of use" of a body organ, member, function or system, it is plain that his injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]).

Similarly, any claims that plaintiff's injuries satisfy the 90/180 category of Insurance Law § 5102(d) is also contradicted by his own testimony wherein he states that he was only confined to his bed for four days and to his home for approximately one month a result of this accident. Further, plaintiff does not claim that as a result of his alleged injuries, he was "medically" impaired from performing any of his daily activities, (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]), or that he was curtailed "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]; *see also Sands v. Stark*, 299 AD2d 642 [3rd Dept. 2002]). Indeed, according to his own sworn testimony, other than being unable to participate in his hobbies, including performing work on classic cars as he used to be able to do before this accident or go bowling, there is nothing that he cannot do. In light of these facts, this Court determines that plaintiff has 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]).

Thus, 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*, supra). 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 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 [Sup. Ct. Bronx 2003], *citing O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept. 1998]).

In any event, in order to be sufficient to establish a *prima facie* case of serious physical injury, the 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 (98 NY2d 345, 353 [2002]) stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests. Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003]). However, even the MRI and CT scan tests and reports must be paired with the doctor's observations during his 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 held in *Pommels v. Perez* (4 NY3d 566 [2005]), that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in *Pommels*, the Court of Appeals held that additional contributing factors, such as gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury. The Court 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" (*Id.*; *Neugebauer v. Gill*, 19 AD3d 567 [2nd Dept. 2005]).

Under the no-fault statute, to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, 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 shall be deemed "insignificant" within the meaning of

the statute (*Licari v. Elliot*, supra; *Grossman v. Wright*, 268 AD2d 79, 83 [2nd Dept. 2000]). 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*).

Having said that, recently, the Court of Appeals in *Perl v. Meher*, 2011 NY Slip Op. 08452, held that a quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (*Perl v. Meher*, 2011 NY Slip Op. 08452 [2011]).

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

In support of his motion, defendant relies principally upon the plaintiff's deposition testimony and the sworn report of Dr. S. Murthy Vishnubhakat, M.D., a neurologist who performed an independent neurological examination of the plaintiff on May 19, 2011.

With this evidence, defendant has established his *prima facie* entitlement to judgment as a matter of law.

Specifically, Dr. Vishnubhakat, examined the plaintiff, performed quantified range of motion testing on his cervical and thoracolumbar spine with a goniometer, compared his findings

to normal range of motion values and concluded that the ranges of motion measured were normal. Dr. Vishnubhakat also performed motor and sensory testing and found no deficits, and based on his clinical findings and medical records review, concluded that plaintiff sustained a minor sprain and strain-like injury to the cervical and lumbar spine, with no evidence of either cervical or lumbosacral radiculopathy nor any permanent or residual disability (*Staff v. Yshua*, 59 AD3d 614 [2nd Dept. 2009]; *Cantave v. Gelle*, 60 AD3d 988 [2nd Dept. 2009]).

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 defendant's 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 the affirmation of Dr. Mitchell Goldstein, M.D., an orthopedist who first examined the plaintiff on May 16, 2008; the unsworn, unaffirmed MRI reports of plaintiff's cervical spine, lumbar spine, and right knee; and the unsworn reports of plaintiff's EMG and nerve conduction studies.

Plaintiff's proof is wholly insufficient to present a triable issue of fact herein.

First, the unsworn, unaffirmed MRI reports as well as the unsworn report of plaintiff's EMG and nerve conduction studies do not constitute competent medical evidence in opposition to defendant's *prima facie* showing of entitlement to judgment as a matter of law. While the various radiologists at Orlin & Cohen Orthopedic Associates, LLP appear to have had the MRIs of plaintiff's cervical and lumbar spine and right knee taken under their supervision and although they also appear to be the physicians interpreting the MRI studies, they all fail to report an opinion as the causality of their respective findings. This is fatal to plaintiff's opposition (*Collins*

v. Stone, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]). Similarly, the unsworn EMG and nerve conduction studies also fail to present a triable issue of fact. It is well settled that the plaintiff is precluded from relying upon his treating physicians' unaffirmed medical reports and records to oppose the defendant's motion (*Kolodziej v. Savarese,* 88 AD3d 851 [2nd Dept. 2011]; *Capriglione v. Rivera*, 83 AD3d 639, 640 [2nd Dept. 2011]; *Casas v Montero,* 48 AD3d 728 [2nd Dept. 2008]; *Iumsen v. Konopka*, 38 AD3d 608 [2nd Dept 2007]). Further, said unsworn nerve conduction studies and EMG reports are not accompanied by a report of the physician, Dr. Datikshavli, who attests therein to an opinion as to the causality of his/her findings (*Id*).

Finally, while at first blush the report of Dr. Mitchell Goldstein appears to constitute competent medical evidence in opposition to defendant's *prima facie* showing, a more complete reading of his report proves otherwise. First, Dr. Goldstein states that in arriving at his medical conclusions, he relied, *inter alia*, upon plaintiff's MRI films which, as stated above, were not tendered by the plaintiff in admissible form. Based on the review of this inadmissible evidence, Dr. Goldstein diagnoses plaintiff with "cervicalgia, herniated cervical intervertebral disc at C3-4 and C4-5, herniated nucleus pulposus of the cervical spine at C3-4 and C4-[sic], internal derangement of the knee joint, knee pain, herniated disc at L1-2, lumbago and lumbar sprain." In light of the fact that Dr. Goldstein's conclusions were reached in reliance upon the unsworn and incompetent reports of others, the affirmation of plaintiff's treating physician is without probative value on the issue of whether the plaintiff suffered a serious injury (*Govori v. Agate Corp.*, 44 AD3d 821 [2nd Dept. 2007]; *Besso v. Demaggio*, 56 AD3d 596 [2nd Dept. 2008]).

Moreover, although Dr. Goldstein sets forth his range of motion findings of the plaintiff's cervical and thoracolumbar spine and bilateral shoulders, he fails to set forth what objective testing was used to determine such measurements. Failure to indicate which objective test was performed to measure the loss of range of motion is contrary to the requirements of *Toure v. Avis Rent a Car Systems*, supra. It renders the expert's opinion as to any purported loss meritless, and the Court cannot consider such opinion (*see also Powell v. Alade*, 31 AD3d 523 [2nd Dept. 2006]).

Therefore, in the absence of any competent or admissible evidence supporting a claim for serious injury, defendant's motion seeking summary judgment dismissal of the plaintiffs' complaint is herewith **GRANTED** (*Licari v. Elliot*, supra), and the complaint is dismissed.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 17, 2012

ENTER:

HON. JEFFREY S. BROWN, JSC
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