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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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TOMAS PEREZ,

Plaintiff(s),

Index No. 7098/10

Motion Submitted: 12/5/11
Motion Sequence: 001

-against-

BRIAN C. SCHREIER and CHARLES J. SCHREIER,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants move this Court for an order granting summary judgment in their favor and dismissing the complaint on the ground that the plaintiff has not suffered a "serious injury" within the meaning of Insurance Law § 5102(d). Plaintiff opposes the requested relief.

This action arises from a motor vehicle accident that occurred on April 20, 2008. Plaintiff's vehicle was impacted from the rear by defendant Charles J. Schreier's vehicle, while both vehicles were moving in the same lane of travel. Schreier's vehicle was operated by defendant Brian C. Schreier at the time of the accident. As a result of this accident, plaintiff claims to have suffered serious and permanent injuries, including restricted range of motion in the areas of his lumbar and cervical spine.

Based upon his bill of particulars, plaintiff is asserting claims of permanent consequential and significant limitation of use of a body function or system, and a medically determined injury or impairment of a non-permanent nature, which prevented him from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the accident ("90/180") claim.

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 (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, the defendants 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]). Defendants have met their burden.

In support of their motion, defendants have submitted, *inter alia*, plaintiff's bill of particulars,[1] plaintiff's deposition testimony, and the affirmed reports of defendants' examining orthopedic surgeon and radiologist.

On or about January 6, 2011, defendants' examining radiologist, Stephen Lastig, M.D., reviewed the cervical and lumbar spine MRI studies taken on April 28, 2008 and May 20, 2008, respectively. Upon review, Dr. Lastig set forth his impressions that plaintiff suffers from multi-level degenerative disc disease in both his cervical and lumbar spine areas, and that the findings on the MRI are not causally related to the reported accident of April 20, 2008. In addition, Dr. Lastig did not find any disc herniations or bulges in the cervical spine, and only mild bulging at the L5-S1 level in the lumbar spine that he attributes to the degenerative disease.

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[1]Plaintiff's bill of particulars has not been verified by plaintiff himself as required by CPLR § 3044. Defendants have not moved this Court to declare the bill of particulars a nullity, or to require plaintiff to verify it.

The MRI report of the cervical spine dated April 28, 2008 notes, *inter alia*, two bulging discs, which cause a "slight" spinal stenosis. The MRI report of the lumbar spine dated May 20, 2008 notes a herniated disc at the L5-S1 level in the lumbar spine, also contributing to a "slight" spinal stenosis. Those MRI reports do not mention any degenerative disc disease, nor do they relate the findings to the subject accident.

Although the MRI reports and Dr. Lastig's review of same differ in various respects, the Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from injury and its duration (***Little v. Locoh***, 71 A.D.3d 837, 897 N.Y.S.2d 183 [2d Dept., 2010]). Thus, whether or not the radiologists agree on the interpretation of the MRI studies, plaintiff must still exhibit physical limitations in order to sustain a claim of serious injury within the meaning of the Insurance Law.

Plaintiff was examined by Michael J. Katz, M.D., defendant's examining orthopedic surgeon, on January 21, 2011. Dr. Katz reviewed a number of plaintiff's medical records, including the bill of particulars, MRI and nerve study reports, physical therapy and acupuncture notes, and the reports of plaintiff's doctors and chiropractor. Dr. Katz measured range of motion in plaintiff's cervical and lumbar spine areas, with a goniometer. Dr. Katz also conducted various other tests, including reflex, Adson's, Babinski, and Patrick tests, which were negative. Dr. Katz set forth his specific findings, comparing those findings to normal range of motion, and he concluded that plaintiff's cervical and lumbosacral strains are resolved. According to Dr. Katz, plaintiff does not exhibit any objective evidence of a disability, is capable of full time, full duty work, and is capable of carrying on his activities of daily living.

Examining the reports of defendants' physician, there are sufficient tests conducted set forth therein to provide an objective basis so that his 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]).

Thus, defendants have met their burden with respect to the permanent consequential and significant limitation of use categories of injury.

As to the 90/180 claim, Dr. Katz noted that plaintiff was involved in a prior motor vehicle accident with similar injury, and that the MRI of the cervical spine indicated

degenerative changes, both of which "may have had an effect on the claimant's initial recovery process . . . ." Dr. Katz's report does not address plaintiff's 90/180 claim.

As to whether or not defendants have sustained their burden on the 90/180 claim, the Court considers plaintiff's deposition testimony submitted with the instant motion.

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]).

Moreover, a plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the accident (***Omar v. Goodman***, 295 A.D.2d 413, 743 N.Y.S.2d 568 (2d Dept., 2002); ***Lauretta v. County of Suffolk***, 273 A.D.2d 204, 708 N.Y.S.2d 468 [2d Dept., 2000]).

Plaintiff's deposition testimony establishes that plaintiff was working as a deliveryman at a deli prior to the accident, and that he missed only one week of work following the accident. Plaintiff further admitted that he was not told by any medical professional that he could not work following the accident. Upon his return to work, plaintiff apparently suffered no change in his duties, and continued to work at the deli for almost three more years. Plaintiff only ceased working at the deli because he moved to a different county. Plaintiff further testified that he is currently unemployed and is not actively seeking employment.

As to his specific injuries, plaintiff testified that he refused to go to the hospital on the date of the accident despite feeling pain in his neck, in addition to a headache. According to plaintiff, he received physical and chiropractic treatment through November or December 2008, at which time he ceased treatment. Plaintiff did not offer a reason for his cessation of treatment. Defendant admitted to taking only an over-the-counter pain reliever since the accident.

Aside from missing one week from work, plaintiff testified that he can no longer play soccer because his lower back hurts, and that he can no longer go dancing because it hurts his back to do so. According to plaintiff, he used to play soccer with friends and go dancing

once or twice a month before the accident. Plaintiff also testified that he cannot carry his children, whose ages as of the deposition date in December 2010 were nine, six and four years old, or clean the bathtub. Plaintiff was not forced to hire help for household chores, and he testified that he can lift grocery bags up to thirty (30) pounds. Plaintiff had no future medical appointments at the time of his deposition.

Thus, 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]), and affirmation of defendants' physician are 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 permanent consequential limitation and significant limitation categories of the applicable law, nor under the 90/180 category of the law.

Plaintiff is now required to come forward with viable, valid objective evidence to verify his complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 A.D.3d 458, 802 N.Y.S.2d 706 [2d Dept., 2005]). Plaintiff has failed to meet his burden.

In opposition to defendants' motion, plaintiff has submitted, *inter alia*, the MRI reports previously referred to above, physical therapy and acupuncture notes, chiropractic evaluations, a pain management consultation report, and an affirmed report from his treating osteopath, Dr. John J. McGee.[2]

Dr. McGee's affirmed report dated October 18, 2011 fails to set forth by what means, or with what instrument, plaintiff's range of motion in the cervical and lumbar spine areas was measured. Thus, defendant has failed to establish an objective basis so that the 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., supra***; ***Gaddy v. Eyler, supra***).

In addition, Dr. McGee's report does not indicate with specificity when the examination results set forth on page 2 were obtained. Contrary to plaintiff's deposition testimony wherein he stated that he was not working because he had moved, Dr. McGee noted that, "[t]he patient was not working because of this accident. He was totally disabled." In the very next section entitled "Physical Examination," Dr. McGee notes that plaintiff's

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[2]Plaintiff's submission of the accident report, which is not certified, and defendant Brian C. Schreier's deposition testimony is inapposite to the determination of this motion; rather, it appears that those items were included in order to bring to the Court's attention that defendant Schreier was arrested and criminally charged in connection with the subject accident.

gait was "not antalgic." Thus, Dr. McGee's report appears to be inconsistent with plaintiff's testimony and internally inconsistent as to the level of plaintiff's alleged disability.

Moreover, Dr. McGee stated in his "Opinion and Prognosis" section that, "[i]n this type of injury there are nerves and disc pathologies as well as tearing of soft tissue components . . ." without addressing the degenerative disc disease findings of Dr. Lastig, or plaintiff's previous accident. Dr. McGee also opines in general terms that "[t]here can be permanent limitations of motion to the cervical and lumbar spine due to the injuries sustained." Notably absent from Dr. McGee's report is a statement that plaintiff is disabled in any specific respect. Instead, Dr. McGee states in vague terms that, "the patient remains impaired with regard to some functional capabilities . . . ." Thus, Dr. McGee's opinion that plaintiff has "sustained traumatic injuries" as a direct causal result of the accident is rendered speculative and insufficient to raise a triable issue of fact.

The pain management physician, Andrew M. G. Davy, M.D., examined plaintiff on November 25, 2008. Although Dr. Davy wrote that plaintiff's "level of activity is severely limited," Dr. Davy did not report the basis for that conclusion. Instead, he noted that plaintiff's pain, at its worst, is a "3 out of 10," and that plaintiff continues to work as a driver. Dr. Davy further states that plaintiff is "not limited in activities of daily living . . ." and that plaintiff's pain does not interfere with the quantity and quality of plaintiff's sleep, which plaintiff reported as being "six hours of restorative sleep." Dr. Davy concluded that plaintiff "has done well with therapy and his pain is minimal . . .;" "he has a mild partial disability from the motor vehicle accident dated 4/20/2008." This conclusion in November 2008 is markedly at odds with his initial statement that plaintiff's level of activity is "severely limited," and also at odds with Dr. McGee's October 2011 report that plaintiff has sustained "traumatic injuries."

For all the foregoing reasons, this Court has determined that plaintiff has failed to raise a triable issue of fact with respect to the issue of serious injury within the meaning of Insurance Law § 5102(d).

Accordingly, defendants' summary judgment motion is granted in its entirety, and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: January 31, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.

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