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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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WILLIAM YOUNG,

Plaintiff,

-against-

ANNMARIE DURSO AND MARY JENKINS,

Defendants.

----------x

TRIAL PART: 10

NASSAU COUNTY

INDEX NO. 14737/10 ~~011028-11~~

MOTION SEQ NO.:1,2

SUBMIT DATE:05/02/12

The following papers having been read on this motion:

Notice of Motion.....1,2
Opposition.....3
Reply.....4

By separate motions, defendants Annmarie Durso and Mary Jenkins, each seek an Order, awarding them summary judgment dismissing the plaintiff, William Young's complaint on the grounds that his injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). Both motions are granted.

This action arises out of a three car accident that occurred on February 19, 2009 at approximately 12:15 p.m. near the intersection of Route 107 and Greenwood Drive in North Massapequa, New York. The vehicle being operated by the plaintiff was rear-ended by the defendants' respective vehicles while the plaintiff was stopped at a red light. At his sworn examination before trial, plaintiff testified that he felt one heavy impact as a result of which he claims he was rendered unconscious for several minutes (Young Tr., p. 20). He declined to be transported via ambulance to the hospital; instead plaintiff testified that he drove himself thereto and that following an examination and medical tests, he was discharged the same day (*Id.* at 45).

At his deposition, plaintiff testified that, although at the time of the accident he had been retired for several years from his job as a self-employed carpenter, he was en route to repair a leak to earn "extra money" (*Id.* at 12).

He testified (in direct contradiction to his claims in his bill of particulars) that following the

accident, he was not confined to his bed or home (*Id.* at 59). Indeed, he stated that he eventually completed the repair of the leak, that he has no difficulty using his tools, and that he has also done other "general carpentry work" post his accident (*Id.* at 47-48, 85). That being said, plaintiff claims that he is no longer able to cut grass, do heavy lifting, bend or fish for prolonged periods of time (*Id.* at 63, 68-69). He states that he gets tired faster as a result of the injuries he sustained in this accident (*Id.* at 69). Plaintiff also testified that following his accident, he has flown to Minnesota and has driven to Florida.

When asked about prior accidents and injuries, plaintiff testified that he was involved in an accident where he fell from a ladder and broke his left arm (*Id.* at 64-65) and that he also had a prior personal injury claim involving his eye and chin (*Id.* at 66-67).

As a result of this accident, plaintiff claims that he sustained, *inter alia*, the following serious injuries: focal herniated disc at L4-5 in the left intervertebral foramen; posterior disc bulges at L4-5 and L5-S1; bilateral L5-S1 radiculopathy; significant limitation of range of motion of the lumbar spine; pain, numbness, tingling and weakness to bilateral legs (Verified Bill of Particulars, ¶2; Supplemental Bill of Particulars, ¶2).

The 72 year old plaintiff, William Young, claims in his bill of particulars that his injuries fall within all of the categories of the serious injury statute. However, this claim is entirely meritless. Based upon a plain reading of the papers submitted herein, it is obvious that plaintiff's injuries did result in his 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 also fail to satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]).

Similarly, plaintiff's claims of serious injury under the 90/180 category of Insurance Law § 5102(d) are also contradicted by his own testimony wherein he states that he was not confined to his bed or home as a result of this accident or that he is curtailed in his usual activities "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, 57 NY2d 230, 236 [1982]; *Sands v. Stark*, 299 AD2d 642 [3rd Dept. 2002]). In fact, according to his own sworn testimony, other than being unable to cut the grass or do heavy lifting, there is nothing that he cannot do. To the contrary, there is ample

testimony that he resumed "general carpentry work" including finishing the repair job which he was on his way to perform before the accident, and travel distances including to Minnesota and drive from New York to Florida. Furthermore, in the absence of any evidence that he is "medically" impaired from performing any of his daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]), 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 of the serious injury statute; to wit, permanent consequential limitation of use of a body organ or member and significant limitation of use of a body function or system.

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]).

Furthermore, 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.*, 98 NY2d 345 [2002]). 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*, 18 NY3d 208 [2011]).

With these guidelines in mind, this Court will now turn to the merits of defendants' motions.

In support of her motion, defendant Mary Jenkins submits the following: the sworn report of Dr. Chandra M. Sharma, M.D., a neurologist who performed an independent neurological examination of the plaintiff on December 23, 2011; the sworn report of Dr. Alan J. Zimmerman, M.D., an orthopedic surgeon who performed an independent orthopedic evaluation of the plaintiff on December 28, 2011; and, the sworn MRI report of Jacques Romano, M.D. who reviewed that CT scans dated March 30, 2009 of plaintiff's lumbosacral spine and causally related his findings by noting that the "findings are not suggestive of the sequelae of acute trauma."

Similarly, in support of her motion, Annemarie Durso also relies upon the sworn report of Dr. Chandra M. Sharma, M.D. wherein Dr. Sharma performed an independent neurological examination of the plaintiff on December 23, 2011 and the sworn report of Dr. Alan J. Zimmerman, M.D., who performed an independent orthopedic evaluation of the plaintiff on December 28, 2011.

Initially, it is noted that Dr. Romano's report constitutes competent and admissible evidence and may be relied upon by the defendant, Mary Jenkins. Not only does Dr. Romano aver that he reviewed plaintiff's CT scans (*Fiorillo v. Arriaza,* 52 AD3d 465 [2nd Dept. 2008]; *Sayas v. Merrick Transportation*, 23 AD3d 367 [2nd Dept. 2005]), but he also reports an opinion as to the causality of the findings in his report (*Silkowski v. Alvarez*, 19 AD3d 476 [2nd Dept. 2005]; *Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]). Accordingly, his report will be considered as part of defendant Jenkins' proof.

Indeed, based upon the papers submitted herein, this Court finds that the defendants have established their prima facie entitlement to judgment as a matter of law.

The affirmed reports of Drs. Sharma and Zimmerman who examined the plaintiff and performed quantified range of motion testing on his cervical and lumbar spine with a goniometer, compared their findings to normal range of motion values and concluded that the ranges of motion measured were normal, sufficiently demonstrates that the plaintiff did not sustain a "serious injury" as a result of this accident. The physicians also performed motor and sensory testing and found no deficits, and based on their clinical findings and medical records review, concluded that the plaintiff has recovered fully from all alleged injuries from the subject accident (*Staff v. Yshua*, 59 AD3d 614 [2nd Dept. 2009]; *Cantave v. Gelle*, 60 AD3d 988 [2nd Dept. 2009]). Indeed, Dr. Zimmerman notes that the lumbar sprain has since resolved and Dr. Sharma finds that the cervical and lumbar sprain

have resolved and the neurological examination was normal.

Having made a prima facie showing that the plaintiff did not sustained 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,* 4 NY3d 566 [2005]; *see also Grossman v. Wright*, supra).

In opposition, counsel for plaintiff submits the sworn affidavit of Michael Gramse, DC, a chiropractor who claims to have been consistently treating the plaintiff since February 2009 and the unsworn reports of Dr. Richard Stapen, M.D. and Dr. Steven M. Peyser, M.D., radiologists who claim to have interpreted the CT scan of plaintiff's lumbar spine and cervical spine on March 30, 2009 and March 23, 2009 respectively. Despite these submissions, plaintiff's proof is wholly insufficient to present a triable issue of fact herein (*Id*).

First, although Mr. Gramse properly proffers a sworn affidavit (CPLR 2106; *Pichardo v. Blum,* 267 AD2d 441 [2nd Dept. 1999]), his findings nonetheless are insufficient to raise a triable issue of fact. Specifically, in his report, Mr. Gramse, claims to have performed "computerized range of motion testing...utilizing a Norotrack Motion Analyzer" on plaintiff's cervical and lumbar spine. However, it remains unclear to this Court as to how a chiropractor can perform such testing or more importantly how he can interpret the findings in a medical way such that the objective purpose underlying the Insurance Law can be legitimately achieved. For example, Mr. Gramse purports to compare his measured range of motion findings to "normal" standards; however, the chiropractor fails to state the medical source of his baseline "normal" measurements. Moreover, Mr. Gramse continually relies upon "visible and palpable" muscle spasms to document the positive findings of certain "medical" tests. This is clearly insufficient. Reliance upon "visual observations" to conclude positive findings does not constitute objective evidence of a "serious injury" (*Vasquez v. Basso*, 27 AD3d 728 [2nd Dept. 2006]; *Walters v. Papanastassiou*, 31 AD3d 439 [2nd Dept. 2006]).

Therefore, this Court finds that Mr. Gramse's affidavit opining as to any purported loss is improper and meritless (*Toure v. Avis Rent A Car Systems*, supra; *Powell v. Alade*, 31 AD3d 523 [2nd Dept. 2006]).

Furthermore, Drs. Stapen and Peyser's unsworn reports are equally insufficient to defeat summary judgment. It is clear that said reports are neither sworn nor affirmed; accordingly, they are

presented in inadmissible form and are devoid of any probative value (*Grasso v. Angerami*, 79 NY2d 813 [1991]; *Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept. 1992]). Further, although Drs. Stapen and Peyser appear to have taken the CT scan under their supervision and also appear to be the physicians interpreting the findings of the scans, in the absence of the physicians' opinions as to the causality of their respective findings, the reports are rendered incompetent and inadmissible (*Collins v. Stone*, supra; *Betheil-Spitz v. Linares*, supra).

Therefore, in light of plaintiff's failure to present any competent or admissible evidence supporting a claim for serious injury, defendants, Annemarie Durso and Mary Jenkins separate motions each seeking an Order, awarding them summary judgment dismissal of the plaintiff, William Young's complaint on the grounds that his injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is granted.

The complaint is dismissed in its entirety.

This shall constitute the decision and order of this Court.

Settle Judgment on Notice.

This constitutes the decision and order of this Court.

ENTER

DATED: June 28, 2012

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

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