Scan

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

ANTONIO VACCHIO and VICTORIA VACCHIO, Plaintiffs, -against- CRAIG S. THALER, JEFFREY L. THALER, CAROLYN L. COPLAN and NEIL COPLAN, Defendants.	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 3604-10 XXX MOTION SUBMISSION DATE: 6-7-12 MOTION SEQUENCE NO. 004

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition and Exhibits	X
Reply Affirmation	X

Defendants, Craig S. Thaler and Jeffrey L. Thaler ("Thaler"), move pursuant to CPLR §3212 for an Order granting summary judgment in their favor dismissing Plaintiffs' complaint, alleging that the injuries sustained by Plaintiff, Antonio Vacchio ("Antonio"), do not satisfy the "serious injury" threshold requirements of Insurance Law §5102(d). Plaintiff, Victoria Vacchio's, claim is derivitive. The complaint as against Defendants, Carolyn L. Coplan and Neil Coplan ("Coplan"), was previously dismissed by this Court's Order dated August 4, 2011.

Thaler's motion is granted.

This action arises out of a motor vehicle accident on November 1, 2007 in which Thaler's vehicle struck Coplan's vehicle in the rear, pushing it into Antonio's vehicle. As

a result of the accident, Antonio allegedly sustained serious personal injuries, including but not limit to, C3/4, C4/5, C5/6, and C6/7 disc herniations; C2/3 disc bulge; C6/7 radiculopathy; T2/3 and T3/4 disc herniations; T1/2 disc bulge; and partial tear of the proximal long head of the biceps.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2D 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.,* 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 5557 (1980); *Alvarez V. Prospect Hospital,* 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center,* 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York, supra*. The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy,* 35 NY2d 361 (1974). Within the context of a summary judgment motion that seeks dismissal of a personal injury action resulting from a motor vehicle accident for the alleged failure of the plaintiff to sustain a "serious injury" within the meaning of Insurance Law §5102(d), the

defendant bears the burden of establishing a prima facie case that the plaintiff's injuries do not meet the threshold requirements of the statute. *Gaddy v. Eyler*, 79 NY2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence, in admissable form, to demonstrate the existence of a question of fact on the issue. *Id.* The court must then decide whether the plaintiff has established a prima facie case of sustaining a "serious injury". *Licari v. Elliot*, 57 NY2d 230 (1983).

Insurance Law §5102(d) defines "serious injury" as a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of fetus; (6) permanent loss of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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 (90) days during the one-hundred-eight (180) days immediately following the occurrence of the injury or impairment.

The defendant is not required to disprove any category of "serious injury" that has not been pled by the plaintiff. *Melino v. Lauster*, 82 NY2d 828 (1993). Whether the plaintiff can demonstrate the existence of a compensable "serious injury" depends upon the quality, quantity, and credibility of admissable evidence. *Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 (1st Dept. 2002).

Essentially, in order to satisfy the statutory "serious injury" threshold, objective proof of the plaintiff's injury is required. *In Toure v. Avis Rent-A-Car Systems,* 98 NY2d 345 (2002), the Court of Appeals held that a plaintiff's proof of injury must be supported by objective medical evidence, in admissible form, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both the plaintiff and the defendant rely on those reports. *Gonzalez v. Vasquez,* 301 AD2d 438 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem, or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *Pommels v. Perez*, 4 NY3d 566 (2005).

While a herniated or bulging disc, or the presence of radiculopathy may constitute a "serious injury" within the ambit of Insurance Law §5102(d), a plaintiff is required to provide, inter alia, objective medical evidence which demonstrates the extent and degree of the alleged physical limitation resulting from the disc injury and its duration. *Perl v. Meher*, 18 NY3d 208 (2011); *Ifrach v. Neiman,* 306 AD2d 380 (2nd Dept. 2003); *Jason v. Danar,* 1 AD3d 398 (2nd Dept. 2003); *Felix v. New York City Tr. Auth.,* 32 AD3d 529 (2nd Dept. 2006); *Garcia v. Sobles,* 41 AD3d 426 (2nd Dept. 2007); *Bestman v. Seymour*, 41 AD3d 629 (2nd Dept. 2007).

When examining medical evidence offered by a plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by verified objective medical findings. *Grossman v. Wright,* 268 AD2d 79 (2nd Dept. 2000). Further, the plaintiff must provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury. *Perl v. Meher*, *supra*; *Kauderer v. Penta,* 261 AD2d 365 (2nd Dept. 1999); *Constantinou v. Surinder,* 8 AD3d 323 (2nd Dept. 2004); *Brown v. Tairi Hacking Corp.,* 23 AD3d 325 (2nd Dept. 2005).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, 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. *Gaddy v. Eyler, supra; Licari v. Elliot, supra.* A minor, mild, or slight limitation will be deemed insignificant within the meaning of the statute. *Licari v. Elliot, supra.* A claim raised under the "permanent consequential limitation of use or a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *Toure v. Avis, supra.* In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis; and (2) the evaluation compares the plaintiff's

limitation to the normal function, purpose, and use of the affected body organ, member, function, or system. *Id.*

In the instant matter, Antonio has clearly not submitted any evidence to establish a "serious injury" under categories "1" through "6" as outlined hereinabove. The Court will thus only address categories "7", "8", and "9".

In applying the foregoing standards and principles, the Court finds that Thaler has met their initial burden of establishing a prima facie case of entitlement to summary judgment with the submission of the affirmations of Robert Israel, M.D., Edward M. Weiland, M.D., and Davis Fisher, M.D. Dr. Israel, an orthopedist, reviewed Antonio's medical records and conducted an examination on February 1, 2011. He found normal ranges of motion of the cervical spine, left shoulder, and left elbow. He diagnosed Antonio with resolved sprains of the cervical spine, left shoulder, and left elbow, found no need for orthopedic treatment, and determined that he is capable of working without restrictions.

Dr. Weiland, a neurologist, reviewed Antonio's medical records and conducted an examination on February 16, 2011. He found Antonio to have normal ranges of motion of the cervical spine, lumbar spine, thoracic spine, and shoulders. He diagnosed Antonio with a history of closed head trauma, resolved; resolved cervical sprain/strain; contusion of the left shoulder and left elbow; and a preexisting lumbar myofascial pain disorder unrelated to the November 1, 2007 accident.

Dr. Fisher, a radiologist, reviewed Antonio's MRI films. He found degenerative changes of the lumbar spine at L3/4, L4/5, and L5/S1 that are not causally related to

the November 1, 2007 accident. He further found degenerative changes of the cervical spine at C5/6 and C6/7 that are not causally related to the November 1, 2007 accident. Finally, he found degenerative changes of the left shoulder consistent with a preexisting condition.

Thaler also submits Antonio's examination before trial transcript in support of the motion. Antonio testified that at the time of the accident he was on his way to an appointment with Dr. Hausknecht for treatment for an injury sustained in an accident in July 2007, for which he also treated with Dr. Battista. He further testified to not missing any time from work as a result of the November 1, 2007 accident, although he apparently was not working at the time as a result of the prior accident.

In opposition, Antonio has failed to raise a triable issue of fact. Dr. Hausknecht, in his affirmation submitted on behalf of Antonio, fails to address the July 2007 accident for which he was treating Antonio at the time of the November 1, 2007, and whether it was a possible cause of his alleged complaints. *See Linton v. Nawaz,* 62 AD3d 434 (1st Dept. 2009); *Brewster v, FTM Servo Corp.,* 44 AD3d 351 (1st Dept. 2007); *Kupka v. Emmerich,* 2 AD3d 595 (2nd Dept. 2003); *Pommels v. Perez, supra.* As such, Antonio cannot support a claim for injuries under categories "7", "8", or "9".

Accordingly, Thaler's motion is granted and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: August 2, 2012

STEVEN M. JAEGER, A.J.S.C.