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SHORT FORM ORDER

INDEX No. 07-21232
CAL. No. 11-01484MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11-10-12
ADJ. DATE 6-25-12
Mot. Seq. # 003 - MG; CASEDISP
004 - MD

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JOSUE M. ALI and SERGIO ALI,

Plaintiffs,

- against -

EL TONE LEASING CORP., ALCIDES ARGUETA, and ALADOZ ARGUETA,

Defendants.

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Upon the following papers numbered 1 to 44 read on these motions for summary judgment and dismissal and to amend pleadings; Notice of Motion/ Order to Show Cause and supporting papers 1- 20; 25 - 39; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 21 - 24; 40 - 41; Replying Affidavits and supporting papers 42 - 44; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (003) by defendants for summary judgment and dismissal and the motion by defendants (004) for leave to amend and summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (003) by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint of plaintiff Josue M. Ali on the ground that he did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and for an order pursuant to

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CPLR 3126 dismissing the complaint of plaintiff Sergio Ali for failure to appear for a court-ordered deposition and for failure to comply with discovery demands is granted; and it is further

ORDERED that the motion by defendants (004) for an order pursuant to CPLR 3025 granting leave to amend their answer to include the affirmative defense of the Graves Amendment (49 USC § 30106), and for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant El Tone Leasing Corp. i/s/h/a El Tone Leasing Corp. dismissing plaintiffs' complaints and all cross claims as against it is denied as moot.

This is an action[1] to recover damages for personal injuries allegedly sustained by plaintiff Josue M. Ali and for property damages allegedly sustained by plaintiff Sergio Ali in a motor vehicle accident that occurred on May 10, 2007 at approximately 7:20 p.m. The accident allegedly occurred on Brentwood Road at or near its intersection with Connetquot Avenue in Islip, New York. By his bill of particulars, plaintiff Josue M. Ali alleges that as a result of the subject accident he sustained the following serious injuries, cervical spine sprain, cervical myofascitis, and lumbar spine sprain. In addition, plaintiff Josue M. Ali alleges that following the accident he was treated at the emergency room of Southside Hospital in Bay Shore, New York and then released, and that he was confined to bed and home until approximately June 10, 2007. Plaintiff Josue M. Ali also alleges that at the time of the accident he was employed as a machinist and that he was incapacitated from his employment from March 10, 2007 until approximately June 10, 2007. He further alleges that as a result of the subject accident he sustained economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendants seek summary judgment dismissing the complaint of plaintiff Josue M. Ali on the grounds that he did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Their submissions include the pleadings, plaintiff's bill of particulars, plaintiff's deposition transcript, and the affirmed report dated October 29, 2010 of defendants' examining orthopedic surgeon, Vartkes Khachadurian, M.D.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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; or 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the

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[1]By order dated February 5, 2008 (J. Baisley), the action commenced by plaintiff Josue M. Ali was consolidated with a related action commenced by plaintiff Sergio Ali in Suffolk County District Court.

"permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see*, ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). In order to qualify under the 90/180-days category, an injury must be "medically determined" meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011]).

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

The deposition transcript dated April 23, 2010 of plaintiff Josue M. Ali reveals that his father is co-plaintiff Sergio Ali, that he resides with his parents, that he was the operator of the vehicle involved in the accident, and that his father owned the vehicle. Plaintiff testified that while his vehicle was stopped it was struck in the rear and that the two other vehicles involved in the accident were a taxi operated by a man and a Toyota four-door vehicle operated by a woman. In addition, plaintiff testified that he complained at the scene of the accident of pain in his neck and back, and that he was x-rayed at the hospital and given medication and a prescription for ibuprofen and then released from the hospital on the same day. Plaintiff also testified that a few days after the accident he went to see his father's chiropractor, Dr. Craig Selzer, who treated plaintiff three times a week for about two weeks. In June 2007, plaintiff went to a medical doctor, Dr. Maria Herrera, who was referred by the chiropractor, and saw her twice a week for approximately three months. According to plaintiff, she prescribed physical therapy three times a week, gave ibuprofen and prescribed "patches" for his back. Plaintiff further testified that he also saw his primary care physician for back pain for approximately eight visits and that his primary care physician only prescribed medication. Plaintiff stated that following the accident, he was confined to bed for a "couple of days" and confined to his home for a "couple of weeks." Plaintiff never saw a neurologist, has no future medical appointments, and no one has advised surgery or injections.

Plaintiff testified that he returned to his work as a machinist in July 2007 and worked one full day, operating the machine that he operated prior to the accident, then he went back to Dr. Herrera who told him to stay out of work. Plaintiff further testified that he told his supervisor that he could not work because "my doctor told me I couldn't work because of my back pain" and explained that "[s]he told me to stay out of work I think it was for, like, two months, three months." Plaintiff left work and did not return until November 2007. When he returned to work in November 2007 his duties and responsibilities did not change, no one assisted him, and he continued to work five days a week, 40 to 50

hours a week, for three months when he found better job opportunities and left. Plaintiff stated that there is nothing that he cannot do at all as a result of the accident but that there are activities that he can do with limitations which are construction work as a carpenter, which he used to do prior to his work as a machinist, and playing soccer, basketball and baseball, which he used to play in the summertime.

In his affirmed report, defendants' examining orthopedic surgeon, Dr. Khachadurian, indicates that he examined plaintiff Josue M. Ali on said date, that he reviewed plaintiff's records, and that he performed range of motion testing of plaintiff's lumbar spine and cervical spine. Dr. Khachadurian states that plaintiff's "examination was performed with the use of a percussion hammer, sensory pins, measuring tape and visual." Among his findings for the lumbar spine are normal lumbar lordosis with no evidence of spasm or shift of the lumbar spine, forward flexion of 90 degrees (normal 90 degrees), backward extension of 30 degrees (normal 30 degrees), side-to-side tilt 30 degrees (normal 30 degrees), and side-to-side rotation of 45 degrees (normal 45 degrees). With respect to plaintiff's cervical spine, Dr. Khachadurian reported that there was no evidence of spasm or shift and that plaintiff was able to extend backwards 60 degrees (normal 60 degrees), rotate right and left 45 degrees (normal 45 degrees), tilt right and left 30 degrees (normal 30 degrees), and flex forward to 70 degrees (normal 70 degrees). He added that there was no evidence of radicular or referred pain on examination of the cervical spine in the sitting position, deep tendon reflexes at the elbows and wrists were normal, and the Tinel signs were negative at the elbows, wrists and hands. Dr. Khachadurian found that the sensory pin examination of the upper extremities was normal. In conclusion, he diagnosed cervical sprain with no clinical evidence of neuromotor deficits, and no clinical evidence of herniated discs, radiculitis or radiculopathy, resolved. Dr. Khachadurian also diagnosed lumbar sprain with no clinical evidence of herniated discs, radiculitis or radiculopathy, resolved. He opined that plaintiff had no evidence of orthopedic disability related to the subject accident and could perform his usual work activities unrestricted.

Here, defendants met their prima facie burden of showing that plaintiff Josue M. Ali did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Lim v Flores***, 96 AD3d 723, 946 NYS2d 183 [2d Dept 2012]; ***Bernier v Torres***, 79 AD3d 776, 913 NYS2d 299 [2d Dept 2010]). Defendants' submissions include the affirmed report of their examining orthopedic surgeon who found no limitation in motion upon range-of-motion testing of plaintiff's cervical and lumbar regions of his spine (*see id.*; ***Ranford v Tim's Tree and Lawn Serv., Inc.***, 71 AD3d 973, 897 NYS2d 245 [2d Dept 2010]). Defendant also submitted proof establishing, prima facie, that plaintiff did not sustain a serious injury under the 90/180 category of Insurance Law § 5102 (d) (*see* ***Kolodziej v Savarese***, 88 AD3d 851, 931 NYS2d 509 [2d Dept 2011]; *see also* ***Karpinos v Cora***, 89 AD3d 994, 933 NYS2d 383 [2d Dept 2011]). Moreover, there is no evidence that plaintiff incurred economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) (*see* ***Moran v Palmer***, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]).

Once defendants made their prima facie showing that plaintiff Josue M. Ali did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, the burden shifted to plaintiff to produce sufficient evidence to raise a triable issue of fact (*see* ***Dantini v Cuffie***, 59 AD3d 490, 873 NYS2d 189 [2d Dept 2009], *lv denied* 13 NY3d 702, 886 NYS2d 93 [2009]).

In opposition to the motion, plaintiff Josue M. Ali submitted his uncertified Southside Hospital emergency room records and the initial report dated March 16, 2007 of Craig Selzer, D.C. to demonstrate that he did sustain a "serious injury" as defined in Insurance Law § 5102 (d).

Plaintiff Josue M. Ali failed to raise a triable issue of fact in opposition to the motion (*see* ***Jenson v Brooke***, 97 AD3d 539, 947 NYS2d 328 [2d Dept 2012]). Plaintiff's hospital records are uncertified and thus fail to raise a triable issue of fact (*see* ***D'Orsa v Bryan***, 83 AD3d 646, 919 NYS2d 881 [2d Dept 2011]). In addition, the initial report of plaintiff's chiropractor, Dr. Selzer, does not constitute competent evidence to oppose the motion for summary judgment because it is not in affidavit form (*see* CPLR 2106; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***Perdomo v Scott***, 50 AD3d 1115, 857 NYS2d 212 [2d Dept 2008]). Moreover, plaintiff failed to establish economic loss in excess of basic economic loss (*see* ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]). Finally, plaintiff's submissions fail to set forth competent medical evidence that the injuries he allegedly sustained as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days thereafter (*see* ***Pierson v Edwards***, *supra*). Therefore, defendants' motion for summary judgment dismissing the complaint of plaintiff Josue M. Ali on the ground that he did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

Defendants also seek an order pursuant to CPLR 3126 striking the complaint of plaintiff pro se Sergio Ali for his repeated failure to comply with Court orders compelling an examination before trial and his failure to provide outstanding discovery or to object to the demands for discovery. They argue that the failure to provide said discovery has denied them the right and opportunity to properly defend this action. Defendants attach an affirmation of good faith indicating that defendants' counsel has attempted to communicate with plaintiff pro se to resolve by agreement the issues raised by the motion but has been unable to reach an agreement. In support of their request, defendants also submit copies of the preliminary conference order dated February 22, 2008; defendants' demand for discovery and inspection dated February 22, 2008 demanding, among other things, copies of all estimates, repair records, invoices, receipts or work orders for damages to plaintiff's vehicle; a stipulation dated February 23, 2010 that depositions of plaintiffs were to be held on or before April 23, 2010 and that all parties were to respond to outstanding discovery and inspection within 30 days; defendants' notice for discovery and inspection dated May 10, 2010 seeking, among other things, an authorization to obtain plaintiff Sergio Ali's property damage claim file from Nationwide Insurance Company; the so-ordered stipulation dated July 12, 2011 (J. Whelan) directing that "Sergio Ali will be produced for a deposition on or before 8/8/11 Josue Ali & Sergio Ali will provide [defendants] with authorizations to obtain the property damage claim(s) file from the carrier (Nationwide)"; defendants' notice dated July 22, 2011 of examination before trial of plaintiff Sergio Ali on August 8, 2011; and the affidavit of service of the motion on plaintiff pro se at two different Bay Shore, New York addresses.

The nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter of discretion (*see* ***Kihl v Pfeffer***, 94 NY2d 118, 700 NYS2d 87 [1999]; ***Zletz v Wetanson***, 67 NY2d 711, 499 NYS2d 933 [1986]; ***Friedman, Harfenist, Langer & Kraut v Rosenthal***, 79 AD3d 798, 914 NYS2d 196 [2d Dept 2010]; ***Morano v Westchester Paving & Sealing Corp.***, 7 AD3d 495, 776 NYS2d 83 [2d Dept 2004]; ***Novis v Benes***, 268 AD2d 464, 701 NYS2d 914 [2d Dept 2000]). Although striking

a pleading is a drastic remedy, it is appropriate where there is a clear showing that the failure to comply with discovery demands was willful or contumacious (*see* ***Frias v Fortini***, 240 AD2d 467, 658 NYS2d 435 [2d Dept 1997]). It can be inferred that a party's conduct is willful and contumacious when it repeatedly fails to comply with discovery demands and court orders compelling disclosure without providing a reasonable excuse for noncompliance (*see* ***Commisso v Orshan***, 85 AD3d 845, 925 NYS2d 612 [2d Dept 2011]; ***Mei Yan Zhang v Santana***, 52 AD3d 484, 860 NYS2d 129 [2d Dept 2008]; ***Dinstber v Geico Ins. Co.***, 32 AD3d 893, 820 NYS2d 804 [2d Dept 2006]; ***Kroll v Parkway Plaza Joint Venture***, 10 AD3d 633, 781 NYS2d 613 [2d Dept 2004]; ***Ordonez v Guerra***, 295 AD2d 325, 743 NYS2d 156 [2d Dept 2002]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (***Kihl v Pfeffer***, *supra* at 123).

Here, plaintiff Sergio Ali failed to submit any opposition to the motion and thus did not offer a reasonable excuse for failing to comply with the repeated discovery demands or the orders of the Court directing compliance with those demands (*see* ***Northfield Ins. Co. v Model Towing and Recovery***, 63 AD3d 808, 881 NYS2d 135 [2d Dept 2009]; *see also* ***Montemurro v Memorial Sloan-Kettering Cancer Ctr.***, 94 AD3d 1066, 942 NYS2d 623 [2d Dept 2012]; ***Roug Kang Wang v Chien-Tsang Lin***, 94 AD3d 850, 941 NYS2d 717 [2d Dept 2012]; ***Morgenstern v Jeffsam Corp.***, 78 AD3d 913, 912 NYS2d 231 [2d Dept 2010]). Therefore, the Court grants defendants' request to unconditionally strike the complaint of plaintiff Sergio Ali (*see id.*; ***Smith v Eastern Long Is. Hosp.***, 263 AD2d 477, 692 NYS2d 726 [2d Dept 1999]).

Based on the foregoing, defendants' further request for leave to amend their answer to include the affirmative defense of the Graves Amendment (49 USC § 30106), and for summary judgment in favor of defendant El Tone Leasing Corp. i/s/h/a El Tone Leasing Corp. (El Tone) dismissing the complaint as against it, is denied as moot.

Accordingly, the motion (003) by defendants for summary judgment in their favor dismissing the complaint of plaintiff Josue M. Ali on the ground that he did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and for an order pursuant to CPLR 3126 dismissing the complaint of plaintiff Sergio Ali for failure to appear for a court-ordered deposition and for failure to comply with discovery demands is granted. The plaintiffs' complaints are dismissed. The motion (004) by defendants for leave to amend their answer and for summary judgment in favor of defendant El Tone Leasing Corp. i/s/h/a El Tone Leasing Corp. is denied as moot.

Dated: 9/21/12

THOMAS F. WHELAN, J.S.C.