SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA23A

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Sandy Tamayo and Ivelise Tamayo, Index No 020567/2009

Plaintiff, Decision/Order

-against-

Kevin D. Turman and Patricia Tucker,

Defendants

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HON. ALEXANDER W. HUNTER, JR.

The motion by defendants for an order granting them summary judgment on the ground that the plaintiff Sandy Tamayo has not sustained a serious injury pursuant to New York Insurance Law §5102(d), is granted

The cause of action is for personal injuries sustained by plaintiff Sandy Tamayo on October 17, 2008 on the Major Deegan Expressway at or near its intersection with East 155th Street in Bronx County when he alleges that his vehicle was struck in the rear by defendants' vehicle while he was stopped at a traffic light

Defendants allege that plaintiff Sandy Tamayo has not sustained a serious injury pursuant to New York Insurance Law §5102(d) Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained **See, Licari v. Elliott, 57 N.Y.2d 230 (1982)** "It is incumbent upon the court to decide in the first instance whether plaintiff has a cause of action to assert within the meaning of the statute " **Id. at 237** New York Insurance Law §5102(d), defines "serious injury" as, "a personal injury which results in 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 party 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 "

The defendant has the burden of establishing that the plaintiff has not suffered a serious injury as a result of the accident The defendant must submit " affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim " **Grossman v. Wright, 268 A.D.2d 79 (2nd Dept. 2000)** When a defendant's motion is sufficient to raise the issue that a serious injury has not been sustained, then the burden shifts to plaintiff to produce prima facie evidence in admissible form to support the claim of a serious injury Unsworn reports of plaintiff's examining doctor will not be sufficient to defeat a motion for summary judgment **Grasso v. Angerami, 79 N.Y.2d. 813 (1991)** If the defendant fails to meet this initial burden, then the court need not consider whether the plaintiff's

papers raise a triable issue of fact **Trantel v. Rothenberg, 286 A.D.2d 325 (2nd Dept. 2001); Papdonikolakis v. First Fidelity Leasing Group, Inc., 283 A.D.2d 470 (2nd Dept. 2001)**

In support of the motion for summary judgment, defendants submit the affirmed report of Ravi Tikoo, M D , a neurologist who examined plaintiff on March 2, 2011 Dr Tikoo conducted a physical examination of the plaintiff which included a straight leg raising testing In his report he noted that, "There was mild tenderness of the cervical and lumbar spine" but "No associated spasm was noted " Dr Tikoo concluded that plaintiff did not have "significant clinical evidence of neuropathy, radiculopathy, or disc herniation from the accident " (Defendants' Exhibit D) He diagnosed plaintiff with a history of cervical strain, thoracic strain and lumbosacral strain He further opined that plaintiff was not disabled from a neurological standpoint and that no permanent injury was sustained (Defendants' Exhibit D)

Defendants further submit the affirmed report of Robert J Orlandi, M D., an orthopedic surgeon who examined the plaintiff on March 1, 2011 Dr Orlandi conducted range of motion tests on plaintiff's cervical spine and shoulders and lumbar spine and found all to be within normal limits He observed no neck or back spasm and found that plaintiff did not have a "musculoskeletal disability" nor "permanent residuals" from what he concluded to be a "minor accident " (Defendants' Exhibit E)

Defendants also submit the affirmation of Jessica F Berkowitz, M D., a radiologist, who reviewed the MRI taken of plaintiff's cervical spine on November 8, 2008 Dr Berkowitz noted that no bulges or herniations were present and there was no evidence of "acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma " (Defendants' Exhibit F) Dr Berkowitz concluded that there was no causal relationship between plaintiff's accident and the findings on the MRI (Defendants' Exhibit F)

Dr Berkowitz also reviewed the MRI taken of plaintiff's lumbar spine on November 8, 2008 In her affirmation dated March 2, 2011, she asserts that no disc bulges or herniations were present and "normal lumbar lordosis is maintained " (Defendants' Exhibit F) She further states that, "There is no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous rupture or epidural hematoma " Dr Berkowitz further notes, "This report is in disagreement with the original radiology report." (Defendants' Exhibit F) She opines that there is no causal relationship between plaintiff's accident and the findings in the MRI

Defendants contend that based on the reports of said doctors, plaintiff did not suffer a permanent injury or a significant limitation of a body function or system as defined by Insurance Law §5102(d) They aver that the medical evidence shows that any causally related injury allegedly sustained by plaintiff was mild, at best, and is now resolved

Moreover, defendants contend that plaintiff did not sustain an injury or impairment of a non-permanent nature under the 90/180 category of serious injury since plaintiff's Bill of Particulars alleges that plaintiff was confined to his home and was incapacitated from his employment for only two (2) weeks following the accident Moreover, plaintiff is not asserting a claim for loss of earnings in the instant action Accordingly, the motion for summary judgment should be granted

Plaintiff opposes the motion and argues that defendants have not met their burden of showing that plaintiff did not sustain a serious injury First, plaintiff refers to defendants' failure to acknowledge two (2) independent medical examiners' (IME) reports which show positive findings Plaintiff refers to the unsworn report of Ron Amidror, D C , a chiropractor who examined the plaintiff on December 23, 2008 Dr Amidror conducted range of motion tests on plaintiff and concluded that plaintiff suffered a "mild chiropractic disability" that was causally related to the subject accident (Plaintiffs' Exhibit 1) Dr Amidror further recommended that plaintiff continue chiropractic treatments two (2) times per week for six (6) weeks (Plaintiffs' Exhibit 1).

Plaintiff further argues that defendants ignored the report of a second IME, William J Walsh Jr , M D , an orthopedic surgeon who examined plaintiff on December 23, 2008 Range of motion testing revealed some limitations in plaintiff's cervical spine Dr Walsh opined that plaintiff suffered a cervical spine sprain/strain that was resolving and thoracic spine sprain/strain that was resolved He concluded that plaintiff suffered a "mild disability" and stated that there was a "probable causal relationship" between the accident and plaintiff's "symptomatology " (Plaintiffs' Exhibit 2) Dr Walsh recommended that plaintiff continue physical therapy two (2) times per week for an additional six (6) weeks, "with one orthopedic follow up within six weeks and should then be re-evaluated " (Plaintiffs' Exhibit 2)

Plaintiff contends that since defendants failed to address the foregoing reports, they have not met their burden of showing that plaintiff did not sustain a serious injury

This court notes that the report of Dr Amidror is not in admissible form and, therefore, said report is disregarded Dr Amidror is a chiropractor and it is well established that an affirmation from a chiropractor is not competent evidence if it is not subscribed to before a notary or other authorized individual **Shinn v. Catanzaro, 1 A.D.3d 195 (1st Dept. 2003).** Additionally, Dr Walsh, in his report merely stated that there was a "probable" causal relationship between plaintiff's symptoms and the subject car accident Thus, this court finds that defendants have met their initial burden of establishing that plaintiff did not suffer a serious injury causally related to the action and the burden shifts to plaintiff to submit proof in admissible form to create an issue of fact **Franchini v. Palmieri, 1 N.Y.3d 536 (2003)**

Plaintiff submits the affidavit and report of Mitchell Zeren, a chiropractor who was treating plaintiff after the accident In his report, dated October 21, 2008, Dr Zeren noted that plaintiff was having trouble with his daily routines Range of motion testing revealed that plaintiff had significant limitations in range of motion in his cervical and lumbar spine Moreover, Dr. Zeren noted "severe paraspinal muscle spasm of the cervical and upper thoracic spine " (Plaintiffs' Exhibit 3). Dr Zeren stated that, "there appears to be a causal relationship between Mr Tamayo's injuries and the accident of October 17, 2008 (Plaintiffs' exhibit 3)

Additionally, plaintiff submits the affirmed report of Yolande Bernard, M D , who performed a physiatrist evaluation of plaintiff on October 30, 2008. Dr Bernard performed range of motion testing on plaintiff's cervical spine and lumbosacral spine and found significant limitations Dr Bernard causally related the injuries to the subject accident and recommended physical therapy three (3) to four (4) times per week as well as continued chiropractic care. (Plaintiffs' Exhibit 4) In follow up examinations performed by Dr Bernard on December 2, 2008 and January 15, 2009, plaintiff was noted to have continued pain and loss of range of motion

Moreover, on January 7, 2009, Aric Hausknecht performed NCV/EMG tests on the plaintiff which revealed an L5-S1 radiculopathy Dr. Hausknecht opined that plaintiff was partially disabled and restricted plaintiff's activities Dr Hausknecht also causally related the injuries to the subject accident (Plaintiffs' Exhibit 5)

Plaintiff next submits the affirmed report of Arden M Kaisman, M D , who gave the plaintiff several epidural steroid injections on March 4, 2009, March 18, 2009, May 11, 2009 and June 15, 2009 Additionally, on February 9, 2009 and April 13, 2009, Dr Kaisman performed range of motion tests on plaintiff's lumbar and cervical spine and found limitations (Plaintiffs' Exhibit 6)

Finally, plaintiff refers to his deposition testimony wherein he stated that he can no longer stand as often as he used to, go to the gym or play softball Plaintiff stated that he played softball twice a week and went to the gym four (4) times a week Moreover, he has treated consistently with a chiropractor and has not had a gap in treatment Accordingly, plaintiffs assert that defendants' motion should be denied

Although plaintiff's experts opined that plaintiff had limited range of motion in his cervical and lumbar spine, plaintiff's submissions involved examinations of the plaintiff shortly after and up to six (6) months after the accident Plaintiff is alleging that he has suffered a permanent loss of use of a body organ member function or system, a permanent consequential limitation of use of a body organ or member or a significant limitation of a body function or system. However, defendant submitted the affirmed reports of doctors who examined plaintiff in March 2011 and found that he had full range of motion in his cervical and lumbar spine and that all sprains and strains were resolved Plaintiff failed to submit any reports of recent examinations performed on the plaintiff to show that his injuries are permanent in nature and to rebut defendants' experts findings of full ranges of motion **Shu Chi Lam v. Wang Dong, 84 A.D.3d 515 (1st Dept. 2011)**

Additionally, plaintiff failed to show that he suffered a serious injury under the 90/180 category of Insurance Law §5102(d) His Bill of Particulars and deposition testimony reveal that he was confined to his home for approximately two (2) weeks after the accident and could not return to work for only two (2) weeks after the accident Therefore, plaintiff has not demonstrated that he has sustained a serious injury under the 90/180 category **Perez v. Corr, 84 A.D.3d 646 (1st Dept. 2011)**

Accordingly, since plaintiff has failed to raise an issue of fact as to whether he has sustained a serious injury under Insurance Law §5102(d) Defendants' motion for an order dismissing plaintiffs' complaint is granted

Defendants are directed to serve a copy of this order with notice of entry upon the plaintiffs and file proof thereof with the clerk's office

This constitutes the decision and order of this court

Dated February 17, 2012

J.S.C.

ALEXANDER W. HUNTER, JR.
J.S.C.