Grant v United Pavers
2010 NY Slip Op 33900(U)
July 8, 2010
Supreme Court, Bronx County
Docket Number: 302949/2008
Judge: Alison Y. Tuitt
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[* 1]
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NEW YORK SUPREME COURT - COUNTY OF BRONX

L.W.

PART 05

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
--X

GRANT,HOPETON

Index №. **0302949/2008**

-against-

Hon..**ALISON Y. TUITT** ,

UNITED PAVERS CO. INC.

Justice.

--X

The following papers numbered 1 to 3 Read on this motion, **SUMMARY JUDGMENT DEFENDANT**
Noticed on **February 01 2010** and duly submitted as No. ____ on the Motion Calendar of 3/1/10

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
______________ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the annexed memorandum decision dated 7/8/10

Motion is Respectfully Referred to:
Justice: ______
Dated: ______

Dated: 7/8/10

Hon. [signature]
ALISON Y. TUITT, J.S.C.

FN

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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

HOPETON GRANT and LAWRENCE OGILVIE,

Plaintiffs,

-against-

UNITED PAVERS and ANTONIO RICCI,

Defendants.

INDEX NUMBER: **302949/2008**

Present:
HON. **ALISON Y.TUITT**
Justice

The following papers numbered 1 to 3

Read on this Defendants' Motion for Summary Judgment

On Calendar of **3/8/10**

Notices of Motion-Exhibits and Affirmation	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, defendants' motion for summary judgment if granted for the reasons set forth herein.

The within action arises from a motor vehicle accident on September 15, 2007 wherein plaintiff alleges he sustained serious injuries. Defendants move for summary judgment on the grounds that plaintiff failed to prove a serious injury as required by §5102(d) of the Insurance Law.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York,

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49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

In the present action, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a serious injury. Lowe v. Bennett, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. Licari v Elliot, 57 N.Y.2d 230 (1982); Lopez v. Senatore, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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 prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 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. Toure, supra. [1]

In the instant action, defendants move for summary judgment arguing that plaintiff Hopeton Grant has not suffered a serious injury pursuant to §5102 of the Insurance Law. Defendants have met their burden by producing competent medical evidence showing that neither plaintiff has sustained a serious injury. The burden now shifts to the plaintiff.

As a result of the subject accident on September 15, 2007, plaintiff Hopeton Grant alleges to

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[1]The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, 352, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002].)

have sustained a tear of the posterior horn of the medial meniscus; diffuse posterior disc bulges throughout the cervical spine; central herniated disc at C3-4 impressing on the ventral surface of the spinal cord without definite lateralization; central herniated disc at C4-5 impressing on ventral surface of the spinal cord without definite lateralization,; left paracentral herniated disc at C5-6 impressing on the ventral surface; diffuse posterior disc bulges at T12-L1, L3-4, L4-5 and L5-S1, central subligamentous herniated disc at L4-5 impressing on the ventral aspect of the thecal sac.

Plaintiff was transported from the scene of the accident by ambulance to Our Lady of Mercy Medical Center where he complained of neck, back and left knee pain. Plaintiff was released from the hospital two days later, on September 17, 2007. On September 18, 2007, plaintiff went to his primary care physicians with complaints of neck, back and left knee pain and was referred to Dr. Orsuville Cabatu who states in an affirmation that he has been treating plaintiff from September 18, 2007 to the present time. On his initial physical examination of the plaintiff, Dr. Cabatu found significant restrictions in the left knee, as well as cervical and lumbar ranges of motion. In his affirmation, Dr. Cabatu details the limitations and compares it to the normal ranges. Dr. Cabatu prescribed physical therapy and states that plaintiff has had over 100 physical therapy sessions since the accident. Dr. Cabatu ordered MRI's of plaintiff's back, neck and left knee which revealed the above referenced findings. Dr. Cabatu referred plaintiff to an orthopedist, Dr. Stanley Liebowitz for the knee injury. Dr. Liebowitz states in his affirmation that his partner Dr. Thomas Scilaris performed arthroscopic surgery on plaintiff's left knee at Beth Israel Hospital on March 17, 2009. Dr. Cabatu states that he has seen plaintiff on a regular basis, approximately 14 times since the accident. Dr. Cabatu most recently examined plaintiff on January 26, 2010 and again found significant restriction in range of motion in the cervical and lumbar regions as well as the left knee. In light of the continued limitations after extensive physical therapy and arthroscopic surgery, it is Dr. Cabatu's opinion that plaintiff sustained severe, permanent injuries as a result of the accident. Dr. Liebowitz states in his affirmation that he has examined plaintiff on two occasions: on February 4, 2009 and when he found significant restriction in plaintiff's left knee range of motion ; and on February 1, 2010 when he again found restrictions in the left knee. Dr. Liebowitz also opines that the injury to the left knee is permanent and causally related to the accident.

Defendants' motion must be granted. Defendants' expert, Dr. Jessica Berkowitz, a radiologist reviewed plaintiff's MRI films and found that the left knee MRI revealed some degeneration and that no definite

discrete meniscal tear could be identified. She further states a finding of "internal degeneration involving the posterior horn of the medial meniscus and both horns of the lateral meniscus. Dr. Berkowitz states that her review of the lumbar spine MRI revealed, in relevant part, "findings are all chronic and degenerative in origin." With respect to the cervical spine MRI, Dr. Berkowitz states that there are disc herniations at C3-4, C4-5 and C5-6 but states that the etiologies of the herniations cannot be definitely determined on the basis of MRI review. She also states that disc bulges are chronic and degenerative in nature. Notwithstanding Dr. Berkowitz's findings, plaintiff's experts failed to address these findings of pre-existing conditions and this is a fatal omission to the opposition of a motion on threshold. See, Colon v. Taveras, 873 N.Y.S.2d 637 (1st Dept. 2010); Valentin v. Pomilla, 873 N.Y.S.2d 537 (1st Dept. 2009). Under similar circumstances, Courts have held that summary judgment was properly granted because plaintiff's expert failed to adequately address plaintiff's pre-existing back condition and did not provide any foundation or objective medical basis supporting the conclusions they reached. See, Kupka v. Emmerich, 769 N.Y.S.583 (2d Dept. 2003) (Summary judgment granted where chiropractor's affidavit was silent on a prior lower back injury for which chiropractor treated plaintiff. Court held that the chiropractor's finding that plaintiff's current restriction of motion was causally related to the subject accident should not have been considered.; Franchini v. Palmieri, 1 N.Y.3d 536 (2003) (Court of Appeals held that plaintiff's submissions were insufficient to defeat summary judgment because her experts failed to adequately address plaintiff's preexisting back condition and other medical problems, and did not provide any foundation or objective medical basis supporting the conclusion they reached); Cacaccio v. Martin, 652 N.Y.S.2d 74 (2d Dept. 1996); Cody v. Parker, 693 N.Y.S.2d 769 (3d Dept. 1999); McCauley v. Ross, 748 N.Y.S.2d 409 (2d Dept. 2002); Finkelshteyn v. Harris, 721 N.Y.S.2d 90 (2d Dept. 2001).

The only admissible records submitted by plaintiff are the two affirmations of his treating physicians. The hospital records plaintiff submits to the Court are not certified. Thus, these records are not considered because they have no probative value and are not properly before the Court. Grasso v. Angerami, 79 N.Y.2d 813 (1991). Plaintiff states that he received over 100 physical therapy sessions but other than his statement, no proof of this is provided to the Court. The records have not been provided to the Court. Although both experts reference that plaintiff received physical therapy, neither physician states the source of that information. Neither states that they have reviewed sworn copies of those records. Both physicians reference plaintiff's unsworn MRI results or reports, but neither provides that they actually personally reviewed the films.

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Plaintiff also submits an unsworn, uncertified copy of the operative report for the left knee surgery. Dr. Liebowitz states the findings as provided in the operative report but he did not perform the surgery.

The finding of herniated discs alone are insufficient to constitute a serious injury. The finding of a herniation must be accompanied by objective evidence in admissible form as to the extent of the limitation resulting from the herniation. Onishi v. N&B Taxi, Inc., 858 N.Y.S2d 171 (1st Dept. 2008). Plaintiff has failed to make this showing. Dr. Cabatu states that he has seen plaintiff about 14 times since the accident, but only provides findings of limitations in plaintiff's range of motion in the cervical and lumbar spine immediately after the accident on September 18, 2007 and then again on January 26, 2010. Thus, there is no information regarding plaintiff's limitations from September 19, 2007 through January 25, 2010. Moreover, Dr. Liebowitz only examined plaintiff on two occasions, on February 4, 2009 and then one year later on February 1, 2010. There is no objective evidence in admissible form as to the extent of the plaintiff's limitations in his left knee during that one year, and prior to February 4, 2009.

Plaintiff also fails to raise an issue of fact as to whether he was unable to perform substantially all of her usual and customary activities for 90 days during the first 180 days following the accident. In order to establish a claim under the 90/180 category, there must be proof that plaintiff's usual and customary activities were impaired in some significant way for 90 out of the first 180 days after the accident. Cruz v. Calabiza, 641 N.Y.S.2d 255 (1st Dept. 1996). The claim must be supported by "competent medical proof that directly substantiated the claim". Cruz v. Aponte, 874 N.Y.S.2d 442 (1st Dept. 2009) quoting Uddin v. Cooper, 820 N.Y.S.2d 44 (1st Dept. 2006)(citations omitted). Even missing 3 months of work out of the first 180 days is insufficient without a showing of other daily activities that were hindered due to the injury. Uddin, 820 N.Y.S.2d at 45. Here, there is no evidence that plaintiff could not perform her usual and customary activities for 90 out of the 180 days. Plaintiff states that he missed two months from work but fails to offer substantiating documentation to support his claim. Dembele v. Cambiasa, 874 N.Y.S.2d 72 (1st Dept. 2009). Moreover, plaintiff fails to show that he had significant impairment of his usual and customary activities. Cruz v. Calabiza, 641 N.Y.S.2d 255 (1st Dept. 2009). Plaintiff testified that during the 3 months following the accident, he cut back on exercising but was not advised by any doctor to do so. He also self-restricted his lifting of items weighing less than a carton of six gallon water bottles. These allegations are insufficient to make a finding under the 90/180 category as the claims must be supported by competent medical proof. Cruz v. Aponte, 874

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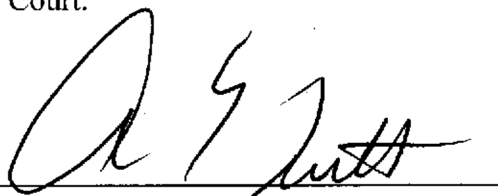
N.Y.S.2d 442 (1st Dept. 2009). Here they are not and, in any event, these claimed restrictions do not rise to the level of a curtailment of substantially all of his usual activities. .

Accordingly, for the reasons stated, the defendants' motion for summary judgment is granted and the plaintiff's complaint is dismissed.

This constitutes the decision and order of this Court.

Dated: July 8, 2010



Hon. Alison Y. Tuitt