[* 1]

5

SHORT FORM ORDER
SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:
HON. ANTHONY L. PARGA
JUSTICE

----------X PART 8

ROBERT HOPKE,

Plaintiff,

INDEX NO. 23400/09

-against-

MOTION DATE: 6/20/11
SEQUENCE NO. 001

ISAAC SYLVAIN,

Defendant.

----------X

Notice of Motion, Affs. & Exs.....1
Affirmation in Opposition & Exs.....2
Reply Affirmation.....3

Upon the foregoing papers, it is ordered that the motion by defendant, ISAAC SYLVAIN, for summary judgment, pursuant to CPLR §3212, on the grounds that the plaintiff did not sustain a serious injury within the meaning of New York State Insurance Law §5102 (d) is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Robert Hopke, as a result of a motor vehicle accident which occurred on March 15, 2008, on Spagnoli Road, approximately five hundred feet east of Hub Drive, in Huntington, New York. The plaintiff was the driver of a tractor-trailer, and was in the course of his employment, at the time that the accident occurred.

Movants contend that plaintiff's injuries fail to meet the "serious injury" requirements of Insurance Law §5102 (d) and §5104 . In support of his motion, Movant submits the plaintiff's verified bill of particulars, plaintiff's deposition transcript, an examination report of orthopedic surgeon, Dr. Michael J. Katz, and the radiologist reports of Dr. A. Robert Tantleff relating to his review of plaintiff's cervical spine and thoracic spine MRI films. Movant argues that plaintiff testified at his deposition that he missed only one week from work as a truck driver as a result of the accident. Additionally, defendant argues that plaintiff underwent approximately one year of physical therapy after the accident and then ceased treatment when his Workers' Compensation

benefits ran out, despite the plaintiff having private health insurance coverage.

Defendant submits the report of Dr. Michael J. Katz, a board certified orthopedic surgeon who examined plaintiff at defendant's request on October 22, 2010. Dr. Katz examined the plaintiff, performed range of motion testing on the plaintiff, and compared those findings to normal findings. Dr. Katz found that plaintiff had normal ranges of motion in his cervical spine, thoracolumbosacral spine, and right hip. Dr. Katz concluded that plaintiff had resolved cervical derangement and resolved thoracolumbosacral derangement. Dr. Katz also concluded that the plaintiff shows no signs or symptoms of permanence relative to the musculoskeletal system relating to March 15, 2008. Dr. Katz further opined that plaintiff is not disabled and is capable of full time work duty as a tractor trailer driver and of his activities of daily living. Dr. Katz lastly opined that the MRI report of plaintiff's cervical spine indicates degenerative changes, as did the x-rays of plaintiff's cervical and lumbar spines.

Additionally, Movant submit the affirmed radiology reports of Dr. A. Robert Tantleff relating to plaintiff's cervical spine MRI and thoracic spine MRI. Dr. Tantleff found only "normal degenerative changes" in plaintiff's cervical spine and lumbar spine, noting that said changes are consistent with the individual's age and the normal aging process and are not causally related to the date of the within accident.

Accordingly, Movant has demonstrated a prima facie showing of entitlement to summary judgment on the grounds that plaintiff's alleged injuries do not meet the serious injury threshold of Insurance Law §5102(d). The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

In opposition, plaintiff submits the affirmed radiology reports of Dr. Jeffrey Kauffman for the MRIs of plaintiff's cervical spine and thoracic spine. With respect to plaintiff's cervical spine, Dr. Kauffman found that plaintiff had small-to-moderate posterior disc osteophyte complex at C3-C4 and C5-C6, a small disc bulge at T1-T2, and within the posterior aspect of the C2 vertebral body at the junction of the body of the dens, Dr. Kauffman noted an 8 x 9 mm nonspecific cystic lesion. With respect to plaintiff's thoracic spine, Dr. Kauffman found a small-to-moderate central/right paracentral disc protrusion. The existence of a herniated or bulging disc alone, however, without evidence that it led to a period of disability, is insufficient to defeat

summary judgment. (*See, Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005); *Ortiz v. Ianina Taxi Services, Inc.*, 73 A.D.2d 721 (2d Dept. 2010); *St. Pierre v. Ferrier*, 28 A.D.3d 641 (2d Dept. 2006)).

Plaintiff further submits the affirmation of the doctor with whom plaintiff treated at Island South Physcial Medicine and Rehabilitation, P.C., Dr. Nisarali Visram, M.D. Dr. Visram certifies that the medical records annexed to his affirmation are correct and accurate. He further attests that the plaintiff underwent a course of physical therapy at his office which lasted over a year. Dr. Visram attests that plaintiff's treatment was terminated on or about July 30, 2009 due both to plaintiff's Workers' Compensation carrier's refusal to pay for additional treatment and because "the patient had reached maximum medical improvement." As such, Dr. Visram offers an explanation for the gap in treatment from July 30, 2009 to plaintiff's recent examination with Dr. Visram on April 4, 2011. Dr. Visram found limitations in the ranges of motion of plaintiff's cervical spine from June 24, 2008 through July 30, 2009, and again found limitations in the ranges of motion of plaintiff's cervical spine during his examination of the plaintiff on April 4, 2011. Dr. Visram opines that based upon plaintiff's pre-accident and post-accident medical history, as well as Dr. Visram's examinations of the plaintiff, all of the plaintiff's injuries, symptoms and limitations set forth in his medical records and reports are directly causally related to the motor vehicle accident of March 15, 2008 and not the result of any prior trauma or pre-existing degenerative conditions. Dr. Visram further attests that he disagrees with the defendant's consulting radiologist that the disc injuries observed in the plaintiff's MRI films are pre-existing degenerative changes unrelated to the accident herein. Dr. Visram notes that "same is wholly inconsistent with the patient's subjective and objective medical history, including the absence of any pre-accident complaints, testing or treatment of the cervical and thoracic spines."

In addition, plaintiff submits an affidavit of plaintiff's initial physical therapist, Diana Justice, DPT, who worked at PKL Physical Therapy. Ms. Justice attests that the plaintiff treated at said office for two months immediately following the accident and certifies that the contents of the medical records submitted from PKL Physcial Therapy are correct and accurate. Said records begin on April 22, 2008 and indicate that plaintiff complained of pain in his cervical spine, mid-back and lower back and had restrictions in the ranges of motion in his cervical spine within the month following the accident.

As plaintiff has submitted the certified records of PKL Physical Therapy for the two months following the accident, and the certified records of Dr. Visram at South Island Physcial Medicine and Rehabilitation, P.C., from June 24, 2008 to July 30, 2009, plaintiff has submitted evidence sufficient to demonstrate significant limitations contemporaneous with the accident.

(*See, Calabro v. Petersen*, 82 A.D.3d 1030, 918 N.Y.S.2d 1030 (2d Dept. 2011); *Ferraro v. Ridge Car Service*, 49 A.D.3d 498, 854 N.Y.S.2d 408 (2d Dept. 2008)).

Lastly, plaintiff submits an affidavit in which he attests that he cannot work the same hours as he did before the accident and that he has had to "curtail" his overtime. He further attests that prior to March 18, 2008, he never had any "of these pains, restrictions or physical limitations prior to injuring my neck and back in the March 15, 2008 accident with the defendant's vehicle and have never injured my neck or back in any other accident." Plaintiff attests that he stopped treatment at Island South Physcial Medicine and Rehabilitation both because his Workers' Compensation carrier denied payment for additional treatment and because his doctor concluded that he had reached maximum medical improvement and that further treatment would not improve his condition or prognosis further.

Accordingly plaintiff has produced evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of this action. (*See, Adetunji v. U-Haul*, 250 A.D.2d 483, 672 N.Y.S.2d 869 (1st Dept. 1998); *Brown v. Achy*, 9 A.D.3d 30, 776 N.Y.S.2d 56 (1st Dept. 2004)). The reports of plaintiff's treating doctor, Dr. Visram, from June 24, 2008 through July 30, 2009, as well as Dr. Visram's April 4, 2011 examination of the plaintiff, demonstrate objective evidence of the physical limitations in plaintiff's cervical spine resulting from the within accident and warrant the denial of the defendant's motion. (*See, Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005)).

Accordingly, defendant's motion for summary judgment is denied. If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)).

Dated: July 26, 2011

Anthony L. Parga, J.S.C.

Cc: McCabe, Collins, McGeough & Fowler, LLP
346 Westbury Avenue
P.O. Box 9000
Carle Place, NY 11514

Law Offices of Kevin T. Grennan, PLLC
1000 Franklin Avenue, Suite 302
Garden City, NY 11530