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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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KENNY LAPAIX,

Plaintiff(s),

-against-

JOSEPH G. CONSIGLIO, DONALD M. RICCILLO and EDMUND ROSENBLUM,

Defendant(s).

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Index No. 8839/09

Motion Submitted: 7/27/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant Consiglio moves this Court for an Order granting summary judgment in his favor and dismissing the complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff opposes the requested relief.

This action arises from a chain reaction motor vehicle accident that occurred in Nassau County on May 19, 2008. Plaintiff alleges that, while his vehicle was stopped for a red light, his vehicle was struck in the rear by defendant Consiglio's vehicle, propelling

plaintiff's vehicle into the rears of the cars in front of him.[1] Plaintiff claims that his back and neck impacted his driver's seat twice, causing a stinging sensation in those areas and resultant injuries to his cervical and lumbar spine. Plaintiff declined medical attention at the scene. Plaintiff received physical therapy, massage and acupuncture for approximately three months following the accident, but has not used any devices, including a brace or cane, relative to his claimed neck and back injuries.

In his Bill of Particulars, plaintiff claims that he has sustained permanent partial loss of use of his neck and back; 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 of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York Univ. Med. Center,*** 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York,*** 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Here, defendant must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident (***Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). Defendant has met her burden.

A tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (***Little v. Locoh***, 71 A.D.3d 837, 897 N.Y.S.2d 183 (2d Dept., 2010); ***Knox v. Lennihan***, 65 A.D.3d 615, 884

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[1]The claims against defendants Riccillo and Rosenblum were discontinued, with prejudice, by stipulation dated September 30, 2010.

N.Y.S.2d 171 (2d Dept., 2009); ***Kearse v. New York City Transit Authority***, 16 A.D.3d 45, 789 N.Y.S.2d 281 [2d Dept., 2005]).

In support of his motion for summary judgment, defendant has submitted, *inter alia*, the plaintiff's deposition testimony, plaintiff's verified Bill of Particulars, and the affirmed medical report of Dr. Kuldip K. Sachdev, defendants' examining neurologist.

The twenty-four (24)-year-old plaintiff was examined by Dr. Sachdev on December 9, 2010, two years and approximately seven months after the date of the accident. Dr. Sachdev reviewed a number of plaintiff's medical records, including June and July 2008 MRI scans of plaintiff's cervical and lumbar spine, respectively, a nerve study, evaluation reports from physical therapy and a Dr. Zarina Mandelblat, as well as progress notes from physical therapy, acupuncture and aqua therapy.

Upon examination of plaintiff, Dr. Sachdev measured range of motion in plaintiff's cervical and lumbar spine areas, with a goniometer, and he compared those findings to normal range of motion based on published guidelines promulgated by the New York State Division of Disability Determination and the American Medical Association. Palpation of the cervical spine revealed no vertebral tenderness, and palpation of the lumbar spine revealed minimal tenderness. Dr. Sachdev noted that there was no spasm in either the cervical or lumbar spine areas. The results of supine and sitting straight-leg-raising tests conducted in conjunction with examination of plaintiff's lumbar spine revealed normal results. Dr. Sachdev set forth his specific findings, comparing those findings to normal range of motion, and he concluded that plaintiff does not exhibit any objective evidence of restriction of range of motion in either the cervical or lumbar spine, and does not exhibit objective evidence of a neurological disability. Dr. Sachdev added that, based on his examination on that date, plaintiff is not disabled from working, or from the activities of daily living.

Plaintiff's deposition testimony, taken in May 2010, establishes that he missed two weeks of work immediately following the subject accident, at the direction of someone from the physical therapist's office. According to plaintiff's testimony, the physical therapist's office permitted plaintiff to return to work after the two-week period, with the instruction that he should not "lift." Prior to the accident, plaintiff's job was to stock shelves at a grocery store. Upon his return to the grocery store, he requested to be "repositioned," and approximately a "couple of weeks" later he was placed in the seafood department where he currently remains, waiting on customers. Plaintiff did not testify that this was in any way a demotion, or that he suffered reduced pay as a result of his transfer to the seafood department, or that he could not work at all. Plaintiff lives at home with his parents.

Plaintiff further testified that his shifts are between four and six hours in duration, and that he is paid nine dollars per hour. The only loss in earnings as testified to by plaintiff were for the two weeks that he did not work following the subject accident.

Despite having been treated for approximately three months, plaintiff testified that he was never provided with any medication for the pain in his back or neck. According to his testimony, plaintiff testified that he cannot lift things greater than ten pounds, or play basketball any longer as a result of the accident. Other than those things, there is nothing that plaintiff is unable to do now. Further, aside from trying to lift, nothing else gives him difficulty post-accident. Plaintiff's neck pain is felt rarely, and only when he moves it "too quick." According to plaintiff, he feels back pain "very often."

The affirmed medical reports of defendant's physician, as well as the plaintiff's deposition testimony can be sufficient to establish *prima facie* that the plaintiffs did not sustain a serious injury in a motor vehicle collision within the meaning of Insurance Law § 5102(d) (see ***Park v. Orellana***, 49 A.D.3d 721, 854 N.Y.S.2d 447 (2d Dept., 2008); ***Tarhan v. Kabashi***, 44 A.D.3d 847, 844 N.Y.S.2d 89 [2d Dept., 2007]).

Examining the reports of defendant's physician, there are sufficient tests conducted set forth therein to provide an objective basis so that their respective qualitative assessments of plaintiff could readily be challenged by any of plaintiff's expert(s) during cross examination at trial, and be weighed by the trier of fact (***Toure v. Avis Rent A Car Systems, Inc.***, 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002); ***Gaddy v. Eyler,*** 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

Furthermore, a defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (***Kuperberg v. Montalbano***, 72 A.D.3d 903, 899 N.Y.S.2d 344 (2d Dept., 2010); ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 A.D.3d 664, 852 N.Y.S.2d 287 [2d Dept., 2008]).

Thus, as noted, defendant's submission of plaintiff's deposition testimony (***Jackson v. Colvert***, 24 A.D.3d 420, 805 N.Y.S.2d 424 (2d Dept., 2005); ***Batista v. Olivo***, 17 A.D.3d 494, 795 N.Y.S.2d 54 [2d Dept., 2005]), and affirmation of defendant's physician are sufficient herein to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (***Paul v. Trerotola***, 11 A.D.3d 441, 782 N.Y.S.2d 773 [2d Dept., 2004]), under permanent consequential limitation and significant limitation categories of the applicable law, nor under the 90/180 category of the law.

Plaintiff is now required to come forward with viable, valid objective evidence to verify his complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 A.D.3d 458, 802 N.Y.S.2d 706 [2d Dept., 2005]). Plaintiff has failed to meet his burden.

As to plaintiff's 90/180 claim, the Court notes that a plaintiff must set forth competent medical evidence to establish that he sustained a medically determined injury or impairment of a nonpermanent nature, which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for 90 of the 180 days following the subject collision (***Ly v. Holloway***, 60 A.D.3d 1006, 876 N.Y.S.2d 482 [2d Dept., 2009]).

In opposition to defendants' summary judgment motion, plaintiff has submitted an affidavit dated July 8, 2011. In that affidavit, plaintiff confirms that he was out of work for two weeks following the accident, and that he returned to work thereafter, in the seafood section of the grocery store. Plaintiff further states, *inter alia*, that the pain interferes with his life on a daily basis, and that he has difficulty lifting and carrying heavy things, bending and sitting for long periods of time, and sleeping and playing basketball.

Plaintiff does not state that he was prevented from performing substantially all of his usual and customary activities for 90 of the 180 days following the accident, nor could he make such a statement in light of his deposition testimony taken in May 2010. The Court finds that plaintiff's self-serving affidavit is an attempt to raise a feigned factual issue, and is insufficient to defeat defendant's motion, for the 90/180 category of loss (*see* ***Wu v. City of New York***, 42 A.D.3d 451, 839 N.Y.S.2d 548 (2d Dept., 2007); ***Semple v. Sterling Estates, LLC***, 300 A.D.2d 297, 751 N.Y.S.2d 306 (2d Dept., 2002); ***Regina v. Friedman***, 272 A.D.2d 461, 707 N.Y.S.2d 674 [2d Dept., 2000]).

In support of his claims under the permanent partial loss of use of his neck and back, permanent consequential limitation and significant limitation categories of the Insurance Law with respect to his cervical and lumbar spine areas, plaintiff has submitted the affirmations of a treating physician (Dr. Khandros), a radiologist (Dr. Lyons), and an examining neurologist (Dr. Lerner), as well as therapy progress notes.

The Court will consider all reports on plaintiff's motion which were listed as being relied upon by defendant's expert (Dr. Sachdev) (*see* ***Williams v. Clark***, 54 A.D.3d 942, 864 N.Y.S.2d 493 (2d Dept., 2008); ***Barry v. Valerio***, 72 A.D.3d 996, 902 N.Y.S.2d 97 [2d Dept., 2010]).

The affirmed report of plaintiff's treating physician, Dr. Khandros, is dated August 4, 2008 and chronicles one initial examination of plaintiff, conducted by the doctor, the day after the subject accident. Thus, plaintiff has not submitted to this Court for its consideration

a recent finding from his treating physician to verify his subjective complaints of pain and limitation of movement (*see* ***Tudisco v. James***, 28 A.D.3d 536, 813 N.Y.S.2d 482 (2d Dept., 2006); ***Hernandez v. DIVA Cab Corp.***, 22 A.D.3d 722, 804 N.Y.S.2d 396 [2d Dept., 2005]).

Furthermore, Dr. Khandros' report refers to the MRI examinations of plaintiff's cervical and lumbar spine areas, highlighting the disc bulges and the herniation found as a result of conducting those MRIs. Dr. Khandros fails to account for the other finding clearly documented in the lumbar spine MRI report, which is that, "[t]here is a levocurvature. In the given clinical setting, clinical evaluation is required to differentiate among acceleration-deceleration vector injury (muscle spasm), positioning, and/or scoliosis." Dr. Khandros' report does not address whether scoliosis is ruled out, or in, as a cause of the levocurvature; thus, her report is rendered speculative (*see* ***Iovino v. Scholl***, 69 A.D.3d 799, 893 N.Y.S.2d 230 [2d Dept., 2010]).

The MRI report of plaintiff's cervical spine (June 5, 2008) reveals a single disc bulge at the C 5-6 level, without any canal or foraminal narrowing, and reversal of the normal lordotic curve with an associated dextrocurvature. Moreover, the radiologist stated that, with respect to the latter findings, they are "compatible with" acceleration-deceleration vector injury (muscle spasm, "whiplash").

The MRI report of plaintiff's lumbar spine reveal two disc bulges (L 3-4, L 4-5), a tear and herniation at L 5-S1, and a levocurvature. Dr. Lyons, the radiologist, stated that, with respect to the levocurvature, "clinical evaluation is required to differentiate among acceleration-deceleration vector injury (muscle spasm), positioning, and/or scoliosis." As discussed above, the differentiation was apparently never made.

Thus, the radiologist's findings have not been directly related to the subject accident (*see* ***Knox v. Lennihan***, 65 A.D.3d 615, 884 N.Y.S.2d 171 (2d Dept., 2009); ***Munoz v. Koyfman***, 44 A.D.3d 914, 844 N.Y.S.2d 111 (2d Dept., 2007); ***Collins v. Sheridan Stone***, 8 A.D.3d 321, 778 N.Y.S.2d 79 [2d Dept., 2004]). Without more, the radiologist's findings are not evidence of a serious injury (*see* ***Knox, supra***; ***Kearse v. New York City Transit Authority***, 16 A.D.3d 45, 789 N.Y.S.2d 281 [2d Dept., 2005]).

Dr. Lerner, plaintiff's examining neurologist, conducted his examination of plaintiff on July 11, 2011. His affirmed report characterizes plaintiff's range of motion restrictions in plaintiff's lumbar spine as "a moderate degree of impairment and disability," and plaintiff's range of motion restrictions in plaintiff's cervical spine as, "a mild degree of impairment and disability."

Dr. Lerner's characterizations are borne out by his documented range of motion findings, which show normal flexion in cervical range of motion, and normal left and right

tilt of the cervical spine. According to Dr. Lerner, plaintiff has suffered only a 6% loss of range of motion upon rotation of the cervical spine, and a 17% loss in extension. As to the lumbar spine, plaintiff has suffered a 17% loss in flexion and a 20% loss in extension. Dr. Lerner further reported that straight leg raising is negative bilaterally, and that plaintiff's gait is normal and steady. As such, plaintiff's injuries are not significant within the meaning of Insurance Law § 5102(d) (***Gaddy, supra*** at 957; ***Licari v. Elliot***, 57 N.Y.2d 230, 236, 441 N.E.2d 1088, 455 N.Y.S.2d 570 (1982); *cf.* ***Evans v. Pitt***, 77 A.D.3d 611, 908 N.Y.S.2d 729 (2d Dept., 2010); ***Kang v. Cho***, 74 A.D.3d 1328, 904 N.Y.S.2d 743 (2d Dept., 2010); ***Parker v. Singh***, 71 A.D.3d 750, 896 N.Y.S.2d 437 (2d Dept., 2010); ***Azor v. Torado***, 59 A.D.3d 367, 873 N.Y.S.2d 655 [2d Dept., 2009]).

Dr. Lerner also fails to address the issue of scoliosis despite acknowledging having reviewed the lumbar spine MRI report of July 2, 2008, thus rendering his opinion regarding plaintiff's lumbar spine speculative in nature (***Iovino, supra***).

Based on the foregoing, defendant Consiglio's summary judgment motion is granted, and the complaint against him dismissed.

The foregoing constitutes the Order of this Court.

Dated: September 29, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE