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SHORT FORM ORDER

INDEX No. 07-38897
CAL. No. 11-00528MV



**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. PART 46 - SUFFOLK COUNTY**

***PRESENT:***

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 4-28-11(#002)
MOTION DATE 6-23-11 (#003)
ADJ. DATE 8-25-11
Mot. Seq. # 002 - MD
# 003 - MD

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| PAUL BERTRAM, | : | LITMAN & LITMAN |
| | : | Attorney for Plaintiff |
| Plaintiff, | : | 209 Glenmore Street |
| | : | East Williston, New York 11596-1415 |
| - against - | : | |
| | : | CARCAGNO & ASSOCIATES |
| MICHAEL C. DECICCO, | : | Attorney for Defendant |
| | : | 80 Broad Street, Suite 1203 |
| Defendant. | : | New York, New York 10004 |

Upon the following papers numbered 1 to 25 read on these motions to vacate note of issue and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 15 (003) 14-21 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 22-23; 24-25 ; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that motion (002) by the defendant, Michael C. Decicco, pursuant to 22 NYCRR §202.21 and CPLR 3124 and 3126 (2) for an order striking the plaintiff's note of issue and certificate of readiness is denied; and it is further

***ORDERED*** that motion (003) by the defendant Michael C. Decicco pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain an injury within the threshold imposed by Insurance Law §5102 (d) is denied.

This negligence action arises out of a motor vehicle accident which occurred on December 15, 2004 at Middle Country Road and Martin Street, Coram, New York, when the vehicle operated by the plaintiff, Paul Bertram, was struck in the rear by a truck operated by the defendant, Michael Decicco.

Pursuant to 22 NYCRR §202.21(e) a motion to vacate the note of issue for lack of readiness must be filed within twenty days of the note being filed (***Schroeder v IESI NY Corp.,*** 24 AD3d 180, 805 NYS2d 79 [1st Dept 2005]). The instant motion was served by the defendants on March 22, 2011. The note of issue was filed on March 18, 2011. Accordingly, defendants' motion to vacate the Note of Issue is timely in that it was filed within twenty days of the filing of the Note of Issue.

When a party moves to vacate the note of issue within twenty days following its service, 22 NYCRR 202.21(e) provides that the court may grant vacatur upon a showing that the case is not ready for trial and a material fact in the certificate of readiness is incorrect (***Weiss et al v Finkelstein, M.D. et al***, 2006 NY Slip Op 51502U, 12 Misc 3d 1189A, 824 NYS2d 767, 2006 NY Misc Lexus 2085 [Nassau County]). Here, it is determined that the defendant failed to show that a material fact in the certificate of readiness is incorrect.

The defendant seeks to vacate the Note of Issue on the basis that the plaintiff failed to provide discovery previously demanded. The Preliminary Conference order of August 27, 2009 set forth that the plaintiff was to provide medical records and HIPPA compliant authorizations for all health care providers, diagnostic testing and films including MRI's and CT scans, x-rays, and authorizations for employment records for two years prior to the accident. At the plaintiff's December 1, 2010 deposition, the defendant orally demanded authorizations for the plaintiff's no fault records and for the records of Dr. Kelly, Middle Island Physical Therapy. These same authorizations were then requested by letter dated February 24, 2011. In addition, by letter dated December 7, 2010, the defendant set forth that the demands served on or about February 5, 2009 remain outstanding. However, a copy of said demand was not provided to this court.

The plaintiff opposes this motion on the basis that on September 30, 2009 the bill of particulars, police report, medicals, HIPPA compliant authorizations and power of attorney pursuant to Public Health Law §18 were provided to the defendant's counsel. The plaintiff further responded by providing the name and address of the non-party witness, Antonio Notaro, along with statements by the defendant. The defendant was further advised that there were no collateral sources other than no-fault, and that the plaintiff had not yet retained any experts. The Next Generation radiology/MRI report was provided, as well as authorizations for plaintiff's employment records, the no-fault file, and the records of James Kelly, D.O., Next Generation Radiology, and Mather Hospital, all dated September 30, 2009.

Based upon the foregoing, it is determined that the defendant has not established that a material fact in the certificate of readiness is incorrect. There is no discovery outstanding as the plaintiff has complied with the defendant's demands.

Accordingly, motion (002) by the defendant for an order vacating the note of issue is denied.

In motion (003), the defendant seeks summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as set forth in Insurance Law §5102 (d). By way of his bill of particulars, the plaintiff alleges that as a result of the accident, he sustained a herniated foraminal disc at L3-4 which impinges on the exiting left L3 nerve root.

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 eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR

3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102 (d), " '[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint on the basis the plaintiff did not suffer a serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a 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 "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** , *supra*).

In support of this motion, the defendant has submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's bill of particulars; an unsigned copy of the transcript of the examination before trial of the plaintiff dated December 1, 2010; and the sworn reports of Sanford R. Wert, M.D., P.C. dated February 8, 2011 concerning his independent orthopedic examination of the plaintiff, and Edward M. Weiland, M.D. dated February 11, 2011concerning his independent neurological examination of the plaintiff. The defendant failed to submit, as required by CPLR 3212, copies of the medical records and MRI reports upon which his experts base their opinions (*see* ***Friends of Animals v Associated Fur Mfrs.,*** supra).

In Dr. Wert's report concerning his orthopedic examination of the plaintiff, he failed to set forth the

objective method employed to obtain the range of motion measurements of the plaintiffs' lumbar spine, such as the goniometer, inclinometer or arthroidal protractor (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff (***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Additionally, Dr. Weiland has set forth a variation in the normal range of motion values for flexion of the lumbar spine as 70 to 90 degrees, leaving it to this Court to speculate as to how the variations in the ranges of motion are relative to his findings, and as to the actual value for the range of motion is (*see*, ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; *see also*, ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown, and the Court is left to speculate (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; *see also* ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]).

Moreover, it is noted that the defendant's examining neurologist, Dr. Weiland, set forth a different normal range of motion value for lumbar lateral flexion against which he compared his findings, as compared to the normal range of motion for lateral flexion set forth by Dr. Wert. Dr. Weiland indicated that the normal range of motion for lateral flexion is 25 degrees, whereas Dr. Wert stated it was 30 degrees. Dr. Weiland failed to set forth his findings with regard to examination of the plaintiff for lumbar rotation. Thus, this court is left to speculate as which range of motion for the lumbar spine lateral flexion is correct, Dr. Weiland's findings for rotation, or if the plaintiff was examined for the same.

Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2d Dept 2002]). Here, the reports of Dr. Wert and Dr. Weiland do not rule out the herniated disc at L3-4, or that the herniated disc does not impinge on the exiting left L3 nerve root in plaintiff's lumbar spine. In that such injury may constitute evidence of serious injury based upon objective findings, the defendant has failed to establish that Mr. Bertrand did not sustain a serious injury. Dr. Weiland set forth in his report that he read the MRI report of the plaintiff's lumbar spine of January 10, 2005, and comments that if the history obtained from the claimant is correct, then there is a causal relationship with regards to the claimant's subjective complaints. Dr. Weiland does not comment on causation relative to the herniated disc. Although Dr. Wert states that the herniated disc at L3-4 predates the subject accident, he has set forth no basis for his opinion.

Based upon the foregoing, the defendant has raised factual issues in the moving papers which preclude summary judgment on the issue of whether the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d). Further, defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see*, ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the experts offer no opinion with regard to this category of serious injury. Neither physician related his findings to this category of serious

injury for this period of time immediately following the subject accident (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Thus, the defendant has failed to demonstrate entitlement to summary judgment on this category of injury.

These factual issues raised in defendant's moving papers preclude summary judgment. The defendant has failed to satisfy his burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]), as the burden has not shifted to the plaintiff.

Accordingly, motion (003) by defendant for dismissal of the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 10/24/11

Emily Pines
J.S.C.
HON. EMILY PINES