COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

----------x Index No.: 107736/2011
James Long, Motion Seq 001

Plaintiff,

-against-

Taida Orchids Inc. and Hungsing Wong, DECISION/ORDER

Defendants.

Hon. Arlene P. Bluth, JSC
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For the following reasons, defendants' motion for summary judgment dismissing this action on the grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) is granted.

In this action, plaintiff alleges that on October 19, 2010, he sustained personal injuries when, while walking across Bleecker Street, he was struck by defendants' vehicle. In support of their motion, defendants claim that plaintiff did not sustain a permanent consequential limitation of a body, organ, member, function or system, a significant limitation of use of a body part or system, or a 90/180 curtailment of activities, as required by Insurance Law § 5102 (d).

To prevail on a motion for summary judgment, in a serious injury case, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Santos v Perez*, 107 AD3d 572, 573 [1st Dept 2013]). Such evidence includes "'affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim'" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [2nd Dept 2000]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert

affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818, 818 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 566, 572 [2005]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a "defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident" (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). However, a defendant can establish prima facie entitlement to summary judgment on this category without medical evidence, "by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that [the plaintiff] was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period" (*id.*).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the organ or body system's use and purpose, or a quantitative assessment that assigns numeric percentage to plaintiff's loss of range of motion (*Perl v Meher,* 18 NY3d 208, 217 [2011], *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]). However, if either the plaintiff's or defendant's expert relies upon range of motion measurements to establish a limitation, the experts must specify "the objective tests they used to arrive at the measurements" (*Duran v Jeong Hoy*, 89 AD3d 541, 541 [1st Dept 2011]; *see also Simantov v Kipps Taxi, Inc.*, 68 AD3d 661, 661 [1st Dept 2009]; *Lopez v Abdul-Wahab*, 67 AD3d 598, 599 [1st Dept 2009]).

In his verified bill of particulars, plaintiff claims disc herniations at C6-7 and C5-6, and

trauma to the left shoulder with neuropathy running from plaintiff's left side of the neck down to his left hand. During his deposition, plaintiff testified that, following the accident, he did not work at all for three months due to the pain in his shoulder and his neck (plaintiff's deposition, movants' exhibit D at 16-18). There is no 90/180 claim in the bill of particulars, and plaintiff testified at his deposition that he was out of work for the three months after the accident but that no doctor told him to stay out of work (plaintiff's deposition transcript, page 18).

In support of their motion, defendants submit the affirmed medical report of Dr. Joseph Y. Margulies, an orthopedic surgeon (movants' exhibit C). Dr. Margulies conducted an orthopedic examination of plaintiff on August 16, 2012 and concluded that plaintiff had a resolved cervical sprain and a resolved left shoulder contusion. Dr. Margulies reviewed the March 21, 2011 MRI of plaintiff's cervical spine, the verified bill of particulars, the October 19, 2010 x-ray of plaintiff's left shoulder, a January 23, 2011 electrophysiological study, emergency room records and progress notes.

Dr. Margulies notes that all of plaintiff's range of motion testing were normal. For example, his evaluation of plaintiff's cervical spine revealed no tenderness on palpation and the following range of motion: "the range of motion was normal to all directions tested including flexion 45°/45°, extension 45°/45°, right and left lateral flexion 45°/45°, right and left rotation 80°/80°" (moving papers, exhibit C, page 2). He found normal range of motion in plaintiff's shoulders and lumbosacral spine.

Based upon the foregoing, defendants have satisfied their burden of establishing prima facie that plaintiff did not suffer a serious injury. The burden, therefore, shifts to the plaintiff to show that there are factual issues (*Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]).

In opposition to the defendants' motion, plaintiff submits: (1) the October 19, 2010 certified

emergency room records from Beth Israel Hospital; (2) the April 19, 2011 affirmed report of Dr. P. Leo Varriale, MD, an orthopedist, who examined plaintiff six months after the accident at defendants' no-fault carrier's request; (3) a January 18, 2012 affirmed report of Dr. Andre Khoury-Yacoub, MD, a board certified radiologist, who reviewed plaintiff's MRI; and (4) a January 28, 2013 affirmed report of Dr. Ilya Simakovsky, D.C. As a chiropractor, Dr. Simakovsky was required to submit an affidavit; therefore, Dr. Simakovsky's statement was not in admissible form and was not considered by the Court. *See* CPLR 2106; *Gibbs v Reid*, 94 AD3d 636, 942 NYS2d 355 (1st Dept. 2012).

In his orthopedic report, Dr. Varriale found cervical radiculopathy and resolved strains to the left shoulder and hand six months after the accident. Dr. Varriale found no disability from work and suggested eight physical therapy sessions over the next month and a trial of three epidural injections for the cervical radiculopathy. While plaintiff has shown that a doctor made these findings six months after the accident, plaintiff has not shown that said findings were permanent and still exist today. In other words, plaintiff has not submitted any admissible evidence to contradict Dr. Margulies' affirmed report which was annexed to the moving papers, in which the doctor affirmed that everything was resolved by the time of his examination in April 2012.

In his affirmed report, Dr. Khoury-Yacoub, plaintiff's radiologist, states that the MRI of plaintiff's cervical spine taken about five months after the accident revealed:

> "On the T2 weighted images, there is diffuse loss of disc signal at C5-6 and C6-7, related to degenerative disc disease. There is straightening of the cervical curvature. At C6-7, there is a small right sided subligamentous disc herniation mildly deforming the anterior right aspect of the sac best seen on axial T2 #5 and sagittal image #5. At C5-6, there is a subligamentous central and slightly left sided herniation mildly deforming the sac best seen on axial #8"

(Opposing papers, exhibit D, at 1-2). Notably, the radiologist does not state that any of the findings

are trauma related due to the accident.

The bill of particulars does not allege an injury to satisfy the 90/180 category, but even if this Court considers plaintiff's testimony that he did not work for three months, defendants still met their prima facie burden on this category. In his deposition, plaintiff testified that no doctor told him to not work for the first three months (deposition transcript, page 18). The inability to work, alone, is not determinative of a 90/180–day injury (*Bailey v Islam*, 99 AD3d 633, 634 [1st Dept 2012]; *Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [1st Dept 2009]). Plaintiff has not shown, in admissible form, that any medical provider advised him not to engage in work or other activities. Plaintiff provides no medical evidence of his inability to perform any daily task for at least a 90-day period (see *Pinkhasov v Weaver*, 57 AD3d 334, 334-335 [1st Dept 2008] [absent medical evidence, plaintiff's subjective statements that he was unable to perform usual and customary activities for 90 days was insufficient to defeat summary judgment or establish serious injury]).

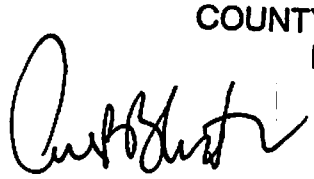
In summary, plaintiff has failed to present evidence in admissible form to raise an issue of fact as to plaintiff's alleged serious injury.

In accordance with the foregoing, it is

ORDERED that the defendants' motion for summary judgment dismissing this action is granted.

This is the Decision and Order of the Court.

Dated: New York, NY
September 12, 2013



Hon. ARLENE P. BLUTH, JSC