

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ALLAN L. WINICK,

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

PETER GERBASI,

Plaintiff,

MOTION DATE: August 22, 2000
MOTION SEQUENCE: 006,007,
008, 009
INDEX NO. 30562/97

-against-

ISABEL HERAN, JORGE A. AGUILAR, BOBBI A.
DAVID, SAMUEL LEVIN, CHRISTINA POPPER,
RAFAEL ESCOBAR, ANTHONY ANDREIVOLO,
JAMES VALENTI AND CHRISTOPHER VALENTI,

Defendant(s).

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause
- Answering Affidavits
- Replying Affidavits
- Briefs: Plaintiff's/Petitioner's
- Defendant's/Respondent's

Defendants Isabel Heran and Jorge Aguilar move pursuant to CPLR 2221(e) for leave to renew the order of this court (Winick, J., June 22, 2000) which denied defendant's motion for Summary Judgment on the issue of damages. Defendants James Valenti, Bobbi A. David, Samuel Levin, Christina Popper, and Raphael Escobar cross-move for similar relief. The prior motion was denied by this court because the defendants failed to provide the court with Dr. John C. Killian's examination report. Renewal is granted.

Defendants claim that plaintiff has failed to sustain a serious injury pursuant to Insurance Law §5102(d).

The present action arose out of a multi-car accident. Plaintiff claims that the accident was caused by the defendants' negligence. Plaintiff did not request medical attention at the scene of the accident. He did not lose consciousness nor was he bleeding at the scene. He returned to work a few days after the accident. The day following the accident, plaintiff sought the services of his primary care physician. A few days later he sought the care of an orthopedist who recommended physical therapy and exercise.

In support of defendants' motion, defendant has furnished a photocopy of Dr. Killian's examination report and Dr. Killian's affirmation. Dr. Killian found no positive objective findings to support plaintiff's subjective complaints.

The evidence tendered by defendants in support of the motion is sufficient to shift the burden of proof to the plaintiff.

In opposition to the motion, plaintiff has offered the original affirmation of Dr. Rafael Garcia. Plaintiff was examined by Dr. Garcia on April 21, 2000.

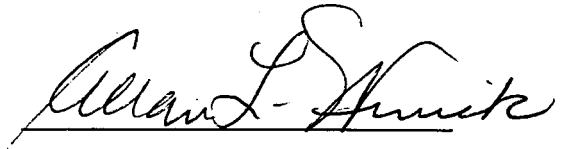
The affirmation of Dr. Garcia fails to explain the three year gap in medical treatment. *Marshall v. Albano*, 182 AD2d 614. Plaintiff, additionally, has failed to show that he has suffered a significant limitation within the meaning of Insurance Law §5102(d). The affidavit of Dr. Garcia is insufficient to establish that plaintiff suffered serious injury because it consists of "conclusory assertions tailored to meet statutory requirements." *Lopez v. Senatore*, 65 NY2d 1017. Plaintiff has failed to adequately rebut defendants' *prima facie* case.

On a motion for Summary Judgment, the court can search the record to determine

whether Summary Judgment should be granted to any other party. It has done this and applied the same rules of law to defendants Anthony Andreivolo and Christopher Valenti. Upon renewal the complaint and all cross-claims against defendants are, therefore, dismissed.

This constitutes the order and judgment of the court.

Dated: August 24, 2000

A handwritten signature in black ink, reading "Allan L. Winick". The signature is written in a cursive style and is positioned above a horizontal line.

Allan L. Winick J.S.C.

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