

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

LEONARD NATHAN, SHIRLEY NATHAN and SAMUEL
NATHAN, an infant over the age of 14 years
by his Father and Natural Guardian, LEONARD
NATHAN and LEONARD NATHAN, individually,

Plaintiff(s),

MOTION DATE: 6/03/08

INDEX NO.: 8733/07

-against-

SEQ. NO. 1

ARNOLD BIXON and GERALDINE BIXON,

Defendant(s)

The defendants' motion, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiffs' complaint due to the plaintiffs Leonard Nathan and Samuel Nathan's respective failure to sustain a serious injury as defined by Insurance Law §5102(d) is determined as hereinafter provided.

This personal injury action emanates out of a February 8, 2007 "rear end" motor vehicle accident which occurred on Peninsula Boulevard in Hempstead. The plaintiff Leonard Nathan was operating a 2003 Buick Suburban, in which his fifteen year old son, the infant plaintiff Samuel Nathan, was a front seat passenger, when it was struck from the rear by the defendants' 2000 Cadillac.

During a November 8, 2007 deposition, the plaintiff Leonard Nathan testified, inter alia, that after the accident he and Samuel went home (p.42, L2). They did not visit the hospital (p.43, L21) or received medical treatment until the following day when they visited a chiropractor, Howard Rosner (p.42, L19 - p.43, L3). Mr. Nathan complained of neck and back pain (p.55, L24).

He had sustained a prior back injury in a 1994 motor vehicle accident (p.45, L21 - p.46, L5) for which he received treatment from E. Wiseman, M.D. (see defendants' Exhibit K). A lawsuit was

commenced but it was resolved prior to trial for an undisclosed amount (p.50, L19).

Following this accident, his chiropractor referred him to James M. Liquori, D.O. (p.56, L5) for a March 5, 2007 EMG (p.56, L25) as well as an orthopedist, Mitchell Goldstein, M.D. (p.27, L13-21) whom he saw once or twice (p.58, L4). No medical provider prescribed any medication, gave him an injection or recommended surgery (p.62, L17 - p.63, L4). However, after his no-fault coverage expired, he (and Samuel) continued to visit the chiropractor "once every other week" (p.55, L13). He also underwent cervical and lumbar MRI examinations (p.53, L24).

After the accident, he spent approximately one-half of the next two or three days in bed (p.65, L6) but, contrary to the allegations of his September 11, 2007 bill of particulars (see defendants' Exhibit E, para.6[b]), he was not otherwise restricted to his home (p.64, L14). At the time of the November 8, 2007 deposition - nine months after the February 8, 2007 accident - Mr. Nathan continued to complain, inter alia, of neck and upper back pain (p.95, L21), although apart from his biweekly chiropractor visits, he had no scheduled appointments for medical treatment (p.81, L12).

Likewise, Samuel Nathan initially received treatment the day after the accident when he accompanied his father to the chiropractor (p.95, L15). He too complained of neck and back pain (p.95, L21). He also saw Dr. Liquori twice (p.97, L18), Dr. Goldstein "once or twice" (p.98, L10) and had cervical and lumbar MRI examinations performed (p.98, L15). No prescription medication or injections were ordered and surgery was not recommended (p.106, L12-18). He lost no time from school (p.107, L2) although, for a period, his physical education activities were limited

The defendants' motion is premised upon the aforementioned deposition testimony and the November 30, 2007 and December 5, 2007 affirmations of an orthopedist, Isaac Cohen, M.D., and radiologist, David A. Fisher, M.D.. Dr. Cohen's affirmation avers, inter alia, that a contemporaneous examination, utilizing objectively measured criteria, confirmed that Mr. Nathan incurred only "[c]ervical and lumbosacral sprain[s], resolved" (see defendants' Exhibit L). Dr. Fisher's review of Mr. Nathan's lumbar and cervical MRI films

revealed "no disc herniations or bulges" (see defendants' Exhibit M).

In addition, Dr. Cohen's December 5, 2007 affirmation as to Samuel concludes, after a contemporaneous examination utilizing objectively measured criteria, that he merely sustained "[m]ild soft tissue contusions, cervical and lumbosacral spine area, resolved" (see defendants' Exhibit G). Dr. Fisher's November 30, 2007 review of Samuel's cervical and lumbar MRI films were "unremarkable" and found "no disc herniations or bulges present" (see defendants' Exhibit H).

Those affirmations, coupled with Mr. Nathan and Samuel's deposition testimony, are sufficient to establish the defendants' prima facie entitlement to summary judgment as a matter of law by demonstrating that neither plaintiff sustained a serious injury as defined by Insurance Law §5102(d) on February 8, 2007 (see Toure v Avis Rent A Car Sys., 98 NY2d 345; Albano v Onolfo, 36 AD3d 728).

In opposition, the defendants have failed to establish a triable issue of fact. The April 21, 2008 affidavits of Howard Rosner, D.C. (see plaintiffs' Exhibits B & I) impermissibly incorporate the findings of other providers (see Porto v Blum, 39 AD3d 614; Moore v Sarwar, 29 AD3d 845). Moreover, they both recite purported restrictions in ranges of motion without comparing those findings to what is normal (see Gimmanco v Valerio, 47 AD3d 674). Mr. Nathan's prior back injury is also inadequately addressed (see Franchini v Palmieri, 1 NY3d 536; Munoz v Koyfman, 44 AD3d 914; Houston v Gadjos, 11 AD3d 514).

The remaining affirmations are equally deficient. Dr. Liquori's affirmations (see plaintiffs' Exhibits E & L) are undated. Dr. Goldstein's April 30, 2008 affirmations (see plaintiffs' Exhibits C & M) incorporate his March 8, 2007 reports, however, those reports simply conclude that Samuel sustained "[c]ervicothoracic sprain/strain myofascitis" while Mr. Nathan allegedly incurred "[l]umbosacral sprain, strain, sciatica".

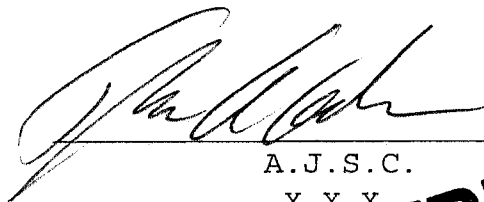
Drs. Diamond and Mayfield have also submitted affidavits adopting the findings of their respective MRI examinations (see plaintiffs' Exhibits D, O & P). Yet, neither physician expresses an

opinion as to causation (see Collins v Stone, 8 AD3d 321; Albano supra at 729). It also bears noting that the law is well settled that "the mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective medical evidence of the alleged physical limitations resulting from the disc injury and its duration" (Umanzor v Pineda, 39 AD3d 539).

Lastly, Mr. Nathan's conclusory April 12, 2008 affidavit (see plaintiffs' Exhibit N) together with the earlier deposition testimony is insufficient to establish a triable issue of fact as to whether he or Samuel were unable to perform substantially all of their daily activities for not less than 90 out of the first 180 days as a result of the accident (see Doyaga v Teleeba, Inc., 35 AD3d 798; Felix v New York City Transit Auth., 32 AD3d 527). Samuel admittedly lost no time from school (see defendants' Exhibit F, p.107, L2) and, inter alia, Mr. Nathan was not confined to his home (p.64, L14).

Accordingly, the defendants' motion, pursuant to CPLR 3212, for an award of summary judgment dismissing the plaintiffs' complaint due to the plaintiffs Leonard Nathan and Samuel Nathan's respective failure to sustain a serious injury within the meaning of Insurance Law §5102(d) is granted.

Dated: July 8, 2008



A.J.S.C.

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