

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

MACKENTOSH SAMSON,

Plaintiff(s),

MOTION DATE: 10/31/11

INDEX NO.: 6996/10

-against-

SEQ. NO. 1

CINDY DELMAS, TRISTAN HOLNESS and ANSELL
HOLNESS,

Defendant(s)

The defendants Tristan Holness and Ansell Holness' motion, pursuant to CPLR 3212, for summary judgment due to the plaintiff's alleged failure to sustain a serious injury as defined by Insurance Law §5102(d) on October 29, 2008 is determined as hereinafter provider.

This personal injury action arises out of an October 29, 2008 motor vehicle accident that occurred at or near the intersection of Earle Ovington Boulevard and Charles Lindbergh Boulevard in Uniondale. The plaintiff, age 27, was a passenger in the co-defendant Cindy Delmas' vehicle and filed this action on April 9, 2010. Upon joinder of issue and the completion of disclosure, the case was certified for trial on April 7, 2011. On April 22, 2011 the plaintiff filed a note of issue. The defendants' June 30, 2011 motion is therefore timely (see CPLR 3212[a]).

During a January 19, 2011 deposition, the plaintiff testified, inter alia, that he declined the offer of an ambulance (p.61,L13) and first sought medical attention approximately three weeks later on November 20, 2008 when he visited "Lynbrook Best Medical Care" where he was treated by Svetlana Khandros, M.D. (p.64,L8; see plaintiff's Exhibit C) and complained of pain to his neck, low back and right shoulder (p.66,L4). He received physical therapy, acupuncture and massage therapy (p.67,L15) three to four times per week (p.66,L12) for about seven to eight months (p.66,L16). In addition, he was referred for December 1, 2008 (cervical) and January 2, 2009 (lumbar) MRI examinations (see plaintiff's Exhibits A & B) and to a neurologist, Kerin B. Hausknecht, M.D.. Dr. Khandros' August 30, 2011 affirmation avers, inter alia, that she treated the plaintiff on

November 20, 2008, December 17, 2008, January 29, 2009, during May, 2009 and, after the movants' June 30, 2011 motion, on August 3, 2011. He reportedly was caused to miss two weeks of classes from the technical school he attended (p.14,L12;p.90,L16) and was also involved in a prior (2006) motor vehicle accident (p.69,L20;p.74,L4). However, that accident allegedly involved his head (p.98,L3), knees and chest (p.74,L19;p.80 L7) instead of his neck, low back and right shoulder and those injuries reportedly resolved before this accident. He saw no other physicians (p.87,L7) and, at the time of his January 19, 2011 deposition, had no scheduled appointments (p.89,L12) - including the subsequent August 3, 2011 rebuttal examination of Dr. Khandros.

The movants' motion is premised upon the aforementioned deposition testimony, medical history and the March 8, 2011 affirmation of an orthopedist, Jimmy U. Lim, M.D. (see movants' Exhibit B). Dr. Lim avers, inter alia, based upon a contemporaneous medical examination utilizing objective medical criteria, e.g., a goniometer, that the plaintiff incurred only cervical and thoracolumbar strains which have resolved. The movants have thereby established a prima facie entitlement to judgment as a matter of law by demonstrating that he did not sustain a serious injury within the meaning of Insurance Law §5102(d) on October 29, 2008 (see Pommells v Perez, 4 NY3d 566; Toure v Avis Rent A Car Sys., 98 NY2d 345; Albano v Onolfo, 36 AD3d 728).

In opposition, the plaintiff has failed to establish a triable issue of fact. Dr. Khandros' August 30, 2011 affirmation recites various restrictions in the plaintiff's cervical and lumbar range of motion and concludes that he sustained "permanent partially disabling injuries to his neck and back". However, no explanation is proffered for the substantial, i.e., May, 2009 - August 3, 2011 gap in treatment which exists (see Purto v Blum, 39 AD3d 614; Umanzor v Pineda, 39 AD3d 539). Nor did she adequately account for the plaintiff's earlier accident (see Franchini v Palmieri, 1 NY3d 536; Houston v Gajdos, 11 AD3d 514; Munoz v Koyfman, 44 AD3d 914).

The radiologist who conducted the December 1, 2008 (cervical) and January 2, 2009 (lumbar) MRI examinations have submitted affidavits adopting their earlier reports (see plaintiff's Exhibits A & B). Yet, neither physician has proffered an opinion as to causation (see Collins v Stone, 8 AD3d 321; Albano supra at 729). In any event, the law is well settled that the mere existence of a

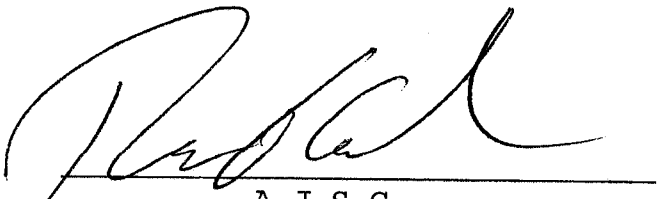
herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (see Umanzor supra).

Dr. Hauskneht likewise reports specific restrictions in the plaintiff's cervical and lumbar spine and opines that he incurred, inter alia, cervical and lumbar "derangement with intervertebral disc displacement", i.e., herniated discs and/or bulges, at C3-C4 and C4-C5 and L4-L5. However, since he simply asserts, in conclusory fashion, "I have also reviewed the [MRIs]", it is unclear whether he examined the actual films or merely incorporated the radiologists unsworn reports (see Porto; Umanzor supra; Kreimerman v Stunis, 74 AD3d 753). In contrast to Dr. Lim, he also fails to set forth the objective medical testing he utilized to arrive at the aforementioned conclusions (see Robinson-Lewis v Grisafi, 74 AD3d 774; Vilante v Miterko, 73 AD3d 757). Moreover, his conclusory dismissal of the plaintiff's 2006 accident involving, inter alia, his head and chest (p.98,L3) renders his conclusions speculative (see Donadido v Doukhnych, 55 AD3d 532; Munoz supra).

Finally, the plaintiff's August 31, 2011 conclusory and unsubstantiated affidavit (see plaintiff's Exhibit E) is insufficient to establish a triable issue of fact as to whether he was unable to perform substantially all of his daily activities for not less than 90 out of the first 180 days as a result of the accident since, inter alia, admittedly missed only two weeks from school (see Kreimerman supra).

Accordingly, the defendants Tristan Holness and Ansell Holness' motion, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint as against them due to his failure to sustain a serious injury as defined by Insurance Law §5102(d) on October 29, 2008 is granted. Upon searching the record (see CPLR 3212[b]), the Court hereby, sua sponte, also dismisses the action as against the defendant Cindy Delmas.

Dated: DEC 12 2011



A.J.S.C.
X X X

ENTERED
DEC 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE