

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

THOMAS WALKER and CAROLYN WALKER,

Plaintiff(s),

MOTION DATE: 8/19/11

INDEX NO.: 476/09

-against-

SEQ. NOS. 1 & 2

ANNETTE J. ASTOLFO,

Defendant(s)

The parties' respective motions, pursuant to CPLR 3212, for summary judgment are determined as hereinafter provided.

This personal injury action arises out of a three car "chain reaction" motor vehicle accident that occurred on May 14, 2007 at or near the intersection of North Broadway and North Park Drive in Massapequa. The plaintiff Thomas Walker was operating the middle vehicle which was allegedly "rear ended" by the defendant's vehicle.

On January 12, 2009 the plaintiffs commenced this action alleging negligence by the defendant (see defendant's Exhibit B). Issue was joined on or about April 13, 2009 (see defendant's Exhibit C). Upon the completion of disclosure, the case was certified for trial on January 19, 2011 (see defendant's Exhibit A) and on or about February 4, 2011 the plaintiff filed a note of issue. The defendant's April 20, 2011 motion, pursuant to CPLR 3212, for summary judgment due to Mr. Walker's failure to incur a serious injury as defined by Insurance Law §5102(d), and the plaintiffs' April 29, 2011 cross motion, pursuant to CPLR 3212(e), for partial summary judgment as to the issue of liability, are therefore timely (see CPLR 3212[a]).

During a September 14, 2010 deposition (see defendant's Exhibit G), Mr. Walker testified, inter alia, that at the time of the incident he was transporting goods as an employee of his father's company, JPW, Incorporated (p.19,L7-15). As a result of

the accident, he allegedly lost about "six weeks" of work (p.14,L24). He was removed from the scene by ambulance to the New Island Hospital Emergency Room (p.50,L7;p.52,L6) where he was treated and released (p.52,L23) and directed to follow-up with his primary care physician. A "cervical paraspinal muscle strain" was diagnosed and x-rays revealed, inter alia, a "straightening of the normal cervical lordosis indicating the presence of cervical spasm" and "mild degenerative osteoarthritis of the cervical spine" (see defendant's Exhibit E).

On May 17, 2007 he visited a neurologist, Itzhak C. Haimovic, M.D. (p.59,L12) who, inter alia, referred him for a May 25, 2007 cervical MRI (see plaintiffs' Exhibit A) and physical therapy (p.62,L9) which he participated in for "a while" (p.63,L14). Thereafter, he saw Dr. Haimovic or his partner, Ian Stein, M.D. "as needed" (p.74,L12).

In addition, at the suggestion of his wife, the plaintiff Karolyn Walker (p.77,L3), he visited another physician, Dr. Remore (p.76,L23), to treat his arthritis "every few months" (p.77,L10). He was unable to recall whether he informed Dr. Remore about the May 14, 2007 accident (p.78,L3). Dr. Haimovic is or was also treating him for vertigo (p.80,L12) which he suffers from on a daily basis (p.81,L16). His next appointment was scheduled for October 5, 2010 (p.83,L12). He was not treated by any other medical provider for this accident (p.84,L4) and, prior to May 14, 2007, sustained a fractured thoracic vertebrae (T11) in a July, 2000 fall (p.84,L23).

The defendant's motion is premised upon the foregoing medical record and testimony as well as the October 16, 2010 affirmation of a radiologist, David A. Fisher, M.D. (see defendant's Exhibit I) and December 1, 2010 affirmation of an orthopedist, Isaac Cohen, M.D. (see defendant's Exhibit H). Dr. Cohen avers, after a contemporaneous December 1, 2010 examination, that the plaintiff sustained cervical soft tissue injuries which had resolved. More particularly, he found that the plaintiff maintained a normal range of motion and "a completely normal functional capacity of the cervical and thoracic spine areas". Dr. Fisher reviewed the May 25, 2007 cervical MRI film and observed "no disc herniations or bulges" or "evidence of traumatic or causally-related injury to the

cervical spine".

These affirmations, premised upon contemporaneous medical examinations utilizing objectively based medical criteria, are sufficient to establish the defendant's prima facie entitlement to summary judgment due to Mr. Walker's failure to incur a serious injury as defined by Insurance Law §5102(d) (see Pommells v Perez, 4 NY3d 566,574; 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. Haimovic's June 23, 2011 affirmation avers, inter alia, that he treated Mr. Walker on May 17, 2007, June 18, 2007, August 28, 2007, January 20, 2008, May 25, 2008, January 2, 2009, August 14, 2009, December 25, 2009, August 4, 2010, September 13, 2010 and October 15, 2010 and that, after the April 20, 2011 service of the defendant's motion, the plaintiff was treated by Dr. Stein on June 23, 2011. Dr. Stein reportedly observed restrictions in Mr. Walker's cervical range of motion although he has not supplied an affirmation. Two (1/2/09 and 8/14/09) unsigned reports from Dr. Stein have, however, been supplied together with an unsigned January 15, 2011 physical therapy report (see plaintiffs' Exhibits D-F). Similarly, an unsigned copy of Dr. Richard Silvergleid's 5/25/07 MRI report has been submitted (see plaintiffs' Exhibit B) as well as unsworn copies of Dr. Haimovic's June 5, 2007 and March 20, 2008 nerve conduction studies (see plaintiffs' Exhibits C & D).

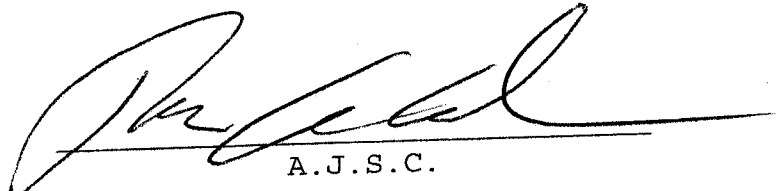
He concludes that Mr. Walker's "cervical radiculopathy, headaches, neck pains, dizziness, imbalance and thoracic pain" are causally related to the May 14, 2007 accident and "are chronic and will last for an indefinite period". No explanation is, however, proffered for the substantial (i.e., 10/15/10 - 6/23/11) gap in treatment (see Pommells; Albano supra). Moreover, Dr. Haimovic impermissibly incorporates the unsworn findings of other physicians including, but not limited to, Dr. Silvergleid's May 25, 2007 MRI report. Conversely, after reviewing the actual film, Dr. Fisher observed no evidence of cervical injury (see Kreimerman v Stunis, 74 AD3d 753; Umanzor v Pineda, 39 AD3d 539). Finally, with respect to his alleged thoracic injury, Dr. Haimovic fails to adequately account for Mr. Walker's July, 2010 fall (see Franchini v Palmieri,

1 NY3d 536,537; Munoz v Koyfman, 44 AD3d 914,915; Houston v Gajdos, 11 AD3d 514,515).

Mr. Walker's conclusory and unsubstantiated July 15, 2011 affidavit averring, in pertinent part that he still experiences "significant and constant back and neck pain, tingling, numbness and pain in [his] hands and arms, as well as vertigo and dizziness" from the May 14, 2007 accident is likewise insufficient to create 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 subsequent to the accident (see Doyaga v Teleeba, Inc., 35 AD3d 798; Felix v New York City Transit Authority, 32 AD3d 527).

Accordingly, the defendant's motion, pursuant to CPLR 3212, for summary judgment due to the plaintiff Thomas Walker's failure to sustain a serious injury as defined by Insurance Law §5102(d) is granted and the plaintiffs' cross motion, pursuant to CPLR 3212(e), for partial summary judgment as to the issue of liability is dismissed as academic.

Dated: SEP 21 2011


A.J.S.C.
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ENTERED
SEP 26 2011
NASSAU COUNTY
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