

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

ALVARO MENDEZ,

Plaintiff(s),

MOTION DATE:11/18/11

INDEX NO.: 9015/10

-against-

SEQ. NO. 1 +2

PEDRO DELACRUZ, ALBERTO TAVARES, STEVEN
BETTS and DEREK BETTS,

Defendant(s)

The defendants' respective motions, pursuant to CPLR 3212, for summary judgment due to the plaintiff's failure to sustain a "serious injury" as defined by Insurance Law §5102(d) is determined as hereinafter provided.

This personal injury action arises out of a May 31, 2009 motor vehicle accident that occurred on Merrick Road at or near its intersection with Park Avenue in Baldwin. The plaintiff was a passenger in the defendant Pedro Dela Cruz's vehicle which was being permissively operated by the defendant Alberto Tavares when it impacted with a vehicle owned and operated by the co-defendants.

The plaintiff was removed from the scene by ambulance to the South Nassau Communities Hospital emergency room (see defendants Steven Betts and Derek Betts' Exhibit D, plaintiff's 4/8/11 deposition, p.13,L16;p.15,L12) where he was treated and released (p.16, L14-16). The "next day" (p.16,L25), i.e., June 1, 2009, he allegedly visited Lev Aminov, M.D. (p.17,L9). (Conversely, Dr. Aminov's 11/9/11 affirmation in opposition [see plaintiff's Exhibit D] avers, inter alia, that she initially treated the plaintiff on 6/15/09). He reportedly saw Dr. Aminov "[o]nce a month" (p.18,L16) and began participating in physical therapy "once a week" (p.19,L17) or "three times a week" (p.20,L25). He was unable to recall whether he received treatment from any other physician or visited a chiropractor (p.20,L5-13). However, he did undergo a July 14, 2009 lumbar and July 17, 2009 cervical MRI examination with Harold

Augenstein, M.D. (p.20,L16-19; plaintiff's Exhibit C).

The defendants' motions are premised upon the aforementioned medical history and testimony and the April 26, 2011 and April 28, 2011 affirmations of an orthopedist (Salvatore Corso, M.D.) and a neurologist (Charles Bagley, M.D.) (see defendants Betts' Exhibits D & E). Dr. Corso avers, inter alia, after a contemporaneous examination utilizing objective medical criteria, e.g., a goniometer, that the plaintiff incurred only cervical and lumbar strains and left shoulder, left knee and right foot sprains as well as a right thigh contusion. Similarly, Dr. Bagley concludes that the plaintiff's neurological examination was "normal" (see defendants Betts' Exhibit E). The movants have thereby established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) on May 31, 2009 (see Pommells v Perez, 4 NY3d 566; Toure v Avis Rent A Car Sys., 98 NY2d 345). In opposition, the plaintiff has failed to establish a triable issue of fact.

Although the plaintiff did not recall being treated by a chiropractor (see defendants Betts Exhibit D, p.20,L13), the November 9, 2011 affidavit of Marc L. Jacobs, P.C., avers, inter alia, that he treated him on June 3, 2009, January 19, 2011 and, after the April 26, 2011 and April 28, 2011 examinations of the defendants' physicians, on October 27, 2011 (see plaintiff's Exhibit B). Specific cervical and lumbar restrictions are reported on each occasion but no explanation is proffered for the substantial gaps in treatment which exist (see Pommells supra). Moreover, he impermissibly incorporates the findings of Dr. Augustein's unsworn MRI reports (see Kreimermen v Stunis, 74 AD3d 753; Vilomar v Castillo, 73 AD3d 758).

The November 3, 2011 affirmation of Dr. Augustein (see plaintiff's Exhibit C) does incorporate his earlier findings of a "small posterior disc protrusion" at L5-S1 and "minimal posterior disc bulges" at C3-4 through T1-T2. Yet, 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 disc injury and its duration" (Umanzor v Pineda, 39 AD3d 539). In addition, Dr.

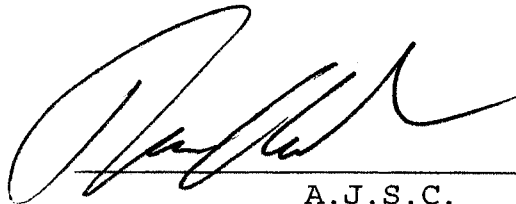
Augustein did not proffer an opinion as to causation (see KNX v Lennihan, 65 AD3d 615).

As noted, in contrast to the plaintiff, Dr. Aminov avers, inter alia, that he initially treated him on June 15, 2009 and, thereafter, on August 16, 2010, October 25, 2010, December 13, 2010, January 14, 2011 and October 24, 2011 (see plaintiff's Exhibit D). While Dr. Aminov concludes that the plaintiff sustained an unspecified "permanent partial disability", his diagnosis on each of the aforementioned occasions was merely "cervical sprain, sprain right leg, sprain left arm [and] lumbar sacral sprain".

Finally, the plaintiff's conclusory and unsubstantiated affidavit (see plaintiff's Exhibit D) is 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 as a result of the accident (see Doyaga v Teleeba, 35 AD3d 798; Felix v New York City Transit Authority, 32 AD3d 527).

Accordingly, the defendants' respective motions, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint due to his failure to sustain a serious injury as defined by Insurance Law §5102(d), are granted.

Dated: JAN 24 2012



A.J.S.C.
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ENTERED
JAN 26 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE