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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

Present:
HON. LAWRENCE J. BRENNAN
Acting Justice Supreme Court

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JEAN L. ST. FELIX,

Plaintiffs,

-against-

MARY STEVENSON,

Defendant.

----------x

TRIAL PART: 44
NASSAU COUNTY

INDEX NO.:010953/03

MOTION DATE: 1-17-05
SUBMIT DATE: 3-23-05
SEQ. NUMBER - 001

The following papers have been read on this motion:

Notice of Motion, dated 12-15-04 1
Affirmation in Opposition, dated 3-8-05..... 2
Reply Affirmation, dated 3-15-05 3

Defendant's motion for an Order granting defendant summary judgment is granted.

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court to direct judgment in his or her favor as a matter of law. Alvarez v. Prospect Hospital, 68 N.Y.2d 320. The party opposing the motion must then produce proof in admissible form sufficient to necessitate a trial as to material issues of fact. *Rebecchi v. Whitmore*, 172 A.D2d 600. Further, to grant a motion for summary judgment, it must clearly appear that no material issue of fact is presented. The burden upon the Court when deciding this type of motion is not to resolve issues of fact or

credibility, but rather to determine whether indeed any such issue of fact exist. (*Barr v. County of Albany,* 50 N.Y.2d 247; *Daliendo v. Johnson,* 147 A.D.2d 312).

In addressing the issue as to the existence of a "serious injury" the court initially looks to the pleadings. Plaintiff, Jean St. Felix, alleges in his Bill of Particulars to have sustained the following injuries: central disc herniation L5-SI; disc bulge C4-5; disc bulge C5-6; cervical radiculopathy; lumosacral radiculopathy and headache syndrome.

The instant application interposed by the defendant seeking dismissal of the plaintiff's complaint is supported by affirmed medical reports from Dr. John Killian and Dr. Stephen Lastig. Dr. Killian, the defendant's independent examining orthopedist, conducted a spinal exam, a lumbosacral spine exam, a cervical spine exam and a physical exam. Dr. Killian diagnosed the plaintiff as having no sprains as to the lumbosacral and cervical areas. He concluded in his sworn statement that the plaintiff exhibited no objective evidence of a disability.

Dr. Stephen Lastig examined the Magnetic Resonance Imaging films as to the plaintiff's lumbar and cervical spine. With respect to the MRI of the lumbar area, Dr. Lastig concluded in his sworn statement that there were no trauma related abnormalities. As to the MRI of the cervical spine, Dr. Lastig found age-related congenital narrowing incidental. Moreover, he found no evidence of an abnormality causally related to the trauma.

In a motion for summary judgment seeking to dismiss a cause of action, the defendant is required to establish a prima facie case that the plaintiff did not sustain a "serious injury" as contemplated by the New York State Insurance Law §5102(d). (*Gaddy v. Eyler,* 79 N.Y.2d 955). Upon such a showing, it becomes incumbent upon the plaintiff to come forward with

sufficient evidence in admissible form to rase the factual issue as to whether a "serious injury" has been sustained. (*Licari v. Elliott,* 57 N.Y.2d 230 (1982). Based upon the submission of the foregoing medical reports, this Court finds that the defendant has met his burden in establishing a prima facie case that the plaintiff did not sustain a "serious injury" within the purview of Insurance Law §5102(d).

Thus, the burden now shifts to the plaintiff to rebut the case set forth by the movant by the submission of proof in admissible form which demonstrates the existence of a triable issue of fact as to the existence of a "serious injury".

In opposition to the defendant's application, the plaintiff has submitted two unsworn MRI reports as to his cervical and lumbar spine dated 11/29/00 and 12/6/00 respectively. Additionally, the plaintiff has submitted the unsworn medical reports of Orthopedist Dr. Walter Ploski dated 1/9/01 and Neurologist Dr. Teresella Gondolo dated 2/28/01. Dr. David Steiner performed electrodiagnostic studies 1/15/01 on plaintiff and his unsworn report is also submitted by plaintiff in opposition to this application.

The medical evidence submitted by plaintiff, being neither sworn nor affirmed to be true under penalty of perjury, does not constitute competent evidence in opposition to this motion to dismiss. *Bourgeois v. North Shore University Hospital*, 290 AD2d 525 (2nd Dept. 2002). Further more, the plaintiff has failed to satisfy the standards recently set forth by the Court of Appeals in Pommells v. Perez, 2005 N.Y. Lexis 1041.

Based upon the foregoing, the court finds that the plaintiff has not met his burden of raising a triable issue of fact as to the existence of a "serious injury". Therefore, the defendant's motion for summary judgment dismissing the plaintiff's complaint is hereby

granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 13, 2005

HON. LAWRENCE J. BRENNAN
Acting Supreme Court Justice
XXX

ENTERED

JUN 17 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Marilyn S. Unger, Esq.
283 Commack Road, Ste. 210
Commack, NY 11725

Jacqueline R. Sobotta
Martyn, Toher, Esposito
Martyn and Adler, Esqs.
Attorneys for Defendant
330 Old Country Road, Ste. 211
Mineola, NY 11501