SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 21**

ANTHONY ABITABILE,

Plaintiffs,

- against -

CHOE SOON and JAMES CHOE,

Defendants.

----------X

Index No. 026536/09
Mot. Seq. # 02
Mot. Date 6.15.11
Submit Date 7.29.11

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

Plaintiff, Anthony Abitabile, moves for an Order, pursuant to CPLR 3212, awarding him summary judgment on the grounds that his injuries satisfy the 90/180 category of the "serious injury" threshold requirement of Insurance Law §5102(d). The motion is denied.

This action arises out of a motor vehicle accident that occurred on August 26, 2008 at approximately 5:10 p.m. at the intersection of Searingtown Road and the Long Island Expressway's north service road in North Hills, New York.

In his Verified Bill of Particulars, plaintiff alleges that as a result of this accident, he sustained the following injuries: disc herniation at C6-C7; intraosseous herniation of disc material into the anterior superior endplate of C5; disc bulges at C3-C4, C4-C5 and C5-C6; bilateral C5-C6, C6-C7 cervical radiculopathy and bilateral carpel tunnel syndrome; and straightening of the usual cervical lordosis (Verified Bill of Particulars, ¶6).

While plaintiff claims that his injuries fall within five of the nine categories of Insurance Law §5102(d) including fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (*Id.* at ¶18), it is only under the 90/180 category of the serious injury statute that he seeks summary judgment herein.

At the time of the accident, the 28-year-old plaintiff was employed as an HVAC mechanical contractor for Absolute Comfort in Floral Park, New York. He claims in his bill of particulars that as a result of this accident, he was confined to his bed for approximately three days following the accident and to his home for approximately one week, after which time he attempted to resume activities for approximately two weeks without success. Plaintiff claims that he was subsequently confined to his home again through approximately December 8, 2008 (Verified Bill of Particulars, ¶¶8-9). He alleges that he was fully incapacitated from his

employment from the date of loss through approximately December 8, 2008 and remains partially incapacitated from his employment to date (*Id.* at ¶¶10-11).

At his sworn examination before trial, plaintiff testified that as a result of this accident, he can no longer engage in physical activities such as sports. He states that he can no longer play hockey or go to the gym on a regular basis (Abitabile Tr., p. 120). He also testified that he can no longer stand or sit for long periods of time (*Id.* at 124) and that he has trouble going down the stairs (*Id.* at 128).

Initially, it is noted that while the overwhelming bulk of summary judgment motions based upon the Insurance Law serious injury threshold are filed by defendants seeking the dismissal of complaints, nothing prevents the plaintiffs, such as the plaintiff herein, from affirmatively seeking summary judgment on serious injury on the basis of their claimed serious injuries as supported by proper and adequate evidence (*Damas v. Valdes*, 84 AD3d 87 [2nd Dept. 2011]; *Refuse v. Magloire*, 83 AD3d 685 [2nd Dept. 2011]). In such instances, the plaintiff, as the movant, is required to demonstrate his/her entitlement to judgment as a matter of law by establishing, prima facie, that he/she sustained a serious injury within the meaning of the statute (*Rasporskaya v. New York City Tr. Auth.*, 73 AD3d 727 [2nd Dept. 2010]). Once this is established, the burden shifts to the defendants to come forward with evidence to overcome the plaintiff's submissions by demonstrating a triable issue of fact that a "serious injury" was not sustained (*cf. Lewis v. John*, 81 AD3d 904, 905 [2nd Dept. 2011]; *Mugno v. Juran*, 81 AD3d 908 [2nd Dept. 2011]).

As stated above, despite having alleged that his injuries fall within five of the nine categories of the Insurance Law, upon the instant motion, plaintiff only seeks summary judgment as to his 90/180 claim.

To prevail under the "medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law §5102[d]) "which would have caused the alleged limitations on the plaintiff's daily activities" (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]), and, furthermore, a curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra at 236; *see also Sands v. Stark*, 299 AD2d 642 [2nd Dept. 2002]).

Unlike a claim of serious injury under "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories, a gap or cessation in treatment is irrelevant as to whether plaintiff sustained a non-permanent medically determined injury which prevented the plaintiff from performing substantially all material acts which constituted such person's daily activities for not less than 90 days during the 180 days immediately after the accident (*see Gomez v. Ford Motor Credit Co.*, 2005 WL 3193696).

Plaintiff's self-serving affidavit, standing alone, is insufficient proof of a 90/180 impairment (*Shvartsman v. Vildman*, 47 AD3d 700 [2nd Dept. 2008]; *Caruso v. Rotondi*, 248

AD2d 425 [2nd Dept. 1998]). However, where the affidavit is supported by admissible medical evidence, the burden is satisfied (*Cullum v. Washington*, 227 AD2d 370 [2nd Dept. 1996]).

In this case, in support of his motion, the plaintiff submits, *inter alia*, the sworn affirmation of Dr. Alfred Faust, M.D., a Board Certified Orthopedic Surgeon; the sworn affirmation, dated April 28, 2011, of Dr. Linda Harkavy, M.D., a licensed physician who read the MRI films of plaintiff's cervical spine (dated September 24, 2008); as well as his own sworn affidavit.

Initially, it is noted that the sworn reports of Dr. Linda Harkavy, M.D. do not constitute competent admissible evidence in support of plaintiff's motion. Even assuming that Dr. Harkavy is a board certified radiologist (it is unclear from her affirmation that she is a licensed radiologist trained to read the MRI films in the first place), in the absence of any opinion as to the causality of her purported findings, her report does not constitute competent medical evidence that would establish plaintiff's entitlement to judgment as a matter of law (*Collins v. Stone*, 8 AD3d 321 [2nd Dept. 2004]; *Betheil-Spitz v. Linares*, 276 AD2d 732 [2nd Dept. 2000]).

Dr. Faust's affirmation is equally insufficient. In his affirmation, Dr. Faust, states that he first treated the plaintiff on September 11, 2009 [sic], and thereafter treated him on September 17, 2008, September 26, 2008, November 21, 2008 and December 3, 2008. Dr. Faust further states in his affirmation, as follows:

> 3. I have treated the plaintiff with respect to injuries to his cervical spine.
>
> 4. That as a result of my examinations and treatment of Mr. Abitabile, I determined that his cervical injuries prevented him from performing his duties at work, which included manual labor. Mr. Abitabile was completely disabled from performing these duties

> from the date of the motor vehicle accident (August 26, 2008) through December 8, 2008. *This disability was directly related to the medically determined herniations and bulges in plaintiff's cervical spine as diagnosed by Dr. Linda Harkavy per MRI exam of September 24, 2008 and confirmed through my clinical evaluations*. (Abitabile Motion, Ex. G [Emphasis Added]).

Inasmuch as Dr. Faust's affirmation relies upon the incompetent report of Dr. Linda Harkavy, *supra*, and insofar as Dr. Faust fails to otherwise (outside of Dr. Harkavy's incompetent report) indicate that plaintiff sustained a "*medically determined* injury or impairment of a non-permanent nature" (Insurance Law §5102[d]), said report is also insufficient and rendered incompetent (*Vishnevsky v. Glassberg*, 29 AD3d 680 [2nd Dept. 2006]; *Marziotto v. Striano*, 38 AD3d 623 [2nd Dept. 2007]).

Thus, in the absence of any admissible medical evidence to substantiate his claims of a 90/180 impairment, plaintiff's self-serving affidavit, does not establish his prima facie entitlement to judgment as a matter of law (*Shvartsman v. Vildman*, supra; *Caruso v. Rotondi*, supra).

Moreover, even if considered, this Court does not read Dr. Faust's affirmation to indicate that, based on competent medical evidence, his purported inability to return to work was linked to his alleged accident related injuries (*Gavin v. Sati*, 29 AD3d 734 [2nd Dept. 2006]; *Jocelyn v. Singh Airport Service*, 35 AD3d 668 [2nd Dept. 2006]). Furthermore, while plaintiff testified that he can no longer go to the gym on a regular basis or sit or stand for long periods of time, this Court is not persuaded that as a result of the injuries sustained in this accident, plaintiff has been impaired in his usual activities "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra at 236; *see also Sands v. Stark*, 299 AD2d 642 [2nd Dept. 2002]).

In light of the foregoing, this Court finds that the plaintiff's failure to make a prima facie showing of entitlement to judgment as a matter of law requires a denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985]).

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: August 26, 2011

ENTER:

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