SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 10
NASSAU COUNTY

EMELINDO GARCIA and FEDELINA GARCIA,

Plaintiffs,

SUBMISSION DATE: 08/29/03
INDEX No.: 10910/01

-against-

BENJAMIN J. DUNN and SLOMINS, INC.,

MOTION SEQUENCE #1

Defendants.

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Upon the foregoing papers, defendant's motion for an order granting summary judgment to defendant and dismissing the plaintiff's complaint on the grounds that plaintiff did not suffer a serious injury as specified in Insurance Law § 5102 and § 5104 is granted.

The instant action stems from a motor vehicle accident that occurred on December 2, 2000 on Jerusalem Avenue near the intersection with Fisher Lane in Levittown, New York. Plaintiff commenced the instant action by filing a summons and complaint on March 13, 2001. Issue was joined by the service of an answer on or about December 5, 2001. Plaintiff, in his Bill of Particulars, claims to have sustained Disc Herniations at the L4-L5 and L5-S1, Disc Bulges at C3-C4, C4-C5, C5-C6, Lumbar Radiculopathy, Cervical Radiculopathy, Cervical and Lumbar radiculitis and restricted range of motion in the cervical and lumbar regions.

Plaintiff has claimed that he sustained a serious physical injury that is permanent in nature as a result of the accident. The court finds otherwise. Plaintiff's injuries fail to meet the serious injury requirement of Insurance Law § 5102. Insurance Law § 5102 (d) states:

> 'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, a significant limitation of use of body function or system; or 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.

Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. Andre v. Pomeroy, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). The goal of summary judgment is to issue find, rather than to issue determine. Hantz v. Fleischman, 155 A.D.2d 415, 457 N.Y.S.2d 350 (2d Dep't 1989). A motion for summary judgment should be granted if the evidence presented demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Nassau Diag. Imag. & Radiation Oncology Assoc. v. Winthrop-University Hosp., 197 A.D.2d 563, 564, 602 N.Y.S.2d 650, 651 (2d Dept. 1993); Baly v. Chrysler Credit Corp., 94 A.D.2d 781, 463 N.Y.S.2d 233 (2d Dep't 1983). "In determining a motion for summary judgment, the court must ascertain whether there are any triable issues of fact in the proof laid bare by the parties' submissions of affidavits based on personal knowledge and documentary evidence, rather than in conclusory or speculative affidavits." Behar v. Ordover, 92 A.D.2d 557, 459 N.Y.S.2d 304 (2d Dep't 1983). Defendant has the initial burden of proving a serious injury was not incurred by the plaintiff. Gaddy v. Eyler, 79 N.Y.2d 955, 956-957, 591 N.E.2d 1176, 582 N.Y.S.2d 990 (1992). Once defendant presented their entitlement, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact. See, Kaplan v. Hamilton Med. Assoc., P.C., 262 A.D.2d 609, 692 N.Y.S.2d 674 (2d Dep' t 1999).

Defendant has submitted an affirmation from Dr. John C. Killian stating that after reviewing the plaintiff's records and

performing objective testing that "there were no consistently objective physical findings in this examination to confirm this claimant's subjective complaints. He further states that "there were significant inconsistencies to indicate that he is exaggerating his complaints for motivational purposes. I do not feel that he has any impairment or disability from problems with his spine." Dr. Killian further states that he believes that the plaintiff if capable of performing all of his usual activities without limitations. Additionally, defendant has submitted an affirmation from Dr. James Sarno, a neurologist, stating "There is no neurological disability." Finally, the defendant has submitted an affirmation from Dr. A. Robert Tantleff, a radiologist, attesting that the plaintiff in his opinion suffers from chronic degenerative disc changes which are not caused by an "uncomplicated accident." He states that "[a]s this finding developed over the course of many years and is a long standing chronic process it is not causally related to the claimant's traumatic event, which occurred only 9 days prior to the MRI examination." The defendant has set forth sufficient evidence to substantiate that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102.

Once the defendant has established that the injury falls outside of Insurance Law § 5102, plaintiff has the burden of proving a triable issue of fact. The statute specifies the types of injuries or the impairment that are defined as a serious injury. In the instant matter, in order to meet this burden, plaintiff must establish that there is a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of the body function or system or that he has 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. The plaintiff has not sustained a permanent loss of use of a body organ, member, function or system. See, Oberly v. Bangs Ambulance, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001). Additionally, the plaintiff's injuries to his spine do not constitute an organ or member, therefore plaintiff could not have sustained a permanent consequential limitation of use of a body organ or member. See, Daviero v. Johnson, 110 Misc.2d 381 441 N.Y.S.2d 895 (Sup. Ct. 1981). "The law requires the limitation of

use to be more than minor, mild or slight." Lanuto v. Constantine, 192 A.D.2d 989, 991, 596 N.Y.S.2d 944, *lv denied* 82 N.Y.2d 654.

The court finds that the injuries complained of by plaintiff do not constitute a significant limitation of use and therefore fall outside the realm of Insurance Law § 5102. Plaintiff submitted several letters and reports from his treating physicians specifically, letters and reports from Dr. Joseph Gregorace, Dr. Pinsky and Dr. Robert Diamond. These letters and reports do not constitute affidavits as they are not in admissible form and will not be considered in the determination of the instant motion. See, Grasso v. Angerami, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991); Thousand v. Hedberg, 249 A.D.2d 941, 672 N.Y.S.2d 579 (4th Dep't 1998) Gill v. O.N.S. Trucking, 239 A.D.2d 463, 657 N.Y.S.2d 452 (2d Dep't 1997). Additionally, the court agrees with the defendant that these reports have no probative value as they are over two years old. See, Chinnici v. Brown, 295 A.D.2d 465, 744 N.Y.S.2d 186 (2d Dept 2002); Scott v. Roudellou, 291 A.D.2d 550, 737 N.Y.S.2d 873 (2d Dept 2002).

Plaintiff has submitted an affidavit from Dr. Francine G. Moshkovksi who plaintiff saw in May of 2001. This report is also over two years old and therefore it probative value is minimal. Id. The doctor states that she relied on numerous reports including MRI reports that are not in evidence. Furthermore, the doctor has not specified how the tests were performed. See, Hernan v. Church, 276 A.D.2d 471, 714 N.Y.S.2d 87 (2d Dept 2000). The doctor diagnosed plaintiff as having a cervical sprain and lumbar sprain. Additionally, Dr. Moshkovski stated in her prognosis for the plaintiff that "the claimant has a mild, partial disability. The claimant should be independent in activities of daily living." The court finds that Dr. Moshkovski affidavit does not set forth sufficient objective proof to rebut defendants prima facie showing that plaintiff has not sustained a permanent consequential limitation of use of a body organ or member; a significant limitation of use of the body function or system or that he has a medically determined injury . See, Toure v. Avis Rent-A-Car, 98 N.Y.2d 345, 746 N.Y.S.2D 865 (2002); Hernan v. Church , *supra*. Plaintiff has not presented sufficient evidence to substantiate that he sustained 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. Sigona v. New York City Transit Authority, 255 A.D.2d 231, 659 N.Y.S.2d 254 (1st Dept 1997). Plaintiff in his bill of particulars stated that he missed two weeks of work and in his deposition stated four weeks of work. One of the goals of the no-fault system is to keep minor personal injury cases arising out of automobile accidents out of the courts. Licari v. Elliot, 57 N.Y.2d 230, 441 N.E.2d 1088, 445 N.Y.S.2d 570 (1982). This incident falls in realm of a minor personal injury action. Plaintiff's vehicle sustained minimal damage and the alleged injuries are minor. The court finds that the plaintiff has failed to demonstrate that a triable issue of fact exists.

Accordingly, it is hereby ordered that the defendant is granted summary judgment and the plaintiff's complaint is dismissed.

This decision constitutes the order of the court.

Dated: OCT 28 2003

HON. KENNETH A. DAVIS J.S.C.

ENTER

OCT 31 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE