SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 7
NASSAU COUNTY

ANTHONY L. McGANN,

Plaintiff,

SUBMISSION DATE: 08/24/06
INDEX No.: 1192/05

-against-

JOHN C. CRAIN and PINE BUSHE WAREHOUSING,

Defendants.

MOTION SEQUENCE #1
XXX

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, the defendants' motion for summary judgment pursuant to CPLR § 3212 and New York Insurance Law § 5102 (d) is granted.

The instant action seeks damages resulting from injuries sustained by plaintiff in an automobile accident that occurred on June 22, 2004. The action was commenced by the filing of a summons and complaint on January 26, 2005. Issue was joined by the service of an answer on March 24, 2005.

On June 22, 2004, plaintiff was operating a Budget rental truck while traveling north on the New Jersey Turnpike near the exit for Carlstadt, New Jersey. Defendant John Crain was operating a tractor trailer traveling south on the New Jersey Turnpike. Plaintiff testified that an axle with wheels came off of defendant's truck and crossed the median. Plaintiff does not have any recollection of the tires hitting his vehicle. When he regained consciousness he was in a ditch on the side of the road. He testified that his head had come into contact with the ceiling of the cab. Plaintiff was taken to the Emergency Room of Hackensack University Medical Center complaining of neck pain radiating to his shoulders and numbness of the right arm. He was diagnosed with multiple superficial abrasions and cervical spinal

stenosis. Plaintiff, prior to the accident, was being treated for the cervical spinal stenosis by a chiropractor. A consultation with a neurologist and an outpatient MRI were scheduled as well as a follow up visit at the Emergency Room. Plaintiff was then discharged. Plaintiff testified that he was confined to bed for one day, home for two days, and missed work for four days, after which he returned to work in his normal capacity.

On June 23, 2005, plaintiff was examined by Dr. Harry Benisatto, a chiropractor. Plaintiff complained of severe neck pain, pain and numbness to his right shoulder, loss of hand strength, and inability to move his neck. Since 2000, Dr. Benisatto had been treating plaintiff for lower back pain. In his affidavit, Dr. Benisatto stated that the examination on June 23, 2005 was the first time that plaintiff had complained of neck pain. Dr. Benisatto performed deep tendon reflex that revealed a right hand grip of twenty-five (25) kilograms and left hand grip of twenty-nine (29) kilograms. Dr. Benisatto opined that the right hand, plaintiff's dominant hand, should be at least ten to fifteen percent (10-15%) stronger than his left. Testing of plaintiff's biceps showed that reflexes were positive two on the left and positive one on the right. A positive two is normal. Dr. Benisatto opined that plaintiff has a significant loss of motion in his neck of fifty percent (50%) and has a permanent partial disability to his cervical spine. Plaintiff is still receiving treatment from Dr. Benisatto for his various injuries.

On August 22, 2004, September 18, 2005, October 5, 2005, March 1, 2005, and April 12, 2005, plaintiff was examined by Dr. Jill Bressler. After performing EMG/NCV studies of the upper and lower extremities and reviewing MRI films of the cervical spine, Dr. Bressler concluded that plaintiff had impingement on the right C6 nerve root, the left S1 nerve root, and the left superficial perineal nerve, and multiple bulging discs at the cervical spine. Dr. Bressler opined that plaintiff had sustained a serious injury resulting in permanent partial injury and restriction of motion to the cervical spine.

On February 24 2006, Dr. Howard Reiser performed a neurological examination of plaintiff on behalf of defendants. He found straight leg raising negative bilaterally and found plaintiff's neck to be supple and non-tender. He reviewed the Emergency Room report and found that the cervical spine stenosis and the T4 compression fracture were pre-existing, the CT scan

performed on the date of the accident revealed degenerative changes but no acute trauma, and the MRI of the cervical spine showed multi-level degenerative changes, congenial narrowing of the cervical spine with spinal cord flattening at C4-C5 and C5-C6 but showed no acute changes. Dr. Reiser concluded that these conditions were pre-existing, that there were no ongoing symptoms, only subjective complaints, and that there were no objective findings to substantiate Dr. Bressler's findings of a permanent partial injury.

On March 3, 2006, an independent medical examination of plaintiff was performed by Dr. Richard Bochner. His examination of the cervical spine revealed no tenderness of the spine or paracervical muscles, no muscle spasm, cervical spine range of motion forty degrees right and thirty five degrees left, forty degrees of extension and flexion, motor function 5/5 in the upper extremities, and deep tendon reflexes of positive two equal at biceps, triceps, and brachioradialis. The examination also revealed no tenderness in the thoracic or lumbar spine.

On June 15, 2006, Dr. Stanley Sprecher, a radiologist, reviewed the MRI scans of the cervical spine, brain, lumbar spine, the x-rays of the spine, chest, the CT scans of the cervical spine and the head, and concluded that plaintiff has chronic, pre-existing spinal stenosis with cord compression, but no acute trauma caused by the accident.

The trial court has the ability to issue summary judgment where there are no triable issues of fact with regard to questions of serious injury. 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(1974). In a motion for summary judgment, defendant has the initial burden of showing that a serious injury was not incurred by the plaintiff. Gaddy v. Eyler, 79 N.Y.2d 955 (1992). 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.

To survive a motion for summary judgment and defeat defendant's contention that plaintiff's injuries do not constitute a serious injury pursuant to the Insurance Law, plaintiff must submit objective medical evidence that presents a triable issue as to the seriousness of the injury. Pommells v. Perez, 4 N.Y.3d 566 (2005); Whiteford v. Smith, 168 A.D.2d 885 (3d Dept. 1990).

In order for a plaintiff to prove that he suffered a "permanent consequential limitation of use of a body organ or member" and/or "significant limitation of use of a body function or system" he must provide objective evidence as to the extent or degree of the limitation and its duration. Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345 (2002). A bulging or herniated disc alone is not a serious injury but an expert's designation of a numeric percentage of plaintiff's range of motion can be used as objective evidence. Id. Additionally, straight leg raising test results can be used as objective evidence to prove serious injury. Risbrook v. Coronamos Cab Corp., 244 A.D.2d 397 (2d Dept. 1997).

Alternatively, plaintiff must prove that he suffered a "medically determined injury 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." With respect to the 90/180 category, a plaintiff's activities must be curtailed to a great extent rather than slight curtailment. June v. Gonet, 298 A.D.2d 811 (2d. Dept. 2002). Plaintiff's own specific list of activities which he is unable to engage in as well as documentation that supports her claim of days missed from work will be considered. Id.

However, even when there is objective medical proof, additional factors, such as a pre-existing condition, may warrant the grant of summary judgment for the defendant. Pommels v. Perez, 4 N.Y.3d 570 (2005). The medical reports and affirmations submitted by plaintiff must show more than mere speculation that the injuries sustained by plaintiff were caused by the accident and

not plaintiff's pre-existing condition. Montgomery v. Pena, 19 A.D.3d 288 (3d. Dept. 2005).

Here, defendants have submitted sufficient proof that plaintiff did not suffer a serious injury. The affirmations of Dr. Reiser and Dr. Bochner show that plaintiff's injuries to the spine were pre-existing and that there is no objective proof to confirm plaintiff's subjective complaints of a permanent neck injury resulting from the accident on June 22, 2005.

In response to defendant's prima facie showing, plaintiff has failed to present objective medical evidence to create a triable issue of fact as to whether the injuries, even if assumed to meet the serious injury requirements, were in fact caused by the accident on June 22, 2005. In his affidavit, Dr. Benisatto claims that the plaintiff has sustained a fifty percent (50%) loss to the range of motion of his neck, but does not provide objective evidence to support this, nor does he provide evidence beyond speculation that the injuries were caused by the accident. Dr. Bressler's affidavit fails to address plaintiff's pre-existing condition of cervical spine stenosis. Plaintiff himself admits that he was being treated for this condition prior to the accident. Furthermore, plaintiff has failed to present a triable issue as to the 90/180 category of serious injury. Plaintiff's activities were not curtailed to a great extent, rather he testified that he was out of work for only four days and then able to return in his full capacity.

Therefore, defendants' motion for summary judgment pursuant to CPLR § 3212 and New York Insurance Law § 5102 (d) is granted.

This decision constitutes the order of the court.

Dated: SEP - 5 2006

J.S.C.
XXX

HON. KENNETH A. DAVIS

ENTERED
SEP 06 2006
NASSAU COUNTY
COUNTY CLERK'S OFFICE