SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 24
NASSAU COUNTY

ANTHONY SOLURI,

Plaintiff,

-against-

STEPHEN J. TIMKO,

Defendant.

MOTION SUBMITTED:
September 21, 2009
MOTION SEQUENCE:01
INDEX NO. 008209-08

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3
Affirmation	4
Reply Affirmation	5
Plaintiff's Memorandum of Law	6

DECISION and ORDER

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as the result of an automobile accident. Plaintiff's complaint essentially alleges that on or about April 23, 2007, a motor vehicle owned and operated by the defendant collided with a motor vehicle operated by the plaintiff, causing serious injury to the plaintiff. It is further alleged that the collision was due solely to the negligence of the defendant.

Defendant moves for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's

complaint on the ground that plaintiff did not sustain a serious injury, within the meaning of Insurance Law § 5102 (d), as a result of the subject accident.[1]

Defendant's submissions, including plaintiff's Verified Bill of Particulars, plaintiff's admissions at his deposition, the affirmed report of Dr. Lastig, a radiologist, and the affirmed report of Dr. Katz, an orthopedic surgeon, were sufficient to make a prima facie showing that plaintiff did not sustain a serious injury, within the meaning of Insurance law § 5102 (d), as a result of the subject motor vehicle accident (see *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eyler,* 79 NY2d 955, 956-957 [1992]). For the reasons that follow, plaintiff's opposing submissions were insufficient to raise a triable issue of fact as to whether he sustained a "serious injury" within the meaning of the No-Fault Insurance Law.

The affirmed medical report of Dr. Petrizzo, dated September 14, 2009 (annexed to the Affirmation in Opposition as Exhibit "A") fails to indicate that he performed any objective range of motion testing, fails to indicates any loss of range of motion measured in degrees with respect to any of the examinations of plaintiff, and fails to compare any purported loss of range of motion of plaintiff's cervical or lumbar spine to that of normal range of motion in the near aftermath of the accident or at any other time (*see Yeung v Rojas*, 18 AD3d 863 [2d Dept 2005]; *Brent v Jackson*, 15 AD3d 46 [1st Dept 2005]; *Lynch v Lorkowski*, 12 AD3d 489 [2d Dept 2004]; *Paul v Trerotola,* 11 AD3d 441 [2d Dept 2004]; *Nemchyonok v Ying*, 2 AD3d 421 [2d Dept 2003]; *Grossman v Wright*, 268 AD2d 70 [2d Dept 2000]). In fact, the September 14, 2009 report of Dr. Petrizzo specifically states that examinations performed on August 16, 2007 and again on September 13, 2007 indicated that plaintiff had good range of motion in his lumbar and cervical spine.

In addition, Dr. Petrizzo's report makes no representation that any of the injuries described in plaintiff's Verified Bill of Particulars were proximately caused by the subject accident, and the report makes no representation that any of the findings delineated in the radiologist's reports (annexed to the Affirmation in Opposition as Exhibits "C" and "D") were causally related to the subject accident.

Plaintiff's deposition testimony, moreover, established that he was involved in a prior accident in 2000 or 2001 wherein he sustained serious injuries to his neck and back. Plaintiff was treated at a hospital, received treatment from a Dr. Benetar and Dr. Kaplan, underwent three MRI studies, and filed a lawsuit that was settled for approximately $25,000.00. As Dr. Petrizzo fails to mention the prior accident in his report, the report is insufficient, as a matter of law, to raise a

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[1]Insurance Law § 5102 (d) defines "serious injury" to mean: a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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; 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.

triable issue of fact as to whether the subject accident was a proximate cause of any of the injuries delineated in plaintiff's Verified Bill of Particulars (*Rogers v Chiarelli* 10 AD3d 355 [2d Dept 2004]; *Finkelshteyn v Harris*, 280 AD2d 579 [2d Dept 2001]).

In addition, defendant's submits the affirmed report of Dr. Lastig, a radioligist, who reviewed the cervical and lumbar MRI studies taken of plaintiff's spine shortly after the accident (Exhibit "F" to the Notice of Motion). In the report, Dr. Lastig states the basis for his opinion that these MRI studies furnish unequivocal evidence of multilevel degenerative disc disease and multilevel disc desiccation, which is most likely degenerative in nature and not related to the subject accident. Plaintiff's opposing submissions fail to address these findings (*Cardillo v Xenakis* 31 AD3d 683 [2d Dept 2006]; *Giraldo v Mandanici*, 24 AD3d 419 [2d Dept 2005]).

It is also noted that the affirmations and MRI reports of Dr. Mendelsohn and Dr. Lerner (annexed to the Affirmation in Opposition as Exhibits "C" and "D") are without probative value as Dr. Mendelsohn and Dr. Lerner, like Dr. Petrizzo, do not opine that any of their findings are causally related to the subject accident, as opposed to the prior accident or pre-existing degenerative disc disease (*Collins v Stone*, 8 AD3d 321 [2d Dept 2004]).

Finally, plaintiff's opposing submissions were inadequate to raise a triable issue of fact as to whether plaintiff sustained a medically determined injury as a result of the subject accident that prevented him from performing substantially all the material acts constituting his usual and customary daily activities for at least 90 of the 180 days immediately following the accident (*see Pierre v Nanton*, 279 AD2d 621 [2d Dept 2001]).

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

This constitutes the decision and order of the court.

Dated: November 12, 2009

Hon. Vito M. DeStefano, J.S.C.