SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

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EDWARD J. DIETZ, Plaintiff,

Index No. 011619/00
Sequence #001
Part 44

- against -

GIUSEPPE H. GAMBINO and FRANCESO GAMBINO, Defendants.

2/28/2002

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Notice of Motion..1
Affirmation in Opposition..2
Reply Affirmation..3

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Upon the foregoing papers, defendants' motion for an order pursuant to *CPLR §3212* granting summary judgment in their favor and dismissing the summons and complaint of plaintiff upon the grounds that as a matter of law plaintiff has not suffered as serious injury as defined by *Insurance Law §5102(2)* is granted.

Movants have sustained their initial burden of submitting evidentiary proof in admissible form to warrant the objective findings that plaintiff has not suffered a serious injury by the affirmed reports of Dr. Barry Jupiter, an Orthopedist and Dr. Kevin Hausknecht, a Neurologist indicating no or very mild orthopedic or neurological disability or impairment *(see Grossman v. Wright, 268 AD2d 79 [2nd Dept. 2000]; Guzman v. Paul Michael Management, 266 AD2d 508 [2nd Dept. 1999]).*

The burden then shifted to plaintiff to come forward with some admissible evidence of serious injury within the meaning of the No-Fault Law in order to survive the motion *(Gaddy v. Eyler, 79 NY2d 955).* This he has failed to do.

This case involves a motor vehicle accident that occurred on September 23, 1999 resulting in plaintiff's claim of permanent loss of use of a body organ, member, function or system, significant limitation of use of a body function or system, and an inability to perform substantially all of his material daily activities within the 90/180 rule. However, in his opposition there is no indication of permanency, significant limitation or evidence that substantially all of plaintiff's material daily activities were affected.
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Turning first to the issue of permanency, in the absence of a recent examination there can be no projection of permanent limitation *(Bidetto v. Williams, 276 AD2d 516 [2nd Dept. 2000].* The affidavit of Dr. Isaac Cohen annexed to plaintiff's opposition papers states that plaintiff was treated in his office shortly after the accident until "the Spring of 2000 when his No-Fault benefits were terminated". Plaintiff did not return to Dr. Cohen's office until October 17, 2001. That gap in treatment, one and one-half years, is not adequately explained *(Grossman v. Wright, supra).*

Even if the October 17, 2001 office visit is considered to be a "recent examination", Dr. Cohen's affidavit fails to set forth the objective tests he performed on this date in order to reach the conclusion that plaintiff sustained a permanent partial disability. Plaintiff's subjective complaints are not enough nor are limitation of motion tests with unspecified degrees of restriction *(Toure v. Avis Rent-A-Car, 284 AD2d 271 [1st Dept. 2001]).*

Further, references to prior diagnostic testing are of no probative value when the earlier findings have no mention of causation or permanency *(Betheil-Spitz, 276 AD2d 732 [2nd Dept 2000]).*

As to the significance of plaintiff's injuries, a physicians's findings of significance, like that of permanency, must be based upon qualitative objective testing *(Walcott v. Hsuehli, 283 AD2d 485 [2nd Dept. 2001]).*

Finally, plaintiff does not meet the criteria for the 90/180 day category of medically determinated injury. Dr. Cohen's's affidavit did not address whether plaintiff was prevented from performing substantially all of the material acts which constituted his customary activities during that time period (*Lanuto v. Constantine, 192 AD2d 989 [3rd Dept. 1993]).* Plaintiff's personal affidavit, without more, is insufficient to defeat defendant's motion *(Walcott v Husehli, supra).*

Accordingly, defendant's motion is granted.

Dated: March 13, 2002 ....J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE