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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

MG

WILLIAM M. SATCHELL, JR.,

Plaintiff,

-against-

FRIENDLY LIVERY SERVICE, INC. and KEVIN GRANDISON,

Defendants.

Motion Sequence #2
Submitted August 15, 2011
XXX

INDEX NO: 19547/07

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....1-6
Affs in Opposition.....7-11
Affs in Reply.....12&13
Memorandum of Law.....14&14a

Upon the foregoing papers, it is ordered that this motion by defendants, Friendly Livery Service, Inc. and Kevin Grandison, for an order pursuant to CPLR 3212 granting them summary judgment in their favor dismissing the plaintiff, William M. Satchell's complaint on the grounds that his injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5104(a) as defined by Insurance Law § 5102(d), is granted.

This action to recover money damages for serious personal injuries sustained as the result of the alleged negligence of the defendants arises out of a motor vehicle

accident that occurred on March 25, 2007 at approximately 11:45 a.m. at the entrance to the Jet Blue Terminal at John F. Kennedy International Airport in Queens, New York. The plaintiff alleges that the front end of the defendants' motor vehicle made contact with the left rear end of his vehicle.

In bringing this action, plaintiff claims that he sustained the following serious injuries as a result of the subject accident: herniated disc at C5-6; cervical radiculopathy; disc bulge C3-4 indenting the thecal sac; disc bulge C4-5; disc bulge C5-6 indenting the ventral aspect of the thecal sac resulting in foraminal stenosis; disc bulge C6-7 indenting the thecal sac; disc bulge T2-3 with bilateral foraminal narrowing; aggravation and/or exacerbation of previously asymptomatic degenerative disc disease of the cervical and lumbar spine; and aggravation and/or exacerbation of previously asymptomatic mild osteo-arthritic changes of the left shoulder.

Plaintiff alleges in his bill of particulars that he was confined to the hospital for one day and to his bed and home for an additional day.

Further, at his sworn examination before trial, plaintiff testified that at the time of the accident, he was unemployed. He also testified that there is nothing that he can no longer do as a result of this accident.

The 63-year old plaintiff has failed to identify the specific categories of the serious injury statute into which his injuries fall. Nevertheless, whether he can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of his admissible evidence (*Manrique v Warshaw Woolen Assoc.*, 297 AD2d 519).

Based upon a plain reading of the papers submitted herein, it is obvious that plaintiff is not claiming that his injuries fall within the first five categories of "serious injury:" to wit, death; dismemberment; significant disfigurement; a fracture; or loss of a fetus. Further, insofar as he has failed to allege and claim that he has sustained a "total loss of use" of a body organ, member, function or system, it is plain that his injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v Bangs Ambulance,* 96 NY2d 295). Similarly, plaintiff's claims of serious injury under the 90/180 category of Insurance Law § 5102(d) is also contradicted by his own testimony wherein he states that he was only confined to his bed or home for one day as a result of this accident and that he is not curtailed in his usual activities "to a great extent rather than some slight curtailment" (*Licari v Elliott*, 57 NY2d 230, 236; *see also Sands v Stark*, 299 AD2d 642). According to his sworn testimony, there is nothing that he can no longer do that he was previously able to do as a result of this accident. In light of these facts, this Court determines that plaintiff has also effectively abandoned his 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion (*Joseph v Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Thus, this Court will restrict its analysis to the remaining two categories of Insurance Law §5102(d); to wit, permanent consequential limitation of use of a body organ or member; and, significant limitation of use of a body function or system.

In support of a claim that the plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of their examining physician or the unsworn reports of the plaintiff's examining physician (*Pagano v Kingsbury*, 182 AD2d 268).

When a defendants' motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff, in opposition to defendants' motion, to produce *prima facie* evidence in admissible form to support the claim for serious injury (*Licari v Elliot*, *supra*). In order to be sufficient to establish a *prima facie* case of serious physical injury, the affirmation or affidavit must contain medical findings, which are based on the physician's own examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints. However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v Angerami*, 79 NY2d 813). Otherwise, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*see Reid v Wu*, 2003 NY Misc LEXIS 552, Supreme Court, Bronx County, *citing O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems,* stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v Vasquez*, 301 AD2d 438). However, even the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (*Toure v Avis Rent A Car Systems, supra*).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez*, *supra*, that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v Perez,* 4 NY3d 566). The Court held that while "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment" (*Id.; Neugebauer v Gill*, 19 AD3d 567).

Under the no-fault statute, to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Licari v Elliot*, *supra*; *Gaddy v Eyler*, 79 NY2d 955*; Scheer v Koubeck*, 70 NY2d 678). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v Elliot*, *supra*; *Grossman v Wright*, 268 AD2d 79, 83).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of

range of motion is acceptable (*Toure v Avis Rent A Car Systems, Inc., supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Id*).

With these guidelines in mind, this Court will now turn to the merits of defendants' motion.

In that regard, in support of their motion, defendants submit, *inter alia*, the sworn report of Dr. Robert Israel, M.D., an Orthopedist who performed an orthopedic examination of the plaintiff on February 27, 2009; the sworn report of Dr. Sarasavani Jayaram, M.D., a Neurologist who performed a neurological examination of the plaintiff on March 24, 2009; and, the affirmed report of Dr. David A. Fisher, M.D., a Radiologist who reviewed the cervical spine MRI of the plaintiff on March 10, 2008.

With this evidence, defendants have established their *prima facie* entitlement to judgment as a matter of law.

Specifically, the affirmed report of Dr. Fisher, who avers that he personally reviewed the actual MRI films, albeit he was not the physician who had the MRI taken under his direction or supervision, and further, reports an opinion as to the causality of his findings, constitutes competent medical evidence in support of defendants' motion for summary judgment (*Dioguardi v Weiner*, 288 AD2d 253; *Beyel v Console,* 25 AD3d 636).

Further, Dr. Robert Israel, M.D., an Orthopedist, examined the plaintiff, performed quantified range of motion testing on his cervical spine, lumbar spine and left

shoulder with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal. Dr. Israel also performed an examination of plaintiff's thoracic spine, motor and sensory testing and found no deficits, and based on his clinical findings and medical records review, concluded that plaintiff's orthopedic evaluation "was entirely within normal limits and there [were] no positive findings" (*Staff v Yshua*, 59 AD3d 614; *Cantave v Gelle*, 60 AD3d 988).

Similarly, Dr. Sarasavani Jayaram, M.D., a Board Certified Neurologist's neurological examination of the plaintiff, including quantified range of motion testing of plaintiff's cervical, thoracic and lumbar spine with a goniometer in which she compared her findings to normal range of motion values and concluded that the ranges of motion measured were normal, also constitutes competent medical evidence in support of defendants' motion.

Having made a *prima facie* showing that the injured plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels v Perez, supra*; *see also Grossman v Wright*, *supra*). Plaintiff fails to sustain this burden.

In opposition, plaintiff submits the sworn report of Dr. P. Leo Varriale, M.D., an Orthopedist who performed an orthopedic evaluation of the plaintiff on June 25, 2007, three months after the date of accident; the sworn report of Dr. Edward M. Weiland, M.D., a Board Certified Neurologist, who performed a neurological examination of the

plaintiff on July 10, 2007, approximately four months after the date of accident; and, plaintiff's sworn affidavit.

Notably, neither Dr. Varriale's report nor Dr. Weiland's report, illustrates that the plaintiff sustained a "serious injury." Rather, each physician in his respective report confirms that their testing of the range of motion yielded normal results. The only diagnosis provided by Drs. Varriale and Weiland were resolved strains and sprains, which are obviously insufficient to satisfy the serious injury threshold of Insurance Law §5102(d) (*Rabolt v Park*, 50 AD3d 995; *Washington v Cross*, 48 AD3d 457).

Furthermore, the medical reports relied upon by the plaintiff are insufficient to raise a triable issue of fact because they are not based upon a recent examination of the plaintiff (*Marziotto v Striano*, 38 AD3d 623; *Colon v Vargas*, 27 AD3d 512).

Accordingly, in light of plaintiff's failure to raise any triable issue of fact, defendants' motion for summary judgment dismissal of plaintiff's complaint is granted. The complaint is dismissed in its entirety.

Dated: OCT 28 2011

UTE WOLFF LALLY, J.S.C.

ENTERED
NOV 01 2011
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