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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 25

Present: HON. WILLIAM R. LaMARCA
Justice

HENRY MEJIA,

Plaintiff,

-against-

MARCO MEJIA and BYRON PATRICK,

Defendants.

Motion Sequence # 002, #003
Submitted October 12, 2005

INDEX NO: 17434/03

The following papers were read on these motions:

Defendant MEJIA Notice of Motion.....1
Defendant BYRON Notice of Cross- Motion.....2
Affirmation in Opposition dated 7/15/05.....3
Affirmation in Opposition dated 9/14/05.....4
MEJIA Reply Affirmation.....5
BYRON Reply Affirmation.....6

Defendant, MARCO MEJIA, moves and defendant, PATRICK BYRON, s/h/a BYRON PATRICK, cross-moves for an order dismissing plaintiff's complaint and granting defendants summary judgment, pursuant to CPLR §3211 and §3212, on the ground that the claimed injuries do not meet the no-fault threshold requirements of a "serious injury" as defined in Insurance Law §5102(d). Plaintiff opposes the motion which is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on November 22, 2002 in the vicinity of Clinton Road and Stewart Avenue, Hempstead, New York. At the time of the accident, plaintiff was a passenger in the vehicle owned and operated by defendant, MARCO MEJIA, that came in contact with vehicle owned and operated by defendant, PATRICK BYRON. In his bill of particulars, plaintiff alleges that he sustained the following personal injuries that he alleges are of a permanent nature: Herniated disc at L4/5 with edema at site of annular tear; and cervical radiculopathy.

As the proponent of the motion for summary judgment, defendants have the initial burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury causally related to the motor vehicle accident (*Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232, 807 NE2d 282 [C.A.2003]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. If the initial burden is met, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating the existence of a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law § 5102(d) (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197[C.A.2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A.1992]; *Shaw v Looking Glass Associates, LP*, 8 AD3d 100, 779 NYS2d 7 [1st Dept. 2004]).

In support of the motion and cross-motion, defendants have submitted the affirmed medical report of S. Murthy Vishnubhakat, M.D., affiliated with North Shore University

Hospital in the Department of Neurology, an affirmed medical report of John C. Killian, M.D., Board Certified in Orthopedic Surgery, and an affirmed medical report of Stephen W. Lastig, M.D., Diplomate, American Board of Radiology.

Dr. Vishnubhakat's report is based upon a physical and neurologic examination on April 20, 2005 and review of certain medical records. In his affirmed report, Dr. Vishnubhakat concludes that:

> Based on the history, physical and extensive review of the medical records, it is my opinion that Mr. Mejia may have had a cervical and lumbar sprain and strain like syndrome which in my opinion has resolved. He does not show any objective signs of disability for activities of daily living or his profession. His neurologic examination has been normal. Thus, there is no objective evidence of injury to his brain, spinal cord, nerve roots or peripheral nerves. Thus, no neurological injuries existed or there are any adverse prognostic indicators to his central or peripheral nervous system.

After conducting an orthopedic examination of plaintiff on April 19, 2005, Dr. Killian concludes, *inter alia*, that:

> The physical examination was remarkable for subjective complaints of tenderness in the neck and in the lower back and subjective complaints of pain at certain extremes of motion. Those subjective complaints were not accompanied by objective findings including restricted motion or muscle spasm. The neurological examination was normal. The sciatic nerve tension signs were negative.
>
> There were no positive objective physical findings in this examination to confirm any of this claimant's subjective complaints. Based on this examination I would conclude that he has fully recovered from the problems with his neck and back for which he was treated after this accident. He has no impairment of his neck or back and he has no disability from problems with his neck or back from this accident. He is capable of working at his normal capacity and performing all of his usual activities of daily living without any limitations related to injuries from this accident. He requires no further orthopedic

evaluation, follow-up or treatment.

Upon review of an MRI study of plaintiff's lumbar spine which was performed at Meadowbrook Imaging on November 22, 2002 and the MRI study which he performed on January 21, 2003, Dr. Lastig found that the MRI study of the lumbar spine was unremarkable. Dr. Lastig further stated that "there are no findings on this study which was causally related to the reported accident of 11/22/02". Dr. Lastig, therefore, disagrees with the original radiologist's interpretation.

Defendants have made their initial burden of establishing that plaintiff has not sustained a serious injury within the ambit of Insurance Law § 5102(d).

In opposition to the motion, plaintiff has submitted, *inter alia*, unsworn magnetic resonance imaging reports prepared by John T. Rigney, M.D., a Board Certified Radiologist, relative to plaintiff's lumbar spine, an affirmed medical report of Irina Yefimov, M.D., affiliated with Elite Medical Services, P.C., an unsworn medical report of A.N. Naik, M.D. an unsworn report of Martin L. Plutno, Doctor of Chiropracty, dated May 6, 2003, as well as his sworn report dated July 9, 2005, together with plaintiff's own affidavit.

In his affirmed report, Dr. Yefimov sets forth specific, significant quantified range of motion losses expressed in percentage of normal: flexion 65%, extension 20%, right lateral bending 18%, left lateral bending 20%, right lateral rotation 18% and left lateral rotation 20%. Dr. Yefimov also found decreased sensation over the lateral aspect of the right knee and calf, quantified decreases in strength in right knee flexion and right ankle dorsiflexion. *See, Toure v Avis Rent A Car Systems, supra.*

In his sworn report, properly subscribed before a notary public, plaintiff's chiropractor Dr. Martin L. Pluto, concludes, *inter alia*, that:

> As of his re-evaluation on 7/9/05, our findings indicate that Mr. Mejia has a permanent disability in his lower back. These conditions should be addressed/ managed more orthopedically (medication, injections, potential surgery) now and in the foreseeable future. Any alternative treatment, such as chiropractic/physical therapy, in our opinion, would just give Mr. Mejia temporary symptomatic relief. He has thus been advised by our office once again to follow up orthopedically at this time.

The unsworn medical reports of Dr. Naik and Plutno are not in admissible form (*Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178, 588 NE2d 76 [C.A.1991]; *Magro v He Yin Huang*, 8 AD3d 245, 777 NYS2d 318 [2nd Dept. 2004]) and their exclusion from consideration is warranted (*see, Shinn v Catanzaro*, 1 AD3d 195, 767 NYS2d 88 [1st Dept. 2003]).

Nevertheless, it is the judgment of the Court that plaintiff's submissions in opposition have raised an issue of fact as to whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d). (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 [C.A.2005]). However, plaintiff has not submitted competent medical evidence that he was unable to perform substantially all of his daily activities for not less than 90 out of the first 180 days as a result of the accident. *Nelson v Amicizia*, 21 AD3d 1015, 803 NYS2d 87(2d Dept. 2005); *Hernandez v DIVA Cab Corp.*, 22 AD3d 722, 2005 WL 2786969 (2d Dept. 2005); *see, Sainte Aime v Ho*, 274 AD2d 569, 712 NYS2d 133 (2d Dept. 2000). Plaintiff's self-serving statements as well as his employer's affidavit are insufficient. Finally, the fact that Mr. Byron has not appeared for an examination before trial does not preclude the denial of this motion.

In view of the foregoing, it is hereby

ORDERED, that the defendants' motion and cross-motion for an order dismissing the complaint and granting summary judgment is granted to the extent that the allegations in the 90/180 day category are dismissed and the motion is in all other respects **denied.**

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 19, 2005

WILLIAM R. LaMARCA, J.S.C.

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