SHORT FORM ORDER

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

Present: HON. WILLIAM R. LaMARCA
Justice

PHILLIP BARKOLAS,

Plaintiff,

Motion Sequence #001
Submitted July 21, 2005
XXX

-against-

INDEX NO: 658/04

DOREEN PRINCIPE,

Defendant.

The following papers were read on this motion:

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

Relief Requested

Defendant, DOREEN PRINCIPE, moves for an order, pursuant to CPLR §3212 and and Article 51 of the Insurance Law, for an order dismissing the complaint of plaintiff, PHILLIP BARKOLAS, on the ground that defendant bears no liability or, in the alternative, that the injuries alleged by the plaintiff do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the Insurance Law of the State of New York and, as such, plaintiff has no cause of action under Section 5104(a) of the Insurance Law. Plaintiff opposes the motion which is determined as follows:

Background

The action arises out of a two-vehicle collision that took place on August 16, 2003 at approximately 4:30 P.M. According to the plaintiff, he made a u-turn on North Grove Street in Valley Stream, New York, pulled his car over to park, shifted the gear into park, and was hit from behind by defendant. According to defendant, plaintiff's vehicle backed into her stopped vehicle as plaintiff was making a u-turn.

As to Serious Injury

At his deposition, plaintiff testified that his car was struck in the rear causing his body to move forward and back and the back of his head to hit the headrest. He claims that after the accident he drove home and, within an hour or two, he began to experience sharp, shooting pain in his neck and lower back, radiating into his legs. It appears that the next day he sought medical care at Franklin Immediate Care in Franklin Square, New York, a walk in facility, where he was treated by Paul A. Cooperman. M.D., who prescribed pain medicine and recommended that plaintiff see a chiropractor. On two (2) or three (3) subsequent visits, Dr. Cooperman prescribed additional pain medications and applied a cervical collar for use by the plaintiff. Thereafter, plaintiff sought treatment from Dr. Bridgewood, a chiropractor located in Valley Stream, New York, who initially treated plaintiff five (5) times per week and continues to treat plaintiff on a once a week basis. Plaintiff further testified at his deposition that he was referred by Dr. Bridgewood to Dr. Parker, an orthopedist, who prescribed Darvocet, three (3) times per day, which he continues to take to date. Furthermore, Dr. Parker referred him for MRI's of his neck and back and plaintiff claims that, due to bulging discs, the doctor recommended surgery. Plaintiff stated that,

because of fear of paralysis, he opted instead for epidural injections to his lower back.

In an affidavit annexed to the opposing papers, plaintiff states that he experiences constant and daily pain in his neck and back and stiffness which makes it difficult for him to do any heavy lifting or bending or to hold any heavy objects. He claims that he is unable to stand for long periods of time and that he is unable to do many of his regular daily activities, such as cleaning the house, grocery shopping and exercise, which is exacerbated by cold, winter weather or high humidity in the summer. At his deposition, plaintiff testified that, at the time of the accident, he had been out of work for about one (1) month and he makes no claim for lost earnings. He testified that, since the accident, he has not attempted to return to work and that he was previously employed as a house painter in Jupiter, Florida. Furthermore, plaintiff testified that he had two (2) prior accidents in which he injured his neck and back, first in 1994 and then again in 1999.

On January 16, 2004, plaintiff commenced the instant action for personal injuries against defendant by filing and later serving the Summons and Complaint. On or about March 4, 2004, defendant interposed an answer denying the material allegations of the complaint together with affirmative defenses. Following joinder of issue, plaintiff served a Bill of Particulars in which he alleged that he sustained the following injuries which are permanent and caused by the underlying accident:

- <u>EMG of lower back</u>:
  - delayed onset latency, amplitudes and conduction velocities of the right peroneal nerve;
  - Evidence of lumbar radiculopathy at the level of L3-L4 bilaterally.
- <u>EMG of neck</u>:
  - Cervical radiclopathy of the C5-6 bilaterally
  - Neck sprain, brachial neuritis or radiculitis NOS
- Lumbar strain, thoracic or lumbosacral neuritis or radiculitis

- Lumbago, pain in joint, involving pelvic region and thigh, pain in limb, disturbance of skin sensation.
- Concussion
- Cervical and lumbar derangement, lumbago
- Post traumatic headaches, cervical radiculopathy, cervical spine sprain/strain, lumbar spine sprain/strain, cervical disc herniation/displacement syndrome, lumbar disc herniation/displacement, myofascial pain syndrome
- Subligamentous posterior disc herniations at C3-4, C4-5 and C5-6, impinging on the anterior aspect of the spinal canal. C0-5 retrolisthesis, disc bulges at L4-5 and L5-S1, impinging on the anterior aspect of the spinal canal and neural foramina bilaterally.

Verified Bill of Particulars, annexed to moving papers as Exhibit "C", paragraph 4.

Upon the instant application, defendant now moves for summary judgment dismissing the complaint on the ground that the injuries claimed by the plaintiff fail to meet the "serious injury" threshold requirement of the No Fault Law. In support of the motion, defendant has submitted the affirmed medical report of John C. Killian, M.D., an orthopedist, dated November 10, 2004. Dr. Killian opines that plaintiff has no "spinal impairment or any disability from injuries from the 8/16/03 accident", and he found "no consistently positive objective findings in this examination to confirm any of this claimant's subjective complaints". Dr. Killian further found "significant exaggerations and inconsistencies to indicate symptom magnification for motivational purposes".

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy* , 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment

requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra).* The burden on the moving party for summary judgment is to demonstrate a *prime facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]).

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [C.A. 1982]). On the present motion, the burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (*Lowe v Bennett,* 122 AD2d 728, 511 NYS2d 603 [1st Dept. 1986], *affirmed,* 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's 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 to produce prima facie evidence in admissible form to support the claim of serious injury. *(Licari, supra; Lopez v Senatore*, 65 NY2d 1017, 494 NYS2d 101 [1985]).

Discussion

After a careful reading of the submissions herein, it is the Court's judgment that defendant's evidence is sufficient to establish a *prima facie* case that plaintiff's injuries are "not serious" within the meaning of Insurance Law §5102(d), and, therefore, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" in order to survive the motion (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176 [C.A. 1992]).

In opposition to the motion, plaintiff submits, *inter alia*, a copy of his deposition transcript and an affirmation from his orthopedist, Dr. Parker. At his deposition, plaintiff testified that he had a previous automobile accident in 1999 wherein he injured his neck and lower back (Barkolas transcript, p. 39), and a second previous automobile accident in 1994 wherein he injured his neck and/or back (Barkolas transcript, p. 40-42). Dr. Parker mentions the "neck injury in 1999" in passing, but does not mention the 1994 injury. Dr. Parker's concludes: "If the history given is accurate then there is a causal relationship with his orthopedic problems and the accident that occurred on August 16, 2003." This conclusion is patently insufficient and speculative because Dr. Parker never mentioned the 1994 injury and completely failed to address the pre-existing 1999 back and neck injury (*Franchini v Palmieri*, 307 AD2d 1056, 763 NYS2d 381 [3rd Dept. 2002], *affd* 1 NY3d 536, 755 NYS2d 232, 807 NE2d 282 [C.A. 2003]; see also *Check v Gacevk*, 14 AD3d 586, 789 NYS2d 218 [2nd Dept. 2005]; *Houston v Gajdos*, 11 AD3d 514, 782 NYS2d 839 [2nd Dept. 2004]; *Ponce v Magliulo*, 10 AD3d 644, 781 NYS2d 703 [2nd Dept. 2004]).

Dr. Parker's affirmation is further flawed because it contains no evidence of duration. Dr. Parker does not state when his treatment of plaintiff began, nor does he give a medical opinion as to how long treatment will be needed. He fails to state what objective tests he

performed to measure plaintiff's alleged limitation of motion (*Kivlan v Acevedo,* 17 AD3d 321, 792 NYS2d 573 [2nd Dept. 2005]; *Maldonado v Ying Li*, 13 AD3d 344, 786 NYS2d 553 [2nd Dept. 2004]), and by failing to compare the alleged limitations to the normal range of motion, plaintiff leaves the Court to speculate as to the meaning of Dr. Parker's figures (*see, Manceri v Bowe*, __AD3d__,798 NYS2d 441 [2d Dept. 2005). Dr. Parker further fails to indicate what test, if any, he used to detect a spasm of the cervical spine and of the lumbar spine (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 357, 746 NYS2d 865, 774 NE2d 1197 [C.A. 2002]).

The Court notes that no admissible evidence of disc herniations or bulges is contained in the record as no sworn copies of MRI reports have been submitted (see *Toure, supra,* at 358) and there is no evidence that Dr. Parker personally viewed the actual MRI films (*Shay v Jerkins*, 263 AD2d 475, 692 NYS2d 730 [2nd Dept. 1999]). It is well established that a physician may not rely upon unsworn reports from outside sources (*Kivlan, supra*; *see also Finnegan v Gabriel*, 7 AD3d 663, 777 NYS2d 206 [2nd Dept. 2004]).

Finally, no competent medical evidence is submitted to demonstrate that plaintiff was unable to perform substantially all of his daily activities for not less than 90 of the 180 days immediately following the accident because of a medically determined injury or impairment of a non-permanent nature (*Mohamed v Siffrain,* __AD3d __, 7997 NYS2d 532 [2nd Dept. 2005]; *Liao v Festa*, 18 AD3d 448, 794 NYS2d 905 [2nd Dept. 2005]; *Kivlan*, *supra*; *Kearse v New York City Transit Authority*, 16 AD3d 45, 789 NYS2d 281 [2nd Dept. 2005]). In the absence of such competent medical evidence, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Rodney v Solntseu*, 302 AD2d 442, 754 NYS2d 911 [2ndDept. 2003]).

Based on the foregoing, the Court is compelled to conclude that plaintiff has not met his burden of raising a triable issue of fact as to whether he sustained the requisite "serious injury." Accordingly, defendant's motion for summary judgment dismissing the complaint must be granted.

As to Liability

Given the above finding dismissing the complaint on the ground that plaintiff has not sustained a "serious injury", the Court need not reach the issue of liability. However, it appears that the conflicting evidence in the record as to who caused the accident raises triable issues of fact. (*See, Collett v TWC Ambulette*, 261 AD2d 499, 687 NYS2d 910 [2d Dept. 1999]; *Stoehr v Levere*, 183 AD2d 886, 584 NYS2d 144 [2nd Dept. 1992]). Therefore, summary judgment on the ground that plaintiff was solely responsible for the collision would be unavailable.

Conclusion

Based on the foregoing, it is hereby

ORDERED, that defendant's motion for an order dismissing the complaint on the ground that plaintiff do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the Insurance Law of the State of New York and, therefore, has no cause of action under Section 5104(a) of the Insurance Law is **granted.**

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 9, 2005

WILLIAM R. LaMARCA, J.S.C.

TO: Riconda & Garnett, LLP
Attorneys for Plaintiff
753 West Merrick Road
Valley Stream, NY 11580

Martyn, Toher, Esposito, Martyn, Adler and Borsetti, Esqs.
Attorneys for Defendant
330 Old Country Road, Suite 211
Mineola, NY 11501

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