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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

ERIC THEODOROPOULOS,

Plaintiff,

-against-

KASEMA A. KHAN and NAJIA BENDOUMALI,

Defendants.

Motion Sequence # 001, #002
Submitted May 31, 2005

INDEX NO: 6154/04

The following papers were read on this motion:

Notice of Motion.....1
Notice of Cross-Motion.....2
Reply Affirmation.....3
Affirmation in Opposition to Cross-Motion.....4

Requested Relief

Defendants, KASEMA A. KHAN and NAJIA BENDOUMALI, move for an order, pursuant to CPLR §5012(d) and §3212, granting them summary judgment dismissing the complaint on the ground that plaintiff, ERIC THEODOROPLOULOS, did not suffer a "serious injury" as required by Insurance Law §5104(a) and defined by Insurance Law §5102(d). Plaintiff opposes the motion and cross-moves for an order, pursuant to CPLR §3212, for an order granting him summary judgment on the issue of liability. The motion and cross-motion are determined as follows:

Background

This action arises out of a motor vehicle accident that occurred on April 9, 2003 at approximately 6:47 P.M. on South Marion Place at the intersection with Lincoln Avenue, Rockville Centre, County of Nassau, State of New York. It is alleged that plaintiff was driving his 1989 Ford southbound on South Marion Place and attempted to make a left hand turn into the eastbound lane of traffic on Lincoln Avenue when a1992 Toyota, owned by defendant KHAN and operated by BENDOUMALI, came into contact with plaintiff's car. Plaintiff and an independent witness at the scene of the accident testified at depositions that plaintiff entered into the intersection when the traffic light was green and that the defendant driver, who was traveling westbound on Lincoln Avenue, failed to stop for a red light and struck plaintiff's car on the left side. It is alleged that defendant driver testified at her deposition that there was a green light as she approached the intersection, however the transcript of said testimony is not provided to the Court.

Plaintiff testified that, despite being restrained by a seat belt, the impact of the collision caused the left side of his body to come in contact with the left side door of the car and his head to come in contact with the left side door frame. Plaintiff reports that he lost consciousness for "a second or two" and was assisted out of his car by the police and taken by ambulance to South Nassau Community Hospital in Oceanside, New York. In the Emergency Room, he was treated for head trauma, a scalp laceration and a cut knee and then released after an x-ray failed to reveal any fracture or dislocation of the knee. Thereafter, because of neck and shoulder pain, plaintiff came under the care of Robert Lanter, D.O, P.C., a Doctor of Osteopathy affiliated with Kind Medical Care, who is board certified in physical medicine and rehabilitation, sports medicine, acupuncture, physical

therapy and massage therapy. Plaintiff testified at his deposition that he received physical therapy and chiropractic care at Dr. Lanter's offices, at first three (3) times and then two (2) times per week, for a period of approximately six (6) months. He stated that, because of neck pain, he was also referred by Dr. Lanter, in May 2003, to All County Open MRI and Diagnostic Radiology, PC., for an MRI of his cervical spine. Plaintiff testified that he was told that the results of the MRI's revealed that he had two (2) herniated discs in his cervical spine that were "serious". An affirmed report of Ricahrd J. Rizzuti, M.D., a radiologist who interpreted the MRI films, is annexed to plaintiff's opposition papers. Additionally, in August 2004, plaintiff testified that he consulted David Benatar, M.D., a Diplomate in Orthopedic Surgery and Spine Surgery, because of continuing neck pain, who noted that plaintiff was symptomatic sixteen (16) months after the car accident and stated that he was a candidate for epidural steroid injections in the cervical spine, particularly at C 6-7, and, if that failed, a candidate for an anterior cervical discectomy and fusion. Dr. Benatar concluded that it was unlikely that plaintiff's symptoms would resolve and that permanency was expected as his progress to pre-injury status was poor. It is plaintiff's position that, since the accident, he has had neck pain and muscle spasms every day, that he has restricted physical activities and can no longer ride his bike, play baseball and basketball and enjoy amusement park rides, and that even carrying groceries up the stairs is a problem. Furthermore, he claims that neck pain has disrupted his ability to sit and sleep comfortably and that he must frequently interrupt his work to stand up to stretch and walk around.

On or about May 6, 2004, plaintiff commenced the instant action for personal injuries against defendants by filing and later serving the Summons and Complaint. On June 1, 2004, defendants 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 was incapacitated from his employment as a computer programmer for about one (1) week and sustained the following injuries which are permanent and caused by the underlying accident:

- Posterior disc herniations at C5-6 and C6-7 impinging on the anterior aspect of the spinal canal at C5-6 and on the anterior aspect of the spinal canal and left intervertebral foramen at C6-7, confirmed by MRI;
- Cervical sprain;
- Right shoulder sprain;
- Cervical radiculopathy;
- Clinical evidence of right medial neuropathy at the level of the wrist;
- Quantified limitation and restriction of range of motion of the cervical spine;
- Positive Spurling's test;
- Positive apprehension sign with external rotation as well as gie way weakness of the right shoulder girdle muscles;
- Cervical right paravertebral spasm;
- Right parascapular trigger points/myofascial pain;
- Right upper extremity weakness involving right biceps and wrist extensors;
- Weakness of elbow flexion;
- Axial compression and extension of cervical spine caused pain to right lateral arm and forearm;
- Neck pain radiating into right shoulder;
- Tinsel sign positive over median nerve at level of right wrist;

- Contusion, swelling, left side of head;
- Contusion, left knee;
- Fatigue, depression and anxiety due to disability and general body malaise;
- Shock, fright and upset to the body and nervous system with severe mental anguish and emotional upset;
- Pain, swelling, tenderness, limitation of motion, impairment of function involving the skin, bone, muscle, cartilage, ligaments, tendons, joints, blood vessels, nervous system, lymphatic system and other tissues of the affected and surrounding areas.

Bill of Particulars, Exhibit "C" to the moving papers, paragraph 9.

A Supplemental Bill of Particulars dated August 23, 2004, alleges that plaintiff sustained additional injuries, as follows:

- Candidate for epidural steroid injections at cervical spine, particularly at C6-7;
- Candidate for anterior discectomy and fusion;
- Decrease in the left C-6 dermatomal sensation when compared to the right of a qualitative nature;
- Increased pain upon axial compression;
- Chronic cervical myofascitis;
- Trapezi myofascitis.

Bill of Particulars, Exhibit "D" to the moving papers, paragraph 9.

As to a Serious Injury

Plaintiff seeks to recover damages for the injuries suffered in the accident. The defendants seek dismissal of his claims on the ground that he did not suffer a "serious

injury", as required by Insurance Law §5102(a) and defined by Insurance Law §5102(d).

In support of the application to dismiss, defendants have submitted the affirmed report of Edward M. Weiland, M. D., a Diplomate of the American Board of Psychiatry and Neurology, who conducted a neurological examination of the plaintiff on February 17, 2005. Dr. Weiland's report, dated February 17, 2005, reflects that plaintiff's current complaints consisted of episodic left-sided neck pain without any radicular component, with symptoms provoked with flexion and extension movements of the neck. After a neurologic examination, consisting of, *inter alia*, a Funduscopic examination, corneal reflex test, a Weber test, a head tilt maneuver test, a full range of motion test of the cervical spine with degrees of rotation, extension and flexion provided in comparison to normal degrees, a Straight Leg raising test, a Foraminal Compression Test, Kemp's maneuver test, Lhermitte"s test, Fabere-Patrick test and Adson's Maneuver, Dr. Weiland concludes that no neurological disability exists with regards to any injury occurring on April 9, 2003. He finds no evidence of any lateralizing neurological deficits at the present time and sees no reason why the plaintiff should not be able to perform activities of daily living and maintenance gainful employment, without restrictions, from a neurological perspective in that all injuries claimed to have occurred from the accident have been resolved.

Defendants have also submitted an affirmed report of Isaac Cohen, M.D., a Diplomate of the Board of Orthopedic Surgeons, who examined plaintiff on February 16, 2005. Dr. Cohen's report, dated February 16, 2005, reflects that, after reviewing plaintiff's medical records and examining plaintiff's cervical spine, plaintiff's subjective complaints of tenderness on the right side of the cervical spine cannot be objectively corroborated. Dr. Cohen states that plaintiff's range of motion of the cervical spine area is unremarkably

normal with maintenance of the normal cervical curvature and no evidence of objective disability. He concludes that there is no evidence of objective disability or permanency present although there is a direct causal relationship between the accident and plaintiff's initial complaints.

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 *prima 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]). In the present action, 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 700, 512 NYS2d 364, 504 NE2d 691 [C.A.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 v Elliot, supra; Lopez v Senatore* , 65 NY2d 1017, 494 NYS2d 101, 484 NE2d 130 [C.A.1985]).

Discussion

After a careful reading of counsels' submissions, the Court finds that defendants' physicians' reports that plaintiff did not sustain a serious injury are insufficient to establish, as a matter of law, that plaintiff did not sustain a "serious injury". The doctors, who examined the plaintiff on but one occasion, opine in conclusory fashion that plaintiff has no disability at this time that is causally related to the accident but neither have reviewed the MRI- films of the plaintiff's cervical spine that indicated objective evidence of posterior disc herniations at C5-6 and C6-7 which impinge on the anterior aspect of the spinal canal at C5-6 and of the anterior aspect of the spinal cord at C5-6 and on the anterior aspect of the spinal cord and left intervertebral foramen at C6-7. Furthermore, Dr. Cohen fails to set forth the objective tests that were performed to support his claim of normality. Additionally, he did not compare his findings of the plaintiff's ranges of motion to the normal range of

motion of the affected body part. *Meiheng Qu v Soshna*, 12 AD3d 578, 785 NYS2d 112 (2nd Dept. 2004); *Aronov v Leybovich*, 3 AD3d 511, 770 NYS2d 741 (2 nd Dept. 2004). Where the affirmation and/or report does not set forth the objective tests utilized, it is of no probative value. *Cf., Mosheyev v Pilevsky,* 3 AD3d 523, 771 NYS2d 150 (2nd Dept. 2004); *Gamberg v Romeo*, 289 AD2d 525, 736 NYS2d 64 (2nd Dept. 2001). Defendants have failed to demonstrate that the injuries experienced by plaintiff are not "serious injuries" as a matter of law.

A defendant moving for summary judgment on the ground that the plaintiff did not sustain "serious injury" must make a *prima facie* showing of entitlement to judgment. *Winegrad v New York University Medical Center,* 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Matthews v Cupie Transportation Corp.,* 302 AD2d 566, 758 NYS2d 66 (2nd Dept. 2003); *Gamberg v Romeo, supra.* Failure to do so requires dismissal of the motion regardless of the sufficiency of the opposing papers. *Winegrad v New York University Medical Center, supra.* The Court finds that defendants have not established a *prima facie* case. Under these circumstances, the Court need not consider whether the plaintiff's papers are sufficient to raise a triable issue of fact. *Basmajian v Wang,* 12 AD3d 471, 785 NYS2d 468 (2nd Dept. 2004); *McCluskey v Aguilar,* 10 AD3d 388, 781 NYS2d 130 (2nd Dept. 2004).

As to Liability

Inasmuch as defendant's testimony contradicts plaintiff's, with respect to who disobeyed the traffic signal, a question of fact exists as to who caused the accident and summary judgment on the issue of liability is unwarranted. *Cf., LMV Food Corp. v Jefferson Pizza, Inc.* 269 AD2d 501, 704 NYS2d 500 (2nd Dept. 2000); *Vefeas, Inc. v Devon*

Management Company, 295 AD2d 602, 744 NYS2d 865 (2nd Dept. 2002). The credibility of witnesses is to be tested by the trier of fact at the time of trial. *Cf., Cathey v Gartner,* 15 AD3rd 435, 790 NYS2d 200 (2nd Dept. 2005).

Conclusion

Based upon the foregoing, it is hereby

ORDERED, that defendants' motion for an order pursuant to CPLR §3212 granting it summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" as defined by Insurance Law §5102(d) is denied; and it is further

ORDERED, that plaintiff's cross-motion for an order pursuant to CPLR §3212 granting it partial summary judgment on the issue of liability is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 7, 2005

WILLIAM R. LaMARCA, J.S.C.

ENTERED

SEP 15 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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