SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Scan

Present: HON. WILLIAM R. LaMARCA
Justice

ANTHONY GREENE,

Plaintiff,

-against-

WAYNE LEACOCK,

Defendant.

Motion Sequence # 001
Submitted January 8, 2007
XXX

INDEX NO: 6727/05

The following papers were read on this motion:

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

Requested Relief

Counsel for defendant, WAYNE LEACOCK, moves for summary judgment dismissing the complaint on the grounds that plaintiff, ANTHONY GREENE, failed to sustain a "serious injury" within the meaning of Insurance Law §5102(d). Plaintiff opposes the motion which is determined as follows:

Background

On July 15, 2004, plaintiff was a restrained passenger in a motor vehicle operated by Steven Napolitano, which was traveling in "stop and go" traffic on the Southern State

Parkway, at or near Exit 13 in Valley Stream, New York, when said vehicle was struck in the rear by a vehicle operated by defendant, WAYNE LEACOCK. The instant action was commenced on April 29, 2005, to recover for alleged severe personal injuries sustained by plaintiff as a result of defendant's alleged negligence. According to his bill of particulars, plaintiff's injuries include, *inter alia*, C3-C4 herniation, C5-C6 disc bulge, C6-7 disc bulge, L4-L5 disc bulge, cervical derangement, cervical sprain/strain, cervical radiculitis, restriction of motion of the cervicl spine, lumbar derangement, lumbar and lumbosacral sprain/strain, lumbar radiculitis and restriction of motion of lumbar and lumbosacral spine. The bill of particulars also states that plaintiff was "confined to his home for approximately 3 months immediately following the occurrence and intermittently thereafter to date".

Plaintiff testified at his deposition that, at the time of the accident, he did not request or receive medical treatment at the scene of the accident but, on the evening of July 15, 2004, he was driven to the Emergency Room of North Shore University Hospital complaining of pain in his low back and neck, where he was examined and released. Thereafter, plaintiff sought treatment at Island Medical in East Meadow, New York, where he was treated by Dr. Jeffrey Schwartz and other doctors and received physical therapy, chiropractic treatments, hot packs, electro stimulation, exercises, massages, stretching and other treatments. He testified that he stopped treatment because he was told that nothing more could be done for him, but that he still has pain everyday in his lower back and occasionally in his neck. Plaintiff claims that he can no longer touch his toes, play sports, mop, move furniture or wash dishes anymore and that his life is different as a result of this accident because of the pain he feels. He contends that, although he was involved in an accident twelve (12) years prior to the subject accident, he was pain free and had

recovered from the prior accident on July 15, 2004. Additionally, he asserts that, although he was involved in a subsequent accident on April 26, 2006 when he again injured his back and neck, at that time of the subsequent accident he was still experiencing pain from the July 15, 2004 accident and was told by Dr. Schwartz that his injuries were "permanent".

In support of the motion for summary judgment dismissing the complaint, defendant relies upon plaintiff's deposition testimony on April 6, 2006, that reveals that plaintiff has been unemployed since the year 2000, well before the accident, when he "resigned" from a pharmaceutical factory job at EZM in Westbury, New York. He testified that the last time he worked was from 1996 through 2000 at EZM and that he is unmarried, has no job, no driver's license, and lives with his girlfriend, in an apartment leased solely in his girlfriend's name. Further, defendant submits a properly affirmed report of orthopedist, John Killian, M.D., dated July 24, 2006, wherein he concludes, after physical examination and review of plaintiff's medical records, that plaintiff "has fully recovered from any problems with his neck or back for which he was treated after the 7/15/04 accident. He has no residual neck or back impairment from injuries from that accident and he has no disability from problems with his neck or his back from that accident. He is capable of working at his normal capacity and performing all of his usual activities of daily living without limitations due to problems caused by injuries from the 7/15/04 accident" and requires no followup or treatment for injuries. Dr. Killian's report notes that plaintiff indicated that he eventually got better from the treatment he received from the chiropractor and that his neck and back were doing "fairly well", but that he was injured in a recent accident on 4/26/06 and that he is still treating for neck and back pain from the more recent accident. Dr. Killian opines that it is clear that plaintiff's current complaints of low back pain are more attributable to the

recent accident.

This 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 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.]; *see also, Nixon v Muntaz,* 1 AD3d 329, 766 NYS2d 593 [2nd Dept. 2003], *citing Toure v Avis Rent A Car,* 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 [C.A.]).

In opposition to the motion, plaintiff relies on the affirmation of Jeffrey Schwartz, M.D., who states that he regularly treated "ROY ANTHONY DAWKINS" from July 2004 through July 2004, and who performed range of motion tests on "Mr. Dawkins" which revealed "significant reductions in range of motion, which are based on a comparison of full range of motion for this patient". Dr, Schwartz opines that "this patient" has a whole person impairment of 40% which represents a serious and permanent injury. Although Dr. Schwartz' affirmation later speaks of plaintiff, Mr. GREEN, and opines that there is a causal relationship between his injuries and the accident of July 15, 2004, the Court is unconvinced that this doctor's medical opinion is based upon objective medical tests of the plaintiff herein, but is rather a boiler plate form in which he forgot to change the plaintiff's name. Indeed, without even seeing Mr. GREEN following his subsequent accident of April 26, 2006, Dr. Schwartz opines that the accident of April 26, 2006 may have aggravated and or "exasperated" the permanent injuries diagnosed as a result of the accident on July 15, 2004.

The Law

The standards of summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of material fact, and the moving party is, therefore, entitled to judgment as a matter of law. (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C. A. 1986]). 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]). Thus, when faced with a summary judgment, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial. Issue finding and not issue determination are the key to summary judgment. (*Judice v D'Angelo*, 272 AD2d 583, 709 NYS2d 427 [2nd Dept. 2000]; *cf., Mitchell v Maguire*, 151 AD2d 355, 542 NYS2d 603 [1st Dept. 1989]; *Steven v Parker*, 99 AD2d 649, 472 NYS2d 225 [4th Dept. 1984]; *Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept, 1983]).

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 the submissions herein, it is the judgment of the Court that plaintiff has failed to submit competent medical evidence to show that plaintiff has sustained a "serious injury" as set forth in Section §5102 (d) of the Statute. Plaintiff has failed to demonstrate that he has suffered a permanent or total loss of use of a body member, function or system (see, *Gladys v Eyler*, supra; *Oberly v Bangs Ambulance, Inc.* 96 NY2d 295, 727 NYS2d 378, 751 NE2d 457 [C.A. 2001]), or that he has suffered a significant and important injury that is causally related to the subject accident. (*See, Palasek v Misita*, 289 AD2d 313, 734 NYS2d 587 [2nd Dept. 20021]); *Rhind v Naylor*, 187 AD2d 498, 589 NYS2d 605[2nd Dept. 1992]; *Palmer v Amaker*, 141 AD2d, 529 NYS2d 536 [2nd Dept. 1988]). A diagnosis of disc bulge or herniation does not, by itself, constitute a serious injury within the meaning of the insurance law. *Toure v Avis Rent A Car System, supra; Meely v 4G's Truck Renting Co., Inc.,* 16AD3d 26, 789 NYS2d 277 (2nd Dept. 2005).

Moreover, in order to qualify under the 90/180 day rule, a plaintiff must prove that he or she was curtailed from performing substantially all of his or her customary daily activities to a great extent for 90 out of 180 days following the accident. Plaintiff fails to set forth with specificity any support for his contention that he was prevented from engaging

in his daily activities for the requisite time period following the accident. Plaintiff's self-serving claims that his daily activities and routine have not been the same since the accident is insufficient to create a triable issue of fact in the absence of any competent medical evidence (*Rodney v Solntseu*, 302 AD2d 442, 754 NYS2d 911 [2nd Dept. 2003]; *Hand v Bonura*, 283 AD2d 608, 729 NYS2d 729 [2nd Dept. 2001]); cf., *Pierre v Nanton*, 279 AD2d 621, 719 NYS2d 706 (2nd Dept. 2001); *Zaccara v Goff*, 161 AD2d 638, 555 NYS2d 417 (2nd Dept. 1990). Indeed, the report upon which plaintiff relies is allegedly based upon exams made almost three (3) years before the instant motion and provide insufficient proof of duration and contains unsupported conclusory allegations with respect to the subsequent accident. (*See, Desamour v New York City Transit Authority*, 8 AD3d 326, 777 NYS2d 706 [2nd Dept. 2004]) .

Conclusion

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" within the meaning of Insurance Law §5102(d). It is therefore

ORDERED, that defendant's motion for summary judgment dismissing the complaint is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 30, 2007

WILLIAM R. LaMARCA, J.S.C.

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