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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

TYRONE MOORER,

TRIAL/IAS PART 11

Plaintiff(s),

INDEX NO. 16835/05

- against -

MOTION SEQUENCE
NO. 1

AMBOY BUS CO. INC. and MARC LACHAUD,

MOTION SUBMISSION
DATE: February 12, 2007

Defendant(s).

The following papers read on this motion:

| | |
|---------------------------|---|
| Notice of Motion | X |
| Affirmation in Opposition | X |
| Reply Affirmation | X |

Upon the foregoing papers, the motion by the defendants for an Order granting defendants' motion for summary judgment dismissing plaintiff's Tyrone Moorer complaint for failure to meet the threshold requirements for having sustained a serious injury pursuant to §5102(d) if the New York State Insurance Law, is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on March 19, 2005 at approximately 12:30 pm on 94th Street at or near its intersection with 57th Avenue, Queens County, New York.

Amongst other things, the plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"Plaintiff sustained the following injuries:

- DISC BULGE C4/C5
- CERVICAL SPINE DERANGEMENT
- LEFT SHOULDER DERANGEMENT WITH SUBACROMIAL IMPINGEMENT
- CERVICAL RADICULOPATHY
- LUMBOSACRAL RADICULOPATHY
- CERVICAL SPRAIN/STRAIN
- LUMBAR SPRAIN/STRAIN
- STRAIGHTENING OF THE CERVICAL LORDOSIS

RESTRICTION OF MOTION
DEPRESSION
HEADACHES
INSOMNIA
ANXIETY
FEAR
EMOTIONAL UPSET AND SHOCK"

The defendants in support of the defendants' application, amongst other things, submit the April 11, 2006 deposition transcript of the plaintiff; an affirmed letter report dated June 10, 2006 of Hormozan Aprin, MD, an orthopedist of an orthopedic examination of the plaintiff conducted on June 8, 2006 and an affirmed letter report dated July 28, 2006 of Dhruva G. Sulibhavi, MD a neurologist of a neurological examination of the plaintiff conducted on July 25, 2006.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law (see *Licaro v. Elliot*, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; *Palmer v. Amaker*, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; *Tipping-Cestari v. Kilhenny*, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991).

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) (see, *Zoldas v. Louise Cab Corp.*, 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; *Wright v. Melendez*, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988).

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

"(d) 'Serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant

limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

The report of examination of Dr. Silbhavi states:

"PHYSICAL EXAMINATION:

CERVICAL SPINE:

| | Claimant | Normal |
|-------------------------|---------------|--------|
| Forward Flexion | 40 | 50 |
| Extension | 40 | 45 |
| Lateral Flexion | Rt. 30 Lt. 30 | 40 |
| Rotation | Rt. 70 Lt. 70 | 70 |
| Lordosis | Normal | Normal |
| Distraction | - | - |
| Compression | - | - |
| Muscle Spasm | - | - |
| Tenderness | - | - |
| Radiating pain with ROM | - | - |

LEFT SHOULDER:

| | Claimant | Normal |
|---------------------------|----------|--------|
| Forward flexion | 160 | 180 |
| Back extension | 50 | 60 |
| Abduction | 160 | 180 |
| Adduction | 45 | 75 |
| Internal rotation | 90 | 90 |
| External rotation | 45 | 60 |
| Thoraco-scapular movement | Normal | Normal |
| Tenderness | - | - |
| Heat | - | - |
| Swelling | - | - |
| Erythema | - | - |
| Effusion | - | - |
| Codman's test | - | - |
| Angular Deformity | - | - |
| Apprehension test | - | - |
| Pain by ROM | - | - |

LUMBOSACRAL SPINE:

| | Claimant | Normal |
|-------------------------|---------------|--------|
| Forward Flexion | 60 | 75-90 |
| Extension | 20 | 30 |
| Lateral Flexion | Rt. 20 Lt. 20 | 30 |
| Rotation | Rt. 30 Lt. 30 | 30 |
| SLR Supine | Rt. 45 Lt. 45 | 90 |
| SLR Sitting | Rt. 90 Lt. 90 | 90 |
| Lumbar Lordosis: | Decreased | Normal |
| Lasseque Test | - | - |
| Tenderness | - | - |
| Muscle Spasm | - | - |
| Pain by ROM | - | - |
| Passive Pelvic Rotation | - | - |

NEURO-VASCULAR EXAM:

| | Claimant | Normal |
|-------------------------|----------|----------|
| Biceps Reflex | 1+ | 1+ to 2+ |
| Triceps Reflex | 1+ | 1+ to 2+ |
| Brachio-radialis Reflex | 1+ | 1+ to 2+ |
| Patellar Reflex | 2+ | 1+ to 2+ |
| Achilles Reflex | 1+ | 1+ to 2+ |
| Muscle Power | 5/5 | 5/5 |
| Muscle Atrophy | None | None |
| Babinski | Negative | Negative |
| Sensation | Normal | Normal |
| Peripheral pulse | Normal | Normal |
| Capillary filling | Normal | Normal |

Claimant states that he gets pain in low back by straight leg raising at 45 degrees

IMPRESSION:

Sprain and Strain of the left shoulder, resolved.
Sprain of cervical spine, resolved.
Sprain of lumbosacral spine, Myofascial back pain.

PERMANENCY:

Based on the presented documents and my observation and examination, the claimant's left shoulder condition and symptoms are resolved and has good prognosis.

Based on the presented documents and my observation and examination, there are no objective findings off disability related to the claimant's cervical

spine. The claimant's mild findings of the lumbosacral spine may realize further improvement with time."

The report of examination of Dr. Sulibhavi states:

"PHYSICAL EXAMINATION:

General observation: A copy of his driver's license was obtained. He is a thirty-one-year-old right-handed male, 5'7" tall, weighing 185 pounds, with black hair and dark brown eyes. His blood pressure was 120/90. Pulse was 60 and regular. He is heavy but appeared well nourished and healthy. He was cooperative and pleasant.

On examination he was alert and oriented to time, place and person. Recall is good for recent and remote events. Speech and language functions were normal. Pupils were 2-3 mm, equal and reactive to light and accommodation and on ophthalmoscope examination, fundus was normal. Eye movements were full in all directions. There was no facial weakness. The tongue was midline. The rest of the cranial nerves were normal.

There was no wasting or weakness of the muscles noted. There were no involuntary movements. Coordination was normal. Sensation is intact for all modalities including pain, touch, position and vibration. Deep tendon reflexes are 2+ and symmetrical. Plantars are downgoing. Gait was normal.

He has slight difficulty bending down and touching his toes. On lifting his legs beyond 75 degrees he complained of back pain but there was no radiation of pain down the leg. There was no deformity of the spine but there was a complaint of tenderness in the lumbar spine at the midline and in the paraspinal area.

There is slight limitation of left shoulder movement particularly at the extreme of abduction and on extension.

IMPRESSION:

The claimant's symptoms are considered musculoskeletal involving the left shoulder and the lower back areas. I did not find any objective neurological deficits.

There is no objective causally related neurologic disability noted. I do not find any necessity for further neurological treatment or investigations."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853; *Pagano v. Kingsbury*, supra at 694) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact (see *Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; *Jean-Meku v. Berbec*, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; *Horan v. Mirando*, 221

AD2d 506, 633 NYS2d 402, Second Dept., 1995).

In opposition to the requested relief the plaintiff, amongst other things, submits an affidavit from the plaintiff; an affirmation from Mark Shapiro, MD, a radiologist regarding a June 17, 2005 MRI of the plaintiff's left shoulder and a June 24, 2005 MRI of the plaintiff's cervical spine; two affirmed letter reports, one dated August 30, 2005 and one dated January 30, 2007 of Complete Medical Care Services of NY, PC by Aric Hausknecht, MD, a treating physician of the plaintiff and an affirmation of John McGee, DO, a treating physician of the plaintiff.

The Court initially observes that the affirmation of Dr. Shapiro does not causally relate the respective conditions seen on the respective MRIs to the accident in issue (see, *Ukonu v Velazquez*, 213 AD2d 628, 624 NYS2d 195 (Second Dept., 1995)).

The affirmed reports of Dr. McGee for the period May 23, 2005 to October 5, 2005 in substance set forth a diagnosis of sprains and strains which are insufficient to create a serious injury pursuant to §5102 of the Insurance Law.

Dr. Hausknecht's reports sets forth that said physician examined the plaintiff initially examined the plaintiff on August 30, 2005 and thereafter on January 30, 2007. In this regard, said physician has not offered an explanation for the gap in treatment (see, *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380; *Nemchyonote v Peng Lui Ying*, 2 AD3d 421, 767 NYS2d 811; *Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233). Although the plaintiff contends that there was a termination of insurance benefits, such a rationale is insufficient to justify a gap in treatment (see, *Villalta v Schechter*, 273 AD2d 299, 710 NYS2d 87 (Second Dept., 2000)).

A review of the plaintiff's affidavit sets forth subjective complaints of pain which are insufficient to establish a serious injury (see, *Scheer v Koubek*, 70 NY2d 678, 518, NYS2d 788, 512 NE2d 309).

Based upon all of the foregoing, the defendants' application for an Order granting defendants' motion for summary judgment dismissing plaintiff's Tyrone Moorer complaint for failure to meet the threshold requirements for having sustained a serious injury pursuant to §5102(d) if the New York State Insurance Law, is granted.

SO ORDERED.

DATED: 4/19/2007

Roy S. Walker
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J.S.C.

ENTERED

APR 20 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**