

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

ANDREW FUCHS,

Plaintiff(s),

- against -

JONATHAN P. KATZ,

Defendant(s).

TRIAL/IAS PART 8

INDEX NO. 17255/07

MOTION SEQUENCE
NO. 1

MOTION SUBMISSION
DATE: June 15, 2009

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 defendant for an Order granting the defendant summary judgment pursuant to CPLR 3212 dismissing the complaint on the basis that the plaintiff, Andrew Fuchs, did not sustain a "serious injury" under Section 5102(d) of the Insurance Law, is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on February 16, 2006 at approximately 12:45 pm on I-87 New York Thruway in Plattskill, Ulster County, New York.

The plaintiff in the plaintiff's Verified Bill of Particulars sets forth:

"6. As a result of the defendant's culpable conduct, the plaintiff sustained the following personal injuries:

Sinus tarsi motor vehicle accident with multiple contusions and sprains;

Post traumatic bilateral carpal tunnel syndrome confirmed by electro diagnostic testing;

The above injuries with accompanying pain exquisite tenderness, limitation of range of motion with parathesias in the medial nerve distribution progressive numbness in both hands; weakness, loss of grip strength and

resulting in dropping of objects, difficulty writing;

The above injuries necessitating the use of bilateral wrist splints and use of a contour wrist orthosis;

Internal derangement of the cervical spine and/or pejoration thereof; cervical radiculopathy; acute sprain/strain of the cervical spine; disc bulge of C-3, C-4 approximating the ventral space with contour abnormalities of the thecal sac due to encroachment by the annulus fibrosis; internal derangement of the cervical spine and/or pejoration thereof; cervical radiculopathy; acute sprain/strain of the cervical spine; disc bulge of C-4, C-5 approximating the ventral space with contour abnormalities of the thecal sac due to encroachment by the annulus fibrosis;

Post traumatic headaches;

Cervicalgia; acute sprain/strain of the cervical spine; cervical spasms;

The above injuries with accompanying pain; exquisite tenderness; limited range of motion with worsening neck pain; acute headaches, pain in the upper trapezius musculature' weakness; impairment of motor strength; interference with sleep; positive Spurling's maneuver; limitation of motion at the extremes on flexion and lateral bending as well as rotation; tightness in the para cervical musculature greater on the right; radiating pain to the trapezius musculature on the right; positive Phalen's testing; extension and rotation of the cervical spine causing parathesias radiating to the hand; right and left para vertebral musculature tenderness; flexion extension rotation and tilting limited to less than 10° to 15°; tenderness; tenderness in the para vertebral distribution; spasms radiating into the trapezius musculature; radicular pain into the shoulder' parathesias in the right upper extremity; strengthening of the normal cervical lordotic curvature; positive upper foramina compression-distribution testing; eliciting pain;

The above injuries in sustaining the use of analgesic medications and anti-inflammatory medications as well as use of a cervical collar extensive physical therapy and a home physical therapy program;

Internal derangement of the right shoulder;

Right shoulder sprain;

The above injuries with accompanying pain; exquisite tenderness; limitation of range of motion; weakness; inability to elevate his arm with motion less than 20° in any plain; pain on motion of the joints; sloping of the acromion on x-ray examination; pain while resting' pain increasing with movements; experience with activities and daily living; multiple trigger points;

Left rib contusion;

The above injuries with accompanying pain on movement and breathing;

diffuse tenderness in the upper chest;

Internal derangement of the lumbosacral spine; acute sprain/strain of the lumbosacral spine;

The above injuries with accompanying pain; exquisite tenderness; limitation of range of motion with stiffness; tenderness and spasm throughout the mid-line;

Internal derangement of the bilateral knees and/or pejoration thereof;

Bilateral codromaltia patella;

Right knee contusion;

Left knee contusion;

Patella tilting;

The above injuries with accompanying pain, exquisite tenderness; limitation of range of motion with altered gait; interference with activities of daily living including walking distances;

Traumatic anxiety reaction;

Loss of sleep;

Loss of enjoyment of life;

By reason of the permanency of the injuries, plaintiff reserves the right to prove further and additional damages and all of the accompanying sequelae as are associated with the injuries;

As a result of the aforestated injuries, there will be a permanent limitation of range of motion and a probability of arthritis and/or degenerative changes as well as circulatory disorders in the region of the injury;

All of the foregoing injuries resulted in damage, stretching, tearing and injury to surrounding muscles, tendons, ligaments, cartilages, nerves, nervous systems, tissues, blood supply and soft parts;

All of the foregoing above injuries were accompanied by and productive of severe pain, tenderness, weakness, stiffness, discomfort, swelling, soreness, limitation and restriction of motion and movement, rotation, bending, flexion and extension of the head, body and limbs, difficulty and discomfort while sitting and walking, rigidity, numbness, instability, deformity and disability with involvement of the ligaments, muscles, nerves, tendons, soft tissues and blood vessels which necessitated medication and physical therapy. All of the above injuries are believed to be permanent in nature."

In support of the defendant's application, the defendant, amongst other things, submits the plaintiff's June 4, 2008 deposition transcript; an affirmed letter report dated July 3, 2008 of Professional Evaluation Group PC by Harold Kozinn, MD; an orthopedist of an orthopedic examination of the plaintiff conducted on July 3, 2008 and an affirmed letter report dated July 3, 2008 of Professional Evaluation Group, PC by C.M. Sharma, MD, a neurologist of a neurological evaluation of the plaintiff conducted on July 3, 2008.

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."

In pertinent part, the report of Dr. Kozinn provides:

"PHYSICAL EXAMINATION:

There is no localized tenderness.

CERVICAL SPINE:

Range of Motion	Observed	Normal
Forward flexion	30 degrees	30 degrees
Extension	30 degrees	30 degrees
Right lateral bending	40 degrees	40 degrees
Left lateral bending	40 degrees	40 degrees
Left lateral turning	40 degrees	40 degrees
Right lateral turning	40 degrees	40 degrees

Biceps, triceps 5/5 bilaterally.

Biceps, triceps, brachioradialis reflexes present and equal bilaterally.

Sensation intact bilaterally. No evidence of any atrophy.

LUMBOSACRAL SPINE:

Shoulders and pelvis level. The claimant stands on heels and toes without difficulty.

Range of Motion	Observed	Normal
Forward flexion	80 degrees	80 degrees
Right lateral bending	20 degrees	20 degrees
Left lateral bending	20 degrees	20 degrees

Straight leg raising, Lasegue, Patrick's test negative bilaterally.

No weakness in foot or great toe dorsiflexors. No clonus. Babinski absent.

Sensation intact. Knee jerks and ankle jerks present and equal bilaterally.

KNEES - RANGE OF MOTION

	Observed	Normal
Right Knee	Zero - 130 degrees	Zero - 130 degrees
Left Knee	Zero - 130 degrees	Zero - 130 degrees

The right knee has not tenderness over medial or lateral joint line or over medial or lateral collateral ligament.

Rotation test is negative. No anterior or posterior instability. No medial or lateral laxity.

The left knee has no tenderness over medial or lateral joint line or over medial or lateral collateral ligament.

Rotation testis negative. No anterior or posterior instability. No medial or lateral laxity.

No evidence of swelling in either knee. No increased warmth in either knee.

CHEST:

No localized tenderness over the anterior aspect of the chest.

IMPRESSION:

By history, sprain of the neck.
Sprain of the lumbosacral spine.
Sprain of the knee.
Contusion of the chest.

There is no disability or permanency."

The report of Dr. Sharma sets forth:

"PRESENT COMPLAINTS:

The claimant states that the pains in the neck, shoulders, upper and lower back and both hands still bother him on a frequent basis. There has not been much improvement since onset. He takes Tylenol almost every day, particularly at night.

He has difficulty with all daily activities with holding things, writing, getting dressed. Certain activities such as playing baseball, carrying groceries are still not possible to do. On some days the pains become worse and he has to miss his class.

PAST MEDICAL HISTORY:

There is no prior history of injury. He receives treatment for high cholesterol and asthma.

OCCUPATIONAL STATUS:

The claimant is a student.

PHYSICAL EXAMINATION:

MENTAL STATUS:

The claimant has normal comprehension and speech. He was able to provide all the information. He was somewhat bothered by his pains and various activities were performed with hesitation and caution.

CRANIAL NERVES:

The pupils, optic fundi, visual fields and eye movements are normal. The face is symmetrical. The tongue and palate are normal. Other cranial nerves are normal.

MOTOR SYSTEM:

The muscle tone is normal in all limbs. There is no evidence of atrophy, abnormal posture, asymmetry or involuntary movements. The muscle strength is appropriate to age and build.

REFLEXES:

The deep tendon reflexes are symmetrical. No abnormal reflexes are seen.

SENSORY SYSTEM:

The sensations of touch, vibration and position are normal in all limbs.

GAIT AND COORDINATION:

The posture and gait are appropriate for age and body build. There is no foot drop or antalgic pattern. The grasp and coordination are normal. No involuntary or abnormal movements are seen. The claimant is independent in undressing. The claimant was unable to walk on heels because of lower back pain. Both hands have normal appearance.

The rapid alternating movements and finger nose testing are performed normally. The arms and legs were inspected. There is no muscle atrophy or deformity.

SKULL AND SPINE:

The contours of the skull and spine are normal. There is no evidence of craniotomy or spinal injury. The claimant can bend forward and touch his knees. In the supine posture the leg elevation is 10 degrees on both sides. Movements of neck are painful and limited in all directions. He was able to perform about 15-20 degrees of movement in various directions.

Movements of both shoulders are painful and limited in rotation. When asked to bring the hands to the mid spinal region, he was unable to go past the buttock regions.

DIAGNOSIS:

Subjective cervical and lumbar pains.
Normal neurological examination.

COMMENT:

There are no neurological problems.

There is no further need for neurological testing or treatment.

There are no neurological limitations to usual work and activities.

There will be no long term neurological problems of a causally related nature."

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. Eyer, 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 submits affirmations, affidavits and various reports from multiple health care professionals who respectively treated the plaintiff. In particular the affirmation of Vincent J. Leone, MD who has treated the plaintiff since February 7, 2007 and which relates the conditions found during the course of treatment and at the office visit of January 24, 2009 to the accident in issue, create an issue of fact as to whether the plaintiff has suffered a serious injury pursuant to §5102 of the Insurance Law. As such, the defendant's application for an Order granting the defendant summary judgment pursuant to CPLR 3212 dismissing the complaint on the basis that the plaintiff, Andrew Fuchs, did not sustain a "serious injury" under Section 5102(d) of the Insurance Law, is denied.

SO ORDERED.

DATED: *8/4/2009*

Rays Mahon
..... J.S.C.

ENTERED

AUG 06 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**