

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

IAS PART 18

X

SALOMAN A. MURILLO,

Plaintiff,

Index No.: 014204/09

Motion Sequence...01

-against-

Motion Date...11/09/10

**XXX**

RANDY McLAUGHLIN and DAVID KAHOUD,

Defendants

X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the Defendants’ motion seeking an order granting summary judgment pursuant to CPLR § 3212 and dismissal of the complaint of the Plaintiff, on the grounds that the Plaintiff’s injuries do not satisfy the “serious injury” threshold requirement of Insurance Law § 5102 (d), is determined as hereinafter provided.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff in a motor vehicle accident on November 28, 2006. The accident occurred on Nassau Road, at or near its intersection with Harding Street in Uniondale, New York.

In his bill of particulars, the Plaintiff alleges that he sustained the following

**injuries:**

**Lumbar Paravertebral Facet Nerve Block Injections administered on 5/9/07 by David R. Dynof, M.D., to the following regions: L3/4, L4/5, L5/S1;**

**Subligamentous Posterior Herniation and Anterior Bulge of the C4/5 Intervertebral Disc effacing the Thecal Sac;**

**Right Lumbar Trigger Points;**

**Anterior and Posterior Bulge of the C5/6 Intervertebral Disc effacing the Thecal Sac;**

**Posterior Bulge of the L4/5 Intervertebral Disc impinging upon the Thecal Sac;**

**Posterior Bulge of the LS/S1 Intervertebral Disc impinging upon the Spinal Canal;**

**Posterior Bulge of the C3/4 Intervertebral Disc impinging upon the Thecal Sac causing Stenosis of the Spinal Canal;**

**Decreased Range of Motion in the Cervical Spine, Thoracic and Lumbar Spine;**

**Cervical Spine Derangement;**

**Lumbar Spine Derangement;**

**Right Lumbar Radiculitis;**

**Cervical Myalgia;**

**Lumbar Myalgia;**

**Cervical Sprain/Strain;**

**Lumbar Sprain/Strain;**

Cervical Disc Syndrome;

Reversal of the Cervical Lordosis.

At his Examination Before Trial, the Plaintiff admitted that at the time of his accident, his license was revoked due to a prior conviction for driving while intoxicated. After the accident, the Plaintiff felt neck and back pain. No ambulance came to the scene. The Plaintiff was arrested for driving with a revoked license. Subsequently, the Plaintiff posted bail and was released the next day. The Plaintiff had no medical treatment during the first two months after the accident. When he finally sought treatment, the Plaintiff went to a chiropractor in Hempstead and underwent treatment for six months.

In support of their motion, the Defendants submit, *inter alia*, an affirmed medical report of Jacquelin Emmanuel, M.D., dated March 4, 2010 and two affirmed medical reports of Melissa SapanCohn, M.D., dated March 13, 2010.

As a proponent of the summary judgment motion, the Defendant had the initial burden of establishing that the Plaintiff did not sustain a causally-related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories. (*See Toure v. Avis Rent a Car Sys.*, 98 N.Y.2d 345, 352 [2002]). The Defendants' medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. (*Browdame v Candura*, 25 A.D.3d 747, 78 [2<sup>nd</sup> Dept. 2006]).

The Defendants have made a *prima facie* showing of entitlement to judgment as a matter of law by submitting the affirmed medical reports of Dr. Emmanuel and Dr. SapanCohn.

On March 4, 2010, Dr. Emmanuel performed an independent orthopedic examination of plaintiff which revealed as follows:

**Cervical Spine:** There is no tenderness to palpation of the cervical paraspinal musculature. No muscle spasm is noted. Range of motion of the cervical spine reveals flexion 50 degrees (50 degrees being normal), extension 60 degrees (60 degrees being normal), right rotation 80 degrees (80 degrees being normal), and left rotation 45 degrees (45 degrees being normal), and left lateral flexion 45 degrees (45 degrees being normal).

On neurological examination, there are no motor or sensory deficits in the upper extremities. Deep tendon reflexes of the biceps and triceps are present and equal bilaterally. Muscle strength in each range is 5/5. No atrophy of the intrinsic muscles. Cervical compression is negative with no radiation of pain to the back on axial bending.

**Thoracic Spine:** There is no tenderness to palpation over the trapezius and over the spinous process from T1 through T12. There is no paraspinal spasm. Sensation is intact. Lateral bending and rotation are complete and painless.

**Lumbar Spine:** There are no spasms. There is no tenderness noted over the paraspinal musculature on palpation. Range of motion of the lumbar spine reveals flexion 60 degrees (60 degrees being normal), extension 25 degrees (25 degrees being normal), and right and left lateral bending 25 degrees (25 degrees being normal).

Neurological examination reveals patellar and Achilles reflexes to be 2+. Muscle strength of the lower extremities is graded at 5/5 bilaterally. Sensory examination of the lower extremities

including the medial and lateral thighs, calves and feet are normal. There is no atrophy noted in the intrinsic muscles of the lower extremities. Straight leg raising is negative. The claimant is able to tiptoe and heel walk.

Based upon the foregoing, Dr. Emmanuel's diagnosis was "cervical, thoracic and lumbar sprains/strains, resolved" and no evidence of an orthopedic disability.

On March 11, 2010, Dr. SapanCohn reviewed the cervical spine MRI taken of Plaintiff. Dr. SapanCohn's study indicates as follows:

There is straightening of the normal cervical lordosis.  
The C2-3 disc space is normal  
At the C3-4 level, there is mild disc bulging.  
At the C4-5 and C5-6 levels, there are anterior and posterior osteophytes and circumferential disc bulging.  
The C6-7 and C7-T1 disc spaces are normal  
The marrow signal is normal. No intrinsic spinal cord abnormality is identified.

**IMPRESSION:**

Straightening of the normal cervical lordosis.  
Degenerative change at C3-4, C4-5 and C5-6.

On March 11, 2010, Dr. SapanCohn reviewed the lumbosacral spine MRI taken of the Plaintiff. In her report, Dr. SapanCohn stated, in pertinent part, that:

The normal lumbar lordosis is maintained.  
The L1-2, L2-3 and L3-4 disc spaces are within normal limits.  
At the L4-5 level, there is minimal disc bulging.  
At the L5-S1 level, there is minimal disc desiccation and disc bulging.  
The marrow signal is normal. The conus is within normal limits.

**IMPRESSION:**

Mild disc bulging at L4-5 and L5-S1.

**DISCUSSION:**

This patient has mild degenerative change at the L4-5 and L5-S1 levels consistent with disc bulging. Disc bulging is unrelated to trauma. Disc bulging occurs as the outer fibers of the disc, also known as the annulus fibrosis loses its normal elasticity. This allows the central, more gelatinous portion of the disc to bulge circumferentially. This is within the spectrum of degenerative disc disease and is not related to trauma.

At the L5-S1 level, there is mild disc desiccation. Disc desiccation indicates that the disc has dried out and lost its normal water content. This is the commencement of degenerative disc disease.

The burden now shifts to the Plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious. *Flores v. Leslie*, 27 A.D.3d 220, 221 [1<sup>st</sup> Dept. 2006].

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law § 5102 (d). *See Toure v. Avis Rent A Car Sys., Inc.*, *supra*; *Scheer v. Kioubek*, 70 N.Y.2d 678, 679 [1987]; *Munoz v. Hollingsworth*, 18 A.D.3d 278, 279 [1<sup>st</sup> Dept. 2005].

The plaintiff must come forth with objective evidence of extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v. B&P Chimney Cleaning*, 71 A.D.3d 978 [2<sup>nd</sup> Dept. 2010]; *Cornelius v. Cintas Corp.*, 50 A.D.3d 1085 [2<sup>nd</sup> Dept. 2008];

*Moore v. Edison*, 25 A.D.3d 672 [2<sup>nd</sup> Dept. 2008]; *Sharma v. Diaz*, 48 A.D.3d 442 [2<sup>nd</sup> Dept. 2007]; *Amato v. Fast Repair, Inc.*, 42 A.D.3d 477 [2<sup>nd</sup> Dept. 2007]) and upon medical proof contemporaneous with the subject accident. (*Perl v. Meher*, 74 A.D.3d 930 [2<sup>nd</sup> Dept. 2010]; *Ferraro v. Ridge Car Service*, 49 A.D.3d 498 [2<sup>nd</sup> Dept. 2008]; *Manning v. Tejada*, 38 A.D.3d 622 [2<sup>nd</sup> Dept. 2007]; *Zinger v. Zylberberg*, 35 A.D.3d 851 [2<sup>nd</sup> Dept. 2006].

Even where there is medical proof, when contributory factors interrupt the chain of causation between the accident and the claimed injury, summary dismissal of the complaint may be appropriate. *Pommells v. Perez*, 4 N.Y.3d 566, 572 [2005]. Whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of a body part. *Dufel v. Green*, 84 N.Y.2d 795, 798 [1995].

In opposition to the motion, the Plaintiff submits, inter alia, his own affidavit and an affirmation of Dr. David Randall Dynof.

On January 31, 2007, over two months after the accident, Dr. Dynof conducted an initial orthopedic examination of the Plaintiff. Dr. Dynof's initial examination of the Plaintiff's cervical spine revealed "moderate tenderness to palpation noted C4 through T1 to deep palpation bilaterally. Spasm and tenderness are noted in the trapezius bilaterally, cervical paraspinal and levator scapulae bilaterally. Mild tenderness (myalgia) is noted in the paracervical and trapezial muscles consistent with trigger points located on the right and

left.”

On the date of the Plaintiff’s examination, Dr. Dynof conducted range of motion studies on the affected areas and found that with respect to the lumbar spine, the range of motion was limited: “extension 0-20 degrees (normal being 25 - reduction 20%), left rotation 0-30 degrees (normal being 35 - reduction 15%), right rotation 0-30 degrees (normal being 35 - reduction 15%), left flexion 0-25 degrees (normal being 30 - reduction 16.7%), right flexion 0-25 degrees (normal being 30- reduction 16.7%).”

As to the Plaintiff’s cervical spine, Dr. Dynof concluded that the range of motion was limited: “extension 0-35 degrees being 45 - reduction 12.3%), rotation 0-80 (normal being 85 degrees - reduction 6%), left flexion 9-40 degrees (normal being 45 - reduction 12%), right flexion 9-35 degrees (normal being 45 - reduction 12.3%).”

Due to the Plaintiff’s subjective pain, Dr. Dynof administered six injections to his lower back. The Plaintiff’s treatment was discontinued on June 19, 2007.

On August 20, 2010, Dr. Dynof re-examined the Plaintiff and concluded that “despite the prior intensive and protracted course of therapy and pain management techniques, his condition showed limited improvement and his complaints of pain continued.”

Based on his examination, a review of the medical records of the Plaintiff’s treating chiropractor and Dr. Nirmal Kade, a review of the MRI films of the cervical and lumbar spines, Dr. Dynof’s final impression was that Mr. Murillo suffers from posterior disc



bulges of the C3/4 intervertebral discs impinging on the thecal sac causing mild stenosis of the spinal canal; an anterior bulge and subligamentous posterior herniation of the C4/5 intervertebral disc effacing the thecal sac; anterior and posterior bulge of the C5/6 intervertebral discs effacing the thecal sac and reversal of the cervical spinal canal.

Contrary to the Plaintiff's contention, the Plaintiff has failed to raise a triable issue of fact with respect to his claims that the injuries he sustained are serious within the meaning of Insurance Law § 5102 (*e.g. Jin Mei Liu v. Lomberta*, 58 A.D.3d 687 [2<sup>nd</sup> Dept. 2009]).

Here, the record reveals that the Plaintiff first sought treatment with Dr. Dynof on January 31, 2007, over two months after the accident, returned to him on May 9, 2007 and then again on August 10, 2010, and then only after the Defendants' motion for summary judgment was noticed (*see Pommells v. Perez, supra*, at p. 574; *Rivera v. Bushwick Ridgewood Properties, Inc.*, 63 A.D.3d 712, 713 [2<sup>nd</sup> Dept. 2009]).

Hence, Dr. Dynof's conclusions are not based on medical proof contemporaneous with the accident. *See Perl v. Meher, supra; Ferraro v. Ridge Car Service, supra*. Nor has the Plaintiff adequately explained the gap in treatment. In his affidavit, the Plaintiff states:

"I concluded my treatment with Hills Chiropractor P.C. because my no-fault benefits were cut off and I could not pay the medical bills out of pocket. At the time of this accident, I did not have any health insurance to cover future medical bills after the accident."

In his affirmation, Dr. Dynof concluded that “[t]he reason why there was a cessation of treatment from my office is that it is clear that after extensive therapy that further treatment would only be palliative in nature . . . Mr. Murillo has reached maximal functional capacity at this time and he would find temporary relief with pain management injections but they would most likely would not be of definitive treatment for him.”

Nor do the disc bulges discerned by the Plaintiff’s radiologist, Dr. Jeffrey Chess, who expresses no opinion with respect to causation, establish the existence of a serious injury (*see Casimir v. Bailey*, 70 A.D.3d 994 [2<sup>nd</sup> Dept. 2010]; *Knox v. Lennihan*, 65 A.D.3d 615 [2<sup>nd</sup> Dept. 2009]; *Luizzi-Schwenk v. Singh*, 58 A.D.3d 811, 812 [2<sup>nd</sup> Dept. 2009]). Furthermore, no affirmation was submitted by Dr. Chess.

It has been repeatedly held that “[t]he mere existence of herniated or bulging discs, and even radiculopathy, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration” (*Catalano v. Kopmann*, 73 A.D.3d 963 [2<sup>nd</sup> Dept. 2010]; *Vilomar v. Castillo*, 73 A.D.3d 758 [2<sup>nd</sup> Dept. 2010]; *Ortiz v. Iania Taxi Services, Inc.*, 73 A.D.3d 721 [2<sup>nd</sup> Dept. 2010]; *Stevens v. Sampson*, 72 A.D.3d 793 [2<sup>nd</sup> Dept. 2010]; *Luizzi-Schwenk v. Singh, supra*).

Moreover, “[a] defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), despite the existence of an

MRI which shows herniated or bulging discs' ” (*Johnson v. County of Suffolk*, 55 A.D.3d 875, 877 [2<sup>nd</sup> Dept. 2008], quoting from *Kearse v. New York City Transit Authority*, 16 A.D.3d 45, 49-50 [2<sup>nd</sup> Dept. 2005]).

The affirmation of Dr. Dynof, the Plaintiff's treating orthopedist, merely noted the findings contained in the magnetic resonance imaging reports of the Plaintiff's cervical and lumbar spines, which revealed evidence of disc bulges. *Collado v. Satellite Solutions & Electronics of WNY, LLC*, 56 A.D.3d 411 [2<sup>nd</sup> Dept. 2008]. Dr. Dynof expressed no opinion on the cause of the findings he made as a result of his review of the Plaintiff's MRI reports. *Id.*; *Casimir v. Bailey, supra*; *Collins v. Stone*, 8 A.D.3d 321, 322 [2<sup>nd</sup> Dept. 2004].

Further, the Plaintiff's medical report failed to address the findings of the Defendants' radiologist who concluded that the bulging and herniated discs were degenerative in nature and unrelated to the subject accident. *Casimir v. Bailey, supra*; *Singh v. City of New York*, 71 A.D.3d 1121 [2<sup>nd</sup> Dept. 2010]; *Larson v. Delgado*, 71 A.D.3d 739 [2<sup>nd</sup> Dept. 2010]. Hence, the conclusion of the Plaintiff's experts were speculative. *Id.*

Finally, the Plaintiff has not sustained his burden under the 90/180 day category which requires the Plaintiff to submit objective evidence of a “medically determined injury or enforcement of a non-permanent nature which prevents the injured person from performing substantially all of the natural 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.” (Insurance Law § 5102 [d]).

“When construing the statutory definition of a 90/180 day claim, the words ‘substantially all’ should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment.” (*Thompson v. Abbasi*, 15 A.D.3d 95 [1<sup>st</sup> Dept. 2005]; *Gaddy v. Eycler*, 79 N.Y.2d 955 [1992]).


The Plaintiff, a day laborer, has not satisfied his burden as he conceded he only missed one month of employment (§ 7 of the Plaintiff’s affidavit). See *Camacho v. Dwelle*, 54 A.D.3d 706 [2<sup>nd</sup> Dept. 2008]; *Kaminski v. Kawamoto*, 49 A.D.3d 501 [2<sup>nd</sup> Dept. 2008].

In view of the foregoing, the Defendants’ motion for summary judgment is **GRANTED** and the complaint is **DISMISSED**.

All matters not decided herein are hereby **DENIED**.

This decision constitutes the decision and order of the court

DATED: Mineola, New York  
February 7, 2011

  
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Hon. Randy Sue Marber, J.S.C.

XXX  
**ENTERED**  
FEB 07 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE