

**SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY**

PRESENT:

**Honorable James P. McCormack
Acting Justice of the Supreme Court**

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KARIN HAGEN and SALVATORE FABOZZI,

Plaintiff(s),

Index No. 18147/04

-against-

Motion Seq. No.: 001

Motion Submitted: 10/25/07

**ROGER LOSEE, UBVL AUTO LT, U.B. VEHICLE
LEASING, INC., WORLD OMNI FINANCIAL CORP.,
PNC VEHICLE LEASING , LLC and BTM CAPITAL
CORPORATION,**

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Defendant Roger Losee (hereinafter "Losee") moves for an order pursuant to CPLR §3212 granting summary judgment dismissing both plaintiff's Karin Hagen and Salvatore Fabozzi's complaint on the grounds that neither suffered a "serious injury" under New York Insurance Law Section 5102(d). Plaintiff's oppose. The motion is decident as hereinafter provided.

This personal injury action arises out of an accident the occurred on November 2,

2003 at approximately 4:00 p.m. at the intersection of Merrick Avenue and Jerusalem Avenue, North Merrick. Both plaintiff's Hagen and Fabozzi, operator and passenger respectively, were stopped at a red light when the vehicle they were in was struck in the rear by defendant Losee's vehicle. Plaintiff Hagen struck her left knee on the dashboard or steering column; plaintiff Fabozzi struck his head and neck on the window of the door.

Plaintiff Hagen claims that as a result of the subject accident, she sustained, inter alia, a tear of the posterior horn of the medial meniscus and lateral meniscus of the left knee which required surgery consisting of a partial medial meniscectomy and partial synovectomy performed under general anesthesia. In addition to the knee injury, M.R.I. studies of plaintiff Hagen showed a disc herniation at C5-6 and bulging disc of C-3 - C5 and L1 - L5 - S1 of the cervical and lumbar spine. Shortly after the accident, plaintiff Hagen came under the care of a neurologist, Dr. Kerin Hausknecht and began a physical therapy regimen at the Bellmore Medical Office consisting of spinal massage, electrical stimulation, hot packs, etc. which took place for one year. Plaintiff continues to treat with Dr. Hausknecht. In a sworn affidavit dated September 20, 2007, plaintiff Hagen stated that her left knee continues to buckle causing excruciating pain with popping or clicking. She further states she can no longer participate in athletics as she had prior to the subject accident such as bowling or skiing and has had to hire a cleaning service to clean her home as she is no longer able to do so. She complains of constant neck pain radiating into her arm and causing numbness in her fingers.

Plaintiff Fabozzi claims that as a result of the subject accident, he sustained, inter alia, herniated cervical disc at C-3 through C-7 and bulging /herniated discs and L4-L5 and L5-S1 as confirmed by M.R.I. studies. Plaintiff Fabozzi also alleges cervical and lumbar radiculopathy at the left C6 and L5-S1 nerve roots as a result of an NCV/EMG diagnostic test. Like his co-plaintiff, Fabozzi came under the care of Dr. Hausknecht who prescribed a physical therapy program through the Bellmore Medical Office where he treated for approximately one-year. Fabozzi also came under the care of a orthopedist who had prescribed the diagnostic tests. In his sworn affidavit, Fabozzi states that he's had to resort to pain medication for his neck and back, which he takes presently, when the conservative course of medical treatment did not completely alleviate his pain. He complains of restriction and limitation in his daily activities with severe radiating pain and numbness in his shoulder, arms, legs and buttocks. He claims to no longer be able to perform chores around the home such as light construction, mowing the grass and handyman repairs. He's been forced to hire a gardener to maintain his property and can no longer take long trips in a car.

Both plaintiffs contend in their respective bill of particulars that the injuries they sustained as a result of this accident fall within the following categories of serious injuries:

“permanent consequential limitation of use of a body organ member;”

“significant limitation of use of a body function or system;”

and,

“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 ninety (90) days out of the first one hundred eighty (180) days following the date of accident.” (Defendant’s Exhibit F, p.6).

In moving for summary judgment, defendant Losee must make a prima facie showing that plaintiff did not sustain a “serious injury” within the meaning of New York State Insurance Law 5102(d). Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome defendant’s submissions by demonstrating a triable issue of fact that a “serious injury” was sustained. (*Pommels v. Perez*, 4 NY 3d 566 [2005]; *Grossman v. Wright*, 268 Ad 2d 79, 84 [2d Dept. 2000]).

In support of a claim that the plaintiff has not sustained a serious injury, defendant may rely either on the sworn statements of the defendant’s examining physician or the unsworn reports of the plaintiff’s examining physician (*Pagano v. Kingsbury* 182 AD 2d 268 [2d Dept. 1992]). Here, the defendant had each plaintiff examined by Dr. Issac Cohen, an orthopedist, and, Dr. Fredrick Mortati, a neurologist. The examinations were conducted in October and November, 2006. With respect to

plaintiff Hagen, Dr. Cohen diagnosed her as "status post left knee arthroscopy...cervical and lumbosacral spine strain, resolved,;" (Defendant's Exhibit G). He found no objective evidence of residual disability or permanency related to the accident and was able to perform her normal activities in an unrestricted fashion. Dr. Mortati found plaintiff Hagen not to have sustained a radiculopathy at any level or any other neurological pathology. (Defendant's Exhibit H). The various physical complaints and pains Hagen related to Dr. Mortati during the course of is examination could "not be explained on any neurological basis." As for plaintiff Fabozzi, Dr. Cohen and Dr. Mortati found that he was both orthopedically and neurologically stable and intact with no evidence of radiculopathy. Both plaintiff's had missed two to three weeks from work.

Based on the foregoing, this Court find that the defendants have submitted sufficient proof in admissible form that both plaintiffs did not sustain a serious injury within the meaning of ths statue as a result of the subject accident.

In opposition to defendant's motion, both plaintiffs submitted, inter alia, a sworn affirmation of Dr. Kerin Hausknecht, the treating neurologist for both plaintiff's, and, the sworn affirmation of Dr. Robert Diamond, MD, a radiologist, who supervised the taking of the M.R.I. film images of the cervical and lumbar spine on December 10, 2003. In addition, as indicated previously, both plaintiff's have submitted there own affidavit.

In his affirmation pertaining to plaintiff Hagen, Dr. Hausknecht recited his findings as to plaintiff's restrictions in range of motion and quantified same both from

his initial examination and his most recent exam on September 19, 2007. Plaintiff's most recent range of motion testing was compared to normal ranges in the different spheres tested. He further noted the reports of the M.R.I. findings of the left knee affirmed in Dr. Diamond's affirmation, and the arthroscopic surgery performed by Dr. Allen Sossan. As of the most recent exam of September 19, 2007, Dr. Hausknecht diagnosed plaintiff Hagen with a twenty-five (25%) percent loss of motion in the left knee which was permanent, a thirty-three and a third (33 1/3%) loss of motion in the cervical spine which was permanent and forty (40%) percent loss of motion in the lumbosacral spine which was also permanent.

Based on the Hausknecht affirmation, the affirmation of the radiologist and plaintiff's own affidavit, plaintiff Hagen has presented objective evidence of the extent of her alleged physical limitations resulting from not only the knee injury but also the disc injury. The submitted affirmations substantiate plaintiff Hagen's claim of a serious injury by ascribing a percentage to the degree of limitation and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (Toure v. Avis, *supra*; Dutel v. Green, 84 NY 2d 795 [1995]). Accordingly, this Court finds that plaintiff had raised a triable issue of fact with regards to the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system." Although not specifically addressed by either party in their respective moving papers, the Court finds plaintiff did not submit sufficient evidence in opposing defendant's prima facie showing that

she did not sustain a "serious injury" within the 90/180 day category of Insurance Law §5102(d). In the absence of any documentation in evidentiary form to prove that such curtailment of activities was at the direction of a doctor and thus medically determined, plaintiff's affidavit is insufficient to establish a serious injury within the meaning of Insurance Law §5102(d) (*Glielmi v. Banner*, 254 AD 2d 255[2d Dept. 1998]). There is no proof of continuous confinement, total loss of mobility or substantive disability which prevented the plaintiff from engaging in all customary and usual activities. (*Hezekian v. Williams*, 81 AD 2d 261 [2d Dept. 1981]). Thus, the 90/180 day "serious injury" claim as to Hagen must be dismissed.

Accordingly, defendant's motion for summary judgment dismissal of plaintiff's complaint is herewith denied insofar as plaintiff Hagen has demonstrated the existence of a triable issue of fact that a "serious injury" was sustained within the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system."

As for plaintiff Fabozzi, Dr. Hausknecht likewise found restriction in range of motion testing both at the initial exam in November 2003 and at the recent exam on September 19, 2007. These findings were quantified as to percentage loss and compared with normal range of motion variables. (Plaintiff's Exhibit D.) Plaintiff Fabozzi at the most recent exam complained of radiating pain and numbness in both arms and legs. He also found positive neurological findings such as straight leg raising and Tinel's test. In both the cervical and lumbar spines, Dr. Hausknecht found a fifty (50%) percent loss

of motion which was permanent. Dr. Hausknecht opined that plaintiff Fabozzi's injuries had altered his ability to perform normal everyday activities and would continue to result in chronic symptoms with limitations of his daily activities.

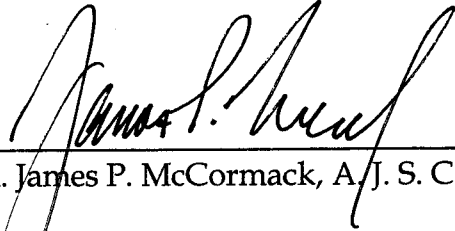
This Court finds as to plaintiff Fabozzi that the submitted affirmations substantiate his claim of a serious injury. While the mere existence of a bulging or herniated disc is not evidence of a serious injury, objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration will meet the burden. (*Monelle v. Keller*, 281 AD 2d 523 [2d Dept. 2001]). The Hausknecht affirmation ascribing a percentage to the degree of limitation and the comparison of plaintiff Fabozzi's limitations to the normal function, purpose and use of the affected body organ, member, function or system satisfies plaintiff's burden in this instance. (*Toure v. Avis*, supra). Accordingly, this Court finds that plaintiff Fabozzi has raised a triable issue of fact with regards to the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system." For substantially the same reasons as heretofore stated in co-plaintiff Hagen's case, plaintiff Fabozzi likewise has failed to present sufficient evidence of a "serious injury" within the 90/180 day category of Insurance Law §5102(d). Thus, the 90/180 day "serious injury" claim as to Fabozzi is dismissed.

In conclusion, defendant's motion for summary judgment dismissal of both plaintiff's complaints is denied insofar as each plaintiff has demonstrated the existence of a triable issue of fact that a "serious injury" was sustained within the "permanent

consequential limitation of use of a body organ or member" and " significant limitation of use of a body function or system."

This constitutes the Decision and Order of the Court.

Dated: December 4, 2007
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED

DEC 12 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**