SUPREME COURT - STATE OF NEW YORK

SCAN

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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TRIAL PART: 34

KEVIN B. WILSON, SR. and MARIE P. WILSON,

Plaintiffs,

NASSAU COUNTY

-against-

INDEX NO: 001344-01

MOTION DATE: 10-17-02

JONATHAN HARLEY and LAWRENCE HARLEY,

MOTION SEQ. NOS: 001

Defendants.

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The following papers having been read on this motion:

Notice of Motion, dated 9-17-02 1
Affirmation in Opposition, dated 1-13-03 2
Affirmation in Reply & In Further Support of Motion, dated 1-28-03 3

Defendants' motion for summary judgment pursuant to CPLR § 3212 dismissing the complaint based on the failure of the plaintiff to have sustained a "serious injury" under Insurance Law § 5102 is granted and the complaint is dismissed.

This action arose as a result of a two car motor vehicle accident which occurred on August 25, 1999, in Brooklyn, New York, from which the plaintiff has alleged to have sustained serious injuries. Defendant alleges that plaintiff has failed to establish a "serious injury" as defined by the Insurance Law § 5102(d) and as such has no cause of action under the New York Insurance Law Section § 5104(a). As a result, they argue this action must be dismissed.

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law. *Junco v. Ranzi,* 288 ADd2d 440 (2nd Dept., 2001); *Frank Corp. v. Federal Ins. Co.*, 70

NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Frank Corp. v. Federal Ins. Co., supra*, at 967, *GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, *supra* at 601. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see, Frank Corp. v. Federal Ins. Co., supra*).

Further to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist [see, *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989)].

In addressing the serious injury issue as defined by the New York State Insurance Law §5102(d), the Court first looks at the plaintiff's pleadings. Plaintiff, alleges in his Bill of Particulars to have sustained a central herniated disc at C4-C5 at the anterior subarachnoid space, a disc bulge at L4-L5 causing pressure effect on the thecal sac, bulging of the joint capsule on the supra spinatus muscle and tendon of the right shoulder and muscle spasms, all of which plaintiff contends satisfies the serious injury requirement of the Insurance Law. Since a disc herniation or bulge and limited range of motion may constitute evidence of serious injury, a defendant must demonstrate that it is not causally related to the accident, *Caulfield v. Metten*, 275 AD2d 758 (2nd Dept. 2000). Conversely the existence of a herniated disc or bulge does not in and of itself constitute a serious injury. To raise a triable issue of fact as to whether a herniated disc or bulge constitutes a serious injury, a plaintiff is required

to provide objective evidence of the qualitative nature of the plaintiff's limitations based upon the normal function, purpose and use of the injured body parts. *Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2002).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Junco v. Ranzi, supra; Winegrad v. New York Univ. Med. Center,* 64 NY2d 851, 853 (1985).

> "Serious injury" as defined by §5102(d) of the New York State Insurance Law "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."

Defendant argues that plaintiff did not sustain a "serious injury" as defined by any section of the statute. Defendants' application, is supported by affirmations of Dr. S. Farkas, an orthopedist, dated January 14, 2002, Dr. Burton Diamond, a neurologist, dated January 14, 2002, and Dr. Bert Heyligers, a radiologist, dated January 16, 2001.

On behalf of the defendant, Dr. Farkas, examined the plaintiff and as well as the medical records, reports, which were available for his review. Upon examination of the thoracic spine no spasm was noted and he found him to have full range of motion. Upon examination of the lumbar spine, straight leg raising was negative, plaintiff could flex forward to 90 degrees. Examination of the cervical spine found no spasm , tinel's sign was negative to the elbow and wrist and Dr. Farkas found the plaintiff to have resolved cervical, lumbar and thoracic sprains. He concluded he was not disabled, and that there was no permanency as a result of this accident, that he was capable of performing all of his normal activities of daily living without limitations.

Dr. Burton Diamond examined the plaintiff as well as the available medical records and based upon his examination and his subjective complaints, determined the plaintiff had a totally normal neurological exam that there was no evidence of any neurological disability. Dr. Diamond based his diagnosis upon findings of no atrophy of any muscle groups and muscle strength was fully intact in both the upper and lower extremities.

Dr. Heyligers, at the request of the defendant's, reviewed the plaintiff's cervical MRI, dated August 30, 1999 , which revealed degenerative disc disease at C2-3 through C4-5, and found no evidence of disc herniation.

In a motion for summary judgment seeking to dismiss, the defendant is required to establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). *Gaddy v. Eyler*, 79 NY2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence in admissible form to demonstrate the existence of a question of fact on the issue. *Gaddy*, supra.

The Court must than decide whether plaintiff established a prima facie case of sustaining a serious injury. *Licari v. Elliott,* 57 NY2d 230 (1983).

In opposition, the only competent medical evidence the plaintiff relies upon is a sworn affidavit from Dr. Daniel Wilen, a physician he only saw for the first time on January 13, 2003, in response to this motion. Dr. Wilen's affirmation is clearly insufficient as he basis his prognosis on the unsworn records and reports of other physicians upon which he cannot rely. Consequently, there is no medical history or course of treatment provided, causally relating the unsworn MRI reports to the accident which forms the basis of this claim nor is there any objective medical evidence of the extent or degree of the alleged limitation resulting from the injuries to his cervical or lumbar spine. *Davis v Brightside Fire Protection*, 275 AD2d 298 (2nd Dept. 2000)., *Pierre v. Nanton,* 279 AD2d *621 (*2nd Dept. 2001*).* The medical evidence proffered in this case fails to support the plaintiff's burden, the mere parroting of language tailored to meet statutory requirements is insufficient. *Grossman v. Wright*, 268 AD2d 79 (2nd Dept. 2000). The court did not consider the unsworn medical reports and other unsworn records offered by the plaintiff since such material does not constitute competent evidence. *Slavin v. Associates Leasing, Inc., 273 AD2d 372 (2 nd Dept. 2000).* As these reports do not constitute competent evidence they may not be considered by the court. *Grasso v. Angerami, 79NY2d 813 (1991*), Sandt v. New York Racing *Ass'n, Inc., 289 AD2d 218 (2nd Dept. 2001), Golden v. Lee,* 275 AD2d 341 (2nd Dept. 2000).

In a motion for summary judgment seeking to dismiss, the defendant is required to establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Gaddy v. Eyler, 79 NY2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence in

admissible form to demonstrate the existence of a question of fact on the issue. *Gaddy*, supra. The Court must than decide whether plaintiff established a prima facie case of sustaining a serious injury. *Licari v. Elliott,* 57 NY2d 230 (1983).

Plaintiff has proffered no medical testimony to support a finding that he suffered a permanent loss of use of a body part or function because there is no testimony by his expert to find the total loss of use necessary to come within this category of serious injury. *Oberly v. Bangs Ambulance*, 96 NY2d 295 (2001), *Mikl v. Shufelt,* 285 AD2d 949 (3rd Dept. 2001).

A plaintiff's self-serving claim of inability to perform his daily activities without medical evidence to connect the inability to perform one's activities to the injury is insufficient. *Jackson v. New York City Transit Authority,* 273 AD2d 200 (2nd Dept. 2000), *Turchuk v. Town of Wallkill*, 255 AD2d 575 (2nd Dept. 1998) *cf. Hines v. Capital District Transportation Authority,* 280 AD2d 768 (3rd Dept. 2001). Plaintiff's claim lacks any medical evidence to support a claim of a medically determined injury of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law 5102(d). *Toure v. Avis Rent A Car Systems, Inc.,* supra, *Jackson v. New York City Transit Authority,* 273 AD2d 200 (2nd Dept. 2000), *Turchuk v. Town of Wallkill*, 255 AD2d 575 (2nd Dept. 1998), *cf. Hines v. Capital District Transportation Authority,* 280 AD2d 768 (3rd Dept. 2001). In addition to showing a nexus between the injury and the duration of the disability, there must be proof of the full extent of the person's usual activities and a curtailment to a great extent of the ability to perform them. *Horowitz v. Clearwater,* 176 AD2d 1084 (3rd Dept.1991). The lack of medical evidence proffered in this case fails to support the plaintiff's burden. *Toure v. Avis Rent A Car*

Systems, Inc. , *supra*, *Grossman v. Wright*, supra.

Plaintiff has failed to provide the necessary proof of any serious injury. *Grossman v. Wright, supra.* Having addressed plaintiff's claimed injury, it was incumbent upon the plaintiff to come forward with competent object medical proof of serious injury within the meaning of the no-fault statute to raise an issue of fact. *Grossman v. Wright*, supra. The affidavit of plaintiff's attorney, who has no personal knowledge of plaintiff's medical injuries is without evidentiary value. *Carpluck v. Friedman,* 269 AD2d 349 (2nd Dept. 2000). Additionally, no adequate explanation is given for the gaps and lack of treatment and this motion. Any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his or her own expert must be adequately explained. *Grossman v. Wright*, supra at 237. Plaintiff has failed to meet his burden, the motion is granted and the complaint is dismissed.

This constitutes the Decision and Order of this Court.

E N T E R

DATED: February 28, 2003

HON. DANIEL PALMIERI
Acting J.S.C.

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ENTERED

MAR 05 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE