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SUPREME COURT - STATE OF NEW YORK

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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DENNIS K. O'SHEA,

Plaintiff,

-against-

ALLISON F. HALL,

Defendant.

----------x

TRIAL PART: 32

NASSAU COUNTY

INDEX NO: 6518-03

MOTION DATE: 11/8/04
SUBMIT DATE: 12-7-04
MOTION SEQ. NO: 001

The following papers having been read on this motion:

Notice of Motion, dated 10-6-04	**1**
Affirmation in Opposition, dated 11-9-04	**2**
Reply Affirmation, dated 12-6-04	**3**

Upon the foregoing papers, it is ordered the defendant's motion for summary judgment pursuant to CPLR §3212 seeking dismissal of the plaintiff's complaint is hereby granted.

The underlying cause of action arises from an automobile accident that occurred on April 29, 2002 wherein plaintiff claims to have sustained a serious injury, within the purview of Article 51 of the Insurance Law, after the vehicle he was operating was struck in the rear by the vehicle driven by the defendant.

As articulated in his Bill of Particulars, plaintiff claims he sustained the following personal injuries in said accident, all of which he claims to be serious: insult to the muscular skeletal system of both the cervical and lumbar spine; insult to the neuroperipheral system of both the cervical and lumbar spine; post-concussion syndrome; headaches; radiculitis throughout the entire spine; grade 1-11 anterolisthesis of L4 relative to L5 with large circumferential disc bulge; disc bulges at L2-L3 and L5-S1 and aggravation of any prior

injuries.

A motion for summary judgment requires that the moving party establish his or her cause of action sufficient to warrant a court to direct judgment as a matter of law (*Friends of Animals, Inc. v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065). The party opposing the motion must then come forth with evidence in admissible form to necessitate a trial as to any material issues of fact (*Frank Corp. v Federal Ins. Co.*, 70 NY2d 966). When considering a motion for summary judgment, the burden upon the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247; *Daliendo v Johnson*, 147 AD2d 312).

The instant application interposed by the defendant is supported by affirmed medical reports by Drs. Dmitry Kolesnik, the No-Fault neurologist; Joseph Paul, the No-Fault orthopedic surgeon; Steven Ender, neurologist; Carl Austin Weiss, orthopedic surgeon and Sondra Pfeffer, radiologist.

Dr. Kolesnik conducted a neurological examination of the plaintiff on 6/26/02, approximately 2 months post accident, and opined that plaintiff had a resolved lumbar sprain, and a left foot drop related to a prior accident of 1963. He found plaintiff to have no neurological disability and stated that plaintiff may continue with his normal working duties and activities of daily living without any neurological limitations.

Dr. Paul conducted an independent orthopedic examination of the plaintiff on 6/26/02, 2 months post subject accident, and found the plaintiff to have no disability and a resolved sprain of the lumbar spine. Dr. Paul stated as well that plaintiff was capable of working and

performing all of his normal activities of daily living without any limitations.

Dr. Ender, defendant's neurologist, conducted an independent neurological examination of the plaintiff on 8/29/03. He noted full range of motion of plaintiff's cervical and lumbar spine and no lumbosacral paraspinal muscle tenderness or spasm. Dr. Ender found that plaintiff had a resolved cervical and lumbosacral strain and otherwise a normal neurological examination with no residual disability.

Dr. Weiss, an orthopedic surgeon, submits an affirmed report of an orthopedic consultation carried out on 8/27/03 at defendant's request. Dr. Weiss found no tenderness to pressure in the mid cervical spine and full range of motion of the head, neck, both shoulders and knees. He notes that plaintiff's MRI shows Grade II anterolisthesis and disc bulges, and that plaintiff's x-rays revealed no positive findings. Dr. Weiss concludes that plaintiff has no disability and no permanency, that he suffered sprain injury of the neck and back to which he has recovered.

Dr. Pfeffer, a radiologist, offers an affirmed report stating that she reviewed the lumbar spine MRI examination performed on the plaintiff on 5/24/02, 25 days following trauma. She finds that plaintiff's disc bulges are degenerative processes related to repeated stress and strain on the disc-anuli, and finds no causal relationship with the MRI finding of a disc bulge and the subject accident, regardless of severity.

Upon motion by a defendant seeking summary judgment seeking to dismiss a personal injury complaint, he or she carries the burden of establishing that the plaintiff did not sustain a serious injury as enumerated in Article 51 of the Insurance Law §5102(d) *Gaddy v Eyler*, 79 NY2d 955). Upon such a showing, it becomes incumbent upon the nonmoving party to

come forth with sufficient admissible evidence to raise a triable issue of fact as to the existence of a serious injury. (*Licari v Elliott*, 57 NY2d 230).

Within the context of the defendant's burden, when presented with MRI reports indicating disc bulges and/or herniations he or she through their medical experts must demonstrate that such disc bulges and or herniations are not causally related to the subject automobile accident or that they do not constitute a serious injury (*Chaplin v Taylor*, 273 AD2d 188; *Gray v Lasurdo*, 302 AD2d 560).

Thus, the pertinent question before the Court at this juncture is whether the medical evidence proffered by the defendant in the form of the affirmed reports by the aforementioned doctors is sufficient to meet his burden. Specifically, the Court needs to inquire whether the doctors' conclusions adequately attribute causality of the disc bulges present in the MRI to something other than the subject automobile accident or that such bulges are not serious injuries (*Chaplin, supra; Gray, supra*).

This Court finds the conclusion of the various reports that plaintiff's disc bulges are degenerative in nature, and that the sprains to plaintiff's cervical and lumbar spine have resolved are sufficient to make a prima facie case demonstrating entitlement to judgment as a matter of law (*cf. Woods-Smith v Tighe,* 291 AD2d 399). Thus, the burden now shifts to the plaintiff to rebut the movant's case by the submission of admissible proof which is demonstrative of a serious injury (*Gaddy, supra*).

In opposition to the defendant's application, plaintiff submits an affirmation by his counsel, an affidavit by Dr. Arthur Goldberg, his treating chiropractor, and an affirmed report by his radiologist, Dr. Alexander Belman.

According to plaintiff's deposition before trial conducted on March 24, 2004, he did not seek medical treatment immediately following the subject accident. Rather he went home, rested for a period of time and then went to work for the remainder of the day. Moreover, plaintiff did not miss anytime from work, nor was he confined to his bed or home following this accident. Plaintiff further testified that the only treatment he sought and received following the 2002 accident was 3 months of chiropractic treatment with Dr. Goldberg.

Dr. Goldberg states that he began treating the plaintiff for injuries related to the subject accident on April 29, 2002, and following range of motion tests, referred the plaintiff for an MRI of his lower back. Based upon the results of the MRI, Dr. Goldberg finds anterolisthesis of the lower back L4 relative to L5, a large disc bulge at L5-S1, L2-L3, and another at L4-L5, such being circumferential. He then opines "Due to the fact that there is no evidence of any prior or subsequent accident or traumas with regard to Mr. O'Shea, I find that based upon a reasonable degree of certainty, the three (3) large bulges in this area of the body are causally related to the accident." Exhibit B of plaintiff's opposition papers include an unaffirmed report by Dr. Goldberg, following another examination of the plaintiff on July 26, 2004. As this report was not in admissible form, this Court did not consider the contents of same (see CPLR §2106; *Shinn v Catanzaro*, 1 AD3d 195).

Dr. Goldberg fails to offer an explanation for the extended gap in treatment between August, 2002 and July, 2004.

Plaintiff's explanation for such gap is that he stopped treatment following independent medical examinations by the insurance company doctors, wherein they were of the impression that he had improved and needed no further treatment. However, plaintiff fails to cite any

appellate authority which recognizes this explanation as an adequate one for gaps in treatment. Decisional law analyzing the issues of gaps in treatment and that which constitutes and adequate explanation, speak of those explanations proffered by the plaintiff's medical experts in affirmed reports and not those of a personal nature offered by the plaintiff's themselves (*Toure v Avis Rent A Car Systems*, 98 NY2d 345; *Brown v Achy*, 9 AD3d 30; *Behm v Radoccia*, 6 AD3d 473).

Moreover, Dr. Goldberg's opinion that plaintiff's injuries are causally related to the subject accident is speculative because Goldberg fails to indicate an awareness of the injuries sustained by the plaintiff in his prior accidents, one of which plaintiff claims to have sustained injuries for which he was hospitalized 3 months in 1963. Plaintiff's expert failed to indicate an awareness of the condition of plaintiff just before the subject accident, therefore Goldberg's finding that the current injuries are causally related to the subject accident is mere speculation, conclusory (*see, Narducci v McRae*, 298 AD2d 443; *Kallicharan v Sooknanan*, 282 AD2d 573) and of no probative value.

The Court notes that the plaintiff did not request this Court's permission to submit a sur-reply. Consequently, plaintiff's sur-reply was not considered in rendering this decision and order.

Defendant has made a prima facie showing of entitlement to judgment as a matter of law. In opposition, the plaintiff has failed to raise a triable issue of fact as to whether he sustained a "serious injury" within the meaning of Insurance Law §5102(d).

Defendant's motion for summary judgment is granted.

This constitutes the Decision and Order of this Court.

ENTER

DATED: December 16, 2004

HON. DANIEL PALMIERI
Acting J.S.C.

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