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SUPREME COURT - STATE OF NEW YORK

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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YVES RICHARD BAPTISTE and TANYA BAPTISTE,

Plaintiffs,

-against-

CHRIS J. FEUSTEL,

Defendant.

----------x

TRIAL PART: 32

NASSAU COUNTY

INDEX NO: 010205/01

MOTION DATE: 4-15-04
SUBMIT DATE: 4-15-04
MOTION SEQ. NO: 001

The following papers having been read on this motion:

Notice of Motion, dated 11-13-03	**1**
Affirmation in Opposition, dated 3-23-04	**2**
Affirmation in Reply, dated 4-13-04	**3**

The motion brought by the Defendant, in the above captioned action, for an order of this Court, pursuant to Rule 3212 of the CPLR and New York Insurance Law Section 5102, dismissing the Plaintiffs' complaint herein upon the ground that the Plaintiff, Yves Richard Baptiste, did not sustain a statutorily defined "serious injury" as a proximate result of the motor vehicle accident, that is the subject matter of the instant action, is granted.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Dept., in *Stewart Title Insurance Company v Equitable Land Services, Inc.*, 207 AD2d 880, 881:

> "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 NY2d 851, 853, *Zuckerman v City of New York*, 49 NY2d 557, 562). 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 v McAuliffe*, 97 AD2d 607), 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 NY2d 320, 324; *Zuckerman v City of New York, supra*, at 562)."

New York Insurance Law Section 5102(d) defines "serious injury" as:

> "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 ususal 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."

This action arises out of a two (2) car motor vehicle accident that occurred on June 10, 1999, at approximately 6:10 p.m. The subject accident took place on Front Street at the intersection of Front Street and High Street in Hempstead, N.Y. At the time of the accident, the motor vehicle operated by the Plaintiff, Yves Richard Baptiste, was proceeding West bound on Front Street and the vehicle operated by the Defendant, Chris J. Feustel was also traveling West Bound on Front when the motor vehicle operated by the said defendant struck the rear of the stopped motor vehicle operated by the said plaintiff.

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. (*Licari v Elliot*, 57 NY2d 230). The

proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Alvarez v Prospect Hospital*, 68 NY2d 320; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851. In the present action, the burden rests on the Defendant to establish, by the submission of evidentiary proof in admissible form, that the Plaintiff has not suffered a "serious injury." (*Lowe v Bennett*, 122 AD2d 728, *affirmed*, 69 NY2d 701). When a Defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the Plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. (*Licari, supra; Lopez v Senatore*, 65 NY2d 1017).

In support of a claim that the Plaintiff has not sustained a serious injury, a 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 AD2d 268). Once the burden shifts, it is incumbent upon the Plaintiff, in opposition to the Defendant's motion, to submit proof of serious injury in "admissible form". Unsworn MRI reports are not competent evidence unless both sides rely on those reports. (*Gonzalez v Vasquez*, 301 AD2d 438; *Ayzen v Melendez*, 299 AD2d 381). However, in order to be sufficient to establish a *prima facie* case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice. (See, CPLR 2106; *Pichardo v Blum*, 267 AD2d 441; *Feintuch v Grella*, 209 AD2d 377).

When a claim is raised under the "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," then, in order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. *(Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345. In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Toure v Avis Rent A Car Systems, Inc., supra*).

In support of the instant motion, the Defendant has submitted, *inter alia*, undated and incomplete medical reports of the Plaintiff's treating doctor, Dr. Sol Farkas, M.D. and physical therapist, Sherrie Glasser, M.S., P.T., the affirmed Report of Paul G. Kleinman, M.D., and the affirmed report of A. Robert Tantleff, M.D.

Additionally, the defendant submitted two (2) published articles that were neither sworn to nor affirmed to be true under penalty of perjury, therefore they do not constitute competent evidence. Accordingly, the aforesaid articles will not be considered by this Court on the instant motion (*see, Lowe v Bennett, supra*).

Dr. Klienman, Diplomate American Board of Orthopaedic Surgery, opines of his July 1, 2003, orthopedic examination of the Plaintiff, Yves Richard Baptiste:

"REVIEW OF MEDICAL RECORDS:

An MRI scan on 8/21/99 was reviewed that showed a small herniated disc at L4-L5 impinging on the ventral surface of the sac.

Report from Dr. Tantleff was reviewed, which was dated July 19, 2000, in which he reviewed the films from 8/21/99. He describes a disc bulge at L4-S1, which he says is chronic and degenerative. He also describes vertebral and facet arthritis and disc desiccation. No vertebral and facet arthritis was described in the MRI report from 8/21/99 by the original radiologist nor does he describe any disc desiccation.

A Bill of Particulars was reviewed.

A chart note from Dr. Berstein was reviewed from 6/30/99.

A normal x-ray report of the lumbosacral spine was reviewed from 6/23/99.

Physical therapy notes were reviewed.

Chart notes from Dr. Farkas were reviewed from 8/25/99, 8/4/99, 7/7/99, 6/21/99, and 6/14/99.

PHYSICAL EXAMINATION:

On physical examination, the patient's gait was normal. He had a full range of motion of his back with 90 degrees flexion and 30 degrees extension and side bending to each side. There was no paravertebral spasm.

Straight leg raising exam was done on a voluntary basis in the sitting position and was negative bilaterally.

Motor exam was normal in the lower extremities for the following muscle groups tested: extensor hallucis longus, ankle plantar and dorsiflexors, and knee flexors and extensors. Sensory exam was normal to light touch in the lower extremities.

The patient had a full range of the shoulders bilaterally with 170 degrees forward elevation, 45 degrees external rotation, and internal rotation to the lumosacral spine bilaterally.

IMPRESSION:

Chronic low back syndrome. Objectively, this has resolved, although subjectively, the patient still claims symptoms.

NEED FOR TREATMENT:

There is no further need for any orthopedic treatment or physical therapy.

WORK STATUS:

The patient can do his regular job full time with no restriction. He can also do his normal daily living activities with no restriction.

Thee is no need for any household help, ambulatory service, or durable medical equipment.

There are no objective findings of any unresolved injuries."

Dr. Tantleff, avers of his July 19, 2000 radiological evaluation of the Plaintiff, Yves Richard Baptiste:

"As per your request, I performed an independent radiology review on YVES BAPTISTE'S MRI of the Lumbar Spine, today July 19, 2000. My findings are as follows:

REVIEW OF MEDICAL RECORDS: The following records were reviewed, MRI report of the Lumbar Spine;

REVIEW OF FILMS DATED 8.21.99: There is desiccation (desiccation is a gradual process occurring gradually over the span of years and decades) and atrophy (flattening) of the Discs; but especially L4-S1. Associated with and as a consequence of the chronic degenerative discogenic changes there is a chronic

degenerative disc bulge of L4-5. There is vertebral and facet arthritis. These findings are consistent with age related changes occurring over a span of years. This age related complex consists of fluid loss from the disc resulting in desiccation. As a result of the fluid loss the disc atrophies and flattens. Associated with the foregoing is elongation of the fibers of the annulus fibrosis, which is a slow chronic process, resulting in an increase in size of its fibers creating enlargement of the disc circumferences. This creates a symmetrical disc protrusion or enlargement commonly known as a bulge.

An additional finding of degenerative disc disease is associated osteoarthritis.

These findings are not causally related to the recent trauma.

There is no significant narrowing of either the transverse or sagittal diameter of the canal to indicate a spinal stenosis condition. No lytic or blastic lesions are present. There is no significant compromise of the neural foramina. No abnormal signal changes are present within the canal indicative of disc herniation or mass. There is no evidence of spondololysis or spondolisthesis. The nerve roots in the thecal sac as well as exiting nerve roots are normally distributed. Psoas and posterior spinal muscles outline normally.

IMPRESSION: CHRONIC DEGENERATIVE DISC COMPLEXES ARE IDENTIFIED AS NOTED ABOVE. THESE FINDINGS DEVELOPED OVER THE COURSE OF MANY YEARS AND ARE A LONG-STANDING CHRONIC PROCESS NOT CAUSALLY RELATED TO THE RECENT ACUTE TRAUMA."

This Court finds that the herein above set forth evidence satisfies the Defendant's initial burden of proof demonstrating, *prima facie*, that the Plaintiff did not sustain a

statutorily defined "serious injury."

In opposition to the instant motion, the Plaintiff has submitted an Affidavit from Philip Fontanetta, M.D. Dr. Fontanetta, in his March 15, 2004 Affidavit, states:

> "The Plaintiff YVES RICHARD BAPTISTE was seen in my office on February 2004, at which time I conducted a thorough examination. I referred him to Metropolitan Diagnosti Imaging, P.C. were and (sic) MRI of the lumbosacral spine. The findings of that MRI were building disc at L4-5 and L5-S1 levels, degenerative spondylosis with associated stenosis, hemangioma within the L2 Vertebral body. I last examined him on March 15, 2004. Based upon these examinations I have concluded that he is still symptomatic and therefore his injuries are permanent in nature.
>
> Based upon a review of his medical records and the results of my examination of the Plaintiff, I have concluded that he has sustained a significant limitation of use of a body part, to wit his back and legs along with the surrounding ligaments and muscles. Therefore, it is my opinion, with a reasonable degree of medical certainty, that the plaintiff YVES RICHARD BAPTISTE has sustained a "serious injury" as defined by New York State Insurance Law which was casually related to the accident of June 10, 1999, with said injuries being permanent in nature."

From his affidavit, it appears that Dr. Fontanetta did not review the actual MRI films of Metropolitan Diagnostic Imaging, P.C. nor did he annex a sworn copy of the MRI report to his affidavit. Therefore, the findings of the aforesaid MRI are without probative value. *Shay v Jerkins*, 263 AD2d 475.

Additionally, the plaintiff has submitted unsworn and unaffirmed medical reports of Dr. Sol Farkas dated June 14, 1999, June 21, 1999, July 7, 1999,

August 4, 1999, August 25, 1999 and February 11, 2004; unsworn and unaffirmed radiological reports of Dr. Sheldon P. Feit, dated February 16, 2004, and Dr. Soloman Gennth, dated August 21, 1999 and an unsigned, unsworn and unaffirmed ophthalmological report of EYEXAM 21. The aforesaid reports do not constitute competent evidence and cannot be considered on the instant motion (*see, Mezentseff v Lau,* 284 AD2d 379; *Meric v Cancela*, 275 AD2d 309; *Slavin v Associates Leasing*, 273 AD2d 372; *Moore v Tappen*, 242 AD2d 526).

In Dr. Farkas' Report, dated July 12, 1999, submitted by the Defendant, in support of the instant motion, the said report reflects treatment dates of 6/14/99, 6/21/99 and 7/7/99 with a diagnosis of cervical sprain and lumbar sprain.

In Sherrie Glasser's Report, dated June 30, 1999, submitted by the Defendant, in support of the instant motion, the said report reflects treatment dates of 6/21/99, 6/22/99 and 6/23/99 with a diagnosis of neck strain and back strain.

At his oral deposition before trial, the plaintiff, Yves Richard Baptiste, testified, without remembering dates or details, that within a week of the subject motor vehicle accident he went to an eye specialist by the name of Dr. Larry Bernstein and also to Dr. Farkas who referred him to a physical therapist whose name he could not remember. Mr. Baptiste further testified that he was unable to return to his employment, as a mortgage broker, from the date of the accident until sometime in September of 1999. Finally, Mr. Baptiste testified that the last physician he saw for injuries arising out of the subject motor vehicle accident was an

orthopedist whose name he could not remember and whom he saw for "one visit" in September of 1999.

This Court's review of all the papers and exhibits submitted for its consideration on the instant motion finds no proffered explanation for the four and one-half (4 ½) year gap in the plaintiff's medical visits, treatments or examinations from September of 1999 to February 2004. The Court finds this failure to be fatal to the plaintiff's efforts to establish a "serious injury" (*see, Best v Bleau*, 300 AD2d 858).

It is pertinent to note that Dr. Fontanetta, in his Affidavit, states that the findings of his ordered MRI were "...bulging disc at L4-5 and L5-S1 levels, degenerative spondylosis with associated stenosis, hemangioma within the L2 vertebral body." This is without probative value because it provides no foundation to support such conclusions. Moreover, while a buldging disc may be sufficient to constitute a "serious injury" (*see, Monette v Keller*, 281 AD2d 523), to succeed under this theory, the Plaintiff must submit objective evidence of the extent or degree of the limitation and its duration. *Crespo v Kramer*, 295 AD2d 467, *quoting Barbeito v Kesev Taxi*, 281 AD2d 379*; Jackson v New York City Transit Authority*, 273 AD2d 200.

Dr. Fontanetta's failure to explain or describe what objective tests, if any, he employed to reach his conclusions renders his opinions insufficient to establish a "serious injury." *Toure v Avis Rent a Car Systems, Inc. Supra; Duldulao v City of New York*, 284 AD2d 296;

Grossman v Wright, 268 AD2d 79.

Finally, the papers submitted herein fail to establish that the Plaintiff, Yves Richard Baptiste, suffered from a medically determined injury which prevented him from performing substantially all of the material acts constituting his usual and customary daily activities for at least 90 of the 180 days immediately following the subject motor vehicle accident. In this regard, the Plaintiff has not submitted credible medical evidence of any limitation in his daily activities or that any restrictions were medically indicated. His self serving Affidavit that "I was out of work for more than three months immediately following this accident", without more, is legally insufficient to raise a triable issue of fact under this category of "serious injury." *Delgado v Hakim*, 287 AD2d 592; *Paulino v Xiaoyu Dai,* 279 AD2d 619; *Sainte-Aime v Ho*, 274 AD2d 569; *Jackson v New York City Transit Authority, supra; Relin v Brotherton*, 221 AD2d 840.

Accordingly, the instant motion is granted and the Plaintiff's Complaint herein is herewith dismissed.

This constitutes the Decision and Order of this Court.

ENTER

DATED: April 29, 2004

HON. DANIEL PALMIERI
Acting J.S.C.

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