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SUPREME COURT - STATE OF NEW YORK

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

-----x
LOREN HORSEY,

Plaintiff,

-against-

**MITCHELL SAMEROFF AND
MARGARET SAMEROFF,**

Defendants.
-----x

**TRIAL PART: 32
NASSAU COUNTY**

**INDEX NO: 13985/02
MOTION DATE: 6-7-04
SUBMIT DATE: 9-10-04
MOTION SEQ. NOS: 001**

The following papers having been read on this motion:

Notice of Motion, dated 6-6-04.....	1
Affirmation in Opposition, dated 8-27-04	2
Reply Affirmation, dated 9-1-04	3

Upon the foregoing papers it is ordered that the defendant's motion for summary judgment pursuant to CPLR §3212 seeking dismissal of plaintiff's complaint on the basis that plaintiff has failed to sustain a "serious injury" within the purview of the Insurance Law §5102(d) is hereby denied.

The underlying action results from an automobile accident which occurred on September 23, 2000 whereby the vehicle that plaintiff Horsey was operating was struck from behind by a vehicle operated by defendant Mitchell Sameroff and owned by Sarah Sameroff. Plaintiff Horsey alleges that as a consequence of said accident he has sustained a "serious injury" within the ambit of Insurance Law §5102(d).

In addressing the issue as to the existence of a "serious injury" the court initially looks to the pleadings. Plaintiff Horsey alleges the following injuries: focal disc bulges at L1-2, L2-3 and L5-S1; loss of height and signal at L1-2 and L2-3; straightening of the cervical lordosis with focal central disc

herniation at C4-5; left knee joint effusion and type I tear of the posterior horn of the medial meniscus; right knee type I tear of the posterior horn of the medial meniscus, buckling of the PCL; traumatic cervical myofascial pain; traumatic lumbar myofascial pain; cervical whiplash syndrome; lumbosacral segmental dysfunction; lumbosacral radiculitis.

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 N.Y.2d 1065.) The party opposing the motion must then come forth with evidence in admissible form sufficient to necessitate a trial as to any material issues of fact. (*Frank Corp., v. Federal Ins. Co.*, 70 N.Y.2d 966.) When considering a motion for summary judgment, the burden upon the court is not to resolve issues of fact but rather to determine if any such material issues of facts exist. (*Barr v. County of Albany*, 50 N.Y.2d 247; *Dalinendo v. Johnson*, 147 A.D.2d 312.)

The instant application interposed by the defendant's seeking dismissal of the plaintiff's complaint is supported by the affirmed medical report of Dr. Sultan, an orthopedic surgeon. Dr. Sultan examined the plaintiff on 12/11/03 at which time he conducted a physical examination, a cervical spine examination, a thoracolumbar examination and a bilateral knee examination. In addition to his examination, Dr. Sultan also reviewed numerous medical reports including reports pertaining to Magnetic Resonance Imaging studies {hereinafter MRI} done with respect to the plaintiff's cervical and lumbar spines, as well as, to the plaintiff's right and left knees. The MRI of the cervical spine revealed focal central herniation at C4-5 and the MRI of the lumbar spine revealed focal disc bulging at L1-L2, L2-L3 and L5-S1. The MRI study as to the left knee revealed joint effusion and a Type I tear of the posterior horn of the medial meniscus and as to the right knee the

MRI revealed a Type I tear involving the posterior horn of the medial meniscus. Subsequent to his review, *inter alia*, of the aforementioned MRI studies and his examination of the plaintiff, Dr. Sultan concluded that from an orthopedic point of view the plaintiff is orthopedically stable and neurologically intact. He further, states that the plaintiff does not demonstrate any objective signs of ongoing disability or post-traumatic impairment in relation to the subject automobile accident of September 23, 2000 and that there is no clinical correlation between the results of the aforementioned MRI studies and the results of the examination he performed.

Upon motion by a defendant for summary judgment seeking to dismiss a personal injury complaint, he or she carries the burden of establishing that the plaintiff did not suffer a “serious injury” as enumerated in Article 51 of the Insurance Law §5102(d). (*Gaddy v. Eyler*, 79 N.Y.2d 955.) Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient admissible evidence to raise an issue of fact as to the existence of a “serious injury”. (*Licari v. Elliott*, 57 N.Y.2d 230.)

Within the context of the defendant’s burden, when presented with MRI reports indicating disc bulges or herniations , he or she through their medical experts must demonstrate that such disc bulges or herniations are not causally related to the subject automobile accident or that they do not constitute a “serious injury” . (*Chaplin v. Taylor*, 273 A.D.2d 188; *Gray v. Lasurdo*, 302 A.D.2d 560.)

Thus, the pertinent question before the court at this juncture is whether the medical evidence proffered by the defendant’s in the form of Dr. Sultan’s medical report, is sufficient to meet their burden. Specifically, the court needs to inquire whether Dr. Sultan’s conclusions adequately attribute causality of the disc bulges and/or herniations present in the plaintiff’s MRI reports to something other than the subject automobile accident or that such disc bulges and herniations are not “serious

injuries”. (*Chaplin, supra; Gray, supra.*)

Dr. Sultan’s conclusion that the plaintiff is both orthopedically and neurologically intact and does not demonstrate any objective manifestations of post-traumatic impairment coupled with his assertion that there was no clinical correlation between the MRI results and the plaintiff’s examination, is sufficient to raise a triable issue of fact as to whether the plaintiff has suffered a serious injury . (*Duldulao v. City of New York*, 284 A.D.2d 296; *cf. Woods-Smith v. Tighe*, 291 A.D.2d 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.*)

As specifically enumerated in his Bill of Particulars, the plaintiff is claiming that he has sustained the following categories of “serious injury” as defined in NYS Insurance Law §5102(d): a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and/or a medically determined injury or impairment of a non-permanent nature which prevents the plaintiff from performing substantially all of the material acts which constitutes the plaintiff’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence.

In opposition to the defendant’s instant application and in support of his respective claims, the plaintiff submits the affirmed MRI reports of Dr. Shapiro. Dr. Shapiro states that the MRI of the plaintiff’s lumbar spine reveals focal disc bulges at L1-2 , L2-L3 and L5-S1 and with respect to the cervical spine the MRI revealed focal central disc herniation at C4-5. As to the plaintiff’s right knee, Dr. Shapiro states that the MRI reveals a Type I tear of the posterior horn of the medial meniscus and the MRI of the left knee indicates joint effusion and a Type I tear of the posterior horn of the

medial meniscus.

While a herniated or bulging disc may indeed constitute a “serious injury” within the ambit of the Insurance Law §5102(d), a plaintiff is required to provide objective evidence of the extent or degree of the alleged physical limitation resulting from the disc injury and its duration. (*Diaz v. Turner*, 306 A.D.2d 241.) Accordingly, the plaintiff submits the affidavit of his treating chiropractor, Dr. Sosnik.

Dr. Sosnik states in his affidavit that he initially saw the plaintiff on September 29, 2000 at which time he conducted a complete physical examination of the plaintiff’s lumbar and cervical areas. Included in the initial examination of the cervical area were the following orthopedic tests: Foraminal Compression Test which was positive resulting in pain in the cervical spine; Soto Hall positive ; Cervical Distraction was positive indicating a cervical muscle injury.

With respect to the initial examination of the plaintiff’s lumbar spine, the following orthopedic tests were performed: Kemp’s test positive bilaterally resulting in pain in the lower back with radiations to the right and left; Straight leg raising was positive at 15 degrees on the right, and 15 degrees on the left; Nachlas’ Test was positive resulting in pain in the right and left sacroiliac joint; Lindner’s Test was positive with pain in the low back to both legs; Spinous Percussion of the lumbar spine was mildly positive.

Subsequent to the initial exam, on 10/06/00 Dr.Sosnik conducted a computerized range of motion test as to the plaintiff’s cervical and lumbar spine. Such testing revealed a restriction in the plaintiff’s range of motion with regard to both his cervical and lumbar spine. Dr. Sosnik continued to treat the plaintiff until June of 2001 at which time treatments were stopped due the opinion of Dr. Sosnik , that there was no additional benefit to be derived from seeking additional treatment. The

plaintiff did, however, seek follow-up treatment with Dr. Sosnik between 01/28/03 and 2/22/03 and was last seen by Dr. Sosnik on 8/13/04. With respect to the issue of gaps in treatment, defense counsel argues that there is an unexplained gap in treatment between 2/22/03 and 8/13/04. This court recognizes that an unexplained gap in treatment is grounds for dismissal of a plaintiff's action, however, Dr. Sosnik states in his affidavit that in his medical opinion that there was no further benefit to be gained by continuing treatment after June of 2001. The fact that the plaintiff returned for some follow-up care with Dr. Sosnik between 01/28/03 and 2/22/03 does not render Dr. Sosnik's opinion an unviable explanation for the gap between 2/22/03 and 8/13/04. (*Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345.)

During the most recent examination of 8/13/04, Dr. Sosnik conducted range of motion testing as to the plaintiff's cervical and lumbar spine and found significant limitations with respect to both regions. He states that the physical limitations experienced by the plaintiff are permanent and that the subject automobile accident of 9/23/00 was the competent producing cause of the plaintiff's injuries. Defense counsel argues that due to a history of prior accidents, the plaintiff has failed to meet his burden with respect to establishing proximate causation as between the subject automobile accident and the alleged sustained injuries. However, defense counsel does not submit to this court any competent medical evidence pertaining to these prior injuries.

When assessing the medical evidence offered by a plaintiff on threshold motions, the court must insure, *inter alia*, that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by objective medical findings. (*Grossman v. Wright*, 268 A.D.2d 79.) Further, these objective medical findings must be based upon a recent examination of the plaintiff wherein the expert must provide an opinion as to the significance of the injury. (*Grossman, supra; Constantinou v. Surinder*, 777 N.Y.S. 708.) A physical examination personally

conducted by the affiant is considered sufficient and thus Dr. Sosnik's medical conclusions can be deemed objective. (*Grossman, supra.*)

The court now considers whether the medical report of Dr. Sosnik and the conclusions contained therein are sufficient to support a claim under the aforementioned categories of injury as provided in Article 51 of the Insurance Law §5102(d).

When considering whether a plaintiff has sustained a permanent loss of use of a body organ, member, function or system, the plaintiff must prove a total loss of use. (*Oberly v. Bangs*, 96 N.Y.2d 295.) In the instant matter, the medical report of Dr. Sosnik does not state that the plaintiff has suffered a total loss of use. Thus, a claim under this category of injury could not be maintained. (*Oberly, supra.*)

With respect to the category where a plaintiff has allegedly sustained a medically determined injury or impairment for the first ninety out of the one hundred and eighty days following the accident, a plaintiff is required to submit medical proof which demonstrates the existence of an injury/impairment and that such injury or impairment has prevented the plaintiff from performing substantially all of his daily customary activities. (*Licari v. Elliott*, 57 N.Y.2d 230.) Dr. Sosnik's affidavit states that during the initial visit the plaintiff indicated that the pain interfered with his everyday activities and that such pain worsened with prolonged sitting, standing or walking. Moreover, the plaintiff testified at his examination before trial {hereinafter EBT} that he was out of work for a period of seven months immediately following the subject automobile accident of 9/23/00. (*cf. Licari, supra.*)

As to the statutory categories of permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system, the Court of Appeals has held that whether a particular limitation is consequential or significant is a question of medical

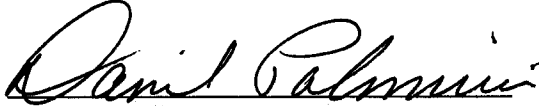
significance and involves a determination as to the degree or nature of the injury based upon the normal function, purpose and use of the particular body part. (*Toure, supra.*) Dr. Sosnik's affidavit which ascribed a numeric percentage loss to the plaintiff's loss of range of motion regarding both the cervical and lumbar spine together with his objectively based opinions as to permanency and causality are sufficient to support a claim of "serious injury" and thus raises a triable issue fact thereby precluding summary judgment. (*Toure, supra.*)

Based upon the foregoing, the defendant's motion for summary judgment seeking dismissal of plaintiff's complaint is hereby denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 17 , 2004


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Acting J.S.C.

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ENTERED

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