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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL PART: 50**

SOMER N. MEJIA,

INDEX NO.: 000973/04

Plaintiff,

MOTION DATE:12-5-05
SUBMIT DATE: 2-2-06
SEQ. NUMBER - 001

-against-

PIER R. DEROSE AND MIRELLA A. DEROSE,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 11-2-05..... 1
Affirmation in Opposition, dated 12-14-05..... 2
Reply Affidavit, dated 1-27-06.....3

This motion was referred to the undersigned on or after January 3, 2006.

This is an action for personal injury caused by a motor vehicle accident. Defendants Pier DeRose and Mirella DeRose are moving for summary judgment dismissing the complaint on the ground that plaintiff failed to sustain a "serious injury" as defined by

§ 5102(d) of the Insurance Law. For the reasons which follow, defendants' motion for summary judgment is granted.

The accident occurred on August 6, 2003 at approximately 4:00 p.m. on 13th Street near the intersection with Franklin Avenue in Garden City. Plaintiff Somer Mejia claims that as a result of the accident he sustained injury to his lumbar and lumbosacral spine. Defendants maintain that plaintiff's alleged injuries do not satisfy the threshold requirement of serious injury which plaintiff must establish in order to recover for non-economic loss. Insurance Law § 5104(a).

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in among other things "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."

On a motion for summary judgment, it is defendant's burden to present sufficient evidence to demonstrate that plaintiff did not sustain serious injury within the meaning of Insurance Law § 5102(d) as a matter of law (*Schultz v. Von Voight*, 86 N.Y.2d 865 [1995]). However, the question of whether plaintiff suffered a serious injury is not always a question

of fact which requires a jury trial (*Licari v. Elliot*, 57 N.Y.2d 230, 237 [1982]). Conclusory assertions of serious injury, including subjective complaints of pain, will not fulfill the statutory definition. However, where plaintiff submits objective evidence as to "the *extent* of the limitation of movement" a factual issue will be presented (*Licari*, 57 N.Y.2d at 238-39 (emphasis in original). See also (*Toure v. Avis Rent a Car Systems*, 98 N.Y.2d 345 [2002]).

Before proceeding to the merits of defendants' summary judgment motion, the court notes that defendants also seek dismissal of the complaint pursuant to CPLR 3211(a)(2) and (7), lack of subject matter jurisdiction and failure to state a cause of action. In our State court system, Supreme Court is a court of original, unlimited, and unqualified jurisdiction*(Matter of Frye v.Tarrytown*, 89 NY2d 714 [1997]). Thus, there is no question that the court has subject matter jurisdiction over this garden variety personal injury action. On a motion to dismiss for failure to state a cause of action, the court must determine whether plaintiff's allegations are sufficient to state all the necessary elements of a cognizable cause of action (*Rovello v. Orofino Realty*, 40 NY2d 633 [1976]). A review of the complaint reveals that plaintiff has alleged a negligence action arising from a motor vehicle accident resulting in serious physical injury. Thus, that branch of defendants' motion to dismiss based upon lack of subject matter jurisdiction and failure to state a cause of action is denied.

In support of their motion for summary judgment, defendants have submitted the affirmation of Dr. Wayne Kerness, an orthopedist who examined plaintiff on May 23, 2005.

Dr. Kerness concluded that plaintiff's shoulder range of motion was normal with regard to forward elevation, abduction, adduction, and internal and external rotation. Similarly, Dr. Kerness concluded that plaintiff's lumbar spine range of motion was normal with regard to flexion, extension, and rotation. Plaintiff reported to Dr. Kerness that he was employed as a manager at a Wendy's restaurant and lost only one day of work due to the accident. Dr. Kerness' diagnosis was that plaintiff had sustained a lumbar sprain or strain and a left shoulder injury, both of which had been resolved by the time of the examination.

Defendants have also submitted the affirmation of Dr. Alan David, a neurologist, who examined plaintiff on the same date. Dr. David concluded that plaintiff's cervical spine range of motion was normal as to flexion, extension, and rotation. Dr. David determined that plaintiff's range of motion as to his elbows, wrist, hip, and lumbar spine were all normal.

Finally, defendants have submitted the affirmation of Dr. Joseph Savino. Dr. Savino performed an independent radiology review of an MRI of plaintiff's lumbar spine which was taken November 20, 2003. The MRI consists of four films, containing 60 views of the spine. Based upon his review of the MRI, Dr. Savino concluded that it was normal.

Defendants have established, through the sworn reports of the three physicians, a prima facie case that plaintiff's injuries were not serious within the meaning of § 5102. Accordingly, the burden shifts to plaintiff to come forward with sufficient evidence to overcome defendants' motion by demonstrating that he sustained a serious injury under the No-Fault Law(*Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]).

In opposition to the motion, plaintiff has submitted the affirmation of Dr. Hassan Nassef who examined plaintiff on August 11, 2003, five days after the accident, and again on November 3, 2003. Plaintiff was regularly treated in Dr. Nassef's office for three days per week during that period. Plaintiff received acupuncture, chiropractic, physical therapy, and other treatment. Dr. Nassef concluded that plaintiff's range of motion of the lumbar spine was significantly restricted. Specifically, flexion was 40 degrees as opposed to a normal of 90 degrees, extension was 15 degrees as opposed to a normal of 30 degrees, lateral flexion on the left side was 10 degrees as opposed to a normal of 30 degrees, and lateral flexion on the right side was 15 degrees as opposed to a 30 degree normal.

Plaintiff has also submitted the affirmation of Dr. Dennis Rossi, a radiologist who performed an MRI of plaintiff's lumbar spine on November 20, 2003. Dr. Rossi concluded that there was mild L4-5 and mild L5-S1 disc bulging with minimal encroachment upon the underlying spinal canal. Dr. Rossi further concluded that there was no significant degree of stenosis or foraminal narrowing, and this [sic] appeared to be of questionable clinical significance.

Plaintiff's affidavit alleges that he went to the Franklin Hospital Medical Center following the accident and was seen in the Emergency Room, complaining of pain in the back and left shoulder. As of the date of the affidavit, December 14, 2005, plaintiff claimed that he was still experiencing pain on a daily basis. Plaintiff claims that he cannot lift as much as he used to, or work out, or weight lift. Plaintiff asserts that he stopped treatment

with Dr. Hassan because he was told that there was nothing more that could be done for him.

Evidence of injury to the soft tissue of the spine, such as a herniated disc, accompanied by a quantified limitation of the range of motion, creates a triable issue of fact as to whether plaintiff sustained a serious injury within the meaning of the No-Fault Law. Pommells v. Perez, 4 N.Y.3d 566 (2005); Brown v. Stark, 205 A.D.2d 725 (2d Dep't 1994). However, a review of the record indicates that plaintiff has not met his burden of going forward to show a serious injury. While Dr. Nassef found an objective limitation in the range of motion, the MRI performed by the radiologist, finding only mild disc bulging, did not confirm a spinal injury. Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

This shall constitute the Decision and Order of this Court

ENTER

DATED: February 17, 2006

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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