SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

----------X **PART 15**

WILLIAM HORSHINSKI and EILEEN HORSHINSKI,

Plaintiffs,

INDEX NO. 16551/03

X X X

-against-

MOTION DATE: 6/14/06

SEQUENCE NO. 002, 2003

MICHAEL J. SACKARIS and SOIL SOLUTIONS, INC.,

Defendants.

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Notice of Motion, Affs. & Exs.....1
Notice of Cross-Motion, Affs. & Exs.....2
Affirmation In Opposition & Exs.....3
Reply Affirmation & Exs.....4
Sur-Reply Affirmation 5

Upon the foregoing papers, it is ordered that the motion by defendants for an for an order granting summary judgment dismissing the Complaint on the ground that the plaintiff did not sustain a serious injury (see Insurance Law §5102(d)) as a result of his motor vehicle accident on July 11, 2002 is granted.

Plaintiffs' cross-motion for an order granting summary judgment on the issue of liability is denied.

In this action plaintiff, William Horshinski, seeks to recover for personal injuries sustained as a result of a two-car accident that occurred at the intersection of Hempstead Turnpike and Osborne Road, West Hempstead, N.Y. on July 11, 2002. Plaintiff, William Horshinski, was the operator and owner of one car; defendant

Michael Sackaris operated the van owned by defendant Soil Solutions, Inc. Defendants' car allegedly made a left turn crossing 3 lanes of traffic before hitting plaintiff's car. Plaintiff Eileen Horshinski's action is derivative in that she is bedridden with Multiple Sclerosis and is dependent on her husband, William Horshinski for her daily activities and needs.

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 demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

The legislative intent underlying the no-fault law was to weed out frivolous claims and limit recovery to significant injuries. As such, courts have required objective proof of a plaintiff 's injury in order to satisfy the statutory serious physical injury threshold. Subjective complaints alone are not sufficient (*Toure v. Avis Rent A Car Systems, Inc.*, 98 NY2d 345 (2002)).

In support of their motion, defendants note that plaintiff refused medical help at the accident scene and missed 6 weeks work as a laborer. There are neither records nor testimony of any medical treatments for 2003, 2004, 2005 or 2006. Defendants' neurologist Edward Weiland's sworn report of the October, 2004 examination concludes that plaintiff's lumbar and neck sprain and chest wall contusion were resolved, there was no neurological disability or permanency. Plaintiff's testimony refers to difficulty sitting for extended periods and inability to maintain the lawn.

In opposition to this application, plaintiff submits extensive testimony regarding his inability to perform the pre-accident duties of taking care of his bed-ridden wife. In further support are unsworn reports from 2002 office visits to Dr. Jeffrey Perry, D.O., orthopedist David Benatar, psychologist Benjamin Hirsch and neurologist Jean-Robert Desrouleaux. There is a 2006 follow-up report by Dr. Perry. There is no explanation for the gap in treatment.

Plaintiff's statements, and those of his doctor reiterating his claims, that he was otherwise limited due to his own subjective complaints of pain, are also insufficient to defeat summary judgment (*Georgia v. Ramataur*, 180 AD2d 713 (2nd Dept. 1992); *Scheer v. Koubek*, 70 NY2d 678 (1987)).

As recently reaffirmed by the Court of Appeals, in the context of soft-tissue injuries, involving complaints of pain which are difficult to observe or quantify, what constitutes a "serious injury" is vexing. The Court of Appeals concluded, however, that even where there is objective medical proof of injury, where additional contributory factors interrupt the chain of causation between the accident and claimed injury, such as a gap in treatment, an intervening medical problem or pre-existing condition, summary dismissal of a complaint may be appropriate (*Pommells v. Perez, et al. 4 NY3d 566* (2005)).

Here, plaintiff did not meet his burden of establishing a triable factual issue on the issue of plaintiff's sustaining a serious injury (*Li H Li v. Woo Sung Yun*, 27 AD2d 624 (2nd Dept., 2006)).

Dated: August 8, 2006.

ENTERED

AUG 11 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Anthony L. Parga, J.S.C.