

SHORT FORM ORDER

SLAN

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS, PART 16
NASSAU COUNTY

EDWIN CASTANEDA,

Plaintiff(s),

ORIGINAL RETURN DATE: 08/07/01

SUBMISSION DATE: 09/17/01

INDEX No.: 15517/99

-against-

SAMUEL J. CLARKE, VERRASTRO TRUCKING
INC. and SANTOS ZEPEDA,

MOTION SEQUENCE #4,5

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2

In this action, plaintiff seeks damages for injuries he allegedly sustained in a motor vehicle accident on February 6, 1998. According to his verified bill of particulars, plaintiff sustained injuries including the following:

C4/5 and C5/6 disc bulges.

Straightening of the cervical lordosis.

Acute generalized cervical polyradiculitis, acute right sided L5-S1 radiculopathy, cervical radiculopathy, post traumatic cervical and lumbosacral; paraspinalis spasticity, nerve root contusions, hematomas, dizziness and dysequilibrium with injury to brain and/or brain stem. Post traumatic anxiety syndrome.

Rib sprain/strain, lumbar radiculitis, cervical radiculitis, ankle sprain/strain, knee sprain/strain. Lower back pain, severe neck pain. Severe right cervico-thoracic spasm, upper trapezius, levator scapulae and sternocleidomastoid muscle tenderness. Bilateral para-lumbar muscle spasm. Frontal headache and jaw pain with lightheadedness. Sternal pain with difficulty breathing. Right ankle and right knee pain.

Headaches with dizziness and balance difficulty, nervousness and anxiety, severe neck pain radiating into both shoulders with numbness of the right hand, severe low back pain radiating into the right hip with numbness of the right foot and weakness of the right leg.

Defendants, by their motion and cross-motion, seek summary judgment dismissing plaintiff's complaint on the ground that he did not suffer a serious injury within the meaning of Insurance Law §5102(d).

In support of their motion and cross-motion, defendants rely upon the affirmation of their examining radiologist Audrey Eisenstadt and their examining dentist, John Larounis, D.D.S. Dr. Eisenstadt found no causal relationship between the subject accident and the abnormalities seen in the MRI of plaintiff's cervical spine and Dr. Larounis found neither a dental disability nor a TMJ pathology.

"[T]he 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 (citations omitted). Failure to make such prima facie showing requires a denial of the motion regardless of the sufficiency of the opposing papers (citation omitted) (Alvarez v. Prospect Hospital, 68 NY2d 320, 324).

Defendants fail to include an affirmation/affidavit from an examining orthopaedist or neurologist, or other medical submission addressing plaintiff's various other complaints including, but not limited to, those involving plaintiff's lumbar and sacral regions. Moreover, while Dr. Eisenstadt's MRI review finds various cervical abnormalities and concludes that none are causally related to the accident since they are all degenerative in nature, she does not state that plaintiff's post-accident complaints are necessarily the result of his degenerative abnormalities.

The attempt by defendants Samuel J. Clarke and Verrastro Trucking Inc. to supplement their submission by including the November 20, 2000 affirmation of their examining neurologist in reply¹ is rejected. A party moving for summary judgment may not submit new matters in reply which should have been submitted as part of the original motion (Ritt v. Leonx Hill Hospital, 182 AD2d 560; Wasyluk v. LTL Developers, Inc., 147 AD2d 475).

As defendants fail to make a prima facie showing that plaintiff did not sustain a serious injury as a result of the February 6, 1998 accident, defendants' motion and cross-motion for summary judgment are denied without regard to the sufficiency of plaintiff's opposition (see, Caufield v. Metten, 275 AD2d 758).

This decision constitutes the order of the court.

Dated: 11-7-01

HON THOMAS P. PHELAN

J.S.C.

ENTERED

NOV 15 2001

NASSAU COUNTY
COUNTY CLERK'S OFFICE

¹ That counsel for defendants Clarke and Verrastro mischaracterize their reply papers as a "Supplemental Affirmation in Support" is of no consequence.