SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

MARCO BARRERA,

Plaintiff(s),

-against-

MTA LONG ISLAND BUS, METROPOLITAN SUBURBAN BUS AUTHORITY and DORRINGTON A. HUNTER,

Defendant(s).

ORIGINAL RETURN DATE:01/05/07
SUBMISSION DATE: 02/15/07
INDEX No.: 4087/04

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....1
Answering Papers.....2
Reply.....3

Motion by defendants, MTA Long Island Bus, Metropolitan Suburban Bus Authority and Dorrington A. Hunter (collectively referred to herein as "MTA"), for an Order of this Court, *inter alia*, awarding defendants summary judgment dismissing plaintiff's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) is granted.

This personal injury action arises out of an accident that occurred on Friday, June 13, 2003, at approximately 4:45pm at the intersection of Franklin Avenue and Old Country Road in Mineola, New York. It is undisputed that Franklin Avenue becomes Mineola Boulevard, north of Old Country Road. At the time of the accident, 32 year old plaintiff, Marco Barrera was traveling in the left northbound lane on Franklin Avenue. As a result of traffic being halted by a construction crew working ahead on Mineola Boulevard, plaintiff, despite having a green light in his favor, was stopped in the intersection of Franklin Avenue and Old Country Road. Plaintiff alleges that while he was stopped in traffic at the intersection, the left side of his car's rear bumper was struck by the rear tire of the bus owned by defendants, MTA. The bus was in the process of making a left turn from Mineola Boulevard onto Old Country Road.

Plaintiff stated at his Public Authorities Hearing (PAH) that he did not lose consciousness or sustain any cuts, abrasions or fractures as a result of the accident (*Barrera PAH*, pp. 34-35, 47). However, according to plaintiff's own testimony, he struck his right knee on the stick shift and steering wheel as a result of the accident and then struck his right knee on the driver's door when he tried to exit the vehicle (*PAH* transcript, pp. 32-34; *Barrera EBT*, pp. 29-31, 33).

The police were summoned to the scene of the accident at which time plaintiff refused medical attention. Later that same evening, however, plaintiff presented at Island Medical Hospital (*see PAH* transcript, p. 45) with complaints to his neck, back and knee. Plaintiff alleges that upon taking x-rays of his neck and back, the hospital released him without ever treating his knee. Two days later, on June 15, 2003, plaintiff sought treatment at the emergency room at Nassau County Medical Center (*Id.*, p.47) for his knee. While at the Nassau County Medical Center, plaintiff underwent an x-ray examination of his right knee which noted a small joint effusion. After the examinations did not reveal any fractures, plaintiff was later discharged the same day with a right knee immobilizer and instructions on its use.

Plaintiff returned to work the next day as a "utility person" at Major Nissan of Garden City, on Monday June 16, 2003 (*Id.*, pp.75, 78). He continued working without any further interruption until, more than three months later, he was absent from work for approximately one month following an arthroscopic surgery performed on September 18, 2003 to his right knee (*Id.*, pp. 78-79).

Plaintiff's September 18, 200 arthroscopy consisted of a partial medial menisectomy, a patella abrasion arthroplasty and a partial synovectomoy with marcaine injection under general anesthesia. Plaintiff admits that during this one month absence from work following the arthroscopy, he was confined to his bed for only two or three days (*Id.*, p. 80). Plaintiff also stated that although he did not go to work in the month after his surgery, he was not confined to his home; rather, he would often go out and exercise (*Id.*, pp. 80-81).

Upon returning to work, plaintiff remained in the same job on a full-time basis for approximately two and one-half years following the subject accident (*Id*). At that point, on December 22, 2005, plaintiff underwent a second arthroscopic surgery of his right knee consisting of a partial medial menisectomy and a partial lateral menisectomy. Plaintiff's right knee was immobilized for five days following the second surgery (*Barrera EBT*, p. 95).

Plaintiff also testified that approximately 8-10 months before the subject accident, sometime in late 2002, he had been involved in a prior motor vehicle accident in which he injured his neck and back and which required him to receive medical attention for an unspecified number of months (*PAH* transcript, pp. 70-71, *Barrera EBT*, p. 97).

In this action, plaintiff Barrera claims specifically that as a result of the June 13, 2003 accident, he sustained a medial meniscus tear of the right knee; significant loss of range of motion in the right knee; underwent arthroscopic surgery, partial medial meisectomoy, patella abrasion

arthroplasty, partial synovectomy and marcaine injection at Berger Regional Medical Center in Paramus, New Jersey on September 18, 2003; significant restriction of range of motion of the neck and back (*Plaintiff's Bill of Particulars*, ¶17).

Among the other branches of defendants' motion, defendants object to plaintiff's service of supplemental bills of particulars. As these bills of particulars merely amplify and elaborate upon the injuries alleged by plaintiff in his original bill of particulars and raise no new theory of liability, this Court denies that part of defendants' motion which seeks to deem plaintiff's assertions of "new" injuries a nullity (*Balsamo v. City of New York*, 287 AD2d 22, 27 [2nd Dept. 2001]; *Kelleir v. Supreme Industrial Park*, 293 AD2d 513 [2nd Dept. 2002]).

In his verified bill of particulars, plaintiff contends that the injuries he sustained fall within the following three categories of serious injury:

> "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." (Insurance Law §5102(d))

In moving for summary judgment defendants must make a prima facie case showing that plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see Pommels v. Perez,* 4 NY3d 566 [2005]; *see also Grossman v. Wright,* 268 AD2d 79, 84 [2nd Dept. 2000]).

Defendants are not required to disprove any category of serious injury which has not been properly pled by plaintiff (*Melino v. Lauster*, 82 NY2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and his submitted exhibits (*Michaelides v. Martone*, 186 AD2d 544 [2nd Dept. 1992]; *Covington v. Cinnirella*, 146 AD2d 565, 566 [2nd Dept. 1989]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of defendant's examining physician or the unsworn reports of plaintiff's examining physician (*see Pagano v. Kingsbury*, 182 AD2d 268 [2nd Dept 1992]; *see also Peschanker v. Loporto*, 252 AD2d 485 [2nd Dept. 1998]).

However, unlike movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems, 98 NY2d 345,* stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, supra, at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of plaintiff (*see, Id.*). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003].

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra* , that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez, supra*).

"Permanent consequential limitation of use of a body organ or member" and "Significant limitation of use of a body function or system"

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*see Toure v. Avis Rent A Car Systems, Inc.,* supra). 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 plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*see id*).

A minor, mild or slight limitation is, however, insignificant within the meaning of the statute (*Licari v. Elliot*, supra; *see also Grossman v. Wright, supra*, at 83).

90/180 days

To prevail under the category of 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", a plaintiff must again provide competent, objective medical proof causing the alleged limitations on plaintiff's daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept. 2001]). Furthermore, plaintiff must demonstrate that he has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra at 236; *see also Sands v. Stark*, 299 AD2d 642 [2nd Dept. 2002]).

Unlike a claim of serious injury under the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories, a gap or cessation in treatment is irrelevant as to whether plaintiff satisfied the 90/180 definition of serious injury (*see Gomez v. Ford Motor Credit Co.*, 10 Misc. 3d 900, 904 [Sup.Ct., Bronx Co., 2005]).

With these guidelines in mind, this Court will now turn to the merits of defendant's motion at hand.

In support of their instant motion, defendants submit, *inter alia*, an unsworn, unaffirmed MRI report, dated May 24, 2005, of plaintiff's physician, Dr. Christine Kim, MD, a radiologist; the affirmed report of Dr. A. Robert Tantleff, MD who performed an independent radiological review of the May 24, 2005 MRI of plaintiff's right knee and the accompanying report dated May 26, 2005; the affirmed report of Dr. S. Farkas, MD, an orthopedist, who also examined plaintiff on behalf of defendants on August 24, 2005; and the affirmed report of Dr. E. Kojo Essuman, MD, a neurologist, who examined plaintiff on behalf of defendants on August 26, 2005.

Although defendants submit an unsworn MRI report of plaintiff's right knee, as a result of plaintiff's reliance on the same report in their proof, the MRI reports constitute admissible evidence in this case (*Gonzalez v. Vasquez*, supra; *see also Ayzen v. Melendez*, 299 AD2d 381 [2nd Dept. 2002]).

The MRI report dated May 24, 2005 reveals that plaintiff at the time of the examination, almost two years after the date of accident, was found to have no evidence of fracture, dislocation or bone marrow signal abnormality; plaintiff had normal lateral meniscus, normal anterior and posterior cruciate ligaments, normal quadriceps tendon, normal patella tendon, and normal bilateral collateral ligaments. The only irregularities noted by Dr. Kim were a minimal irregularity at the posterior surface of the medial meniscus with no obvious or transecting tear, minimal fluid in the suprapatellar bursa and minimal chondromalacia patella (*Motion*, Ex.N).

Dr. Tanteleff's independent radiological review dated October 6, 2005, also concludes, that based upon the above MRI of plaintiff's right knee dated May 24, 2005 and the accompanying report dated May 26, 2005, as follows:

> IMPRESSION: Normal MRI examination of the Right Knee revealing no evidence of ligamentous abnormality nor is there evidence of meniscal tears be they acute or chronic, degenerative or traumatic in origin.
> (*Motion*, Ex.O)

Dr. Farkas, an orthopedist, opines of his August 24, 2005 examination of plaintiff, in pertinent part, as follows:

> SURGICAL HISTORY: The past surgical history, as reported by the claimant is that of right knee surgery on 09/18/03.
> ***
> CHIEF COMPLAINT: The claimant states feeling somewhat better. The claimant complains of neck, back and right knee back. He states numbness in the right leg. The claimant reports no other injuries or complaints.
> ***
> PHYSICAL EXAMINATION:***
> Examination of the lumbar spine: Revealed 90 [degrees] of forward flexion [90 (degree) normal] with 30 [degrees] of lateral bending [30 (degrees) normal] with no complaints. There was no spasms or crepitus noted during static positioning nor during active range of motion. The claimant could toe and heel walk without difficulty. Deep tendon reflexes were 2+ and brisk at both the Achilles tendon and patellar tendon regions. Motor examination was 5+. Straight-leg-raising was negative. The claimant sits and bends fully forward to remove his shoes with no indication of discomfort.
>
> Examination of the cervical spine: Revealed 80 [degrees] of rotation left and right [70 (degrees) normal] and 50 [degrees] of flexion extension (30 [degrees] normal]. There was no spasm or crepitus noted during static positioning, nor during active range of motion. Deep tendon reflexes were 2+. Motor examination was 5+. There was a negative Tinel at the elbow and wrist.
>
> Examination of the right knee: The claimant complaints of pain as I palpate the medial aspect of the right knee. There is no effusion, no bogginess noted about the knee. There is a negative Apley's, McMurray and drawer. Quads/patellar tendon are intact. There is no patellar crepitus. The claimant offers no complaint of pain during the examination. There is 130 [degrees] of flexion is noted. There is normal range of motion. Well healed portals are noted.
> ***
> DIAGNOSIS:
> 1. Resolved cervical sprain.
> 2. Resolved lumbar sprain.
> 3. Resolved internal derangement of the right knee, status post arthroscopy.
>
> ***
> DISABILITY:
> I find no orthopedic disability based on the physical examination at this time. This is also based upon the available medical documentation, which was reviewed. The claimant may perform usual duties of occupation and may carry out the daily activities of living, without restriction.
> (*Motion*, Ex. P)

Dr. Essuman, avers of his August 26, 2005 neurological evaluation of plaintiff, in pertinent part, as follows:

> CURRENT COMPLAINTS
> Claimant experiences continued pain and restricted range of motion in the right knee prescribed as "no good" which restricts walking. Occasional headaches are also experienced with symptoms which are diffuse, nonpulsatile without nausea or vomiting. Intermittent discomfort is also experienced in the neck and lower back without extension into the upper or lower extremities.
> ***
> NEUROLOGICAL EXAMINATION
> ***
> Motor System: On gross inspection, evidence of arthroscopic procedure right knee. This is a well developed adult physique. No apparent areas of atrophy. All joints, extremities and vertebral segments disclosed a complete, full, free, painless range of motion (cervical through lumbosacral).
> ***
> Diagnosis: The findings on neurological examination are entirely normal, negative and without objective focality. For that reason, the diagnosis is a soft tissue injury which is minor, resolved and without sequelae. Specifically, there is no evidence of radiculopathy. There is no clinical correlation between the claimant's subjective symptoms and the objectively normal findings on exam.
> DISABILITY: None, the claimant has resumed all occupational duties after an absence of once [sic] month and based upon the normalcy of examination, there are no precluding factors, which would impede continued full time employment and activities of daily living. (*Motion*, Ex. Q)

Defendants' remaining proof including plaintiff's deposition testimony and a Certificate to Return to Work issued from Premier Orthopedics & Sports Medicine, P.C., confirm that following plaintiff's September 18, 2003 surgery, plaintiff was cleared to "return to full work duty on 10/20/03" and that there is no indication that there is a need for any restrictions of plaintiff's activities. Based on the foregoing, this Court finds that defendant, MTA, has submitted ample proof in admissible form that plaintiff did not sustain a serious injury within the meaning of the statute.

In opposition to defendants' motion, plaintiff submits, *inter alia*, his own affidavits; Nassau County Medical Center's hospital records dated June 15, 2003; the unsworn and unaffirmed report of Dr. Anne Brutus, M.D., CPMR; the unsworn unaffirmed MRI report of Dr. John T. Rigney, M.D., Board Certified Radiologist who examined plaintiff on August 4, 2003; the affirmed medical reports and records of Dr. Howard M. Baruch, M.D. who is licensed by the State of New Jersey; the affirmed medical report of Dr. David Khanan, MD, Ph.D., dated October 8, 2005; and, the affirmed medical report and records of Dr. William J. Kulak, M.D., who examined plaintiff on September 7, 2006.

As stated above, plaintiff may not submit unsworn reports of his own examining doctors, namely, Dr. Brutus and Dr. Rigney, in order to defeat defendants' motion for summary judgment (*Grasso v. Angerami*, supra). In the absence of such affirmations by these physicians, the aforesaid reports will not be considered by this Court on the instant motion (*see Lowe v. Bennett*, 122 AD2d 728 [1st Dept. 1986], *affd* 69 NY2d 701 [1986]).

Plaintiff's submission of Dr. Baruch's affirmation also cannot be considered by this Court. CPLR 2106, which allows physicians to submit an affirmation with the same force as an affidavit, is limited to professionals licensed in the State of New York. This provision must be complied with literally. Failure to submit the required affirmation in this case, compels this Court to disregard the evidence because it is presented in inadmissible form and is insufficient to defeat defendant's motion for summary judgment (*see e.g. Cannizzaro v. King*, 187 AD2d 842 [3rd Dept. 1992]).

Aside from the aforementioned incompetent and deficient submissions, plaintiff also submits the Nassau County Medical Center reports dated June 15, 2003, the affirmed medical report of Dr. David Khanan, MD, Ph.D., who examined plaintiff on October 8, 2005; and, the affirmed medical report and records of Dr. William J. Kulak, M.D., who examined plaintiff on September 7, 2006.

The single page "Department of Radiology Report" from Nassau University Medical Center, two days after the subject accident, states, as follows:

> FINAL REPORT:
> RIGHT KNEE: AP, lateral, oblique
> There is no evidence of fracture or dislocation noted. A small joint effusion is noted.
> IMPRESSION: No fracture or dislocation.

In his October 8, 2005 examination of plaintiff, Dr. Khanan notes, in pertinent part, as follows:

> IMPRESSION:
> - Status post motor vehicle accident.
> - Status post right knee arthroscopic surgery, secondary to tear of posterior horn medial meniscus.
> - Chondromalacia patella.
>
> PLAN: Due to the patient's subjective complaints and objective findings on physical examination, I make the following recommendations:
> - Continue physical therapy 1 day a month for the right knee.
> - His program will include modalities, hot packs, massage, stretching, myofascial release, ergonometer, ROM exercises, therapeutic exercises, isometric exercises and home exercise program.
> - I referred patient to an Orthopedist for continuation fo right knee pain and relative weakness of right knee, in spite of physical therapy program.

> At the present time, residual symptomatology to the medial joint area would be consistent with multiple surgical interventions at that level. His greatest symptoms appear to be from the traumatic patellofemoral pathology consistent with a strike to the patellofemoral area at the time of the accident and consistent with the operative findings.
>
> The current clinical findings are expected to interfere with activities of daily living, occupational duties and recreational endeavors. It is doubtful that these functions can be performed in a manner as was present prior to this accident.
> ***
> At the present time, there is a permanent partial disability with loss of function to the right knee, which is, based on the medical records reviewed and the history obtained, felt to be causally related to the traumatic events of 6/13/03.
> (*Aff in Opp*, Ex. I).

A physician's affirmation which fails to set forth the tests that the physician used to arrive at his conclusions that plaintiff suffered a loss in the range of motion or relies on unsworn reports from outside sources does not constitute "competent admissible medical evidence" based on objective findings, sufficient to raise a triable issue of fact as to "serious injury" (Id.; *Kivlan v. Acevedo*, 792 NYS2d 573 [2nd Dept. 2005]). Accordingly, the report of Dr. Kulak, which fails to indicate that even one objective test was conducted by Dr. Kulak during his examination of plaintiff on September 7, 2006, cannot constitute compete admissible medical evidence, based on objective medical findings, sufficient to raise a triable issue of fact as to "serious injury".

Moreover, Dr. Kulak does not identify even a single activity of daily living which plaintiff is presently limited in his ability to perform as a result of the subject accident. Dr. Kulak, who never examined plaintiff prior to September 7, 2006, three years and three months after the accident, and disregards the evidence that plaintiff showed no limited range of motion upon examinations by two separate physicians just two weeks earlier, has presented no basis for concluding that any positive findings made by him relying on subjective evidence more than three years after the subject accident must be related to the subject accident. Dr. Kulak's report reveals that the range of motion testing conducted by him was not carried out in an objective manner, but rather was based upon subjective complaints of pain relayed by plaintiff.

Plaintiff's final submission, in opposing defendants' motion, is his own self-serving affidavit, which in the absence of otherwise admissible objective medical evidence, is insufficient to establish a serious injury within the meaning of the statute (*Glielmi v. Banner*, 254 AD2d 255 [2nd Dept. 1998]; *Rum v. Pam Transport, Inc.*, 250 AD2d 751 [2nd Dept. 1998]).

Therefore, this Court finds that plaintiff's proof is insufficient to defeat defendants' motion for summary judgment (*see Grasso v. Angerami*, 79 NY2d 813).

Plaintiff's complaint is dismissed without costs. The remaining branch of defendants' motion for an order of preclusion is accordingly denied as academic.

This decision constitutes the order and judgment of the court.

Dated: 4-3-07

HON THOMAS P. PHELAN
J.S.C.

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