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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. MARVIN E. SEGAL,
Justice

TRIAL/IAS PART 4
NASSAU COUNTY

LUIS MEJIA,

Plaintiff,

-against-

WILLIE M. SHUMAKE,

Defendant.

INDEX NO. 950/02

MOTION DATE: 5/28/03

MOTION NO. 002

The following papers were read on this motion:

Notice of Motion.....1
Opposition Affirmation.....2
Reply Affirmation.....3

The motion brought by the defendant, in the above captioned automobile tort action, for an order of this Court, pursuant to Rule 3212 of the CPLR and New York Insurance Law Section 5102(d), granting summary judgment in favor of the defendant dismissing the plaintiff's complaint herein is granted.

The rule in motions for summary judgment has been stated by the Appellate Division, Second Department, in Stewart Title Insurance Company v. Equitable Land Services, Inc., 207 AD2d 880, 881:

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v. New York Univ. Med. Center**, 64 NY2d 851, 853, **Zuckerman v. City of New York**, 49 NY2d 557, 562.) Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank v. McAuliffe**, 97 AD2d 607), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v. Prospect Hosp.**, 68 NY2d 320, 324; **Zuckerman v. City of New York, supra.**, at 562)."

New York Insurance Law Section 5102(d) defines "serious injury" as follows:

"Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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."

The instant action arises out of an automobile accident that occurred on July 7, 2001.

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. (**Licari** v. **Elliot**, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (**Alvarez** v. **Prospect Hospital**, supra.; **Winegrad** v. **New York Univ. Medical Center**, supra.). In the present

action, the burden rests on the defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (**Lowe** v. **Bennett**, 122 AD2d 728, affirmed, 69 NY2d 701.) When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. (**Licari**, supra; **Lopez** v. **Senatore**, 65 NY2d 1017).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may reply on the affirmed statements of the defendant's examining physician (**Pagano** v. **Kingsbury**, 182 AD2d 268). Once the burden shifts, it is incumbent upon the plaintiff, in opposition to the defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining or treating doctors will not be sufficient to defeat a motion for summary judgment. (**Grasso** v. **Angerami**, 79 NY2d 813). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury. (**O'Sullivan** v. **Atrium Bus Co.**, 246 AD2d 418). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which was based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints.

The findings, which must be submitted in a competent statement under oath or affirmation must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law section 5102(d). (**Marquez** v. **New York City Transit Authority**, 259 AD2d 261; **Tompkins** v. **Burtnick**, 236 AD2d 708, **Parker** v. **DeFontaine**, 231 AD2d 412, **DiLeo** v. **Blumberg**, 250 Ad2d 364). For example, in **Parker**, supra, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective

evidence since it is based on the physician's own examinations." (**Tompkins** v. **Burtnick**, supra; **DiLeo** v. **Blumberg**, supra).

It must be noted, however, that not all deficiencies in a plaintiff's claim of serious injury can be cured by a physician's sworn or affirmed statement. Clearly, a physician's affidavit which is premised on little more than plaintiff's subjective complaint is insufficient to establish a prima facie case of serious injury. (**Sulimanoff** v. **Ash Trans Corp.**, 259 AD2d 415; **Grossman** v. **Wright**, 268 AD2d 79; **Delaney** v. **Rafferty**, 241 AD2d 537, **Lincoln** v. **Johnson**, 225 AD2d 593). Of course, the plaintiff's own affidavit, which merely relates subjective complaints of pain, is likewise insufficient to defeat a defendant's motion for summary judgment (**Almonacid** v. **Meltzer**, 222 AD2d 631).

When a claim is raised under the "permanent consequential limitation of use of a body organ or member," "significant limitation of use of a body function or system," or "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," then, in order to to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion is acceptable. (**Toure** v. **Avis Rent A Car Systems, Inc.**, 98 NY2d 345). 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 the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. (**Toure** v. **Avis Rent A Car Systems, Inc.**, supra.)

In support of the instant motion, the defendant has submitted the affirmation of Steven Ender, D.O., Board certified in Neurology and Electromyography, wherein Dr. Ender reports of his February 3, 2002, neurological evaluation of the plaintiff:

"Mr. Mejia was seen for an independent neurological evaluation on February 3, 2003 at your request. He was accompanied by his friend Andre Alfaro to help translate. The claimant reports that while driving his car, he was involved

in a motor vehicle accident. He reports wearing a seat belt at the time and being struck on the rear and then on the right side. He denied head trauma or loss of consciousness. He recalls being dazed following the accident. He was taken by ambulance to Nassau University Medical Center where he was evaluated. X-rays were taken there and no fractures were found. He was discharged home that day. Following his accident, he was treated with chiropractic therapy by Dr. Joseph Huseman. He was in treated (sic.) for approximately eight months and was referred for MRI studies of the cervical and lumbar spine. In addition, he was seen by a neurologist. He recalls having electrophysiologic testing performed of the upper and lower extremities.

The claimant now complains of mid-line neck and lower back pain with heavy lifting and flexion of the lumbar spine. He denies any radicular pain, paresthesias, numbness, weakness or bowel/bladder dysfunction.

* * *

Cranial Nerves: Visual fields are full. Fundi is without papilledema. Pupils are 2mm and react to 1mm. Extraocular muscles intact. Facial sensation is intact to light touch and pinprick. There is no facial weakness or nystagmus present. Palate and tongue are midline.

Motor Examination: Strength is 5/5 throughout. Biceps and brachioradialis reflexes are 1+ symmetrical. Tricep reflex are at 2+ bilaterally. Knee jerks are 2+ symmetrical. Ankle jerks are 1+ bilaterally. Deep tendon reflexes are 2+ and symmetrical. Plantar response is flexor bilaterally. Tone and bulk are normal.

Sensory Examination: Light touch, pinprick and vibratory sensations are intact bilaterally.

Gait: The claimant can walk on heels and toes and tandem normally.

Musculoskeletal Exam: Neck: There is full range of motion of the cervical spine. Ther is no cervical paraspinal muscle tenderness or spasm noted. With flexion of the cervical spine, the claimant complains of neck pain. Back: Straight leg raising is negative in the seated position. There is full range of motion of the

lumbar spine. There is no lumbosacral paraspinal muscle tenderness or spasm noted. With flexion of the spine the claimant complains of lower back pain.

Medical Records: The following medical records were reviewed:

1. A summary report from Jen Osteopathic Medicine, P.C. This includes a summary report of a digital EEG signed by Anthony Conti, D.O.

2. A letter of medical necessity from Dr. Conti for a brain mapping study.

3. A psychological assessment report from Jennifer N. Duffy, Ph.D. dated 7/13/01.

4. A neurological consultation report from Dr. Vlad Zlatnik dated 10/17/01.

5. An EMG/NCV report and date from Dr. Zlatnik dated 10/17/01.

6. An MRI of the cervical spine dated 7/28/01 from Rockville Center open MRI. This describes a Grade 1 retrolisthesis at C3/4 with a broad disc base herniation and bilateral neuroforaminal stenosis. A small subligamental disc herniation noted at the C6/7 level.

7. A lumbosacral spine MRI reported dated 10/5/01 from Island Diagostic Imaging Associates. This describes kyphosis at the L1/2. Degenerative disc disease and osteophyte formation was noted throughout the lumbar spine. There is no evidence of disc herniation.

8. A psychiatry IME report from Dr. Craig Antell dated 9/8/01.

9. A follow-up report from Dr. Antell dated 10/23/01.

Impression: Resolved cervical and lumbosacral paraspinal muscle strain. The claimant has a normal neurological examination. I find no residual neurological disability. The claimant can continue his current duties at work without restriction."

This evidence satisfies the defendant's initial burden of proof of demonstrating that the plaintiff did not sustain a "serious injury."

In opposition to the instant motion, the only admissible evidence presented by the plaintiff was the affirmation of Donald I. Goldman, M.D., wherein Dr. Goldman reports of his April 2, 2003, orthopedic surgical consultation and examination of the plaintiff:

"I saw and examined in Orthopedic Surgical Consultation Luis Mejia, a 59 year old machine/factory/construction worker, on April 2, 2003. He stated while the driver of a car on July 7, 2001, he was hit in the front by another car, resulting in neck, shoulder, back and leg pain. Although he didn't go to the hospital he came under the care of several physicians, receiving conservative treatment and therapy. Due to continuing pain which failed to resolve, the patient was referred to my office for orthopedic surgical evaluation.

* * *

CERVICAL SPINE:

Examination of the cervical spine reveals normal flexion. Extension was also normal. Right rotation was restricted to 45 degrees with pain in the right trapezius and paresthesias radiating down to the right hand. Right and left lateral bending were painful. Grip is normal. There was no atrophy. Left rotation was 60 degrees with minimal discomfort.

Incidentally noted is a scar as a result of surgery of the left hand and thenar area. This is pre-existing and unrelated to the accident.

LUMBAR SPINE:

Examination of the lumbar spine reveals a normal lordotic curve. The posture does not reverse. There is no spasm in the upright position. The spine is midline. Interspinous motion was restricted to 50 degrees with left paralumbar muscle spasm and pain radiating to the left SI joint, buttock and posterior thigh. Extension was restricted to 10 degrees with left paralumbar muscle spasm. Right and left lateral bending were restricted to 20 - 30 degrees with pain.

EXTREMITIES:

Examination of the extremities revealed no evidence atrophy. There are old burns present on the left leg which is unrelated. He walks with a normal gait.

REVIEW OF MRI'S:

I have in my possession the MRI films of the cervical spine dated 7/28/01. Discogenic spondylosis is seen at multiple levels. At C3-C4, there is a herniation with impingement on the thecal sac. On C4-C5, there is a disc bulge with impingement on the thecal sac. At C5-C6, there is thecal sac impingement due to degenerative changes. At C6-C7, there is a disc herniation with thecal sac impingement.

There are also MRI films of the lumbar spine dated 10/5/01 that demonstrate discogenic spondylosis at several levels. There are bulging discs at L1-L2, L2-L3 and L3-L4, with no cord involvement. There is a kyphosis.

REVIEW OF RECORDS: The following records were reviewed:

There was an intake sheet from Nassau County Medical Center, briefly describing the accident.
There was an x-ray report of the lumbar spine from the hospital which was normal.
There was an x-ray report of the cervical spine that was normal.
There was an x-ray report of the chest which was normal.
There was a CT report of the abdomen and pelvis that did not reveal any acute abdominal trauma.

There is a report from Vlad Zlatnik, a neurologist, who saw the patient on 7/17/01 and concluded after his examination and evaluation the patient had sustained trauma and will probably have ongoing problems.

There was an EMG/NCV study of the cervical spine which revealed a "C6-C7 radiculopathy" on the left.
There are reports from Long Beach, briefly describing the patient being seen.
There is an evaluation by an osteopath in Rockville Centre.

The patient had undergone an IME by Dr. Carl Weiss, M.D. on 10/11/02. Dr. Weiss feels that the patient had sustained a trivial accident, and the majority of treatment was inappropriate and overdone.

FINAL IMPRESSION:
CERVICAL HERNIATIONS C3-4 and C6-7
CERVICAL BULGE C4-5
CERVICAL DERANGEMENT AND RIGHT RADICULOPATHY.
CERVICAL DISCOGENIC SPONDYLOSIS - trauma aggravated.
LUMBAR DERANGEMENT AND LEFT RADICULOPATHY.
LUMBAR BULGING DISC-MULTIPLE LEVELS.

PROGNOSIS:

The prognosis regarding Luis Mejia is guarded in view of the fact he has had persistent pain with restriction of motion in both his cervical and lumbar spines for more than one and a half years.

Regarding the cervical spine, the patient sustained a permanent orthopedic disability demonstrated by a painful functional restriction of motion by more than 20%, accompanied by spasm, guarding and radiation. The multiple bulges are preexisting but were trauma aggravated along with clinical evidence of a radiculopathy.

In my opinion, the injury to both his cervical and lumbar spine was causally related to the accident of 7/7/01, and at this time should be considered permanent."

The plaintiff's medical expert's affirmation does not provide any information concerning the nature of the plaintiff's medical treatment for the almost two (2) years gap between the date of the subject motor vehicle accident and his visit to the said expert (see, **Medina** v. **Zalmen Reis & Associates**, 239 AD2d 394). In these circumstances, the expert's opinion as to causation has no rational foundation, is unsupported by objective medical findings and diagnostic tests and is conclusory and speculative (see, **Clark** v. **Martucci**, __AD2d__, 734 NYS2d 364; **Barbarulo** v. **Allery**, 271 AD2d 897; **Broderick** v. **Spaeth**, 241 AD2d 898).

Accordingly, the instant motion must be granted and the plaintiff's complaint dismissed.

This order constitutes the decision and judgment of this Court.

Dated: June 25, 2003

MARVIN E. SEGAL, J.S.C.
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