SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

GEORGE MAKRYLLOS,

Plaintiff,

MOTION DATE: 06/01/06

-against-

MOTION SEQ. NO.: 001

SHIU ZHANG,

INDEX NO.: 16402/04

Defendant.

The following papers read on this motion (numbered 1-3):

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

Defendant Shiu Zhang's motion for summary judgment pursuant to **CPLR §3212** is determined as follows.

Plaintiff George Makryllos, age 23, alleges that on January 26, 2003 at approximately 4:00am, a motor vehicle owned and operated by him came into contact with a vehicle operated and owned by defendant Shiu Zhang. The accident occurred on the west bound Gowanus Expressway at or near its intersection with 34th Street, Borough of Brooklyn. Plaintiff alleges that defendant fell asleep and hit defendant's vehicle in the rear. Defendant now moves for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**.

Insurance Law § 5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a

fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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" (numbered by the court). The court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The court finds that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiff from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of his motion for summary judgment, defendant submits an affirmed report of examination, dated May 25, 2005, of orthopedist Todd B. Soifer, MD covering an examination of May 24, 2005, and an affirmed report, dated May 19, 2005, of neurologist Naunihal S. Singh, MD.

Dr. Soifer found that physical examination of the cervical spine and upper extremities revealed "rotation of the cervical spine [of] 65 degrees right and left (65 normal), extension [of] 0 degrees (normal) and flexion [to] the chest wall (normal)." Providing degrees of motion, Dr. Soifer also found normal forward flexion and rotation of the shoulders and normal elbow range of motion. With respect to the lower extremities, Dr. Soifer noted normal forward flexion, negative straight leg raising, bilaterally, and a normal sensory examination. Dr. Soifer states that "normal range of motion is that of the opposite side unless there is an impairment or disability."

Dr. Soifer also comments that "there is no muscle weakness, measurable atrophy or

reflex changes." Dr. Soifer concludes "from an objective orthopedic standpoint, it is my opinion [plaintiff] has no objective orthopedic disability."

Dr. Singh reported no paravertebral muscle tenderness or spasm on the right or left side of the cervical spine and full range of motion in all directions. He found "flexion was 45 degrees (45 degrees normal), extension was 45 degrees (45 degrees normal), right and left lateral flexion was 45 degrees (45 degrees normal) and right and left lateral rotation was 80 degrees (80 degrees [normal]). Dr. Singh noted no parapsinal muscle spasm on the right or left side of the lumbar spine and found "flexion was 90 degrees (90 degrees normal), extension was 30 degrees (30 degrees normal), right and left lateral flexion was 30 degrees (30 degrees normal) and right and left lateral rotation was 30 degrees (30 degrees normal). Dr. Singh also reported results of sitting and supine straight leg raising tests which plaintiff accomplished up to 90 degrees on both sides, and "full" range of motion of the shoulder joints bilaterally.

Furthermore, Dr. Singh noted normal results upon testing the following: muscle strength in all extremities, deep tendon reflexes, finger to nose and heel to shin, gait and tandem walking. Dr. Singh diagnosed a "cervical spine sprain-resolved" and a "lumbar spine sprain-resolved." Dr. Singh concluded that plaintiff's prognosis is good that "there is no need for further casually related treatment, diagnostic testing or follow-up in my specialty" and that plaintiff "has no neurological disability based on my examination today and he is not disabled from working or from activities of daily living."

In addition, defendant submits deposition testimony of plaintiff conducted on February 22, 2005. Plaintiff testified that later on the day of the accident, he went to the emergency room of Victory Memorial Hospital complaining of lower back pain and numbness in his right leg. After x-rays were performed, the hospital released plaintiff with a neck collar and medication. Plaintiff testified that the following day, he visited New Ability Medical, P.C. ("New Ability") where he received treatment by a chiropractor, acupuncturist, psychologist, neurologist and some other type of physician who was in

charge but could not be named by plaintiff (determined by the court to be a physiatrist). Plaintiff testified that his treatment at New Ability occurred three times per week (until the last month of treatment when plaintiff treated once or twice per week) and continued for three to four months. Plaintiff also reported that he remembers having several MRIs. Plaintiff testified that after he finished treating at New Ability, he began going for massages at "licensed massage places" on Canal Street in Manhattan and in Flushing Queens and had approximately 15 massages in 2004 and as of the date of the deposition (February 22, 2005), he had received approximately six to eight massages.

Although plaintiff had been unemployed for three months prior to the accident, he testified that at the time the accident occurred, he had been scheduled to return to his job as a plumber with his prior employer. Instead of returning the day after the accident, he returned the following week. He testified that due to the accident, his job responsibilities changed but his salary remained the same. Rather than doing physical work, such as installing, piping and drilling, he completed surveys, took photos, measured spaces "where they were going to work, new jobs, preparing jobs." Plaintiff testified that his doctors told him that he could still do installation work if he did not feel uncomfortable.

Thereafter, plaintiff formed his own plumbing company where he does survey and planning work and "light" installation. Plaintiff testified that at the gym, he lifts the same amount of weights as he lifted prior to the accident but does so once per week instead of four times per week. Plaintiff stated that he also swims and runs. Plaintiff claims that he occasionally experiences pain in his lower back and numbness into his right leg.

The court finds that in order for a plaintiff's range of motion findings to be considered, such findings must be compared to normal range of motion results *and* that the 'normal' range of motion findings against which a plaintiff's actual ranges of motion is compared must be "justified range of motion findings." Justified range of motion information is comprised of competent medical evidence taking into account factors such as an individual's age, activity level, any prior restriction, or pre-existing disease. For

example, the leg raise of a normal five year old child and a 75 year old adult would be intrinsically different.

However, the court finds that the reports of both defendant's examining physicians, taken together, are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations, other than the range of motion evaluations, so as to satisfy the court that an "objective basis" exists for their opinions. Accordingly, the court finds that defendant has made a *prima facie* showing that plaintiff George Makryllos did not sustain a serious injury within the meaning of **§§5102(d)**((7)) or ((8)), the only applicable sections. Consequently, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiff submits (1) a document entitled "doctor's affirmation" of physiatrist Jean Futoran, MD of Advanced Rehab Medical Services, PC; (2) a document entitled "Affirmation in Opposition" of radiologist Ravindra Vishnu Ginde, MD with respect to an MRI report covering an examination of plaintiff's lumbosacral spine conducted on February 27, 2003 and an MRI report covering an examination of plaintiff's cervical spine conducted on February 4, 2003; (3) an unsworn report of psychologist Robin Bryant, PhD covering an evaluation of February 6, 2003; (4) an unsworn report of acupuncturist Dr. Joann Yuan Lin, L.AC.; (5) various no-fault insurance verification of treatment forms; and (6) other unaffirmed medical records.

The court notes that the report of a physician which is not affirmed, or subscribed before a notary or other authorized official, is not competent evidence. **CPLR 2106**; **Grasso v. Angerami**, 79 NY2d 814; **Bravo v. Rehman**, 28 AD3d 694; **Kunz v. Gleeson,** 9 AD3d 480; **Magro v. He Yin Huang**, 8 AD3d 245; **Grossman v. Wright**, 268 AD2d 79; **Young v. Ryan**, 265 AD2d 547. Although Dr. Futoran characterizes her report as an affirmation, it is not "subscribed and affirmed by [her] to be true under the penalties of perjury" pursuant to **CPLR §2106**. The report of Dr. Ginde is conclusory and is therefore

also not properly affirmed. In addition, the reports of Drs. Bryant and Lin are not in the required affidavit form. Since the reports of Drs. Futoran, Ginde, Bryant, Lin and of chiropractor Dr. Vito A. La Ferrera are neither affirmed nor in affidavit form, the court has not considered them. The court therefore can only consider the plaintiff's affidavit.

In his affidavit sworn to on April 30, 2006, plaintiff claims that as a result of the accident, he felt pain in his neck, lower back and buttocks and had numbness in his right leg. He stated he received treatment at New Ability for five months. Plaintiff avers that his treatment did not cease "because [he] was healed" but because the medical professionals at New Ability informed him that further treatment "would not be helpful and there was no need for continued treatment at that office." Plaintiff claims that as a result of the accident, he still experiences pain which increases with work, cannot sit for prolonged periods without support, cannot have dinner "at a regular table," cannot sleep for "long enough periods of time" and is "not able to perform as well at work anymore and light lifting causes me to have excruciating pain in my lower back."

It is the determination of this court that the "gap in treatment" is fatal to plaintiff's claim that the evidence submitted is sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law § 5102(d)**. "Even where there is objective medical proof, when 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 a pre-existing condition–summary dismissal of the complaint may be appropriate." **Pommells v. Perez**, 4 NY3d 566, 572. *See* **Pimentel v. Mesa**, 28 AD3d 629; **Mahabir v. Ally**, 26 AD3d 314; **Zhang v. Wang**, 24 AD3d 611; **Neugebauer v. Gill**, 19 AD3d 567; **Mohamed v. Siffrain**, 19 AD3d 561; **Batista v. Olivo**, 17 AD3d 494; **Garces v. Yip**, 16 AD3d 375; **Kearse v. New York City Transit Authority**, 16 AD3d 45; **Kulanda v. Ponce**, 13 AD3d 592; **Mooney v. Edwards**, 12 AD3d 424.

The court finds that the "gap in treatment" between plaintiff's last documented visit

to New Ability in late May of 2003 and plaintiff's visit to Dr. Futoran on February 9, 2006 contradict plaintiff's claim that he suffered from a "serious injury" within the meaning of **Insurance Law §5102(d)**. "In the present case, the so called gap in treatment was, in reality, a cessation of all treatment." **Pommells v. Perez**, *supra* at 574. The court finds that plaintiff's massage treatments at Best Chinese Pui-Na do not qualify as medical treatment which would eliminate the gap in treatment issue, which if such treatment qualifies, requires reports or communication to be submitted, most particularly regarding the status of the allegedly injured area. Plaintiff testified that the massage facilities are "licensed massage places," and their employees are not chiropractors or doctors. With the exception of receiving massages, there is no evidence that plaintiff sought any treatment after May 2003 until the examination of February 9, 2006 by physiatrist Dr. Jean Futoran. "While a cessation of treatment is not dispositive–the law surely does not require a record of needless treatment in order to survive summary judgment–a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so." **Pommells v. Perez**, *supra* at 574. Plaintiff has failed to satisfactorily explain this gap in treatment. Even if the court could consider Dr. Futoran's affirmation, the court notes that her statement as to the reason for plaintiff's cessation of treatment is conclusory.

The court also notes that the MRI report of plaintiff's lumbosacral spine indicates a central herniation of the L4-L5 discs and the MRI report of plaintiff's cervical spine indicates a posterior herniation of discs at the levels of C4-C5 and C5-C6. Even if the these MRI reports were properly affirmed and the court could therefore consider them, the existence of a radiologically confirmed disc injury alone will not suffice to defeat summary judgment. *See* **Pommels v. Perez**, *supra*; **Bravo v. Rehman**, *supra*; **Howell v. Reupke**, 16 AD3d 377; **Kearse v. New York City Transit Authority**, *supra*.

Plaintiff has cited **Chaplin v. Taylor**, 273 AD2d 188 for the proposition that since defendant failed to demonstrate that plaintiff's herniations were not causally related to the

accident, defendant failed to make a prima facie showing that plaintiff did not sustain a serious injury. The court notes that the court in **Kearse v. New York City Transit Authority**, *supra,* held that **Kowalek v. Picariello**, 306 AD2d 249 and other cases, including **Chaplin v. Taylor**, *Id* should no longer be followed to the extent these cases held that failure by a defendant's experts to address positive MRI findings was fatal to defendant's motion even though there were findings that defendant had no restriction in range of motion.

Moreover, plaintiff's complaints of subjective pain do not by themselves satisfy the "serious injury" requirement of the no-fault law. **Scheer v. Koubek**, 70 NY2d 678; **Nelson v. Amicizia**, 21 AD3d 1015; **Kivlan v. Acevedo**, 17 AD3d 321; **Rudas v. Petschauer**, 10 AD3d 357. Plaintiff's affidavit does not raise an issue of fact as it consists of self serving and conclusory statements. Plaintiff's claim that he suffers limitations which interfere with his duties as a plumber and his activities at home is belied by his deposition testimony that he lifts the same amount of weights at the gym as he did before the accident and that treatment improved his symptoms. *See* **Mercado v. Garbacz**, 16 AD3d 631.

We have examined the parties' remaining contentions and find them to be without merit.

On the basis of the foregoing, it is

ORDERED, defendant SHIU ZHANG's motion for summary judgment dismissing the complaint of plaintiff GEORGE MAKRYLLOS, on the grounds that plaintiff GEORGE MAKRYLLOS failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**.

Defendant shall serve plaintiff with a copy of this Order within 15 days after entry of this Order in the records of the Nassau County Clerk.

This constitutes the order of the court.

Dated: September 15, 2006

ENTER:

J.S.C.