SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

TRIAL/IAS, PART **13**
NASSAU COUNTY

WILLIAM BASILE,

Plaintiff,

MOTION DATE:
August 3, 2000
INDEX No. 12444/98

-against-

SEQUENCE No. 1

CHARLES HIRSCH,

Defendant.

The following papers read on this motion:

Notice of Motion and Supporting Papers
Affirmation in Opposition
Affirmation in Reply and in Further Support

Motion by defendant Charles Hirsch for an order pursuant to CPLR 3212 granting summary judgment on the grounds that plaintiff has not suffered a serious injury as required by Insurance Law Section 5102(d) is granted and the complaint is dismissed.

Plaintiff brings this personal injury action for damages arising out of an automobile accident which occurred on July 10, 1997, while he was a passenger in a vehicle that was struck in the rear.

Defendant seeks summary judgment dismissing the action on the grounds that plaintiff has not suffered a serious injury as defined by Insurance Law Section 5102(d) in that plaintiff's medical records do not establish serious injury. He avers that the report of A. Hausknech, M.D. "notes cervical and lumbosacral radiculopathy, myalgia and fibromyositis"; the report of chiropractor Martin Lawrence "notes a diagnosis of cervical whiplash, sprain and strain, cervicalgia, lumbar strain and sprain and sciatica"; and the MRI reports of Dr. Wan indicate "degenerative disc disease and degenerative retrolisthesis", no herniation, and an "unremarkable" brain MRI. He submits that none of the foregoing constitute serious injury.

Defendant contends that plaintiff cannot support his claim that a serious injury prevented him from engaging in his usual and customary daily activities for at least ninety out of the one hundred eighty days immediately following the accident. Defendant offers plaintiff's deposition testimony, where plaintiff testified as follows:

> Q. Is there anything that you could do before the accident that you could no longer do after the accident?
>
> A. Well, yes. I can't turn my neck as far as I used to before.
>
> Q. Anything else?

A. I really haven't - no, no.

Plaintiff also testified that he was not employed at the time of the accident, and that, five months after the accident, in December of 1997, he sailed his forty-five foot sailboat from New York to Florida, where he goes each winter. He testified that raising the sail requires two people to operate the manual winch, and that he was able to engage in that activity. He also took a four or five day sail to the Bahamas from Florida with friends.

By affidavit offered in opposition to defendant's motion, plaintiff now avers that "[f]or the ten months immediately after the accident, I was unable to perform my usual daily activities but was confined to home (with the exception of the times I went to the doctors for treatment) all as a result of my injuries." He also states, "I find it difficult to climb stairs and am unable to perform my share of the household duties, such as cooking, cleaning and grocery shopping, and I still feel pain to my back when I attempt to do these things ..."

In further support of the motion for summary judgment, defendant offers the affirmations of an orthopedist and a neurologist, both of whom find that plaintiff suffered cervical and lumbar sprains which have resolved.

The affirmation/report of S. Farkas, M.D., dated October 28, 1999, with regard to a lumbar examination states that plaintiff "could forward flex touching his fingertips to the toes" and that there was "no spasm or crepitus to palpation during static positioning or active range of motion." He notes that plaintiff

complained of pain on straight leg raises, and that plaintiff stated that he could not "heel walk" due to pain. Dr. Farkas states that the cervical spine examination revealed a complaint of pain, but there "was however, no spasm or crepitus to palpation ..." Dr. Farkas concludes that plaintiff suffered resolved lumbar and cervical sprain, and that he has no orthopedic disability, and may "perform activities of daily living without restrictions."

The affirmation/report of Edward M. Weiland, M.D., a board certified neurologist, dated October 28, 1999 describes in detail his neurologic examination. He reports that plaintiff complained of pain with "lateral rotation of the neck", however, "no associated cervical paravertebral muscle spasm was appreciated." There was "no restriction with flexion and extension movements of the neck", and there was "sciatic notch tenderness." His diagnosis was "cervical sprain/strain - resolved; lumbosacral sprain/strain - resolved; subjective headache disorder". He concludes that "Mr. William Basile suffered blunt trauma and his subjective complaints are causally related to the motor vehicle accident he sustained on July 10, 1997. However, I can find no evidence of any laterlizing neurological deficits at the present time ... I see no reason why the claimant should not be able to perform activities of daily living and continue gainful employment".

In opposition plaintiff offers only one admissible document, by Martin Lawrence, D.C., a chiropractor. The document is mislabeled "PHYSICIANS AFFIRMATION" and begins in affirmation form as follows: "Martin I Lawrence D.C., ... licensed to practice

chiropractic in the State of New York hereby affirms under the penalties of perjury ..." The affirmation of a chiropractor does not constitute "competent evidence (see, CPLR 2106)" (see, Feintuch v. Grella, 209 AD2d 377, lv to app den 85 NY2d 803). The document does, however, bear the notation of a notary on the last page which indicates that the document was sworn to, and thus constitutes an affidavit and is admissible.

The Lawrence affidavit/report does not describe objective clinical tests, and offers only the results. He states that based upon "initial" and "subsequent" test results his diagnosis is as follows, "Cervical herniated (bulging) discs. Cervical-Brachial Radiculopathy. Lumbar herniated (bulging) discs. Grade I retrolisthesis of L2 and L3. Sciatic Radiculopathy. Cervical and Lumbosacral Strain/Sprain. Traumatic Carpel Tunnel Syndrome. Post traumatic multiple mononeuropathy multiplex." Dr. Lawrence notes that he advised plaintiff to "refrain from lifting, bending, and twisting" and commenced treatment on July 11, 1997, which treatment consisted of "spinal manipulation, spinal traction, hydrocollator packs, high galvanic electric muscle stimuylation and trigger point therapy." Treatment was concluded on October 1, 1998.

With respect to plaintiff's claim that he was unable to perform substantially all of his usual and customary daily activities for the requisite period, the Lawrence affidavit/report states: "inasmuch as I have advised Mr. Basile to restrain from lifting, twisting and bending, he could not perform the basic tasks of his daily routine. Therefore there was a fourteen month period

while he was under my treatment that he was unable to perform such activities as bending to tie his shoes, carrying groceries or turning his head to drive".

Lawrence describes his May 16, 2000 follow-up examination as follows:

> 10: Examination revealed: limitation of range of motion of the cervical spine by 50% in all directions, positive Jackson Cervical Compression tests right upper extremity, positive Cervical Distraction test. Limitation of the normal lumbar range of motion by 25%.
>
> 11: Palpation of the deep and superficial cervical paraspinal muscles revealed muscle spasm +3 on the right and +2 on the left with the normal range of +1 and +5. Palpation of the lumbar paraspinal deep and superficial muscles revealed +2 bilaterally, normal range +1 to +5.
>
> 12: Positive right Tunnel wrist test.

Lawrence opines that plaintiff "has sustained a significant limitation of use in a permanent, partial impairment disability of his [n]eck , back and right wrist/hand, due to limitations of the cervical and lumbosacral spine." He further states, "it is my opinion that [plaintiff] is presently restricted from performing those activities, which involve[s] excessive bending, lifting or turning of the head. Moreover, it is my opinion, within a reasonable degree of medical certainty, that the producing cause of Mr. Basile's injuries was the motor vehicle accident of July 10, 1977."

Defendant has made out a prima facie case that plaintiff did not suffer serious injury, suffered only cervical and lumbar

sprain, and that his disc bulges are degenerative and not traumatic in origin. The burden therefore shifted to plaintiff to make out a prima facie case of serious injury (Bocci v. Turkowitz, 255 AD2d 476; Oquendo v. New York City Tr. Auth., 246 AD2d 635). Plaintiff offers several unsworn reports which are not in admissible form and cannot be considered in support of his claim (Grasso v. Angerami, 79 NY2d 813). Thus only the affidavit of Doctor Lawrence is considered.

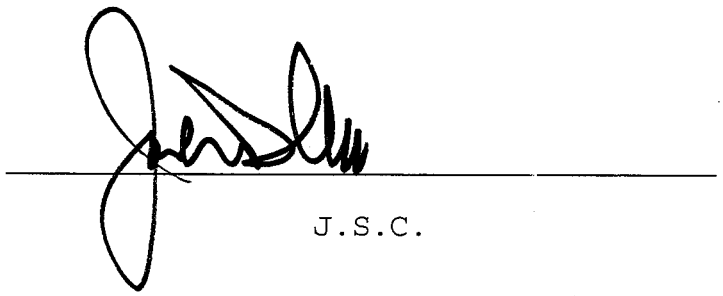
Plaintiff has failed to establish a 90 day claim. His medically determined and directed inability to "bend, twist or lift heavy objects" does not establish that he was unable to perform "substantially all" of his customary daily activities. He fails to indicate what his usual and customary daily activities are, or why they would require bending lifting or twisting. This failure is particularly relevant here since plaintiff was unemployed and on disability for emphysema. He had no work related duties, and clearly, tying shoe laces, driving or carrying groceries cannot be presumed to constitute substantially all of any person's daily activities (Honig v. State, 235 AD2d 779 [allegations were conclusory, subjective and contained little factual detail either about the actions plaintiff was unable to perform, the length of time he was unable to perform those actions, or the proportion of his daily activities that were made impossible]). Moreover, plaintiff's "self-serving unsubstantiated allegation" in his affidavit that he was confined to home for a period of ten months

following the accident is "insufficient" to establish that he sustained a serious injury (Rum v. Pam Transp., 250 AD2d 751).

Insofar as plaintiff's expert finds a "significant" or "permanent" injury in the proffered 50% and 25% limitations respectively of plaintiff's cervical and lumbar spine, Dr. Lawrence "failed to set forth the objective tests, if any, he performed in arriving at his conclusions concerning the alleged restrictions" (Grossman v. Wright, _____ AD2d _____, 707 NYS2d 233, 238). Instead, the chiropractor's conclusions appear to be "conclusory assertions tailored to meet statutory requirements" (Medina v. Zalmen Reis & Assocs., 239 AD2d 394, 395, quoting Lopez v. Senatore, 65 NY2d 1017, 1019), and appear to be based upon the plaintiff's subjective complaints of pain, which are "insufficient to defeat the motion" (Villalta v. Schechter, _____ AD2d _____, 710 NYS2d 87, 88). And, although plaintiff's chiropractor indicated that plaintiff suffered from bulging discs, he did not state that the bulging discs were "causally related to the accident" (see, Lalli v. Tamasi, 266 AD2d 266). His affidavit is vague with respect to which injury was related to the accident, and Lawrence did not state that any specific injury was causally related. Thus, the evidence submitted by defendant, based upon plaintiff's own unsworn MRI report and results, that plaintiff's bulging disc condition is degenerative is uncontroverted. Finally, "the report ... does not explain what appears to be a two-year gap in plaintiff's treatment" (Cillo v. Schioppo, 250 AD2d 416, 417; see also Medina v. Zalmen Reis & Assocs., supra).

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted, as plaintiff has failed to sustain his burden of proof (see, Grossman v. Wright, supra, p. 237).

This constitutes the Order and Judgment of the Court.



J.S.C.

Dated: October 11, 2000