SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 33
NASSAU COUNTY

STEVEN YOUNG,

Plaintiff(s),

MOTION DATE: 5/11/10
INDEX NO.: 15028/08
SEQ. NOs. 1 & 2

-against-

JOSEPHINE A. SERINO,

Defendant(s)

The plaintiff's motion, pursuant to CPLR 3212(e), for partial summary judgment, i.e., as to the issue of liability, and the defendant's cross motion, pursuant to CPLR 3212, for summary judgment due to the plaintiff's failure to sustain a serious injury within the meaning of Insurance Law §5102(d), are determined as hereinafter provided.

This personal injury action emanates out of an April 15, 2008 motor vehicle accident that occurred on State Route 101 (Port Washington Boulevard) near its intersection with Bogart Avenue. The plaintiff's vehicle was traveling northbound on Route 101 and collided with the defendant's vehicle as it exited a service station and attempted to turn left across two lanes of traffic and head south on Route 101. The plaintiff commenced this action on or about August 12, 2008 and issue was joined with the service of the plaintiff's verified answer on or about November 5, 2008 (see plaintiff's Exhibit A). Upon the completion of disclosure, the case was certified for trial on September 23, 2009 and on October 1, 2009 the plaintiff filed a note of issue. The plaintiff's October 30, 2009 motion and the defendant's December 23, 2009 cross motion are therefore timely (see CPLR 3212[a]).

During a July 16, 2009 deposition (see plaintiff's Exhibit 2), the defendant testified, inter alia, that as she was exiting the service station a driver in the first of two adjacent northbound lanes stopped and"waved [her] on" thereby permitting her to "edge out" into traffic (p.18,L20-24). However, before she was able to pass through the second or left northbound lane of traffic and turn left, the front of her vehicle collided with the plaintiff's oncoming vehicle (p.22,L12-23). She explicitly acknowledged, inter alia, that when she looked to her left or south before turning, she failed to see plaintiff's advancing vehicle (p.21,L16-22).

The plaintiff has therefore established his prima facie entitlement to judgment as a matter of law as to the issue of liability (see CPLR 3212[e]). The defendant's admission that she failed to see the plaintiff's vehicle prior to impact and speculative assertion that he failed to take adequate evasive action are inadequate to create a triable issue of fact (see Vehicle & Traffic Law §1143; Strocchia v City of New York, 70 AD3d 926,927; Nabbore v Schneider, 62 AD3d 766; Yasinosky v Lenio, 28 AD3d 652,653). Accordingly, the plaintiff's motion, pursuant to CPLR 3212 (e), for summary judgment as to liability is granted.

Conversely, during his July 16, 2009 deposition (see defendant's Exhibit E), the plaintiff, a self-employed computer consultant (see defendant's Exhibits D, plaintiff's 12/8/08 bill of particulars, para.7 and E, p.10,L11), testified, in pertinent part, that he drove home after the accident (p.35,L12). He first sought medical attention approximately two to three days later (p.36,L16) when he visited his treating chiropractor (Chiappetta) at "Doctors About Care" or "DAC" in West Babylon (p.36,L21-23). He had been receiving chiropractic treatment there since late 2007 or early 2008 (p.39,L2) due to stress (p.38,L11) and approximately "two to three" (p.41,L13) earlier motor vehicle accidents in which he had previously injured his neck and back as well as "a bad slip and fall on ice" (p.41,L6). The prior motor vehicle accidents include one unfortunate occasion when his vehicle was reportedly struck repeatedly (i.e., "[W]e stopping counting after six" times [p.43,L24]) by the same individual. In addition, he was also involved in a subsequent motor vehicle accident on October 4, 2008 (p.56,L21) in which he, once more, injured his neck and back (p.59,L25).

Following this accident, he returned to DAC for chiropractic care and visited its facility about three times a week (p.47,L6). In addition, it also provided physical therapy (p.47,L16). The plaintiff also saw a neurologist (Laura Schoenberg, M.D.) (p.49,L8) and an orthopedist ("Dr. Keshner") (p.51,L3), but each on only a single occasion (p.49,L12;p.51,L7). Dr. Schoenberg referred him to a physical therapist (p.49,L14), however, he discontinued treatment after approximately a month because he felt that it was making him "feel worse" (p.48,L8).

Finally, he underwent a series of MRI examinations(p.45,L10-18), an EMG (p.52,L18) and had a spinal epidural performed at "North Shore Partners in Pain Management" (p.65,L23;p.67,L15). The plaintiff is not seeking compensation for any alleged lost earnings (p.61,L10) and

did not lose any time from work as a result of the April 15, 2008 accident (p.60,L24).

The defendant's cross motion is premised upon the plaintiff's testimony, medical record and the August 20, 2009 and December 10, 2009 respective affirmations of an orthopedist, John C. Killian, M.D. and radiologist, David A. Fisher, M.D. (see defendant's Exhibits G-J). Dr. Killian avers, in sum, after an August 12, 2009 physical examination, that the plaintiff has "recovered fully from all of the problems for which he was treated after this accident", has "no residual causally related impairment or disability" and there is "no positive objective physical findings in this examination to confirm any of [the plaintiff's] subjective complaints". Dr. Fisher personally reviewed the plaintiff's June 26, 2008 (cervical and lumbar), July 11, 2008 (thoracic), December 13, 2008 (cervical), December 18, 2008 (lumbar), and November 17, 2009 (lumbar) MRI films and observed degenerative rather than traumatic changes. These reports, based upon contemporaneous examinations utilizing objectively measured criteria, are sufficient to establish the defendant's prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff failed to incur a serious injury within the meaning of Insurance Law §5102(d) on April 15, 2008 (see Pommels v Perez, 4 NY3d 566; Toure v Avis Rent A Car Sys., 98 NY2d 345; Albano v Onolfo, 36 AD3d 728).

In opposition, the plaintiff has failed to establish a triable issue of fact. The various radiologists (i.e., Richard Silvergleid, M.D., Elizabeth Maltin, M.D., David Panasci, M.D., Samuel Mayerfield, M.D., Steven Winter, M.D., and Robert Diamond, M.D.), who performed the plaintiff's MRI examinations have supplied affirmations adopting the findings of their earlier reports (see plaintiff's Exhibits 7 & 8). However, the physicians do not proffer an opinion as to causation (see Munoz v Koyfman, 44 AD3d 914; Albano supra at 728; Collins v Stone, 8 AD3d 321).

Oddly, despite the plaintiff's testimony, his longstanding chiropractor (Chiapetta) has not submitted an affidavit. Instead, Timothy J. Mosimillo, D.O., of DAC, whom the plaintiff never mentioned during his deposition, has submitted three (4/17/08, 1/3/10 and 1/15/10) affirmed reports (see plaintiff's Exhibit 5). The April 17, 2008 report avers, inter alia, that the plaintiff sustained restrictions in his cervical and lumbar range of motion on April 15, 2008 although the normal range is not identified (see Sanon v Moskowitz, 44 AD3d 926).

In any event, Dr. Mosimillo's "final" report with respect to the April 15, 2008 incident, dated January 3, 2010 (or shortly after the December 23, 2009 service of the defendant's cross motion), concludes that, as a direct result of that accident, the plaintiff sustained eleven (11) separate "displaced/herniated discs" at "C3/4,C4/5,C5/6,C6/7,L2/3,L3/4,L4/5 and L5/S1,T10/T11,T11/T12 and T12/L1". His subsequent October 4, 2008 motor vehicle accident is, however, not referenced thereby rendering his conclusion speculative (see Vickers v Franck, 63 AD3d 1150).

Moreover, a mere twelve (12) days later, on January 15, 2010, Dr. Mosimillo issued an affirmed report as to the latter (10/4/08) accident and, with respect to the plaintiff's prior medical history, noted only "cervical, thoracic and lumbar sprain/strain" (see plaintiff's Exhibit 5). The absence of the eleven (11) previously diagnosed herniated discs is unexplained. The plaintiff has therefore failed to adequately address the plaintiff's multitude of prior and subsequent accidents involving injuries to his neck and back (see Franchini v Palmieri, 1 NY3d 536,537; Vickers supra at 1151; Munoz supra at 915; Houston v Gajdos, 11 AD3d 514,515).

Lastly, the plaintiff's March 17, 2010 conclusory and unsubstantiated affidavit (see plaintiff's Exhibit 4) averring that, despite not missing any time from work as a result of the April 15, 2008 accident, it rendered him permanently disabled and suffering from pain in "everything I do physically" (para.26), is inadequate to create a triable issue of fact as to whether he sustained a medically determined injury of a non-permanent nature which prevented him unable to substantially perform substantially all of his customary and daily activities for not less than 90 days of the first 180 days after the accident (see Vickers supra at 1151; Munoz supra at 916).

Accordingly, the defendant's cross motion, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint due to his failure to sustain a serious injury within the meaning of Insurance Law §5102(d) on April 15, 2008 is likewise granted.

Dated: 7/28/10

A.J.S.C.
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AUG 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE