SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

MG

Present: HON. UTE WOLFF LALLY
Justice

JEAN G. CHERY,

Plaintiff,

-against-

JOANNE T. MOLERIO,

Defendant.

Motion Sequence #1
Submitted: June 25, 2010
XXX

INDEX NO: 7753/09

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....1-5
Affs in Opposition.....6-13
Affs in Reply.....14&15

Upon the foregoing , it is ordered that the motion by defendant Joanne T. Molerio, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of plaintiff Jean G. Chery on the grounds that he cannot prove that he sustained a "serious injury" as defined by Insurance Law §5102(d) and required in Insurance Law § 5104(a), is granted. The complaint is dismissed in its entirety.

This action to recover money damages for personal injuries allegedly sustained due to defendant's negligence arises out of a motor vehicle accident that occurred at the intersection of Old Country Road and School Street in Westbury, New York on January 31, 2008 at approximately 10:40 a.m. At the time of the accident, the 21-year old plaintiff, Jean

Chery ("Chery"), was operating a 1999 Honda Civic and was on his way to work as a school bus driver. It is alleged that the accident occurred when the vehicle being operated by defendant, Joanne T. Molerio, made a "sudden left turn" in front of Chery's vehicle without giving any directional signal on before the impact.

Plaintiff testified at his examination before trial that the air bags in his car deployed upon impact and that thereafter his car was towed away from the scene. Chery stated that despite the "heavy" impact, no parts of his body came into contact with any parts of the car, he did not lose consciousness, was not bleeding as a result of the accident and that he refused an ambulance. He further testified that he did not miss any time from work and that his back "sometimes" bothers him when he drives and plays soccer. Other than playing soccer, however, plaintiff stated that he is not limited in his daily living, and that he can still play soccer but with pain.

Plaintiff also testified that he was involved in a prior motor vehicle accident on July 30, 2007 where the vehicle he was operating was rear-ended. Chery stated that as a result of the 2007 accident, he sustained injuries to his head, neck and back.

It is claimed that as a result of the subject accident, he sustained: L5-S1 herniation with impingement on the left S1 nerve root; lumbar bulges L2-L5; lumbar sprain; cervical bulges C3-C6 and that the subject accident in whole or in part caused this condition and was superimposed on same and/or aggravated same; C5-6 radiculopathy; cervical strain/sprain; pain, tenderness, limitation of motion of the cervical and lumbar spines.

In moving for summary judgment, the defendant must make a *prima facie* showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence in

admissible form sufficient to overcome the defendant's submissions by demonstrating the existence of a triable issue of fact (*Pommels v Perez,* 4 NY3d 566; *see also Grossman v Wright,* 268 AD2d 79, 84).

Defendant is not required to disprove any category of serious injury which has not been properly pled by the plaintiff (*Melino v Lauster*, 82 NY2d 828). 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; *Covington v Cinnirella*, 146 AD2d 565, 566).

In support of a claim that the plaintiff has not sustained a serious injury, defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of the plaintiff's examining physician. (*Pagano v Kingsbury*, 182 AD2d 268). However, unlike the 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). Essentially, in order to satisfy the statutory serious injury threshold, there must be objective proof of a plaintiff's injury.

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, Id.*, 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.

Plaintiff contends that the injuries he sustained fall within only three of the nine categories of the "serious injury" statute:

> "permanent consequential limitation of use of a body organ or member;"
>
> "significant limitation of use of a body function or system;" and
>
> "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." (*Bill of Particulars*, ¶16).

Thus, any other category of serious injury other than these alleged will not be considered by this Court herein (*Melino v Lauster*, 195 AD2d 653, 656 *affd* 82 NY2d 828).

Initially, it is noted that plaintiff's claims of serious injury under the 90/180 category of Insurance Law § 5102(d) is contradicted by his own testimony wherein he states that he did not miss any time from work as a result of this accident and that he is not, nor was he impaired from doing any activities as a result of this accident for 90 days within the first 180 days following this accident. In light of these facts, this Court determines that plaintiff has effectively abandoned his 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion (*Joseph v Forman*, 16 Misc.3d 743 [Sup. Ct. Nassau 2007]).

Thus, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, "permanent consequential limitation of use of a body organ or member"; and, "significant limitation of use of a body function or system."

To meet the threshold of significant limitation of use of a body function or system or permanent consequential limitation, the law required that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition

(*Gaddy v Eyler*, 79 NY2d 955; *Licari v Elliot*, 57 NY2d 230; *Scheer v Koubeck*, 70 NY2d 678).

When 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.,* 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" (*see Toure, Id*).

In support of this instant motion, defendant submits, *inter alia*, the affirmed to report of Michael J. Katz, M.D., a Fellow of the American Academy of Orthopedic Surgeons, designated by defendant who performed an examination of Jean Chery on February 5, 2010; and the sworn affirmed to reports of Dr. Melissa Sapan Cohn, M.D., a Diplomate American Board of Radiology, who reviewed the MRI reports of plaintiff's cervical spine dated April 4, 2008 and the MRI reports of plaintiff's lumbosacral spine dated July 7, 2008.

It should be noted that the defendant's reliance upon the sworn reports of Dr. Cohn fall short of constituting competent medical evidence. It is readily apparent from a reading of Dr. Cohn's report that she has merely "reviewed" Jean Chery's "MRIs." It is unclear to this Court as to whether the "MRIs" to which Dr. Cohn refers are meant to indicate MRI films or MRI reports of other physicians. In either case, Dr. Cohn's report is incompetent and inadmissible. The law is well settled that in order to constitute competent medical

evidence, a radiologist is required to have the MRI taken under his or her supervision and he or she also has to be the physician to read the MRI (*Fiorillo v Arriaza,* 24 Misc.3d 1215(A) [Sup. Ct. Nassau 2007]; see also *Sayas v Merrick Transportation*, 23 AD3d 367). Under these circumstances, while the radiologist need not pair the findings of the MRI films with a physical examination, he or she, as the radiologist performing the MRI, must nevertheless also report an opinion as to the causality of the findings (*Collins v Stone*, 8 AD3d 321; *Betheil-Spitz v Linares*, 276 AD2d 732).

MRI reports are also admissible if another radiologist, i.e., not the radiologist who performs the MRI scan, avers that he or she personally reviewed either the actual MRI films or the sworn MRI reports of the prescribing radiologist, rather than just the unsworn MRI reports of another physician (*Porto v Blum*, 39 AD3d 614; *Beyel v Console*, 25 AD3d 636; *Dioguardi v Weiner*, 288 AD2d 253). If, however, another physician avers that he personally reviewed the prescribing radiologist's sworn reports (not the MRI films), then in order to constitute competent medical evidence, that physician must also pair up his findings with a recent physical examination (*Silkowski v Alvarez*, 19 AD3d 476).

In this case, Dr. Cohn's reports fail on all possible grounds. It is unclear as to whether she is the prescribing radiologist, she fails to report an opinon as to the causality of her findings, and she does not aver that she reviewed the actual MRI films.

For these reasons, Dr. Cohn's reports do not constitute competent medical evidence in support of defendant's motion and will not be considered by this Court on the instant motion (*Mezentseff v Lau,* 284 AD2d 379; *Meric v Cancela*, 275 AD2d 309).

Dr. Michael Katz's affirmation, however, sufficiently establishes that the plaintiff, Jean Chery, did not sustain a "serious injury" within the meaning of the statute. Based upon

his examination of the plaintiff including objective range of motion testing of the plaintiff's cervical, lumbar, and upper and lower extremities in which he compares his findings with normal measurements, Dr. Katz concludes, in pertinent part, as follows:

> Diagnosis:
> Cervical radiculopathy by history -resolved.
> Lumbosacral strain with radiculitis -resolved.
>
> Comment:
> The claimant is a 23-year-old male who alleges an injury of 01/31/08 as a seatbelted driver. The injuries diagnosed in the records are: cervical radiculopathy, lumbar strain with radiculitis. His prognosis is excellent. Currently, he shows no signs or symptoms of permanence relative to the musculoskeletal system and relative to 01/31/08. He is currently not disabled. He is capable of his gainful employment in a demanding capacity as a school bus driver. He is capable of his activities of daily living. He is capable of all pre-loss activities.***

Defendant's evidence does not reveal any evidence of any serious or permanent injuries. Defendant's expert physician, Dr. Katz, confirms that plaintiff Chery had a prior motor vehicle accident in 2007 with injuries to his neck and back predating the accident. Moreover, his range of motion testing does not reveal any restricted mobility on plaintiff's part.

In light of the foregoing, this Court finds that defendant has satisfied her *prima facie* burden of judgment as a matter of law (see *Franchini v Palmieri*, 1 NY3d 536; see *also Luciano v Luchsinger*, 46 AD3d 634).

Having made a *prima facie* showing that the injured plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*Pommels' supra*; *see also Grossman v Wright*, 268 AD2d 79, 84).

In opposition, plaintiff submits, *inter alia*, his own affidavit; two separate sworn affirmations of Robert Diamond, M.D., a Diplomate of the American Board of Radiology, who interpreted the MRI scans of plaintiff's cervical spine and of his lumbar spine dated April 4, 2008 and on July 7, 2008, respectively; the sworn affirmation of Scott A. Jones, D.O. FAAPMR, who performed a physiatric/electrodiagnostic evaluation of the plaintiff on April 15, 2008; the sworn affirmation of David Benatar, M.D. who evaluated the plaintiff on December 15, 2008; and the sworn affidavit of Jonathan H. Tepper, D.C., a chiropractor who first treated the plaintiff on February 1, 2008.

Notably, as Dr. Diamond directed the MRI to be taken under his supervision and is also interpreting said MRI scans in his affirmations, said affirmations constitute competent and admissible medical evidence (*Collins v Stone*, *supra*; *Betheil-Spitz v Linares*, *supra*). Similarly, Dr. Jones' affirmation constitutes competent admissible evidence since he too was the one performing the EMG/NCV testing (*Id*).

Based upon the MRI reports of Dr. Diamond, it is clear that with respect to an MRI of plaintiff's cervical spine on 4/4/08, plaintiff merely sustained:

C3/4 through C5/6 posterior disc bulges.
Mild lingual tonsillar hypertrophy.
Left maxillary sinus cyst or polyp.

Dr. Diamond opines, with respect to his lumbar spine, that plaintiff sustained:

Levoconvex scoliosis.
L2/3 through L4/5 posterior disc bulges.
L5/S1 diminished disc space height and disc hydration loss with posterior disc herniation increasing on the left to impress the proximal left S1 root.

In his physiatric/electrodiagnostic evaluation of the plaintiff, Dr. Jones states, in pertinent part, as follows:

> Impression: 1) Cervical Sprain Strain.
> 2) Cervical Muscle Spasm and Pain.
> 3) R/o Cervical radiculopathy.

Thus, while plaintiff submits an affirmation of the radiologist who read plaintiff's MRI films, namely, Dr. Diamond, and an affirmation of Dr. Jones who performed the electrodiagnostic testing of the plaintiff, the positive findings therein are nevertheless of no significance (*Penaloza v Chaves*, 48 AD3d 654). Dr. Diamond merely states that the disc herniations were shown on the films. He does not offer any opinion on the cause of those disc herniations. It is well settled that positive MRI findings, such as disc herniations, in and of themselves, are insufficient to establish "serious injury" (*Cornelius v Cintas Corp.*, 50 AD3d 1085; *Perdomo v Scott*, 50 AD3d 1115). Similarly, positive EMG findings alone, as documented in Dr. Jones' affirmation, are not evidence of "serious injury" under Insurance Law §5102 absent objective evidence of permanency and causal relation (*Francis v Basic Metal, Inc.*, 144 AD2d 634). Where a defendant made a *prima facie* showing that plaintiff had full range of motion and any injury suffered in the accident had fully resolved, positive diagnostic studies alone will not raise a question of fact.

Dr. David Benatar's affirmation and the plaintiff's chiropractor's affidavit also fail to present a triable issue of fact.

Dr. Benatar, in his affirmation, states in pertinent part, as follows:

> ***On December 15, 2008, Jean Chery came to my office for evaluation as a result of injuries sustained in an automobile accident on January 31, 2008...He came into this office complaining of continuous significant upper back pain aggravated by sitting and standing.***

> A physical examination of the cervical spine on cervical extension and left lateral rotation immediately produced left parascapular pain. Flexion and right lateral rotation was better tolerated. Upper extremities and DTRs are one plus at the biceps and absent at the triceps. The left paracervical muscles are tight and tender through palpation and there is tenderness to palpation along the left rhomboids.
>
> My impression was left cervical radiculopathy.
> ***
> Based upon the objective test taken (including MRI studies and EMG studies as well as range of motion studies), and my own clinical evaluation the mechanism of injuries entirely are consistent with the clinical presentation that the accident of January 31, 2008 is a direct producing cause of Jean Chery's injuries and pathologies causing injuries to his neuro and musculoskeletal systems concerning his cervical spine and kept him partially disabled from his daily activities. ***

Dr. Benatar's narrative report falls short of raising a triable issue of fact. After examining the plaintiff *only once* and *one year* after the subject accident, Dr. Benatar makes conclusory statements that the plaintiff has "injuries from the subject car accident and there was a direct causal relationship between these injuries and this motor vehicle accident." First and foremost, it cannot be overlooked that Dr. Benatar first examined the plaintiff almost one year after the date of the accident. As stated above, medical evidence of an injury is required to establish a serious injury (*Toure v Avis Rent A Car Systems, Inc.*, *supra*). Generally, the medical proof required should be contemporaneous with the accident, showing qualitative evidence of what restrictions, if any, plaintiff was afflicted with (*Nemchyonok v Ying*, 2 AD3d 421; *Pajda v Pedone*, 303 AD2d 729). In fact, a failure to submit medical evidence contemporaneous with the injury, as in this case, requires summary judgment in defendant's favor (*Nemchyonok v Ying*, *supra*).

Second, Dr. Benatar fails entirely to quantify the alleged range of motion limitations of plaintiff's cervical and lumbar spine. Plaintiff's medical proof, therefore, regarding limitation of use is insufficient as his treating physician did not quantify any loss of range

of motion (*Bennett v Genas*, 27 AD3d 601; *Kouvaras v Hertz Corp.*, 27 AD3d 529). Dr. Benatar's conclusory statements as to causality and permanency are not supported by any objective testing and are therefore nothing more than his reiteration fo plaintiff's subjective complaints of pain, which is clearly insufficient to raise a triable issue of fact (*Beckett v Conti*, 176 AD2d 774).

Finally, plaintiff's reliance upon the affidavit of his chiropractor, Jonathan Tepper also falls short of raising a triable issue of fact. First and foremost, Dr. Tepper states in his affidavit that he performed an "orthopedic exam" of the plaintiff. Yet, it remains unclear to this Court as to how a chiropractor can do so. Similarly, Dr. Tepper also references the MRI films. This Court, however, is not convinced that a chiropractor is qualified to read said MRI films in the first place.

Similarly, although Dr. Tepper sets forth range of motion of the plaintiff's cervical and lumbar spine, he fails to set forth what objective testing was used to determine such measurements. Failure to indicate which objective test was performed to measure the loss of range of motion is contrary to the requirements of *Toure v. Avis Rent A Car Systems*, *supra*. It renders the expert's opinion as to any purported loss worthless (*see also Powell v Alade*, 31 AD3d 523).

For these reasons, Dr. Tepper's affidavit is also insufficient to raise a triable issue of fact.

In light of plaintiff's failure to raise any triable issues of fact, defendant's motion for summary judgment is granted and the complaint is dismissed.

Settle Judgment on Notice.

Dated: August 26, 2010

UTE WOLFF LALLY J.S.C.

TO: Steinberg & Gruber, Esqs.
Attorneys for Plaintiff
300 Garden City Plaza, Suite 218
Garden City, NY 11530

Nicolini, Paradise, Ferretti & Sabella, Esqs.
Attorneys for Defendant
114 Old Country Road, Suite 500
Mineola, NY 11501

chery-molerio,#1/sumjudg