Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Zafar Ali,

Plaintiff,

-against-

Mark V. Desantis and Charles Fichter,

Defendants.

Mark V. Desantis,

Third-Party Plaintiff,

-against-

Charles Fichter,

Third-Party Defendant.

Clerk of the Court

Index No.: 17269/2007

Motion Sequence No.: 002; MG
Motion Date: 5/7/10
Submitted: 8/25/10

Motion Sequence No.: 003; XMG
CDISPO
Motion Date: 5/7/10
Submitted: 8/25/10

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Upon the following papers numbered 1 to 30 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 14; Notice of Cross Motion and supporting papers, 15 - 20; Answering Affidavits and supporting papers, 21 - 28; Replying Affidavits and supporting papers, 29 - 30.

The instant action seeks to recover damages for personal injuries arising from a motor vehicle accident which occurred on September 18, 2006 on the North Service Road of Sunrise Highway at its intersection with Pine Acres Boulevard in Bay Shore, New York. The accident allegedly occurred when a vehicle owned and operated by the defendant Charles Fichter made a right onto the North Service Road of Sunrise Highway from Pine Acres Boulevard without stopping. At the time, the plaintiff was operating his vehicle in the left lane of Sunrise Highway, which had two lanes. When he observed defendant Fichter enter the roadway, he stopped his vehicle and was struck in the rear by a vehicle owned and operated by the defendant Mark V. DeSantis. The plaintiff alleges that he sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, the bill of particulars alleges he sustained serious and permanent injuries including a herniated disc at C5-6; a torn annulus at C6-7; a disc bulge at C6-7; a herniated disc at L4-5; a chest wall contusion; and blurred vision. It alleges that the plaintiff remained totally disabled and confined to his bed and home from the date of the accident through October 1, 2006. It alleges that he was incapacitated from his employment for two weeks immediately following the occurrence of the accident. It alleges that he remains partially disabled to date. Defendant DeSantis asserts a cross claim against defendant Fichter for indemnification and/or contribution.

Defendant Desantis now moves for summary judgment dismissing the complaint on the grounds that the plaintiff did not sustain a "serious injury" as defined by Insurance Law Section §5102(d). Defendant Fichter cross-moves for summary judgment dismissing the complaint on the same grounds.

A "serious injury" is defined as 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 constitutes 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" (Insurance Law §5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (see, Licari v. Elliott, 57 NY2d 230 [1982]; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp.,68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (see, Pagano v. Kingsbury, 182 AD2d 268

[2nd Dept., 1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact as to whether a serious injury was sustained within the meaning of the Insurance Law (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]; see also, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In support of his motion for summary judgment defendant DeSantis submits, *inter alia*, the plaintiff's deposition testimony, x-rays performed on the plaintiff's cervical and thoracic spine dated June 23, 2004, the plaintiff's emergency room records, affirmed reports prepared by Alan B. Greenfield with respect to an MRI of the plaintiff's cervical spine performed on November 8, 2006 and an MRI of the plaintiff's lumbar spine performed November 5, 2006, and the affirmed report of Salvatore Corso, M.D. In support of his cross motion for summary judgment, defendant Fichter relies on the papers submitted in support of the motion and submits, *inter alia*, the plaintiff's deposition testimony.

The plaintiff testified that immediately following the accident he was having pain in his neck and back. He went to the emergency room and complained about pain in his neck, back and chest. He was given medication for the pain and was released. One or two days later, he went to his primary care physician, Dr. Singh, and complained of pain his neck and back. Dr. Singh sent him to a neurologist, Dr. Winick. He saw Dr. Winick a couple of times and was then told that he only needed treatment from a chiropractor. He last saw Dr. Winick sometime in 2006. He went to a chiropractor, Dr. Nielson. At first he saw Dr. Nielson once a week, but he now goes every other week. He visits Dr. Nielson regularly because as long as he goes for chiropractic care his back and neck feel okay. He went to an eye doctor on one occasion following the accident. The eye doctor performed an exam and told him that everything was normal. He told him his eyes were just becoming weak. The eye doctor told him it was okay for him to continue to drive for a living. The plaintiff testified that he was employed by Domino's Pizza at the time of the accident and has continued to work there to present. He attempted to go to work the day following the accident, but went home when he was not feeling well. Thereafter, he took approximately two weeks off from work to rest. He testified that, for one or two months after he returned to work he worked three or four eight-hour days, instead of five eight-hour days. He, thereafter, resumed his normal five day a week work schedule and has worked without interruption since. The plaintiff testified that, as a result of the accident, he cannot lift weight, has problems sleeping, cannot exercise, has problems bending in the shower and sometimes gets blurry vision. The plaintiff admitted that he was involved in a prior motor vehicle accident on December 27, 2003 and that he went to the hospital for his injuries. He testified that he did not make complaints of neck or back pain related to this prior accident and only had a little problem with pain in his ribs and chest. He admitted treating with Dr. Nielson, the chiropractor, for approximately one or two months after this prior accident. The plaintiff also admitted that he was bitten by a dog on October 28, 2006 and fell to the ground.

The x-rays performed on the plaintiff's cervical and thoracic spine on June 23, 2004, more than two years prior to the subject accident, show mild degenerative changes in his cervical spine at C5-6 and C6-7 and mild degenerative changes in his thoracic spine.

The plaintiff's emergency room records indicate he was diagnosed with strains of his neck, lower back and chest. Imaging of his lumbar spine showed no acute fractures and normal alignment, but degenerative changes. Imaging of his cervical spine showed no fracture, dislocation or soft tissue swelling, but degenerative changes. EMGs performed on his arms and legs were normal.

Dr. Greenfield affirmed that he reviewed the MRI performed on the plaintiff's cervical spine on November 8, 2006. He concluded that the MRI depicted the presence of multilevel degenerative disc disease at all disc levels associated with degenerative disc bulging and degenerative body osteophytic ridging from C-4 through C-7. He found that these findings, along with the posterior osteophytic ridge/disc complex at C5-6, were clearly longstanding and degenerative and unrelated to the subject accident. He noted that, in the setting of extensive multilevel degenerative changes, the coexistence of a herniation at C6-7 cannot be attributed to the accident in question with any reasonable degree of medical certainty and may merely represent a continuum of long standing degenerative discopathy culminating in degenerative disc herniations. In summary, Dr. Greenfield found that there were no findings on this MRI exam which could be attributed to the accident with any reasonable degree of medical certainty.

Dr. Greenfield affirmed that he reviewed the MRI performed on plaintiff's lumbar spine on November 5, 2006. He avers that it depicts the presence of varying degrees of degenerative disc disease at multiple disc levels throughout and that L2-3 and L4-5 show the most desiccation change. He avers that generalized disc bulging, which is degenerative, is present at L4-5 and that there is degenerative bony facet arthropathy present at L5-S1. He avers that the findings of the MRI are clearly longstanding and degenerative in origin. He concludes that no findings of the study can be attributed to the subject accident with any degree of medical certainty.

Dr. Corso avers that he examined the plaintiff on December 3, 2009. Upon examining the plaintiff's cervical spine, he noted no spasm or tenderness. He measured the range of motion of the plaintiff's cervical spine, compared it to normal values, and found it to be normal in all respects. He performed the Compression test and Spurling test and obtained negative results. Upon examining the plaintiff's thoracolumbar spine, he found the straight leg raise test to be negative bilaterally. Dr. Corso also obtained negative results on the Lasegue and Fabere tests. He measured the range of motion of the plaintiff's lumbar spine, compared it to normal values and found it to be normal with the exception of flexion, which was 70 degrees as compared to normal of 90 degrees. Dr. Corso concluded that the mild limitation in the plaintiff's flexion resulted from her prior degenerative changes. He found that the plaintiff had sustained a cervical and lumbar sprain with exacerbation of pre-existing degenerative changes, but that there was no need for further treatment. He averred that the claimant could perform his normal activities of daily living and could continue in his current occupation without restrictions. He concluded that the plaintiff had no orthopedic disability at that time.

The evidence submitted by the defendants established their *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the subject accident (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Saetia v. VIP Renovations Corp., 68 AD3d 1092 [2nd Dept., 2009]; Dietrich v. Puff Cab Corp., 63 AD3d 778 [2nd Dept., 2009]; DiFilippo v. Jones, 22 AD3d 788 [2nd Dept., 2005]; Casella v. N.Y. City Transit Auth., 14 AD3d 585 [2nd Dept., 2005]). In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether he sustained such an injury as a result of the subject accident (see, Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002] at 350; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008]). The plaintiff failed to meet this burden.

In opposition to the motion, the plaintiff submitted, *inter alia*, the police accident report, certified medical records of treatment received at the office of Devendra Singh, M.D., the affirmed reports of Jonathan C. Winick, the affirmed MRI report of Glenn Gray, M.D., the affirmed MRI report of John Lynch M.D. and the affidavit and accompanying report of the plaintiff's treating chiropractor, Evan R. Nielson, D.C. Contrary to the plaintiff's contention, this evidence was insufficient to raise a triable issue of fact as to whether he sustained a serious injury as a result of the subject accident. Initially, to the extent that the certified medical records submitted contained the doctor's opinion or expert proof, they do not constitute competent evidence because, although they were certified, such records were unsworn (see, Matter of Fortunato v. Murray, 72 AD3d 817 [2nd Dept., 2010]; Buntin v. Rene, 71 AD3d 938 [2nd Dept., 2010]; Matter of Bronstein-Becher v. Becher, 25 AD3d 796 [2nd Dept., 2006]). In any event, the evidence submitted was insufficient to raise a triable issue of fact. It is well settled that a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (see, Caraballo v. Kim, 63 AD3d 976 [2nd Dept., 2009]; Sealy v. Riteway-1, Inc., 54 AD3d 1018 [2nd Dept., 2008]; Kilakos v. Mascera, 53 AD3d 527 [2nd Dept., 2008]). While Dr. Nielson sets forth findings indicating limitations in the plaintiff's range of motion based on a recent examination, neither he nor the plaintiff proffered competent objective medical evidence of the existence of a significant limitation in the plaintiff's spine that was contemporaneous with the subject accident (see, Vilomar v. Castillo, 73 AD3d 758 [2nd Dept., 2010]; Villante v Miterko, 73 AD3d 757 [2nd Dept., 2010]; Milosevic v. Mouladi, 72 AD3d 1036 [2nd Dept., 2010]; Kuperberg v. Montalbano, 72 AD3d 903 [2nd Dept., 2010]; Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]; Magid v. Lincoln Servs. Corp., 60 AD3d 1008 [2nd Dept., 2009]). In any event, the plaintiff's submissions were inadequate as they failed to address the evidence which attributes the condition of the plaintiff's cervical and lumbar spine to degenerative processes and long-standing conditions (see, Nicholson v. Allen, 62 AD3d 766 [2nd Dept., 2009]; Ciordia v. Luchian, 54 AD3d 708 [2nd Dept., 2008]).

Lastly, the plaintiff failed to submit competent medical evidence that the injuries he allegedly sustained in the subject accident rendered him unable to perform substantially all of his

daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (see, Vickers v. Francis, 63 AD3d 1150 [2nd Dept., 2009]; Ciordia v. Luchian, 54 AD3d 708 [2nd Dept., 2008]; Sainte-Aime v. Ho, 274 AD2d 569 [2nd Dept., 2000]).

Based on the foregoing, it is

ORDERED that the motion by the defendant Mark V. Desantis for summary judgment dismissing the complaint is granted; and it is further,

ORDERED that the cross motion by the defendant Charles Fichter for summary judgment dismissing the complaint is granted.

Dated: November 15, 2010

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION