Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Delroy Dean and Shiryl L. Dean,

Plaintiffs,

-against-

John V. Vodola and Winters Bros. Recycling Corp.,

Defendants.

Clerk of the Court

Motion Sequence No.: 002; MG
CDISPO

Motion Date: 10/13/10
Submitted: 12/1/10

Index No.: 43765/2008

Attorney for Plaintiff:

Borda, Kennedy, Alsen & Gold, LLP
1805 Fifth Avenue
Bay Shore, New York 11706

Attorney for Defendants:

Weiner, Millo, Morgan & Bonanno, LLC
220 Fifth Avenue, 10th Floor
New York, New York 10001-7708

Attorney for Plaintiff
Delroy Dean on the Counterclaim:

Russo, Apoznanski & Tambasco
875 Merrick Avenue
Westbury, New York 11590

Upon the following papers numbered 1 to 18 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; Answering Affidavits and supporting papers, 13 - 16; Replying Affidavits and supporting papers, 17 - 18.

The instant action arises from a motor vehicle accident which occurred on September 14, 2007 in Farmingdale, New York. The accident purportedly occurred when a vehicle owned by defendant Winters Bros. Recycling Corp. and operated by defendant John V. Vodola collided with a vehicle being operated by plaintiff Delroy Dean (hereinafter Delroy). Plaintiff Shiryl L. Dean (hereinafter Shiryl) was a passenger in Delroy's vehicle at the time of the accident. The plaintiffs allege that they sustained serious and permanent injuries as a result of the defendants' negligence in causing the accident. Specifically, by way of the bill of particulars, Delroy alleges that he sustained posterior disc herniations at L3-4, L4-5 and L5-S1; acromion impingement on the supraspinatus muscle; increased signal in the supraspinatus tendon consistent with tendinopathy; supraspinatus calcific tendonitis, biceps tenosynovitis; left rotator cuff impingement with calcific tendonitis; biceps tendonitis; bilateral wrist sprain; bursitis, tendonitis, left shoulder sprain with impingement; bilateral wrist pain; left shoulder pain; neck pain; lower back pain; headaches and aggravation of a prior left shoulder injury. Shiryl alleges that she sustained posterior disc herniations at C4-5 and C5-6; sprain of the medial collateral ligament in the left knee; tear in the anterior horn of the medial meniscus; patella alta with lateral patellar subluxation; right C5 radiculopathy; cervical sprain and strain, thoracic sprain and strain; left knee pain; neck and back pain, left knee contusion and numbness of the right hand. Following the accident, both plaintiffs were confined to the hospital for emergency room treatment and released and were confined to their bed and home for approximately one month. Shiryl was incapacitated from her employment for approximately one month. Delroy was not employed. Both plaintiffs allege that they are partially disabled to date.

The defendants now move for summary judgment dismissing the complaint on the grounds that the plaintiffs did not sustain a "serious injury" as defined by Insurance Law Section §5102 (d).

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] *affd* 12 NY3d 750 [2009]).

A defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of making a *prima facie* showing that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (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]; 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 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 that 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 their motion defendants submitted the plaintiffs' deposition testimony, the affirmed independent radiology reports of Sheldon P. Feit, M.D., the affirmed independent orthopedic examination report of S. Farkas, M.D. and a bill of particulars filed by plaintiff Delroy Dean in a prior action alleging, *inter alia*, injury to his left shoulder. This evidence was sufficient to demonstrate the defendants' *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that the plaintiffs did not sustain serious injuries 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]).

The evidence submitted established that Delroy did not sustain a serious injury as a result of the subject accident. During his deposition, Delroy testified that immediately following the accident he was treated in the emergency room and complained of pain in his back, neck, left shoulder and wrists. Shortly thereafter he commenced physical therapy. He received physical therapy approximately three or four times a week until January of 2008. Delroy was no longer receiving treatment for his injuries and had not planned any future appointments. At the time of the accident, Delroy was not working but was providing full time nursing services to his mother. Among his responsibilities were bathing his mother, cooking for her, feeding her and driving her to appointments. Following the subject accident, he continued taking care of his mother through May of 2008. Delroy testified that he continues to suffer pain in his shoulder, lower back and wrists as a result of the accident. Delroy admits that he sustained an injury to his left shoulder twenty years prior to the subject accident, but testified that such injuries fully resolved after approximately three or four years.

Dr. Feit reviewed the MRI of Delroy's lumbosacral spine performed on October 20, 2007 and concluded that all findings were related to pre-existing degenerative changes, were not post-traumatic and were not causally related to the subject accident. Dr. Feit also reviewed the MRI of Delroy's left shoulder performed on September 19, 2007. He concluded that it showed no evidence of a rotator cuff tear and no post-traumatic changes. He affirmed that all of his findings related to the left shoulder were either degenerative or chronic and not causally related to the subject accident.

Dr. Farkas performed an independent orthopedic examination on Delroy on November 3, 2009. He examined Delroy's lumbar spine, cervical spine, shoulder and wrists. He performed objective testing and obtained negative results. He also performed range of motion testing, compared his findings to normal values and concluded that the plaintiff's range of motion was within normal limits in all respects with the exception of a slight limitation in his left shoulder abduction. Dr. Farkas concluded that the plaintiff had sustained sprains of the lumbar spine, cervical spine and left shoulder and wrists. He found that Delroy had no orthopedic disability based on the physical exam, there was no need for orthopedic treatment or physical therapy and that he was capable of performing his activities of daily living without restriction. Contrary to the plaintiffs' contention, the insignificant limitation noted in Delroy's shoulder abduction, a limitation of approximately 9% to 14%, was insufficient to present a triable issue of fact as to whether Delroy sustained a significant or consequential limitation to his left shoulder (see, Acosta v. Alexandre, 70 AD3d 735 [2nd Dept., 2010]; McMullin v. Walker, 68 AD3d 943 [2nd Dept., 2009]; Granger v. Keeter, 23 AD3d 886 [3rd Dept., 2005]; Ibragimov v. Hutchins, 8 AD3d 235 [2nd Dept., 2004]; Trotter v. Hart, 285 AD2d 772 [3rd Dept., 2001]).

In a similar vein, the evidence was sufficient to establish that Shiryl did not sustain a serious injury as a result of the subject accident. During her deposition, Shiryl testified that immediately following the accident she was treated at the emergency room and complained of pain in her left knee and neck. She thereafter commenced physical therapy treatment, which she continued through April of 2008. Approximately eight months later, Shiryl went to an orthopedic surgeon with complaints of knee pain and he referred her for six or seven more physical therapy treatments. She testified that she had finished the prescribed course of treatment and that she did not see any other doctors as a result of the accident. She states that she plans on seeking further treatment for her knee because it has been "acting up." Shiryl testified that she missed approximately one month from work immediately following the accident. She, thereafter, returned to work full time and was promoted. She currently complains of pain to her neck and knee. She testified that she never injured her neck or knee prior to the subject accident. She admits that she was diagnosed with Multiple Sclerosis in June of 2006 and suffered from weakness in the left leg. However, she testified that she did not have symptoms with respect to her left knee from the MS.

Dr. Feit reviewed the cervical spine MRI performed on Shiryl on September 19, 2007. He concluded that the MRI revealed only pre-existing degenerative changes, no post-traumatic changes and no abnormalities causally related to the subject accident. Dr. Feit also reviewed the MRI performed on Shiryl's left knee on October 20, 2007. He found that it failed to depict any evidence of a meniscal tear, ligamentous injury or fracture. He concluded that it showed an area of meniscal degeneration and joint effusion. He concluded that the left knee MRI showed no post-traumatic changes and no abnormalities causally related to the subject accident.

Dr. Farkas performed an independent orthopedic examination on Shiryl on November 3, 2009. He examined her lumbar spine, cervical spine, shoulders and left knee. He performed objective tests and obtained negative results. He also performed range of motion testing, compared his findings to normal values and found the plaintiff's range of motion to be within normal limits in all respects with the exception of a slight limitation in her left knee flexion. Dr. Farkas concluded that the plaintiff had sustained sprains of the lumbar spine, cervical spine and left knee that had resolved. He found that Shiryl had no orthopedic disability based on the physical exam, there was no need for orthopedic treatment or physical therapy and she was capable of performing the usual duties of her occupation and her activities of daily living without restriction. Contrary to the plaintiff's contention, the insignificant limitation noted in Shiryl's left knee flexion, a limitation of approximately 8% to 11%, was insufficient to present a triable issue of fact as to whether Shiryl sustained a significant or consequential limitation to her left knee (see, Acosta v. Alexandre, 70 AD3d 735 [2nd Dept., 2010]; McMullin v. Walker, 68 AD3d 943 [2nd Dept., 2009]; Granger v. Keeter, 23 AD3d 886 [3rd Dept., 2005]; Ibragimov v. Hutchins, 8 AD3d 235 [2nd Dept., 2004]; Trotter v. Hart, 285 AD2d 772 [3rd Dept., 2001]).

In opposition to the defendants' *prima facie* showing, it was incumbent upon the plaintiffs to demonstrate, by the submission of objective proof of the nature and degree of the injury, that they did sustain a "serious" injury as a result of the instant accident, or that there are questions of fact as to whether they 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). The plaintiffs failed to meet this burden.

In opposition to the motion the plaintiffs rely on the affirmed reports of their treating physician, Nunzio Saulle, M.D. Dr. Saulle's affirmed reports were insufficient to raise a triable issue of fact with respect to whether Delroy sustained a serious injury within the meaning of the Insurance Law. Although he concludes that Delroy sustained significant injuries to his lumbar spine and left shoulder as a direct result of the motor vehicle accident, he fails to present a sufficient foundation for this conclusion. In this regard, Dr. Saulle fails to set forth any objective medical findings revealing the existence of limitations to Delroy's lumbar spine that are based on a recent examination (see, Clarke v. Delacruz, 73 AD3d 965 [2nd Dept., 2010]; Ciancio v. Nolan, 65 AD3d 1273 [2nd Dept., 2009]; Diaz v. Lopresti, 57 AD3d 832 [2nd Dept., 2008]; Sharma v.

Diaz, 48 AD3d 442 [2nd Dept., 2008]). He also fails to provide objective medical findings that reveal the existence of limitations to Delroy's lumbar spine or left shoulder that were 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]). Where he does set forth contemporaneous lumbar range of motion findings he fails to compare these findings to normal ranges of motion (see, Sharma v. Diaz, 48 AD3d 442 [2nd Dept., 2008]; Page v. Belmonte, 45 AD3d 825 [2nd Dept., 2007]). Further, Dr. Saulle's conclusion that Delroy sustained an injury to his lumbar spine and left shoulder as a result of the subject accident was inadequate because he failed to address the evidence which attributed these conditions to chronic and degenerative processes (see, Nicholson v. Allen, 62 AD3d 766 [2nd Dept., 2009]; Ciordia v. Luchian, 54 AD3d 708 [2nd Dept., 2008]). In addition, to the extent that Dr. Saulle relies on the unsworn reports of others in forming his conclusions, his report is insufficient to raise a triable issue of fact (see, Vilomar v. Castillo, 73 AD3d 758 [2nd Dept., 2010]; Villante v. Miterko, 73 AD3d 757 [2nd Dept., 2010]; Magid v. Lincoln Servs. Corp.,60 AD3d 1008 [2nd Dept., 2009]; Ferber v. Madorran, 60 AD3d 725 [2nd Dept., 2009]).

For similar reasons, Dr. Saulle's reports were insufficient to establish a triable issue of fact as to whether Shiryl sustained a serious injury as a result of the subject accident. Dr. Saulle concludes that Shiryl sustained significant injuries to her cervical spine and left knee. However, he fails to set forth any objective medical findings revealing the existence of limitations to her left knee that are based on a recent examination (see, Clarke v. Delacruz, 73 AD3d 965 [2nd Dept., 2010]; Ciancio v. Nolan, 65 AD3d 1273 [2nd Dept., 2009]; Diaz v. Lopresti, 57 AD3d 832 [2nd Dept., 2008]; Sharma v. Diaz, 48 AD3d 442 [2nd Dept., 2008]). The current limitation that he notes in her left knee flexion is insignificant. He also fails to provide objective medical findings that reveal the existence of limitations to Shiryl's left knee or cervical spine that were 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]). Where he does set forth contemporaneous cervical range of motion findings he fails to compare these findings to normal ranges of motion (see, Sharma v. Diaz, 48 AD3d 442 [2nd Dept., 2008]; Page v. Belmonte, 45 AD3d 825 [2nd Dept., 2007]). Further, Dr. Saulle's conclusion that Shiryl sustained an injury to her cervical spine as a result of the subject accident was inadequate because he failed to address the evidence which attributed the condition of her cervical spine to chronic and degenerative processes (see, Nicholson v. Allen, 62 AD3d 766 [2nd Dept., 2009]; Ciordia v. Luchian, 54 AD3d 708 [2nd Dept., 2008]). In addition, to the extent that Dr. Saulle relies on the unsworn reports of others in forming his conclusions, his report is insufficient to raise a triable issue of fact (see, Vilomar v. Castillo, 73 AD3d 758 [2nd Dept., 2010]; Villante v.

Miterko, 73 AD3d 757 [2nd Dept., 2010]; Magid v. Lincoln Servs. Corp.,60 AD3d 1008 [2nd Dept., 2009]; Ferber v. Madorran, 60 AD3d 725 [2nd Dept., 2009]).

Lastly, the plaintiffs also failed to submit competent medical evidence that the injuries they allegedly sustained in the subject accident rendered them unable to perform substantially all of their 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]; Sainte-Aime v. Suwai Ho, 274 AD2d 569 [2nd Dept., 2000]).

Based on the foregoing, it is

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted; settle judgment (see, 22 NYCRR §202.48).

Dated: March 1, 2011

William B. Rebolini

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

__X__ FINAL DISPOSITION_____ NON-FINAL DISPOSITION