SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

----------X PART 8

EDWIN BERMUDEZ and SANDRA BERMUDEZ,

Plaintiffs,

INDEX NO. 22849/09
XXX
MOTION DATE: 04/14/11
SEQUENCE NO: 01, 02

-against-

MICHAEL A. JORDING, COUNTY OF NASSAU, JOEL A. SARTO and JORGE A. FUENTES,

Defendants.

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Upon the foregoing papers, the motion for summary judgment by defendants Joel A. Sorto and Jorge A. Fuentes, and the motion for summary judgment by defendants Michael A. Jording and County of Nassau, pursuant to CPLR §3212, are granted.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This action is to recover for personal injuries allegedly sustained by plaintiff Edwin Bermudez in a two-vehicle automobile accident which occurred on October 8, 2008 on Carman Avenue, near the intersection of Park Street, in Westbury, New York. The claim by plaintiff Sandra Bermudez is a loss of services claim which is derivative in nature. Plaintiff Edwin Bermudez was a passenger in a vehicle driven by defendant Joel A. Sorto and registered to Jorge A. Fuentes. It is alleged that there was a collision between said vehicle and a vehicle owned by

the County of Nassau (hereinafter "County"), and driven by County employee, defendant Michael A. Jording.

Defendants Joel A. Sorto and Jorge A. Fuentes and defendants County of Nassau and Michael A. Jording move for summary judgment on the grounds that the plaintiff's alleged injuries do not meet the serious injury threshold as defined by New York Insurance Law §5102(d). Defendants County and Jording also move for summary judgment on liability grounds.

In support of their motions, all defendants submit the deposition transcript of plaintiff Edwin Bermudez. Mr. Bermudez testified that he was employed as a landscaper at the time of the accident and missed approximately one month of work as a result of the accident. He returned to work in November but acknowledged that it was the end of the busy season. Mr. Bermudez testified that his work includes the use of weed trimmers, blowers, hedge clippers and similar equipment. Some of the equipment is gas powered, which Mr. Bermudez testified can be considered heavy. Mr. Bermudez testified that he has no difficulty lifting items up to 50 pounds, but does have difficulty in the 120 pound to 150 pound range. Mr. Bermudez underwent medical treatment for his injuries through March 2009.

Defendants Sorto and Fuentes also submit the report of orthopedist, John Killian, M.D. Dr. Killian performed an examination of the plaintiff Edwin Bermudez on October 26, 2010. Dr. Killian found that plaintiff had full range of motion in his cervical and lumbar spines. He opined that plaintiff has no impairment or disability from injuries relating to the subject accident and that he is capable of working at his normal capacity and of performing all of his usual activities of daily living without limitations.

Defendants County and Jording submit the report of radiologist, Dr. Jeffrey Warhit, who reviewed plaintiff's lumbosacral MRI, originally conducted on February 27, 2009. Dr. Warhit concluded that the MRI revealed degenerative changes at the L5/S1 level, including a small central disc herniation noted at the L5/S1 level associated with degenerative changes. In addition, defendants County and Jording submit the report of orthopedist, Jerrold M. Gorski, M.D., who conducted an examination of the plaintiff on September 7, 2010. Dr. Gorski opined that plaintiff's causally related contusions and sprains had resolved and that plaintiff has some degenerative arthritis in the lumbar spine and an underlying spondylolysis and a spondylolithesis which is underlying and pre-existing. Dr. Gorski opined that the plaintiff had a mild temporary disability due to soft tissue injuries which have completely resolved and that Mr. Bermudez returned to his pre-injury status well within a three month period of time. Dr. Gorski further opined that the plaintiff has no impairment, disability, residuals or permanency related to the

October 8, 2008 incident.

Plaintiff opposes the motions of both defendants, contending that neither movant met their burden of making a prima facie showing of entitlement to summary judgment and that plaintiff has established a prima facie case of serious injury pursuant to New York Insurance Law §5102(d). Plaintiff argues that the defendants' examining doctors, Dr. Gorski and Dr. Killian, each failed to perform objective range of motion tests. In addition, plaintiff submits the affidavit of chiropractor, Stanley Anderson, D.C. Dr. Anderson attests that he reviewed the medical report of Tong Li, M.D., dated October 22, 2008, in which Dr. Li found range of motion limitations in plaintiff's lumbar spine. The Court notes, however, that plaintiff fails to annex the certified records maintained by Dr. Li or an affirmation from Dr. Li attesting to the contemporaneous restrictions in plaintiff's ranges of motion. Dr. Anderson also does not attest to reviewing the certified records of Dr. Li.

Dr. Anderson performed an examination of plaintiff Edwin Bermudez on January 28, 2011. Dr. Anderson found decreased ranges of motion in plaintiff's lumbar and cervical spines. Within his affidavit, Dr. Anderson notes that plaintiff's no-fault benefits were denied on March 19, 2009, and Dr. Anderson states that Mr. Bermudez did not have private health insurance and could not afford further medical treatment. Dr. Anderson opines that plaintiff sustained permanent injuries, multiple trauma, and posttraumatic pain syndrome as a result of the accident. He also opines that Mr. Bermudez has reached "maximum medical improvement determined by periodic serial physical examinations."

In addition, plaintiff submits an affirmation of radiologist, Robert Diamond, M.D., who reviewed plaintiff's February 27, 2009 lumbar and cervical spine MRIs. Dr. Diamond's reading of the MRI films revealed a herniated disc at L5/S1 and a posterior disc bulge art C6/7. Dr. Diamond did not comment on the causation of same, but instead deferred any discussion of causation regarding the above injuries to plaintiff's treating physician.

Contrary to plaintiff's arguments, Movants have made a prima facie showing of entitlement to summary judgment on the grounds that the plaintiff's injuries do not meet the "serious injury" requirements of Insurance Law §5102(d). (*Tourre v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 (Ct. of App. 2002); *Gaddy v. Eyler*, 79 N.Y.2d 955 (Ct. of App. 2002)). Both Dr. Gorski and Dr. Killian quantified the results of plaintiff's range of motion tests, compared those tests to the normal ranges, and found that plaintiff did not have any limitations as a result of the accident. In addition, Dr. Warhit found that plaintiff's lumbar spine MRI revealed only degenerative changes.

From the evidence submitted, plaintiff was not limited in his "usual and customary" daily

activities for at least 90 days during the 180 days immediately following accident, as he missed only one month from work as a landscaper and returned to the same position, which he continues to do full-time today. *(See, Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008); *Charley v. Goss*, 863 N.Y.S.2d 205 (1st Dept. 2008); *Rodriguez v. Virga*, 24 A.D.3d 650, 808 N.Y.S2d 373 (2d Dept. 2005); *Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008)). The New York State courts have consistently held that where pretrial evidence establishes that the Plaintiff was prevented from performing substantially all the material acts of daily activities for less than the requisite 90 days, summary dismissal is warranted. *Charley v. Goss*, 863 N.Y.S.2d 205 (1st Dept. 2008) *Onishi v. N & B Taxi Inc.*, 51 A.D.3d 594, 858 N.Y.S.2d 171 (1st Dept. 2008) *Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008); *Rodriguez v. Virga*, 24 A.D.3d 650, 808 N.Y.S2d 373 (2d Dept. 2005); *See also*, *Hemsley v. Ventura*, 50 A.D.3d 1097, 857 N.Y.S.2d 642 (2d Dept. 2008)(although plaintiff testified at deposition that as a result of accident she was confined to her home for two or three months and suffered certain limitations in her activities around home, there was no competent medical evidence indicating that she was unable to perform substantially all of her daily activities).

It is also well settled that contemporaneous, objective proof of injury is necessary to satisfy the statutory serious injury threshold. (*Lazarus v. Perez*, 73 A.D.3d 528, 901 N.Y.S.2d 39 (1st Dept. 2010)). While plaintiff submits the affidavit of chiropractor Dr. Anderson, who attests that his recent examination of plaintiff revealed range of motion limitations, plaintiff has not proffered competent medical evidence that revealed the existence of significant limitations in his lumbar or cervical spine that were contemporaneous with the subject accident. (*See, Blezcz v. Hiscock*, 69 A.D.3d 890, 894 N.Y.S.2d 481 (2d Dept. 2010)). Dr. Anderson's review of the uncertified records of plaintiff's treating physician, Dr. Li, and his reference to the range of motion findings of Dr. Li after the accident, is insufficient to establish that plaintiff sustained a significant limitation contemporaneous with the accident. (*See, Calabro v. Petersen*, 82 A.D.3d 1030, 918 N.Y.S.2d 1030 (2d Dept. 2011); *Ferraro v. Ridge Car Service*, 49 A.D.3d 498, 854 N.Y.S.2d 408 (2d Dept. 2008)).

Lastly, the existence of a bulging or herniated disc alone, without evidence that it led to a period of disability, is insufficient to defeat summary judgment. (*See, Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005); *Ortiz v. Ianina Taxi Services, Inc.*, 73 A.D.2d 721 (2d Dept. 2010); *St. Pierre v. Ferrier*, 28 A.D.3d 641 (2d Dept. 2006)). Accordingly, plaintiff's submission of Dr. Diamond's affidavit, attesting that plaintiff's MRIs revealed a herniated disc at L5/S1 and a posterior disc bulge at C6/7, is insufficient to defeat defendants'

prima facie showing of entitlement to summary judgment. The mere existence of a herniated or bulging disc, absent evidence of the extent of the alleged physical limitations resulting from the injury and its duration, is insufficient to defeat defendants' motion. (*See, Washington v. Mendoza*, 57 A.D.3d 972, 871 N.Y.S.2d 336 (2d Dept. 2008); *Kearse v. New York City Transit Authority*, 15 A.D.3d 45 (2d Dept. 2005); *Ortiz v. Ianina Taxi Services, Inc.*, 73 A.D.2d 721 (2d Dept. 2010)). Further, Dr. Diamond does not causally relate the MRI findings to the subject accident.

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." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

In opposition to defendants' prima facie showing of entitlement to summary judgment, plaintiff fails to offer sufficient evidence to make an affirmative showing that he suffered a serious injury pursuant to Insurance Law §5102(d), and as such, plaintiff has failed to demonstrate a triable issue of fact. (*See, Kwak v. Villamar*, 71 A.D.3d 762 (2d Dept. 2010)).

Accordingly, defendants' motions for summary judgment are granted on the grounds that plaintiff injuries do not meet the serious injury threshold as defined in New York Insurance Law §5102(d). As such, the Court need not consider the liability arguments set forth by defendants County and Jording.

Dated: June 10, 2011

Anthony L. Parga, J.S.C.

ENTERED
JUN 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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