Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Kevin Morehouse,

Plaintiff,

-against-

Paola Soriano,

Defendant.

Motion Sequence No.: 001; MD
Motion Date: 11/27/12
Submitted: 1/29/13

Index No.: 01394/2011

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Clerk of the Court

Upon the following papers numbered 1 to 27 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 13; Answering Affidavits and supporting papers, 14 - 25; Replying Affidavits and supporting papers, 26 - 27; it is

ORDERED that this motion (001) by defendant Paolo Soriano pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d) is denied.

This is an action wherein plaintiff, Kevin Morehouse, seeks damages for personal injury alleged sustained in a motor vehicle accident which occurred on October 14, 2009, approximately 150 feet north of the Route 27 Service Road South Service Road, in East Patchogue, New York, when his vehicle was struck in the rear by the defendant's vehicle.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102 (d), " '[s]erious injury' means 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 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570[1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect

to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see* ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; transcript of the plaintiff's examination before trial dated January 9, 2012; copy of the emergency room record from Brookhaven Memorial Hospital; one page of a medical record from neurologist Shafi Wani, M.D.; uncertified copy of the x-ray report of plaintiff's left lower leg dated February 16, 2010; uncertified MRI report of the plaintiff's right knee dated February 17, 2010; and the sworn report of the defendant's expert, Lee Kupersmith, M.D. concerning his independent orthopedic examination of the plaintiff on April 14, 2012.

By way of his verified bill of particulars, the plaintiff alleges that as a result of the subject accident, he sustained injuries consisting of disc protrusions at C5-6, and C6-7; cervical sprain/strain; cervical radiculopathy; multiple intramuscular trigger point injections to the cervical spine, shoulder and posterior chest muscle walls; lumbar sprain/strain; lumbar radiculopathy; internal derangement of the right knee; contusion of the right knee; post-traumatic chondromalacia patella of the right knee; right focal cartilage delamination along the central margin of the femoral trochlea; left carpal tunnel syndrome; pain, stiffness, and restriction of motion of the affected areas; and such injuries being permanent in nature.

The plaintiff testified that the morning following the accident, he woke up with swelling in his right knee, and stated that the knee was locking and making a clicking noise. He was having difficulty opening his mouth also, and could not speak, but was able to mumble. He also experienced pain in his neck. He was treated twice in the emergency room at Brookhaven and then began treatment with Dr. Tinari twice a week for about two to three months, until he sought treatment from Dr. Wani, a neurologist, who administered trigger point injections to his left side, his

neck and back, on about three or four visits. Thereafter, he sought treatment with Dr. Segreto who ordered x-rays, MRI studies and physical therapy. Here, although the defendant's expert, Dr. Kupersmith, examined the plaintiff, he has not reviewed the MRI studies and does not rule out that the plaintiff did not sustain the protruding discs, leaving this court to speculate concerning these injuries, precluding summary judgment.

Although the plaintiff has alleged to have sustained cervical and lumbar radiculopathy, no report by an examining neurologist has been submitted by the defendant, as required (***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issues concerning whether the plaintiff's radicular claims have been ruled out by an examining neurologist. This court must speculate as to whether, if Dr. Kupersmith reviewed all of the plaintiff's medical records, and diagnostic studies, his present opinion would be affected by such review, precluding summary judgment.

It is noted that Dr. Kupersmith did find significant deficits in the forward flexion, extension left and right lateral rotation of the plaintiff's cervical spine, raising factual issues concerning whether or not these findings are related to the plaintiff's claimed protruding cervical discs, precluding summary judgment. It is further noted that Dr. Kupersmith did not address such claims concerning the cervical disc protrusions in his report, and has not ruled out that these protruding cervical discs are causally related to the subject accident. He further raised conflicting facts in opining that the plaintiff has no objective findings to substantiate his subjective complaints, despite the limitations in range of motion involving the plaintiff's cervical spine as he set forth in his report and as cited herein, thus precluding summary judgment on this issue as well. Nor does Dr. Kupersmith offer an opinion with regard to the plaintiff's claim of condromalcia of the patella of the right knee and right focal cartilage delamination along the central margin of the femoral trochlea. With regard to the plaintiff's claim of carpal tunnel syndrome to the left wrist, Dr. Kupersmith set forth a conclusory opinion, unsupported by an evidentiary proof or basis, that said injury is unrelated to the subject accident.

Defendant's examining physician offers no opinion as to whether the plaintiff was incapacitated from substantially performing his activities of daily living for a period of ninety days in the 180 days following the accident, he did not examine the plaintiff during that statutory period (*see* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and offers no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.*** , 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The twenty-eight year old plaintiff testified that as a result of this accident, that he can no longer exercise extensively as he did prior to the accident. Before the accident, he played a lot of basketball, and now cannot play as much due to the pain. He can no longer work out or run on the treadmill. Thus, there are factual issues with regard to this category of serious injury, and whether the plaintiff was unable to substantially perform his activities of daily living for a period of ninety out of the one hundred eighty days following the accident, precluding summary judgment.

Inasmuch as the orthopedic surgeon's affirmed report and the defendant's evidence does not exclude the possibility that plaintiff suffered a serious injury in the accident, the defendant is not entitled to summary judgment (*see* ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]). To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d) (*see* ***Toure v Avis Renta A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197; ***Gaddy v Eyler,*** 79 NY2d 955, 582 NYS2d 990 [1992]. Here, defendant failed to satisfy that burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 33 AD3d 737, 822 NYS2s 766 [2d Dept 2006]; *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Since defendant failed to establish his entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiff's papers in opposition to defendant's motion were sufficient to raise a triable issue of fact (*see* ***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (001) for summary judgment dismissing the complaint on the issue that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d) as to either category of injury is denied.

Dated: 1/5/2013

William B. Rebolini

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

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**