SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1146

CA 12-00302

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND VALENTINO, JJ.

BRIAN W. HINT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALFRED L. VAUGHN AND MELANIE P. HEMENWAY,
DEFENDANTS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (APRIL J. ORLOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wyoming County (Michael F. Griffith, A.J.), entered October 26, 2011 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the permanent loss of use category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident when the vehicle he was driving was struck by a vehicle operated by defendant Alfred L. Vaughn and owned by defendant Melanie P. Hemenway. Defendants thereafter moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident within the meaning of Insurance Law § 5102 (d), and Supreme Court denied the motion in its entirety. We agree with defendants that they established as a matter of law that plaintiff did not sustain a serious injury under the permanent loss of use category, i.e., he did not sustain a "total loss of use" of a body organ, member, function or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 297), and we therefore modify the order accordingly. We further conclude, however, that the court properly denied defendants' motion with respect to the remaining categories of serious injury allegedly sustained by plaintiff. Although defendants met their initial burden of proof with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury (*see Roll v Gavitt*, 77 AD3d 1412, 1412), plaintiff raised triable issues of

fact in opposition to the motion by submitting an affirmation from his treating physician and an affidavit from his treating chiropractor, both of which contain the requisite objective medical findings (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351; *Chmiel v Figueroa*, 53 AD3d 1092, 1093). We further conclude that defendants failed to meet their initial burden of proof with respect to the 90/180-day category of serious injury inasmuch as the affirmed report of their examining neurologist did not specifically relate any of the neurologist's findings to that category for the relevant period of time (*see Scinto v Hoyte*, 57 AD3d 646, 647; *Daddio v Shapiro*, 44 AD3d 699, 700). Plaintiff's deposition testimony, which defendants also submitted in support of their motion, was insufficient to establish that plaintiff had no injury in the 90/180-day category (*see Scinto*, 57 AD3d at 647; *Greenidge v Righton Limo, Inc.*, 43 AD3d 1109, 1109-1110).

Entered: November 16, 2012

Frances E. Cafarell
Clerk of the Court