

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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ABID ALI,	No. 1269/06
	Motion
Plaintiff,	Date March 11, 2008
-against-	
	Motion
BRUCE H. GIBSON AND	Cal. No. 1
TIMOT CAB CORP.,	
	Motion
Defendants.	Seq. No. 1

PAPERS
NUMBERED

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Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on July 30, 2004 due to a motor vehicle accident at the intersection of Lexington Avenue and 38th Street, in the County, City and State of New York.

Defendants move for an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law 5102(d).

Defendants assert that plaintiff's bill of particulars sets forth that he sustained disc bulge at C3-C7 and L4-S1, cervical spine and lumbar spine strain/sprain and internal derangement of the right knee/right shoulder. Plaintiff was examined on March 27, 2007 by Dr. Iqbal Merchant, a neurologist. His affirmed examination report states that, as to the lumbar and cervical spine, range of motion testing

showed specified results within normal ranges. No muscle spasm was detected and his gait was found to be normal. Straight leg raising was carried out to ninety degrees bilaterally. He diagnosed cervical and lumbar sprain/strain resolved and found no neurological disability.

Dr. Michael P. Rafiy, an orthopedic surgeon, examined plaintiff on March 27, 2007. He found no muscle spasm in the cervical or lumbar spine. Range of motion testing was within specified normal limits. Straight leg raising as to the lumbar spine was full and equal bilaterally. He found, as to the right shoulder and the right knee, that there were decreased ranges of motion below normal but found them to be self-limited. He diagnosed resolved cervical and lumbar spine sprain/strain and resolved right shoulder and right knee sprain/strain. There was no orthopedic disability.

Dr. David L. Milbauer, a radiologist, examined the MRI films of plaintiff's cervical and lumbar spine, right shoulder and right knee. As to the cervical spine, minor degenerative disc bulges were present at multiple levels without any disc herniations or areas of significant compromise of the canal or neural foramina. The minor disc bulges were degenerative in etiology and pre-existed the subject accident. As to the lumbar spine, there was mild straightening of the lumbar lordotic curvature which was non-specific and may be positional in nature. As to the right knee, there was faint degenerative signal within the menisci noted without signs of meniscal tear. As to all four areas, there were no findings to indicate that a traumatic injury was sustained in the subject accident.

In opposition to the motion, plaintiff asserts that the reports by Dr. Merchant and Dr. Rafiy fail to specify the objective tests relied upon in asserting that plaintiff did not sustain a serious injury. Such doctors also failed to specifically address the 90 out of 180 days category. Neither states the disability for the time frame defined by Insurance Law § 5102. The defendants inaccurately represent the injuries enumerated in plaintiff's bill of particulars. In particular, defendants' review failed to reveal the allegations of three cervical bulging discs and one lumbar bulging disc with varying levels of extension, abutment of bilateral nerve roots and deformities. There were also claims of a right shoulder impingement and a right knee suprapatella effusion among other injuries.

Plaintiff submits an affidavit by Dr. Coral Elcock, a

chiropractor, which incorporates her narrative report and medical records. The report states that she first examined plaintiff on August 27, 2004. Specified range of motion testing of the cervical and thoracolumbar spine resulted in specific findings below normal. There were positive or significant findings in the following tests: Maximum Cervical Compression test, Jackson's Compression test, Cervical distraction, Shoulder Depression test, Soto-Hall Test, Spurling's Maneuver, Iliac Compression, Hibb's test, Gaenslen's test, Laseque's test (Straight Leg Raising): 40 degrees on the left and 45 degrees on the right, Kemp's test, Bechterew's test, Donahue Maneuver. The MRI film of the cervical spine showed bulging disc at C4-C5, and central posterior bulging discs at C3-C4, C5-C6, and C6-C7 deforming the thecal sac and spinal cord diffusely. MRI of the lumbar spine showed bulging disc at L4-L5, posterior bulging discs at L5-S1. The L5 vertebral body was transitional and there was slight loss of normal disc signal intensity and height identified from the L5-S1 disc space level. The MRI of the shoulder showed tendonitis grade II of the distal supraspiantus tendon, slight boney impingement and joint space narrowing. The MRI of the knee identified a suprapatella efusion. She found an impairment in the form of pain, decreased range of motion, neurological impairment, spinal structural impairment and an inability to perform certain activities of daily living.

A separate affidavit by Dr. Elcock states that she again examined plaintiff on February 25, 2008. Plaintiff's condition showed moderate improvement and some of his complaints of pain continued. Range of motion testing as to the cervical-lumbar spine revealed restricted ranges of motion below normal. There was muscle spasm and decreased range of motion in specified degrees in the lumbosacral spine. Her preliminary diagnosis was cervical and lumbar subluxations, lumbar paraspinal myalgia, lumbar spine instability and pain in the right shoulder and knee. She found that plaintiff suffers a limitation of the use of his cervical and lumbar spine which has left him with difficulty in performing his usual and customary daily activities. Treatment was ended after extensive therapy as further treatment would only be palliative in nature.

An affirmation by Dr. Xiaowei Zhang, who re-evaluated plaintiff on December 21, 2007, is submitted. MRI films indicated the injuries as set forth above by Dr. Elcock. He found based upon objective testing that plaintiff had decreased range of motion in the cervical and lumbosacral

spine as well as the right shoulder and right knee. He diagnosed plaintiff as suffering from cervical and lumbar spine derangement, internal derangement to the right shoulder and right knee, acute traumatic strain/sprain of the cervical and lumbosacral paraspinal muscles and ligaments secondary to acceleration/deceleration injuries. Plaintiff has suffered a significant limitation of his cervical and lumbar spine, right knee and right shoulder.

Plaintiff submits his affidavit. He started treatment with Dr. Elcock which lasted until September 2006. He was discharged from treatment as his workers' compensation benefits expired and he could not afford to pay the bills himself. Dr. Elcock also told him that the treatment would only help his symptoms without completely curing them. He takes over the counter medication for the pain and continues the home exercise program prescribed for him. He sets forth the difficulty he has doing daily tasks at home and at work. After the accident he was unable to work as a cab driver for four days and when he returned to work his work schedule was reduced from six days to four/five days a week with less hours per day. He has difficulty handling airport jobs because of the lifting of passengers' heavy luggage.

In reply, defendants assert that the affirmed medical reports of their examining doctors support their argument that plaintiff did not sustain a serious injury. All other reports indicate that plaintiff is not disabled and test results were within normal ranges. Plaintiff's deposition testimony, that he was only confined to home for four days and missed only four days of work, shows that there was no curtailment of plaintiff's activities for at least 90 out of the first 180 days following the accident. Plaintiff's subjective complaints cannot serve as the sole basis for a serious injury finding. Herniated or bulging discs in and of themselves are not serious injuries. [The court notes that defendants raise arguments with respect to Dr. Elcock's affidavits not being sworn. However, plaintiff submitted notarized copies thereof and no objection thereto has been raised.]

Decision of the Court

The motion by defendants for summary judgment dismissing the complaint is denied.

"A party moving for summary judgment must make a prima

facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. Licari v Elliott, 57 NY2d 230. The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. Toure v Avis Rent A Car Sys., 98 NY2d 345. By submitting the affidavits or affirmations of medical experts, who through objective medical testing conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her prima facie burden. Margarin v Krop, 24 AD3d 733; Karabchievsky v Crowder, 24 AD3d 614.

In the instant action, the defendants established their entitlement to judgment as a matter of law. The affirmed medical reports from defendants' neurologist, orthopedic surgeon and radiologist show that plaintiff had no neurological or orthopedic disability or traumatic injury arising from the subject accident. The orthopedic surgeon and neurologist set forth the objective tests which they performed including range of motion and straight leg raising and specific results thereof which were all within normal ranges. No tenderness to palpation or muscle spasm was revealed during the examinations. Disc bulges were found to be degenerative in nature and no disc herniations were found. The right knee and right shoulder were found to be without tear or any indication of a traumatic injury sustained in the accident.

The burden then shifted to plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury. Gaddy v. Eyler, 79 NY2d 955.

In opposition to the motion, plaintiff has sustained his burden of raising a triable issue of material fact. Plaintiff submits two affidavits by his treating chiropractor. One affidavit incorporates and adopts the

narrative medical report concerning the plaintiff's treatment from the time of the accident. The second is based upon a recent re-evaluation of the plaintiff. Decreased range of motion was found during treatment as well as the recent examination. The specific degrees of decreased range of motion are set forth and are compared to a normal range. The examination by Dr. Zhang and his review of the MRI films resulted in a diagnosis relating the disc bulges and right knee and shoulder injuries to the subject accident. The plaintiff's submission was sufficient to raise a triable issue of fact as to whether he suffered a serious injury. Ali v. Agboglo, 14 AD3d 580; Williams v. New York City Tr. Auth., 12 AD3d 365; Acosta v. Rubin, 2 AD3d 657; Savitt v. Wente, 277 AD2d 217.

Accordingly, the motion by defendants is denied.

Dated: June 11, 2008

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HON. DAVID ELLIOT