SHORT FORM ORDER

COPY

INDEX No. 10-314
CAL. No. 11-01127MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 7-21-11 (#001)
MOTION DATE 8-15-11 (#002)
ADJ. DATE 9-27-11
Mot. Seq. # 001 - MD
002 - MD

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BRANDON BERMAN,

Plaintiff,

- against -

DANIAL M. KHAN-YOUSUFZAI and
MOHAMMAD A. KHAN-YOUSUFZAI,

Defendants.

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Upon the following papers numbered 1 to 38 read on this motion and cross motion for summary judgment on liability, age pref. and serious injury ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 8 ; Notice of Cross Motion and supporting papers (002) 9-17 ; Answering Affidavits and supporting papers 18-31; 32-36 ; Replying Affidavits and supporting papers 7-38 ; Other ___ ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the plaintiff, Brandon Berman, pursuant to CPLR 3212 for summary judgment on the issue of liability and for an immediate trial on damages is denied; and it is further

ORDERED that this cross motion (002) by the defendants, Danial M. Khan-Yousufzai and Mohammad A. Khan-Yousufzai, pursuant to CPLR 3212 for summary judgment on the basis that the plaintiff, Brandon Berman, has failed to meet the serious injury threshold limits is determined pursuant to Insurance Law §§ 5102(d) and 5104(a) and is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Brandon Berman, on July 4, 2009 while riding as a passenger in a vehicle which became involved in an accident with the vehicle operated by Danial M. Khan-Yousufzai, and owned by Mohammad A. Kahn-Yousufzai on Sound Avenue, at or near the intersection with Twomey Avenue, Riverhead, New York. The driver of plaintiff's vehicle is not named as a defendant in this action.

By way of his bill of particulars, the plaintiff claims that as a result of this accident, he sustained injuries consisting of C5-6 right parasagittal disc herniation effacing the ventral aspect of the thecal sac; C7-T1 disc bulge; cervical pain, strain and spasm with pain radiating down the arms and numbness and tingling.

1-6-12

In motion (001), the plaintiff seeks summary judgment in his favor on the issue of liability, and an immediate trial on damages. In motion (002), the defendants seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d).

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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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]).

In support of this application, the plaintiff has submitted an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's bill of particulars; an uncertified copy of the MV 104 Police Accident Report; and an unsigned and certified copy of the transcript of the defendant Danial M. Khan-Yousufzai dated March 10, 201. The unsworn MV-104 police accident report constitutes hearsay and is inadmissible (see ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]). It is additionally noted that movant has not submitted a copy of the plaintiff's transcript of his examination before trial or an affidavit by him in support of this motion as required by CPLR 3212. Further, the defendants object to the inadmissible form of the plaintiff's evidentiary proof submitted in support of this application. Thus, the unsigned but certified copy of the transcript of the examination before trial of Khan-Yousufzai is not considered (***Zalat v Zidbz***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). Based upon the foregoing, the plaintiff's motion is deemed insufficient as a matter of law.

Accordingly, motion (001) by plaintiff, Brandon Berman, for and order granting summary judgment on the issue of liability and for an immediate trial on damages is denied.

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 medical 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 the 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, a 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 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of motion (002), the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's bill of particulars; a signed copy of the transcript of the examination before trial of the plaintiff dated September 21, 2010; copies of the sworn reports of Mathew M. Chacko, M.D. dated December 14, 2010 concerning his independent neurological examination of the plaintiff, and Isaac Cohen, M.D. concerning his independent orthopedic examination of the plaintiff.

Based upon a review of the foregoing, it is determined that the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d). It is determined that even if the defendants provided the copies of the medical records which their experts reviewed and on which they base their opinions, in part, as required pursuant to CPLR 3212, expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]), which evidence has not been provided in this case. The moving papers also set forth factual issues which preclude summary judgment as a matter of law.

Dr. Chacko set forth in his report that Mr. Berman is a 38 year old gentleman who was a passenger in a vehicle when it was involved in an accident on July 4, 2009. Following the accident, he experienced neck pain and stiffness, headaches, and pain radiating to the shoulders. He underwent physical therapy and had epidural steroid injections in his neck, and radio frequency ablations, which he stated helped him. He denied a history of other injuries or accidents. Dr. Chacko set forth the medical records and reports which he reviewed, but which have not been provided to this court. He examined the plaintiff's cervical spine and set forth the cervical ranges of motion he obtained, and compared those findings to the normal range of motion values. In his report concerning his neurological examination of the plaintiff, Dr. Chacko has failed to set forth the objective method employed to obtain such range of motion measurements of the plaintiffs' cervical spine, such as the goniometer, inclinometer or arthroidal protractor (*see* ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Supreme Court, Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff. Although Dr. Chacko set forth in his impression that Mr. Berman stated he initially had numbness in his left arm which has since resolved, Dr. Chacko reviewed the EMG and nerved conduction study performed on the plaintiff on August 21, 2009, and stated that it shows evidence of mild chronic left C5-6 radiculopathy. He further states that the MRI of the cervical spine showed a right-sided disc herniation effacing the ventral aspect of the thecal sac at C5-6 and a disc bulge at C7-T1. He asserts that if the history is accurate, Mr. Berman's original symptoms are causally related to the accident. He does not rule out that the herniated disc and bulging disc were not proximally caused by the accident.

Dr. Cohen set forth in his report that Brandon Berman is a 38 year old right-handed male who was involved in a motor vehicle accident on July 4, 2009 when that vehicle was struck in the rear. Dr. Cohen set forth the medical records and reports which he reviewed, but has not provided them with his report. Dr. Cohen set forth his range of motion findings upon examination of the plaintiff's cervical spine obtained with the use of a goniometer and compared those findings to the range of motion values set forth in ranges, leaving it to this court to speculate under what conditions the ranges would be applied (*see* ***Spencer v Golden Eagle, Inc.***, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]; ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; ***Lee v M & M Auto Coach, Ltd.***, *supra*; ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Additionally, the ranges of motion values used by Dr. Chacko differ from the range of motion values asserted to be normal by Dr. Cohen, raising further factual issues. Dr. Cohen does not offer an opinion ruling out that the plaintiff's claimed herniated discs and bulging disc, or radiculopathy, are not causally related to the accident. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2nd Dept 2002]).

Additionally, the defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendants' physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether either plaintiff was

unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***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 the examining physicians do not comment on the same.

These factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy the 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***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (see ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2nd Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motion (002) by defendants for dismissal of the complaint on the basis that the plaintiff has failed to meet the serious injury threshold is denied.

Dated: Dec. 30, 2011

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION