SHORT FORM ORDER

INDEX No. 09-49291

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 11-24-10
ADJ. DATE 1-12-11
Mot. Seq. # 001 - MG; CASEDISP

YENSENG BATISTA, Plaintiff, - against - MELANIE J. SCALICE, Defendant.	LATOS LATOS & DI PIPPO, P.C. Attorney for Plaintiff 22-15 31st Street, 2nd Floor Astoria, New York 11105 DAVID J. SOBEL, ESQ. Attorney for Defendant 811 West Jericho Turnpike, Suite 105W Smithtown, New York 11787

Upon the following papers numbered 1 to 72 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 26; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27 - 70; Replying Affidavits and supporting papers 71 - 72; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5104(d) is granted.

This action was commenced by plaintiff Yenseng Batista to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred near the intersection of Motor Parkway and Commack Road in Suffolk County on November 11, 2008. The accident allegedly occurred when a vehicle operated by defendant Melanie Scalice collided with a vehicle in which plaintiff was riding as a passenger. In his complaint, plaintiff alleges that he sustained serious injuries as defined in Insurance Law § 5102 (d) and economic loss in excess of basic economic loss as defined in Insurance Law § 5104 due to the accident. According to the bill of particulars, plaintiff suffered various injuries as a result of the subject accident, including an aggravated comminuted fracture of the right clavicle.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Defendant's submissions in support of her motion include, among other things, a copy of the pleadings, a transcript of plaintiff's deposition testimony, hospital records relating to plaintiff's treatment in the emergency room of Southside Hospital, affirmed medical reports of Dr. Kupersmith and Dr. Stanley Sprecher and medical records regarding plaintiff's treatment after the subject accident.

Plaintiff opposes the motion, arguing that the evidence presented in opposition to the motion raises triable issues of fact. In opposition, plaintiff submits, among other things, his own affidavit, an affirmed medical report and medical records of Dr. Craig Radnay, and affirmed medical reports of Dr. Stuart Stauber and Dr. Michael Russ. Plaintiff also submits certified medical records from his treatment at Padova Physical Rehabilitation, Acupuncture Solutions, P.C., Peak Chiropractic, P.C., and Harmonic Physical Therapy;'an affirmed medical report of Dr. Eric Roth; an unaffirmed medical report from Robert Snikoff, a chiropractor; and various medical bills.

Insurance Law § 5102 (d) defines "serious injury" as "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

To establish a "significant disfigurement" within the meaning of the No Fault Law, a plaintiff must demonstrate that a reasonable person viewing the scar or other disfigurement attributable to the accident would regard such condition as unattractive, objectionable or as the subject of pity or scorn (*see* ***Spevak v Spevak***, 213 AD2d 622, 624 NYS2d 232 [1995]; ***Prieston v Massaro***, 107 AD2d 742, 484 NYS2d 104 [1985]; ***Caruso v Hall***, 101 AD2d 967, 477 NYS2d 722 [1984], *affd* 64 NY2d 843, 487 NYS2d 322 [1985]; ***Waldron v Wild***, 96 AD2d 190, 468 NYS2d 244 [1983]). Further, while the question of whether a plaintiff's scar constitutes a significant disfigurement generally is submitted to the trier of fact (*see* ***Prieston v Massaro***, *supra*; ***Benitez v Sexton***, 139 AD2d 686, 527 NYS2d 803 [1988]), it still is for the court to determine in the first instance whether a prima facie case of serious injury has been established by the plaintiff (***Licari v Elliott***, 57 NY2d 230, 237, 455 NYS2d 570 [1982]; ***Prieston v Massaro***, *supra*; *see e.g.* ***Sirmans v Mannah***, 300 AD2d 465, 752 NYS2d 359 [2002]; ***Jordan v Baine***, 241 AD2d 894, 660 NYS2d 509 [1997]).

The evidence submitted by defendant establishes prima facie that plaintiff did not sustain a serious injury or a significant disfigurement as a result of the subject accident (*see* ***Burgos v Vargas***, 33 AD3d 579, 822 NYS2d 297 [2006]; ***Mahabir v Ally***, 26 AD3d 314, 812 NYS2d 556 [2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2005]; ***Hemmes v Twedt***, 180 AD2d 925, 580 NYS2d 510 [1992]; ***Benitez v Sexton***, *supra*). Dr. Kupersmith's medical report state that an examination of plaintiff's cervical spine revealed no tenderness to palpation with no evidence of spasm. It states that range of motion testing revealed forward flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), lateral rotation to the left and right to 80 degrees (80 degrees normal), and lateral flexion to the right and left to 45 degrees (45 degrees normal). It states that an examination of plaintiff's lumbar spine revealed no tenderness to palpation and that no spasm was noted. It states that range of motion testing revealed forward flexion to 60 degrees (60 degrees normal), extension to 25 degrees (25 degrees normal), lateral rotation to the right and left to 30 degrees (30 degrees normal), and lateral flexion to the right and left to 25 degrees (25 degrees normal). Dr. Kupersmith's report states that an examination of plaintiff's right clavicle revealed a well-healed scar overlying the mid shaft clavicle region of approximately 13 centimeters. It states that there was no tenderness around the sternoclavicular joint, the AC joint, the anterior deltoid and cuff. It states that range of motion testing of plaintiff's right shoulder revealed abduction to 180 degrees (180 degrees normal), forward elevation to 180 degrees (180 degrees normal), internal and external rotation to 90 degrees (90 degrees normal), posterior extension of 50 degrees (50 degrees normal), and crossed adduction to 50 degrees (50 degrees normal). Dr. Kupersmith concludes that plaintiff exhibits no objective evidence of orthopedic disability and that his prognosis is good.

In addition, the medical report prepared by Dr. Sprecher, who examined radiographs of plaintiff's right clavicle performed on October 29, 2008 and November 21, 2008, states that the pre-accident radiographs reveal a comminuted fracture, and that the post-accident radiographs demonstrate no worsening of the fracture. Dr. Sprecher's report concludes that the subject accident did not exacerbate the prior injury to plaintiff's right clavicle.

Plaintiff's deposition testimony further supports defendant's assertion that plaintiff's injuries do not meet the serious injury threshold. At an examination before trial, plaintiff testified that one month prior to the subject accident, he tripped and fell down the set of stairs leading down to his house. He testified that he went to the hospital where x-rays were performed revealing a fractured clavicle. He testified that he went to Dr. Radnay for treatment, and that he was told to wear a sling so that his clavicle would heal. He testified that after the subject motor vehicle accident the clavicle was not healing properly and that he had surgery on November 27, 2008 to repair the condition. He further testified that he missed one month of work after falling down the stairs, and that he was working in a supervisory capacity and was not able to do any lifting. Plaintiff testified that the motor vehicle accident occurred three days after he returned to work. He testified that did not return to work after the subject accident until one month after his surgery. He testified that he still has pain in his clavicle when the weather changes, but has no other physical complaints.

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). Plaintiff failed to address the findings by defendant's radiologist that plaintiff's injured clavicle

did not worsen as a result of the subject accident (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2009]; ***Laurent v McIntosh***, 49 AD3d 820, 854 NYS2d 228 [2008]; ***Gordon- Silvera v Long Is. R.R.***, 41 AD3d 431, 837 NYS2d 324 [2007]). Contrary to the assertions by plaintiff's counsel, the medical reports of Dr. Radnay do not raise triable issues as to whether plaintiff's prior clavicle fracture was exacerbated by the subject accident. Dr. Radnay's medical report includes his findings about plaintiff's injury, but does not state that the subject accident exacerbated the injury. Moreover, it states that plaintiff has healed very well and has no complaints or pain with motion. It states that there is no tenderness to palpation, no skin tenting and minimal palpable deformity. Plaintiff also failed to submit any medical proof contemporaneous with the accident showing range of motion limitations in his spine and his shoulders (*see* ***LaMarre v Michelle Taxi, Inc.***, 60 AD3d 911, 875 NYS2d 268 [2009]; ***Sapienza v Ruggiero***, 57 AD3d 643, 869 NYS2d 192 [2008]; ***Choi Ping Wong v Innocent***, 54 AD3d 384, 864 NYS2d 435 [2008]). Further, plaintiff failed to submit objective medical findings of restricted movement that are based on a recent examination (*see* ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2005]). Plaintiff also failed to submit any competent medical evidence that he was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days subsequent to the subject accident (*see* ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2007]).

In addition, plaintiff failed to raise a triable issue of fact as to whether he sustained a significant disfigurement as a result of the accident (*see* ***Hutchinson v Beth Cab Corp.***, 204 AD2d 151, 612 NYS2d 10 [1994]; ***Edwards v De Haven***, 155 AD2d 757, 547 NYS2d 462 [1989]). Plaintiff did not submit photographs of the scar and did not testify as to its appearance. Plaintiff's failure to make a record of their appearance prevents this Court from determining the merit of his claim that the scar was significantly disfiguring (*see* ***Edwards v De Haven***, *supra*; ***Lewis v General Electric Co.***, 145 AD 728, 535 NYS2d 260 [1988]).

Finally, plaintiff's alleged economic loss does not exceed the statutory amount of basic economic loss (*see* ***Hutchinson v Clare Rose of Nassau, Inc.***, 40 AD3d 702, 835 NYS2d 698 [2007]; ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [1986]).

Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

Dated: 7 April 2011

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION