

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

-----X

MOHAMED R. ALI and NANDRAM BALAKRAM,
Plaintiff,

Index No.: 21678/05
Motion Date: 9/19/07
Motion Cal. No.:

-against-

JOAN M. SAUNDERS and JOGINDER PAL,
Defendants.

-----X

The following papers numbered 1 to 9 read on this motion by defendants for an order granting summary judgment in defendants' favor and dismissing the complaint on the ground that plaintiff Ali has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104 and dismissing the complaint of plaintiff Balakram for failure to adhere to discovery orders, pursuant to CPLR 3126. Pursuant to a memorandum decision of Justice Kelly, dated August 23, 2007, this motion was referred to this Court.

**PAPERS
NUMBERED**

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that the motion for an order granting summary judgment in defendant's favor and dismissing the complaint, on the ground that plaintiff has not sustained a serious injury within the meaning of Section 5102 of the Insurance Law and dismissing the complaint of plaintiff Balakram for failure to adhere to discovery orders, pursuant to CPLR 3126 is granted, for the following reasons:

This action stems from a motor vehicle accident that occurred at or near the intersection of the Grand Central Parkway Service Road and 173rd Street, Queens County, New York. Plaintiffs commenced this action and alleged in their complaints that they suffered serious injuries from this accident.

It is for the court in the first instance to determine whether plaintiff has established a prima facie case of sustaining a serious injury within the meaning of Insurance Law 5102 (d). *See, Licari v Elliot*, 57 NY2d 230,237 (1982); *Armstrong v Wolfe*, 133 AD2d 957,958 (3rd Dept. 1987.) The analysis of the meaning of serious injury has a long history beginning with *Licari v Elliott, supra*, and applying what could be discerned from the legislative intent, the Court of Appeals, analyzing the word "significant", wrote that "the word 'significant' as used in the statute pertaining to 'limitation of use of a body function or system' should be construed to mean something more than a minor limitation of use. We believe that a minor, mild or slight

limitation of use should be classified as insignificant within the meaning of the statute" (Licari v Elliott, supra, at 236.) The Court of Appeals reiterated this analysis in Dufel v Green, 84 N.Y.2d 795 (1995), in which it wrote that the legislative intent of the "no-fault" legislation was to weed out frivolous claims and limit recovery to major or significant injuries.

To grant summary judgment it must clearly appear that no triable issue of fact is presented. Miceli v Purex Corp., 84 AD2d 562 (2d Dept. 1981.) Additionally, summary judgment should be granted in cases where the plaintiff's opposition is limited to "conclusory assertions tailored to meet statutory requirements" (Lopez v Senatore, 65 N.Y.2d 1017.) The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. Bronson v March, 127 AD2d 810 (2d Dept. 1987.)

In support of the branch of this motion seeking dismissal of plaintiff Ali's complaint, defendants have submitted, *inter alia*, plaintiff's deposition testimony and Bill of Particulars, an affirmed report of Dr. Alvarez, an orthopedist and Dr. Weiland, a neurologist.

The Court finds that defendants have submitted proof in admissible form which establishes that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102. Consequently, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. *See*, Gaddy v Eyler, 79 N.Y.2d 955 [1992] ; Greggs v Kurlan, 290 AD2d 533 (2d Dept 2002.) Consequently, the plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see*, Powell v Hurdle, 214 A.D.2d 720 [2d Dept. 1995].) Further, courts have consistently held that a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (*see*, Grossman v. Wright, 268 A.D.2d 79 (2d Dept 2000.) Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff. *Id.* In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained. *Id.* Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury. *Id.* This burden has not been met by plaintiff.

In opposition, plaintiff Ali has submitted, *inter alia*, an attorney's affirmation, his affidavit, an affirmed report of Dr. Shusterman, a report of Dr. Zinn, a radiologist and various unsigned and uncertified medical reports. Dr. Shusterman's report indicates plaintiff first treated with him on or about February 7, 2003. It is unclear from Dr. Shusterman's report if plaintiff treated with him on other dates, however, there is support for plaintiff having received some medical care until September 2003. Dr. Shusterman examined plaintiff for complaints of

pain from the subject accident. He did various tests and determined he had range of motion limitations; however no degrees of loss are compared to normal. The Doctor diagnosed him as having, inter alia, acute lumbosacral strain/sprain with L5-S1 disc herniation and right shoulder derangement. The Doctor found these injuries causally related to the subject accident and that they were such that they were permanent. Dr. Zinn's report on plaintiff's MRI found evidence of a disc herniation with ventral impingement on thecal sac at L4-5.

Plaintiff's proof of an attorney's affirmation is not admissible probative evidence on medical issues. Armstrong v Wolfe, *supra* at 958. Similarly, his own deposition testimony is not admissible probative evidence on medical issues. *Id.* Moreover, his subjective complaints of pain, unsupported by credible medical evidence, are insufficient to show serious injury. Georgia v Ramautar, 180 AD2d 713 (2d Dept. 1992.) The affirmation of Dr. Shusterman fails to specifically state what objective tests were done, the manner in which they were performed and what results were obtained. *See*, Wadi v. Tepedino, 242 AD2d 327 (2d Dept. 1997.) Additionally, to the extent tests were conducted, they were subjective in nature since they relied upon plaintiff's complaints of pain. *See*, Toure v Avis, 98 NY2d 345, 357 (2002.) Dr. The Doctor's failure to compare his findings of restrictions of movement to normal ranges also renders his report inadequate. Bent v Jackson, 15 AD3d 46 (1st Dept. 2005.) Furthermore, plaintiff has not given any explanation for plaintiff not visiting a medical care provider after 2003. This is a clear indication that plaintiff ceased all treatment, and without an explanation casts grave doubt upon the initial diagnosis. It also suggests that the findings made at the 2003 examination is not causally related to the subject accident. Pommells v Perez, 4 NY3d 566 (2005.) Finally, Dr. Shusterman's examinations are stale and inadequate since they are based upon exams conducted in 2003 and there is no indication of any post 2004 examination. *See*, Chinnici v Brown, 295 AD2d 465 (2d Dept 2002.) *See also*, Medina-Santiago v Nojovits, 5 AD3d 253 (1st Dept 2004.)

Finally, plaintiff Ali has failed to raise a triable issue of fact as to whether his injuries prevented him from performing substantially all of their customary and usual activities during at least 90 of the first 180 days following the accident. *Id.* The only proof of his activities for this time period is his deposition testimony that indicates he was able to substantially perform all his pre-accident activities. For all of the reasons set forth above, plaintiff has failed to raise an issue of fact that he suffered a "serious injury" and defendant's motion for an order of summary judgment dismissing the complaint and all counterclaims is granted. CPLR 3212.

The branch of the motion by defendants to dismiss plaintiff Balakram's complaint is granted. The nature and degree of the penalty to be imposed pursuant to CPLR§3126 is generally a matter left to this court's discretion. Clearly, the penalty of dismissal is extreme and should only be imposed when the failure to disclose has been willful or contumacious. *See*, Garcia v. Kraniotakis, 232 AD2d 369, (2d. Dept. 1996). In the case at bar, defendants

claim the willful and contumacious character of the plaintiff's actions can be inferred from his noncompliance with at least two separate court orders directing medical examinations, failing to appear for scheduled examinations with no notice and his failure to respond to the instant motion.

Defendants have shown that court orders and stipulations that required examinations to be completed by certain dates, have not been adhered to by plaintiff Balakram. This court finds that plaintiff has willfully and contumaciously refused to adhere to these prior court orders and stipulation for discovery and consequently, the complaint of plaintiff Balakram is dismissed pursuant to CPLR 3126.

In sum, based upon the above, the motion is granted in its entirety and the complaint of Mohamed Ali and Nandram Balakram is dismissed.

Dated: September 25, 2007

.....

ORIN R. KITZES, J.S.C.
