Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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KRIKOR GHAZARIAN, Index No.: 701980/2013

Plaintiff, Motion Date: 1/19/16

- against - Motion No.: 55

SUSAN M. DIORIO, Motion Seq No.: 2

Defendant.

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The following papers numbered 1 to 11 read on this motion by defendant for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing plaintiff's complaint on the ground that plaintiff fails to meet the serious injury threshold requirement of Insurance Law § 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 5
Affirmation in Opposition-Exhibits	6 - 8
Reply Affirmation-Exhibit	9 - 10

This is a personal injury action in which plaintiff seeks to recover damages for injuries he allegedly sustained in an accident that occurred on August 29, 2012 when plaintiff was walking on the pedestrian walkway next to the Cross Island Parkway in Queens County, New York and was hit by defendant's vehicle. Plaintiff alleges that as a result of the accident he sustained serious injuries to his back and hip.

Plaintiff commenced this action by filing a summons and complaint on May 30, 2013. Defendant joined issue by service of an answer dated November 7, 2013. Plaintiff filed a Note of Issue on June 10, 2015. Defendant now timely moves for an order pursuant to CPLR 3212, dismissing plaintiff's complaint on the ground that the injuries claimed by him fail to satisfy the serious injury threshold requirement of Section 5102(d) of the

Insurance Law.

In support of the motion, defendant submits an affirmation from counsel, Lisa, M. Pigeon, Esq.; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the preliminary conference order; a copy of the transcript of plaintiff's examination before trial taken on March 6, 2015; a copy of the note of issue; a printout of a log of plaintiff's check-ins to his gym; a copy of the radiology reports from North Shore LIJ; a copy of the records from ProHealth, Division of Orthopedics and Sports Medicine; the MRI report of plaintiff's lumbar spine taken on August 23, 2014 by Dr. John Hlmelfarb, M.D.; a copy of records from Dr. Joon Kim, M.D.; a copy of the affirmed medical report of Dr. Richard Lichtenberg, M.D.; and a copy of the affirmed medical report of Dr. A. Robert Tantleff, M.D.

At his examination before trial, taken on March 6, 2015, plaintiff testified that he was involved in an accident on August 29, 2012 when he was walking on the pedestrian walkway next to the Cross Island Parkway when defendant's vehicle made contact with the guardrail causing the vehicle to flip upside down resulting in the bumper and trunk of the vehicle making contact with his forehead, upper portion of his head, right arm, and right hip. He was seen at North Shore LIJ on the date of the accident. X-rays were taken of his right arm and right hip and a CT scan was performed from his head to his shoulders. He also received stitches for lacerations and was given pain medication. He then began treating with Dr. Casiero, an orthopedist, about one month after the accident. He also began physical therapy at Physiologic PT, P.C. in October of 2012 at a frequency of twice a week. He sought treatment with a pain management specialist and chiropractor at NY Rehab. MRIs were taken in late 2013 to early 2014. Three doctors recommended that he receive epidural injections. However, he never received those injections. He did receive two block injections into his lumbar spine. He testified that he missed one week of school following the accident.

On July 7, 2015, Dr. Lichtenberg performed a neurological physical examination of plaintiff. Plaintiff informed Dr. Lichtenberg that he was currently receiving physical therapy once a week. He continues to have pain in his lower back and has numbness about his right hip and right buttock. He also has discomfort with walking, bending, sitting, and lifting. Dr. Lichtenberg identifies the medical records he reviewed and performed range of motion testing with a goniometer. Dr. Lichtenberg found normal ranges of motion in plaintiff's cervical spine, thoracic spine, bilateral shoulders, bilateral knees, bilateral ankles/feet, bilateral elbows, bilateral wrists, and

bilateral hips. Dr. Lichtenberg noted a decreased range of motion in plaintiff's lumbar spine regarding lateral flexion and extension, but attributed the decrease to plaintiff's voluntarily restricted excursions of the lumbar spine because of complaints of pain. Dr. Lichtenberg further states that incidental movements revealed a largely normal range of the lumbar spine. Dr. Lichtenberg's diagnosis was status post cervical and lumbar spine strains, as per history, resolved. He opines that plaintiff has no objective, clinical, or neurological deficits, and plaintiff had no neurologic impairment or disability causally related to the subject accident. Dr. Lichtenberg further opines that plaintiff's neurological prognosis is good. Regarding the MRI of the lumbosacral spine taken on September 6, 2013 that reveals a disc herniation at L5/S1 and disc bulging at T11/T12 through L4/L5, Dr. Lichtenberg concludes that there were no objective, clinical, neurologic deficits on his examination of plaintiff that correlates with the reported MRI findings.

Dr. Tantleff performed an independent radiology review of the films taken on the date of the subject accident and did not find any acute intracranial hemorrhage or abnormality. Plaintiff's cervical spine showed no evidence of injury, fracture, or sublaxation. Plaintiff's right hip x-ray was normal. Dr. Tantleff reviewed plaintiff's lumbar spine MRIs from September 6, 2013 and August 23, 2014 and found that plaintiff had longstanding chronic degenerative discogenic disc disease.

Defendant's counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body function or system. Counsel also contends that plaintiff, who alleges he missed only one week of school following the subject accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him, for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of his usual daily activities.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and

conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

In opposition, plaintiff submits an affirmation from counsel, Stephen A. Ruland, Esq.; his own affidavit dated November 18, 2015; a copy of the Discharge Instructions from North Shore LIJ; a copy of the certified records of Physiologic Physical Therapy; a copy of the affirmed medical report of Dr. Dr. John Hlmelfarb; a copy of the affirmed medical report of Dr. David Zelefsky, M.D.; a copy of the affirmed medical report of Dr. Joon Kim, M.D.; and a copy of the supplemental verified bill of particulars.

Counsel first alleges that defendant failed to meet her prima facie burden because Dr. Lichtenberg, who examined plaintiff two years after the subject accident, found lumbar range of motion deficits. Although Dr. Lichtenberg states that the limitations are due to plaintiff's subjective complaints of pain, however the subjective complaint of pain coupled with the range of motion deficits demonstrate that plaintiff suffered a significant limitation of use.

Accordingly, the conclusion that plaintiff had no disability or impairment was, therefore, directly contradicted by Dr. Lichtenberg's recorded objectively-measured limitations in range of motion (see Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]).

Thus, defendant failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact(see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]). Where a defendant fails to meet the defendant's

prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]; David v Bryon, 56 AD3d 413 [2d Dept. 2008]).

In any event, this Court finds that plaintiff raised triable issues of fact by submitting the affirmed medical reports attesting to the fact that plaintiff sustained an injury as a result of the accident, finding that plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 AD2d 367 [2d Dept. 2009]).

Specifically, plaintiff first began physical therapy on October 2, 2012 at Physiologic Physical Therapy. Anthony Mannarino, a doctor of physical therapy, submitted an affidavit stating that plaintiff had range of motion deficits in his lower back as well as right hip caused by the subject accident. Dr. Zelefsky also provided an affirmation attesting to plaintiff's loss of motion in his lumbar back in February and April of 2014. Dr. Zelefsky also causally relates the herniation and bulge to the subject accident. Dr. Kim, who treated plaintiff from January 12, 2015 to September 28, 2015, submitted an affirmation as well. He addresses the degenerative disc disease present in the August 23, 2014 MRI by stating that such a finding is expected when an MRI is taken two years after a traumatic incident. He also performed facet block injections on plaintiff on February 6, 2015 and April 3, 2015. On August 20 2014, his examination revealed severe limitations in range of motion. On September 28, 2105, he performed radio-frequency ablation on plaintiff's left L4/L5 and L5/S1 facet joints and diagnosed plaintiff with lumbar facet joint syndrome. HE concludes that the subject accident was the cause of plaintiff's lumbar disc herniations and lumbar facet syndrome and states that lumbar facet syndrome is a permanent condition that will affect plaintiff the rest of his life.

As such, plaintiff demonstrated issues of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai

Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]). In light of this finding, the court need not address the 90/180 category.

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendant for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: January 28, 2016
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.