Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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ERNEST JONES,

Plaintiff,

Index No.: 19891/08
Motion Date: 6/9/10
Motion Cal. No.: 14
Motion Seq. No.: 1

-against-

GLENDON ANDERSON, HUGHETTE WONG, ABRAHAM GEUS, ELRAC, INC., FLOYD McMILLIAN, MELVIA ASHBY, AARON SPENCER,

Defendants.

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The following papers numbered 1 to 19 read on this motion and cross-motions by defendants Glendon Anderson, Hughette Wong, Abraham Geus, Elrac, Inc., Floyd McMillian and Melvia Ashby, for an order, pursuant to CPLR §3212, granting summary judgment to them and dismissing the complaint, on the ground that the injuries claimed by plaintiff do not satisfy the "serious injury" threshold requirement of the Insurance Law 5104(a).

	PAPERS NUMBERED
Notice of Motion-Affidavits--Exhibits-Memorandum of Law.....	1 - 6
Notices of Cross-Motions-Affidavits.....	7 - 14
Affirmation in Opposition-Exhibits.....	15 - 17
Reply Affirmation.....	18 - 19

Upon the foregoing papers, it is hereby ordered that the motion and cross-motions are disposed of as follows:

This is an action for personal injuries allegedly sustained by plaintiff Ernest Jones ("plaintiff") on January 23, 2008, as a result of a motor vehicle accident that occurred on the North Conduit at its intersection with 124th Street, in Queens County, New York. The accident occurred when the vehicle owned and operated by defendants Elrac, Inc., and Abraham Genus, respectively, in which plaintiff was a passenger, came into contact with the vehicle owned and operated by defendants Hughette Wong and Glendon Anderson, the vehicle owned and operated by defendants

Melvia Ashby and Floyd McMillian, and the vehicle owned and operated by defendant Aaron Spencer, who did not appear in this action. The answering defendants collectively move and cross-move for summary judgment on the ground that plaintiff failed to meet the "serious injury" threshold requirement of section 5102(d) of the Insurance Law, which, in pertinent part, defines a "serious injury" as:

> a personal injury which results in ...significant disfigurement; ...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 party from performing substantially all of the material acts which constitute such person customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. See Licari v. Elliott, 57 N.Y.2d 230 (1982). 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 N.Y.2d 345 (2002). 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. See Margarin v. Krop, 24 A.D.3d 733 (2nd Dept. 2005); Karabchievsky v. Crowder, 24 AD3d 614 (2nd Dept. 2005). The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once defendants, as the movants, make a prima facie showing that plaintiff did not sustain a serious injury. Toure v Avis Rent A Car System, 98 N.Y.2d 345 (2002).

In support of their motion and cross-motions, defendants submitted, inter alia, the affirmed medical report of Dr. Edward A. Toriello, an orthopaedic surgeon who conducted an independent medical examination of plaintiff on April 15, 2009; the affirmed medical report of Dr. Daniel J.

Feuer, a neurologist, who conducted an independent medical examination on December 15, 2009; and plaintiff's deposition testimony and bill of particulars. Dr. Toriello set forth that he conducted range of motion testing of plaintiff's cervical spine and right hip. He found that plaintiff had a full range of motion in the cervical spine and lumbar spine, and stated that his impression was "evidence of a resolved cervical hyperextension injury, resolved low back strain and resolved right hip contusion. [Plaintiff] has evidence of pre-existing degenerative changes in his right hip which is not casually related to this accident." Dr. Feuer, based upon objective testing and range of motion indicia, determined that plaintiff suffered from no objective neurological deficits "referable to the central or peripheral nervous system to support his subjective complaints." Further, he stated that plaintiff's "subjective complaints referable to the right hip do not appear to be of neurogenic etiology."

Further, defendants proffer plaintiff's deposition testimony in which he testified that following his discharge from the Emergency Room of Brookdale Hospital, he sought treatment at Cross Island Medical, where he received physical therapy treatment for approximately ten months, consisting of acupuncture, massage, hot packs, and exercise. He further testified that he was advised to undergo hip replacement surgery, since he continues to complain of pain. In his Bill of Particulars, plaintiff claims that, as a result of the accident, he sustained a "significant limitation of use of and/or a permanent consequential loss of use of cervical and lumbar spines," and "was unable to perform the usual and customary duties for a period of at least ninety (90) days during the one hundred eighty (180) days immediately following the occurrence." Specifically, he stated that he was confined to Brookdale Hospital for a few hours on November 23, 2008, his bed for 2-3 weeks, his home for two months, was totally disabled for one and a half months, and remains partially disabled. He further stated that he was out of work for two months.

Through the submission of the affirmed medical reports of their experts, who conducted independent examinations of plaintiff's neck, lower back and right hip, and found no abnormalities causally related to the accident, defendants' evidence was sufficient to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Zhang v. Wang, 24 A.D.3d 611 (2005); Pommells v. Perez, 4 N.Y.3d 566 (2005); Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Burgos v Vargas, 33 A.D.3d 579 (2nd Dept. 2006); Batista v Olivo, 17 A.D.3d 494 (2nd Dept. 2005); Sainte-Aime v Ho, 274 A.D.2d 569 (2nd Dept. 2000). Defendants established, prima facie, that plaintiff suffered no limitation of motion as a result of the accident, and no medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his customary daily activities for not less than ninety days during the one hundred eighty days immediately following his alleged injury or impairment. Defendant thus established his entitlement to summary judgment dismissing the complaint insofar as asserted by plaintiff on the threshold issue. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Licari v. Elliott, 57 N.Y.2d 230 (1982); Djetoumani v. Transit, Inc., 50 A.D.3d 944 (2nd Dept. 2008). Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in

admissible form sufficient to demonstrate the existence of triable issues of fact. See, Gaddy v. Eyler, 79 N.Y.2d 955 (1992);Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001).

Here, on the previous May 26, 2010 , return date of this motion, plaintiff was directed to serve his opposition to the cross-motions prior to the June 9, 2010 submission date of the motion and cross-motions. As plaintiff failed to do so, plaintiff interposed no opposition to the cross-motions, and has failed to meet his burden of demonstrating the existence of a triable issue of fact as to whether he sustained a serious injury. Accordingly, the cross-motions for summary judgment dismissing the complaint by defendants Anderson, Wong, Geus, and Elrac, Inc., are granted.

Plaintiff's opposition to the motion by defendants Ashby and McMillian still fail to demonstrate competent medical evidence sufficient to raise a triable issue of fact. With respect to his attorney's affirmation, it is well recognized that an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance [(Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980); Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455 (2nd Dept. 2006)], and is insufficient to show that plaintiff sustained a serious injury. See, Codrington v. Ahmad, 40 A.D.3d 799 (2nd Dept. 2007). Similarly, uncertified medical records are without any probative value, and cannot be utilized to show a serious injury. See, Norton v. Roder, 65 A.D.3d 1317 (2nd Dept. 2009); Magid v. Lincoln Services Corp., 60 A.D.3d 1008 (2nd Dept. 2009) Annan v. Abdelaziz, 68 A.D.3d 794 (2nd Dept. 2009); Chanda v. Varughese, 67 A.D.3d 947 (2nd Dept. 2009); Sutton v. Yener, 65 A.D.3d 625 (2nd Dept. 2009); Magid v. Lincoln Services Corp., 60 A.D.3d 1008 (2nd Dept. 2009); Merzguioui-Gray v. Shlomit Express Cab Corp., 56 A.D.3d 439 (2nd Dept. 2008); Casas v. Montero, 48 A.D.3d 728, 729 (2nd Dept. 2008). Further, plaintiff failed to submit any competent medical evidence showing the existence of significant limitations that were contemporaneous with or causally related to the subject accident. See, McMullin v. Walker, 68 A.D.3d 943 (2nd Dept. 2009); Sorto v. Morales, 55 A.D.3d 718 (2nd Dept. 2008); Casas v. Montero, 48 A.D.3d 728, 729 (2nd Dept. 2008); Morris v. Edmond, 48 A.D.3d 432, 433 (2nd Dept. 2008). Moreover, the affirmed medical reports submitted by plaintiff, the latest of which was conducted on June 26, 2008, are not based upon recent examinations of plaintiff. See, Elgendy v. Nieradko, 307 A.D.2d 251 (2nd Dept. 2003); Diaz v. Wiggins, 271 A.D.2d 639 (2nd Dept. 2000); Keena v. Trappen, 294 A.D.2d 405 (2nd Dept. 2002). Lastly, plaintiff also failed to proffer competent medical evidence showing 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. Spence v. Mikelberg, 66 A.D.3d 765 (2nd Dept. 2009); Sealy v. Riteway-1, Inc., 54 A.D.3d 1018 (2nd Dept. 2008).

Accordingly, based upon the foregoing, the collective defendants' motion and cross-motions for summary judgment on the ground that plaintiff failed to sustain a "serious injury" are granted and the complaint hereby is dismissed as to all defendants, including defaulting defendant Aaron Spencer, who did not appear in this action.

Dated: October 1, 2010

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J.S.C.