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

- x

JOSEPH SILYE and MARIA SILYE,

Plaintiffs,

- against -

INDERJIT SINGH,

Defendant.

- x

Index No.: 16899/2008

Motion Date: 03/17/2011

Motion No.: 37

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by defendant INDERJIT SINGH for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of plaintiff JOSEPH SILYE on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits - Memo of Law	1 - 4
Affirmation in Opposition-Affidavits-Exhibits	5 - 8
Reply Affirmation	9 - 12

This is a personal injury action in which plaintiff, JOSEPH SILYE, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on January 8, 2008 at the intersection of Crescent Street and 34th Avenue in the County of Queens, City and State of New York.

At the time of the accident, plaintiff, Joseph Silye, age 66, was a pedestrian crossing 34th Avenue at the intersection of Crescent Street when he was struck by the motor vehicle owned and operated by the defendant Inderjit Singh. As a result of the accident, the plaintiff sustained injuries to his head, right hand, cervical spine, left shoulder, right knee and left knee.

The plaintiffs commenced an action against the defendant by filing a Summons and Verified Complaint on July 8, 2008. In addition to the cause of action for damages for injuries sustained by Joseph Silye, the complaint contains a cause of action for damages for loss of services on behalf of Joseph's wife, Maria Silye. Issue was joined by service of defendants' Verified Answer dated August 21, 2008.

Defendant moves for an order pursuant to CPLR 3212 dismissing the complaint against him on the ground that the injuries claimed by Joseph Silye fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, the defendant submits an affidavit from counsel, Bhumika P. Trivedi, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; the affirmed medical report of neurologist, Dr. Maria DeJesus; the affirmed medical report of orthopedist, Dr. Jacquelin Emmaunel and the report of Dr. Robert Tantleff, a radiologist, concerning the MRI studies of the plaintiff's right hand and right knee.

In his verified Bill of Particulars the plaintiff, age 66, states that as a result of the accident he sustained, inter alia, right hand first metacarpal fracture, right knee fracture of the superior patellar spur, right knee subchondral fracture of the medial tibial plateau, right knee tear of the medial meniscus, disc herniation at C7-T1,C6-C7, L5-S1 and disc bulge at L4-L5. Plaintiff states in the Bill of Particulars that he was confined to bed and home, except foe medical appointments for a period exceeding 6 months after the accident. He was not employed at the time of the accident. Plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d) in that he sustained fractures, permanent loss 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, and a medically determined injury or impairment of a non-permanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute the plaintiff's usual and customary daily activities for not less than ninety days during the first one hundred and eighty days immediately following the occurrence of the injury.

The plaintiff was examined by Dr. Maria Audrie DeJesus, a neurologist, who was retained by the defendant. In her examination of December 3, 2009, which was almost 2 years after

the accident, Dr. DeJesus performed quantified and comparative range of motion tests. She found that the plaintiff had no limitations of range of motion in the cervical spine, thoracic spine and lumbar spine. Dr. DeJesus concluded by stating: "my neurological exam was negative for any clinical deficits. From a neurological point of view, there is no evidence of permanency or disability. The claimant may work and may perform all normal activities of his daily living with no restrictions."

The plaintiff was also examined on December 3, 2009 by Dr. Jacquelin Emmanuel, a board certified orthopedic surgeon retained by the defendant. Upon quantified examination, Dr. Emmanuel found that the plaintiff had no limitations of range of motion in the cervical spine. However, Dr. Emmanuel found significant limitations of range of motion of the plaintiff's right hand and right wrist, right thumb, left shoulder, lumboscral spine, right knee and left knee. Dr, Emmanuel notes that "range of motion testing is volitional and as allowed by the claimant." Dr. Emmanuel states in conclusion, "there is mild residual noted on physical examination. There is decreased range of motion as noted on physical examination. The decrease is subjective and may be age related or self-restricted. Objective testing revealing crepitus is due to pre-existing arthritis. There is no functional disability. Mr. Silye may perform his normal activities of daily living."

Dr. Tantleff examined the plaintiff's X-ray of her right knee and right hand. In his affirmed reports dated February 16, 2009, he states that "the examination reveals advanced degenerative changes of the knee involving all three joint compartments. There is no evidence of acute or recent injury." His impression was advanced degenerative changes of the knee without evidence of acute fracture or dislocation." With respect to the x-ray of the plaintiff's right hand, Dr. Tantleff states that "there are degenerative changes of the first metacarpal articulation which is moderately advanced." He states that there are areas of long standing degeneration and that there is no evidence of acute or recent injury." Defendant also submits the report issued by Dr. Maklansky from the Department of Radiology at Elmhurst Hospital dated January 8, 2008 regarding the x-ray of the plaintiff's right knee. He states that although there is no fracture, "there is also a suggestion of a proximal fibular head fracture." Dr. Maklansky also interpreted the x-ray of the plaintiff's right hand taken at Elmhurst Hospital on the date of the accident and states that there is no definite fracture or dislocation. However, he states that "the possibility of a small chip fracture cannot be entirely excluded."

In his examination before trial taken on October 22, 2009, plaintiff testified that at the time of the accident he was on Crescent Street attempting to cross 34th Avenue in Astoria when he was struck by the defendant's vehicle. He was taken by ambulance to the Elmhurst Hospital Emergency Room where he reported injuries to both knees, left shoulder, right thumb and his ribs on the right side. He testified that he was told he had a broken thumb. Subsequently, the plaintiff started physical therapy with Dr. Lambrakis. He treated with Dr. Lambrakis for eight months and than began seeing Dr. Jacobson for physical therapy. He treated with Dr. Jacobson for five months. One year after the accident he consulted with Dr. Xethelias an orthopedic surgeon who told him he needed surgery on his left shoulder and right knee. However, the plaintiff declined the surgery. Plaintiff then went back to Dr. Lambrakis and continued physical therapy.

Defendant's counsel contends that the medical reports submitted are sufficient to establish, prima facie, that the defendant has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff has not sustained a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of her usual daily activities.

Defendant's counsel concedes that Dr. Emmanuel found significant limitations in the plaintiff's range of motion however, counsel states that these limitations do not raise a question of fact because Dr. Emmanuel explained the limitations as being due to plaintiff's age or self-restrictions.

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]).

Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' 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]).

Here, the defendant failed to make a prima facie showing that the plaintiff Joseph Silye did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). The affirmed medical report of the defendant's examining orthopedist, Dr. Jacqueline Emmanuel, relied on by the defendant, clearly set forth that upon her examination of the defendant on December 3, 2009, she found significant limitations in the ranges of motion of the defendant’s right hand, right wrist, right thumb, left shoulder, lumboscral spine, right knee and left knee. Dr. Emmanuel’s report is insufficient to eliminate all triable issues of fact (see Artis v Lucas, 2011 NY Slip Op 03983[2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736; Leopold v New York City Tr. Auth., 72 AD3d 906 [2d Dept. 2020]; Catalan v G & A Processing, Inc., 71 AD3d 1071[2d Dept. 2010]; Croyle v Monroe Woodbury Cent. School Dist., 71 AD3d 944 [2d Dept. 2010]; Kim v Orourke, 70 AD3d 995 [2d Dept. 2010]; Kjono v Fenning, 69 AD3d 581[2d Dept. 2010]; Loor v Lozado, 66 AD3d 847 [2d Dept. 2009]; Powell v Prego, 59 AD3d 417 [2d Dept. 2009]; Buono v. Sarnes, 66 AD3d 809[2d Dept. 2009]; Bagot v. Singh, 59 AD3d 368 [2nd Dept. 2009]).

While Dr. Emmanuel explained that the plaintiff’s decreased range of motion “is subjective and may be age related or self-restricted” her conclusion is speculative rather than definitive and she failed to explain or substantiate, with any objective medical evidence, the basis for her conclusions that the limitations were age related or self-restricted (see Iannello v Vazquez, 78 AD3d 1121 [2d Dept. 2010]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept. 2010]; Bengaly v Singh, 68 AD3d 1030 [2d

Dept. 2009]; Moriera v Durango, 65 AD3d 1024 [2d Dept. 2009]; Busljeta v Plandome Leasing, Inc., 57 AD3d 469 [2d Dept. 2008]).

As the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue 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]; Held v Heideman, 63 AD3d 1105 [2d Dept. 2009]; Landman v Sarcona, 63 AD3d 690 [2d Dept. 2009]; Alam v Karim, 61 AD3d 904[2d dept. 2009]; Liautaud v Joseph, 59 AD3d 394 [2d Dept. 2009]).

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

ORDERED, that the defendant's motion for an order dismissing the plaintiffs' complaint is denied.

Dated: May 13, 2011
Long Island City, NY

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ROBERT J. MCDONALD
J.S.C.