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

ANGELA BEESON and JUNIOR M. BEESON,

Plaintiffs,

- against -

NICOLE L. CERVINI, CIATA DUKULY and AMIE A. DONZO,

Defendants.

- x

Index No.: 22841/2009

Motion Date: 04/28/2011

Motion No.: 5

Motion Seq.: 2

The following papers numbered 1 to 19 were read on this motion by defendant, NICOLE L. CERVINI, and cross-motion by defendants CIATA DUKULY and AMIE A. DONZO for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of JUNIOR M. BEESON on the ground that said plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memorandum of Law...	1 - 5
Dukuly Cross-Motion-Exhibits-Affidavits-.....	6 - 10
Affirmation in Opposition-Affidavits-Exhibits.....	11 - 15
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This is a personal injury action in which plaintiffs, Angela Beeson and Junior M. Beeson seek to recover damages for injuries they each sustained as a result of a three car motor vehicle accident that occurred at approximately 7:25 a.m. on July 9, 2007 on 114th Street at the intersection with N. Conduit Avenue in the County of Queens, New York.

At the time of the accident, Junior M. Beeson, age 45, was taking his wife, plaintiff Angela Beeson, to her job at Woodhull Hospital in Brooklyn, New York. Angela, a registered nurse was

seated in the front passenger seat of their 1999 Nissan Quest. The plaintiffs were proceeding on 114th Street and stopped a red traffic signal at the intersection with N. Conduit Avenue where they intended to turn right. As they were stopped waiting for the light to change, there was a collision on N. Conduit Avenue between the vehicle being operated by defendant Amie A. Donzo and the vehicle being operated by Nicole Cervini. The collision caused the Cervini vehicle to spin out of control and strike the front of the plaintiff's vehicle which was still stopped at the red light on 114th Street. Both plaintiffs were allegedly injured as a result of the accident.

The plaintiffs commenced this action by filing a summons and complaint on August 24, 2009. Issue was joined by service of defendant's answer on October 13, 2009.

Defendant Nicole Cervini now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiffs' complaint on the ground that plaintiff Junior Beeson did not suffer a serious injury as defined by Insurance Law § 5102. Defendants Ciata Dukuly and Amie A. Donzo cross-move for the same relief.

In support of the motion, defendant submits an affirmation from counsel, Tracy Morgan, Esq.; a copy of the pleadings; plaintiffs' verified bill of particulars; a copy of Junior Beeson's deposition transcript; and the affirmed medical report of orthopedic surgeon, Dr. Stanley Ross.

In his verified Bill of Particulars, plaintiff Junior Beeson, age 47, states that as a result of the accident he sustained, inter alia, disc herniation at C3-4; focal disc protrusion at C4-5; disc bulge at C5-6;left sided L4-L5 disc causing mild compression of the L5 nerve root on the left; and L5-S1 annular disc bulge. At the time of the accident, Junior Beeson was employed as a cleaner by the City of New York Department of Education in Brooklyn, NY. He states that he missed approximately two weeks from work as a result of the injuries he sustained in the accident.

Mr. Beeson contends that he sustained a serious injury as defined in Insurance Law § 5102(d)in that he sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

Mr. Beeson, was examined by Dr. Ross, defendant's orthopedist on August 18, 2010. In his affirmed report, he states that Mr. Beeson reported that he had no prior history of accidents or injuries. He presented with pain in the neck, lower back and chest. In his examination, Dr. Ross performed quantified and comparative range of motion tests. He found that the Junior Beeson had no limitations of range of motion in his cervical spine, thoracic spine, lumbar spine, right hand and wrist and left hand and wrist. Dr. Ross's final diagnosis was "cervical spine strain - resolved; thoracic spine strain - resolved; lumbar spine strain - resolved; and chest contusion - healed." He stated that Mr. Beeson's examination did not reveal any objective evidence of a disability.

In his examination before trial, taken on June 11, 2010, Mr. Beeson explained that after the accident an ambulance came to the scene but he did not make any complaints of pain to the ambulance attendant and he did not request to go to the hospital. He testified that after the accident he drove his wife to work and he then returned home. He stated he was employed at the time with the New York City Board of Education as a cleaner at a middle school in Queens and that he only missed two or three days because of the accident. He stated that later in the day after the accident he began to feel pain in both arm, neck and back. He sought treatment the following day from Dr. Abraham for pain management. He received physical therapy and acupuncture at Dr. Abraham's office for two or three months. His treating physicians at that office were Dr. Burd, Dr. Abraham, Dr. Tugetman and Dr. Casson. He stated that he stopped treating because the insurance stopped paying and he never had any further treatments. He stated that although no-fault stopped paying for his physical therapy, he had his own private insurance and he looked into treating with a different doctor but he never followed up. He states that he just does certain exercises at home. He stated that at the time of the deposition his neck still hurt but his back was, "not that bad." When asked if there are any activities that he can no longer do because of the accident he stated, "no" but that he is more cautious about performing certain activities.

Defendant's counsel contends that the deposition testimony of Mr. Beeson as well as the medical report of Dr. Ross are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or

impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

In opposition, plaintiff's attorney Scott L. McCann, Esq., submits his own affirmation as well as the affidavit of Junior Beeson dated March 2, 2011; affirmed medical reports of Dr. Michael Tugetman and radiologist Dr. Charles DeMarco. The plaintiff has also submitted the unaffirmed medical reports and records of Dr. Tugetman, Dr. Abraham, Dr. Casson, Park Neurological Services, P.C., South Queens Acupuncture, PC. and Pain Relief Medical Therapy.

In his affidavit, Mr. Beeson states that on July 17, 2007 he first sought medical attention from Dr. Michael Tugetman and Dr. Abraham at Pain Relief Medical Therapy, PC and treated with them for three months. He states that from the date of the accident up to and including the present he is unable to perform and no longer able to partake in his usual and customary daily activities including his ability to lift heavy objects. He states he is unable to exercise as frequently as he did before and that he has problems doing the laundry, taking out the garbage, sweeping and mopping.

Dr. Tugetman states that he examined the plaintiff on July 17, 2007. His physical examination showed restrictions in range of motion in the cervical spine and lumbar spine. He stated that the MRI conducted by Dr. DeMarco of the cervical spine indicated disc herniation at C3-C4, focal disc protrusion at C4-C5 and disc bulge at C5-C6. The MRI of the lumbar spine showed left-sided disc bulging at L4-L5 causing compression on the L5nerve root of the left and straightening of the normal lordotic curvature of the lumbar spine. He states that Mr. Beeson underwent physical therapy at his office for approximately 3 months. Dr. Tugetman re-examined Mr. Beeson on November 10, 2010 and found that he still had substantially restricted range of motion of the cervical and lumbar spines. Although he compared his restrictions in range of motion to normal values he did not provide the objective measurement or device which he used to quantify the limitations. He states that the plaintiff suffered a significant limitation of use of motion of his cervical and lumbar spine which is causally related to the accident in question and which is permanent in nature. He also states that as a result of his injuries, the plaintiff's ability to exercise is restricted in that he can no longer lift heavy

objects or bend his back or neck to the same degree as before the accident.

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 proof submitted by the defendants, including the affirmed medical reports of Dr. Ross was sufficient to meet its prima facie burden by demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d)under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102 (d) as a result of the subject accident. The objective range of motion tests performed by defendant’s orthopedist indicated that the plaintiff had full range of motion in his cervical and lumbar spines (see Ranford v Tim's Tree & Lawn Serv.,71 AD3d 973 [2d Dept. 2010]; Shevardenidze v Vaiana, 60 AD3d 660 [2d Dept. 2009]). Dr. Ross found that plaintiff's range of motion tests

for his cervical and lumbar spine were within normal limits and that plaintiff was not disabled.

Plaintiff's testimony that he was not homebound or bedridden as a result of the accident and that he returned to work as a cleaner at a public school, established that his alleged injuries did not prevent him from performing substantially all of the material acts constituting his customary daily activities during at least 90 of the first 180 days following the accident (see Richards v Tyson, 64 AD3d 760[2d Dept. 2009]; Geliga v Karibian, Inc., 56 AD3d 518 [2d Dept. 2008]; Sanchez v Williamsburg Volunteer of Hatzolah, Inc., 48 AD3d 664 [2d Dept. 2008]).

In opposition, the plaintiff failed to raise a triable issue of fact (see Srebnick v Quinn, 75 AD3d 637[2d Dept. 2010]). Although Dr. Tugetman reported limitations in range of motion of the plaintiff's cervical and lumbar spine in his examination of July 2007 and in his examination of November 2010, Dr. Tugetman also states in his affirmation dated March 2, 2011 that plaintiff only received physical therapy for three months following the accident and then stopped. There is no explanation by Dr. Tugetman as to why Mr. Beeson, despite the permanent nature of the injuries and the fact that he had private insurance, stopped treatments at that time and why there was a gap in treatment of over three years until the time he next saw Mr. Beeson in November 2010.

While a gap in or cessation in treatment is not necessarily dispositive as the law does not require a record of needless treatment in order for a plaintiff's case to survive a summary judgment motion, a plaintiff who suspends therapeutic measures while claiming a serious injury, must offer a reasonable explanation for having done so. Although plaintiff stated that his no-fault benefits were stopped after three months, he did have private insurance and still did not continue treatment (see Pommells v Perez, 4 NY3d 566 [2005]; Krieger v Diallo, 62 AD3d 504 [1st Dept. 2009]; Moore v Sarwar, 29 AD3d 752 [2nd Dept. 2006]; Mohamed v Siffrain, 19 AD3d 561 [2d Dept. 2005]; Ketz v Harder, 16 AD3d 930[3d Dept. 2005]).

Here, neither the plaintiff nor his doctor adequately explained the gap in the plaintiff's treatment (see Haber v Ullah, 69 AD3d 796 [2d Dept. 2010]; Milosevic v Mouladi, 72 AD3d 1036 [2d Dept. 2010]; Rivera v. Bushwick Ridgewood Props.,63 AD3d 712 [2d Dept. 2009]; cf. Gaviria v. Alvardo, 65 AD3d 567 [2d Dept. 2009]; Bonilla v. Tortori, 62 AD3d 637 [2d

Dept. 2009]; Shtesl v. Kokoros, 56 AD3d 544 [2d Dept. 2008]).

The balance of the medical reports of the plaintiff's treating physicians were unaffirmed and, thus, insufficient to raise a triable issue of fact (see Grasso v Angerami, 79 NY2d 813 [1991]; Mora v Riddick, 69 AD3d 591 [2d Dept. 2010]; Patterson v NY Alarm Response Corp., 45 AD3d 656 [2d Dept. 2007]).

With respect to the 90/180 category, the plaintiff failed to raise a question of fact as he returned to work full time two or three days after the accident. Plaintiff's assertion that he is limited in his ability to exercise and has difficulty with household chores, "while suggestive of discomfort, does not suggest the inability to perform substantially all of her usual and customary daily activities" (see Cantave v Gelle, 60 AD3d 988 [2d Dept. 2009]; Sands v Stark, 299 AD2d 642[2d Dept. 2002]; Ingram v Doe, 296 AD2d 530 [2d Dept. 2002]; Slasor v Elfaiz, 275 AD2d 771 [2d Dept. 2000]). The plaintiff did not demonstrate that he has been curtailed from performing his activities to a great extent rather than some slight curtailment.

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

ORDERED, that the motion of defendant Nicole L. Cervini, and the cross-motion of defendants Ciata Dukuly and Amie A. Donzo for summary judgment is granted and the complaint of plaintiff Junior Beeson is dismissed and the Clerk is directed to enter judgment in favor of said defendants.

Dated: June 20, 2011
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.