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

ILYA MUSAYEV,

Plaintiff,

- against -

YAKOV AMINOV and ARKADIY AMINOV,

Defendants.

- x

Index No.: 19701/09

Motion Date: 12/01/2011

Motion No.: 31

Motion Seq.: 2

The following papers numbered 1 to 12 were read on this motion by defendants, YAKOV AMINOV and ARKADIY AMINOV, for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the plaintiff's complaint on the ground that 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
Affirmation in Opposition-Affidavits-Exhibits	6 - 10
Reply Affirmation	11 - 12

This is a personal injury action in which plaintiff, Ilya Musayev, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on December 28, 2008, near the intersection of Booth Street and 65th Road in the County of Queens, New York.

At the time of the accident, the plaintiff, age 28, was double parked on Booth Street, letting his passengers out, when his motor vehicle was struck in the rear by the vehicle owned by defendant ARKADIY AMINOV and operated by defendant YAKOV AMINOV. As a result of the impact the plaintiff allegedly sustained injuries to his neck and lower back.

The plaintiff commenced this action by filing a summons and complaint on July 24, 2009. Issue was joined by service of defendant's verified answer dated October 22, 2009.

Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Tracy Morgan, Esq; a copy of the pleadings; plaintiff's verified bill of particulars and supplemental bill of particulars; the affirmed medical report of Dr. Thomas Nipper; and a copy of the transcript of the examination before trial of plaintiff, Ilya Musayev.

In his supplemental verified Bill of Particulars, plaintiff, states that as a result of the accident he sustained, inter alia, disc herniations at L5/S1 and C5/C6 as well as adjustment disorder with anxiety and depression. At the time of the accident, plaintiff was employed as an assistant engineer at WebMD. He testified at his examination before trial that he missed one week from work as a result of the accident and was confined to his home and bed for ten days following the accident.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d)in that he sustained a permanent loss of use of a body organ, member function or system; 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.

Dr. Thomas Nipper, an orthopedist retained by the defendants, examined Mr. Musayev on April 27, 2011. Dr. Nipper states in his affirmed report that the plaintiff had no specific complaints at the time of his examination. Dr. Nipper performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine and lumbar spine. He concluded that the plaintiff had a resolved cervical, thoracic and lumbar sprain/strain. He states that there is no objective evidence of any disability or permanency. He states that the plaintiff is capable of performing

all activities of daily living and is independent in ambulation. Dr. Nipper also concludes that plaintiff is capable of performing occupational duties without any limitation or restriction and that there are no indications for surgical intervention.

In his examination before trial, taken on April 4, 2011, plaintiff testified that an ambulance arrived at the scene but he declined medical treatment at that time. Later that same day, plaintiff went to the emergency room at New York Hospital, Queens County, where he was treated for neck and lower back pain and released with a prescription for pain relievers. He then sought physical therapy treatment with Dr. Bangy. Initially, he was being treated three times per week and, as of the date of the deposition, was being treated once per week. He states that he also sought treatment with a psychologist because he could not sleep and had a fear of driving. He states that at the present time he had trouble sitting for long periods and could not lift heavy objects as a result of the accident. He states that he still has pain in his lower back and neck on a daily basis.

Defendants' counsel contends that the medical report of Dr. Nipper and the deposition testimony of the plaintiff stating that he returned to work after one week, 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, Liba N. Groveman, Esq., submits her own affirmation as well as the affirmed medical reports of Dr. Isabella Bangy, Dr. Nicky Bhatia, Dr. Richard A. Gasalberti, Dr. Mark Shapiro and the plaintiff's sworn affidavit of merit.

Dr. Mark Shapiro, a radiologist, submits an affirmation stating that he reviewed the MRI studies of the plaintiff's lumbosacral and cervical spine and found that a disc herniation at L5-S1 and C5- C6. He did not relate his findings to the plaintiff's accident.

In her affirmed report, dated February 22, 2009, Dr. Isabella Bangy, a board certified internist, states that she first examined the plaintiff on January 4, 2009 and treated

him through February 22, 2009. Plaintiff presented with neck pain, upper and lower back pain . Dr. Bangy performed quantified and comparative range of motion tests. She found that the plaintiff had decreased limitation in range of motion of the cervical spine and lumbar spine. At that time Dr. Bangy concluded that the plaintiff sustained a definite permanent partial disability as a result of the injuries he sustained in the accident of December 28, 2008.

The plaintiff also submits an affirmed report from Dr. Gasalberti who examined the plaintiff on October 25, 2010. At that time he presented with knee pain. Dr. Gasalberti examined the plaintiff but did not state if he used an objective method. He provides the range of motion exhibited by the plaintiff at the examination but does not compare plaintiff's range of motion to what is normal. In addition, although the report states that the plaintiff sustained cervical/lumbar derangement as a result of the accident it does not state whether the condition is permanent or constitutes a significant limitation.

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 report of Dr. Nipper and the deposition testimony of the plaintiff in which he stated that he returned to work one week after the accident, were sufficient to meet its prima facie burden by demonstrating that the plaintiff 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]).

In opposition, the plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 006]). The only affirmed medical proof submitted by the plaintiff were the affirmed reports of Drs. Banghy dated February 22, 2009 and the affirmed report of Dr. Gasalberti which was based upon his evaluation of October 25, 2010. Although Dr. Bangy's report was sufficiently contemporaneous with the accident and demonstrated that the plaintiff had significant range of motion limitations of his back at that time which were quantified and compared to normal, the report of Dr. Gasalberti based upon his examination of October 2010 was not recent, and moreover, did not contain objective range of motion limitations which were compared to normal. Without an affirmed medical report indicating the plaintiff's current physical condition the plaintiff's submissions were insufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury (see Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barrzey v Clarke, 27 A.D.3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 A.D.3d 458 [2d Dept. 2005][in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion]; Ali v Vasquez, 19 A.D.3d 520 [2d Dept. 2005]). Further, as stated above, Dr. Gasalberti's report was not probative as it failed to compare any of his own findings on range of motion to what is normal (see Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Frasca-Nathans v Nugent, 78 AD3d 651 [2d Dept. 2010]; Malave v Basikov, 45 AD3d 539 [2d Dept. 2007; Nociforo v Penna, 42 AD3d 514 [2d Dept. 2007]) and failed to state that the plaintif's injuries were permanent or significant.

Lastly, the plaintiff failed to submit competent medical

evidence that the injuries allegedly sustained by him as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days following the accident. The plaintiff himself testified that he did not miss more than one week of work as a result of the accident (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 932 NYS2d 530 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the defendants' motion for summary judgment is granted and the plaintiff's complaint is dismissed.

The clerk is directed to enter judgment accordingly.

Dated: January 9, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.