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

STEVEN BERRIOS and ANTONIO MERCADO,

Plaintiffs,

- against -

C. E. HOFFMAN,

Defendant.

- x

Index No.: 21844/09

Motion Date: 12/08/2011

Motion No.: 4

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by defendant, CHRIS E. HOFFMAN s/h/a C. E. HOFFMAN for an order, pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint of STEVEN BERRIOS 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, Steven Berrios, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on October 10, 2008, on the Whitestone Bridge at or near the intersection of 3rd Avenue in the County of Queens, New York. At the time of the accident, the plaintiff was proceeding northbound on the Whitestone Bridge when his vehicle was hit in the rear by the vehicle being driven by the defendant. Plaintiff alleges that he sustained serious physical injuries as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on August 14, 2009. Issue was joined by service of

defendant's verified answer dated September 23, 2009.

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

In support of the motion, defendant submits an affirmation from counsel, Beth Goldman, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of orthopedic surgeon, Dr. Mark Pitman; and a copy of the transcript of the examination before trial of plaintiff, Steven Berrios.

In his verified bill of particulars, plaintiff, age 23, states that as a result of the accident he sustained, inter alia, a central disc protrusion at C4-C5 and C5-C6. At the time of the accident, plaintiff was employed as a waiter at the Winged Foot Country Club. He testified that he missed 19 days from work as a result of 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. Mark Pitman, a board certified orthopedic surgeon, retained by the defendant, examined Mr. Berrios on February 23, 2011. Plaintiff told Dr. Pitman that his neck was "okay" and no longer bothers him. He stated that his back bothered him but did not hurt. Dr. Pitman performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, left and right shoulders and lumbar spine. He concluded that the plaintiff had a resolved sprain of the cervical spine and resolved sprain of the lumbar spine. He states that based upon his examination, no orthopedic treatment is indicated and there is no permanency and no disability from his occupation.

In his examination before trial, taken on January 19, 2011, plaintiff testified that he left the scene of the accident in an

ambulance. He was treated in the emergency room at Jacobi Hospital and released the same day. The following day he sought treatment with his chiropractor, Dr. Harvey. He was also sent for MRIs of his neck and lower back and continued chiropractic treatments for six or seven months, several days per week. He stated that he stopped treating because he felt he was not getting any better. He also testified that he missed approximately 19 days from work as a result of the accident. Plaintiff testified that as of the time of the deposition he was not in any pain but just felt discomfort from sitting for long periods of time. He stated that there are no activities that he can no longer do as a result of the accident.

Defendant's counsel contends that the medical report of Dr. Pitman and the deposition testimony of the plaintiff 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 Guy R. Vitacco, Jr., Esq., submits his own affirmation as well as the affirmation of Dr. Salim A. Khoury.

Dr. Khoury, an internist, states that he examined the plaintiff on October 24, 2011. In his medical report Dr. Khoury refers to a report of Dr. Singer, a radiologist, who performed the MRI studies of the plaintiff's neck and back on November 24, 2008. Dr. Khoury states that Dr. Singer found focal disc protrusions at the C4-5 and C5-6 levels. Dr. Khoury also refers to the report of chiropractor, Dr. Vincent Notabortolo, who examined the plaintiff on December 2, 2008. Dr. Khoury states that Dr. Notabortolo found restrictions of range of motion of the plaintiff's cervical and lumbar spines. Dr. Khoury's own examination revealed limitations of range of motion of the cervical and lumbar spines. Dr. Khoury concludes that the plaintiff sustained disc protrusion at C4-5 and C5-6 as a result of the accident and that the plaintiff's limitations of range of motion have resulted in a permanent partial disability in the function of the plaintiff's cervical spine and lumbar spine which is causally related to the plaintiff's accident of October 10, 2008.

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 defendant, including the affirmed medical report of Dr. Pitman and the deposition testimony of the plaintiff in which he stated that he only missed 19 days from work, was 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[2d Dept. 2006]). The sole medical proof submitted by the plaintiff is the affidavit of Dr. Khoury. Initially, it appears that Dr. Khoury based his diagnosis of disc protrusion on the MRI

report of Dr. Singer and the chiropractic report of Dr. Notabortolo both of which were not affirmed and were not submitted with plaintiff's opposition papers. As affirmed copies of these reports were not provided to the Court, Dr. Kourhy's reliance upon them in diagnosing plaintiff's condition, renders his conclusions inadmissible (Kreimerman v Stunis, 74 AD3d 753[2nd Dept. 2010]; Benavides v Peralta, 52 AD3d 755 [2d Dept. 2008]; Seebaran v Mendonca, 51 AD3d 658 [2d Dept. 2008]; Malave v Basikov, 45 AD3d 539 [2d Dept. 2007]).

Secondly, in his affidavit, Dr. Khoury merely reports the findings of his examination of the plaintiff on October 24, 2011, nearly three years after the accident. Thus, plaintiff's sole medical proof does not provide evidence of an injury contemporaneous with this accident (see Resek v Morreale, 74 AD3d 1043 [2nd Dept. 2010]; Jack v Acapulco Car Serv., Inc., 72 AD3d 646 [2nd Dept. 2010]; Camacho v John H. Dwelle, 54 AD3d 706 [2d Dept. 2008]). As Dr. Khoury did not examine the plaintiff until three years after the accident, neither he nor the plaintiff proffered competent medical evidence of initial range of motion restrictions contemporaneous with the accident (see Lea v Cucuzza, 43 AD3d 882[2007]).

Therefore, the plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury under the permanent loss, permanent consequential limitation of use, and/or significant limitation of use categories of Insurance Law § 5102 (d) because he failed to submit competent medical evidence that revealed the existence of a significant limitation in his cervical and/or lumbar spine that was contemporaneous with the subject accident (see Srebnick v Quinn, 75 AD3d 637 [2d Dept. 2010]; Catalano v Kopmann, 73 AD3d 963 [2d Dept. 2010]). The failure to present competent evidence regarding a limitation of range of motion contemporaneous with the accident three years earlier renders any attempt to connect his present day injuries to the 2008 accident speculative (see Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]; Batts v Medical Express Ambulance Corp., 49 AD3d 294 [1st Dept. 2008]).

Lastly, the plaintiff failed to 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 19 days 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 defendant's motion for summary judgment is granted and the plaintiff's complaint is dismissed.

The clerk is directed to enter judgment accordingly.

Dated: January 3, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.