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

ALSEINY BARRY,

Plaintiff,

- against -

OLIVE H. ARNOLD AND ERNEST ARNOLD,

Defendants.

- x

Index No.: 15606/2010

Motion Date: 06/21/12

Motion No.: 6

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by defendants, OLIVE H. ARNOLD AND ERNEST ARNOLD, for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint of ALSEINY BARRY 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	1 - 5
Affirmation in Opposition-Affidavits-Exhibits	6 - 10
Reply Affirmation	11 - 12

This is a personal injury action in which plaintiff, ALSEINY BARRY, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on December 22, 2009, at the intersection of 23rd Avenue and 97th Street, Queens County, New York. At the time of the incident, the plaintiff was proceeding on 23rd Avenue when the vehicle operated by defendant, Ernest Arnold, pulled out of a parking space and collided with the plaintiff's vehicle while attempting to make a U-turn. The plaintiff claims that as a result of the accident he sustained injuries to his neck, including a herniated disc at C5-C6, injuries to his right shoulder, lower back and a partial tear of the ACL of the right knee.

The plaintiff commenced this action by filing a summons and complaint on June 18, 2010. Issue was joined by service of defendant's verified answer dated August 12, 2010.

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.

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, defendants submit an affirmation from counsel, Jerome D. Patterson, Esq; a copy of the pleadings; the affirmed medical reports of board certified orthopedic surgeon, Dr. Lisa Nason and neurologist, Dr. Monette G. Basson; and a copy of the transcript of the examination before trial of plaintiff, Alseiny Barry.

Dr. Lisa Nason, an orthopedic surgeon, retained by the defendants, examined Mr. Barry on August 11, 2011. Plaintiff presented with pain in the cervical spine, pain in the right shoulder, pain in the lumbar spine and pain in the right knee. Dr. Nason performed quantified and comparative range of motion tests. She found that the plaintiff had no limitations of range of motion in the cervical spine, right shoulder, lumbar spine and right knee. The doctor states that "based on today's findings, it is my opinion that the claimant has no objective evidence of disability. The claimant may work and perform daily living activities without boundaries or restrictions."

Dr. Monette G. Basson, a neurologist, saw the plaintiff in her office for a neurological evaluation on July 28, 2011. Dr. Basson performed quantified and comparative range of motion tests. She found full range of motion in the plaintiff's cervical spine and lumbar spine, with a significant limitation in right leg raising due to pain in the right knee. Dr. Basson states that there are no abnormal neurologic findings at all. She states that she cannot comment on the knee but she saw no evidence of any ongoing problems related to the lumbosacral spine.

In his examination before trial, taken on April 15, 2011, Mr. Barry, age 38, testified that approximately seven to ten days after the accident he met with his attorney and then commenced physical therapy at a clinic in the Bronx. He stated that when he first began treatments it was at a rate of three times per week. After six months he went once per week and continued treatments up to the time of the deposition. He was treated for pain in his back, right shoulder, neck and right knee. At the time of the accident he was working at a supermarket and was paid in cash. He stated he has not attempted to get another job since he date of the accident.

Defendant's counsel contends that the medical reports of Drs. Nason and Basson as well as the transcript of the plaintiff's examination before trial 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, Gregory C. McMahon, Esq., submits his own affirmation as well as the medical report of Dr. Dina Nelson of the Med Care Health & Rehabilitation Services, P.C., the radiological report of Dr. Lichy, the radiological report of Dr. Kolb with respect to the MRI of plaintiff's right knee, the medical report of orthopedic surgeon Dr. Jeffrey Cohn and the affidavit of plaintiff dated May 16, 2012.

Dr. Jeffrey Cohen, an orthopedic surgeon, examined the plaintiff on January 8, 2010. At that time he found that the plaintiff sustained acute cervical and lumbar trauma and traumatic synovitis of the right knee. He referred the plaintiff for MRI testing and for physiotherapy modalities.

Dr. Nelson first examined the plaintiff at Med Care Health & Rehabilitation Services on January 20, 2010, approximately one month post-accident. At that time the plaintiff complained of right knee pain, neck pain, shoulder pain and lower back pain. Range of motion testing on that date indicated significant limitations in the cervical spine and thoracolumbar spine. Subsequently he underwent a course of treatment for the injuries to his necks back and shoulder through March 2011. He stopped therapy due to financial

difficulty. At a follow up examination on March 12, 2012, the plaintiff again had significant limitations of range of motion of the cervical spine, right knee and lumbar spine. Dr. Nelson states that as a result of the accident the plaintiff sustained cervical strain/sprain, C5-C6 disc herniation, lumbar sprain/strain and right knee derangement with partial ACL tear.

Dr. Lichy examined the MRI of the plaintiff's cervical spine and lumbar spine and found that the MRI showed a midline herniation of the C5-C6 intervertebral disc, encroaching on the spinal cord. Dr. Kolb examined the MRI studies of the plaintiff's right knee which he performed on January 17, 2010 and stated that his impression was a partial tear of the ACL which was caused by recent trauma.

In his affidavit of May 9, 2012, the plaintiff states that as a result of the accident he injured his neck, back and right knee. He went to physical therapy weekly until March 2011 when he stopped because his insurance would not pay for the treatments and he was financially unable to make the payments himself. He states that following the accident he was confined to his bed and home for three months. He continues to have pain in his right knee, neck, and back.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, it is defendant's initial 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]).

As stated above, the medical report of the defendant's examining neurologist, Dr. Basson, relied on by the defendant, clearly set forth that upon her examination of the defendant she found significant limitation in the plaintiff's

range of motion when conducting the straight leg raising test on the right leg. Dr. Basson attributed the limitation to pain in the plaintiff's right knee but she failed to test the range of motion of the plaintiff's right knee. The defendant did not annex a copy of the plaintiff's bill of particulars, however, plaintiff's radiologist, when interpreting the MRI studies, observed a torn ACL of the right knee. Thus, as the plaintiff is alleging a right knee injury and complained of pain in the right knee, it was incumbent upon the defendant's doctor to examine the range of motion of the plaintiff's right knee. Dr. Basson states that she did not review any medical records prior to her examination but was aware that the plaintiff complained of pain to the right knee. She did not attempt to explain the pain in plaintiff's right knee other than stating in her report: "I cannot comment on the knee." Therefore, although Dr. Basson found a clear limitation in straight leg raising due to pain in the plaintiff's knee, the extent of the knee problem was not quantified since she did not test the range of motion. As such, her report is insufficient to eliminate all triable issues of fact (see Katanov v County of Nassau, 91 AD3d 723 [2d Dept. 2012]; Artis v Lucas, 84 AD3d 845 [2d Dept. 2011]; Borras v Lewis, 79 AD3d 1084 [2d Dept. 2010]; Smith v Hartman, 73 AD3d 736 [2d Dept. 2010]; 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]).

Without such comparative quantification of the range of motion of the right knee or explanation of the limitation found with regard to straight leg raising test, the Court cannot conclude that there were no abnormal findings in her report(see Astudillo v MV Transp., Inc., 84 AD3d 1289 [2d Dept. 2011]; Moore v Stasi, 62 AD3d 764 [2d Dept. 2009]; Marshak v Migliore, 60 AD3d 647 [2d Dept. 2009]).

Further, the defendant failed to submit evidence to dispute the findings of the plaintiff's radiologist that the plaintiff sustained a torn ACL as a result of recent trauma. Thus, the defendants failed to objectively demonstrate that plaintiff did not sustain a serious injury under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (see Aronov v Leybovich, 3 AD3d 511 [2d Dept. 2004]).

Therefore, this Court finds that the defendant failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues 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]).

Since the defendants failed to satisfy their initial burden on their motion, it is not necessary to consider whether the plaintiffs' papers in opposition were sufficient to raise a triable issue of fact (see Perez v Fugon, 52 AD3d 668 [2d Dept. 2008]; Gaccione v Krebs, 53 AD3d 524 [2d Dept. 2008]; Coscia v 938 Trading Corp., 283 AD2d 538 [2d Dept. 2001])

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

ORDERED, that the defendants' motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

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

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ROBERT J. MCDONALD, J.S.C.