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

FAUSTO ELIAS HERRERA,

Plaintiff,

- against -

LUCIANO ROJAS,

Defendant.

- x

Index No.: 27700/2010

Motion Date: 07/05/12

Motion No.: 11

Motion Seq.: 1

The following papers numbered 1 to 17 were read on this motion by defendant, LUCIANO ROJAS, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of FAUSTO ELIAS HERRERA 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	1 - 7
Affirmation in Opposition-Affidavits-Exhibits	8 - 13
Reply Affirmation	14 - 17

This is a personal injury action in which plaintiff, FAUSTO ELIAS HERRERA, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on May 26, 2010, at the intersection of Astoria Boulevard and 43rd Street, Queens County, New York.

At the time of the accident, the plaintiff, age 58, was proceeding on Astoria Boulevard on his way to work. As he approached the intersection of 43rd Street he observed that he had a green light in his favor. He observed the defendant's vehicle waiting at the red light on 43rd Street where he intended to make a left turn onto Astoria Boulevard. The plaintiff

testified at his deposition that although the light was still red against the defendant, the defendant proceeded against the red light into the intersection in front of the plaintiff's vehicle causing the front of plaintiff's vehicle to strike the defendant's vehicle on the right side. The plaintiff alleges that as a result of the accident he sustained serious physical injuries.

Defendant now moves 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, William B. Stock, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of orthopedic surgeon, Thomas P. Nipper; neurologist, Marianna Golden; and radiologist Richard A. Heiden; and page 17 from the transcript of the examination before trial of plaintiff, Fausto Elias Herrera.

In his verified Bill of Particulars, plaintiff states that as a result of the accident he sustained, inter alia, partial tear of the rotator cuff of the right shoulder requiring arthroscopic surgery; herniated discs at C3-C4, C4-C5 and disc bulges at C6-C7, L4-L5, L5-S1. At the time of the accident, plaintiff was employed as an auto mechanic at Gulf Auto Repairs in Hollis, New York and testified that he missed one week of work after the accident and then six weeks after the arthroscopic surgery on August 27, 2010.

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d)in that she 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. Heiden reviewed the MRI studies of the plaintiff's left shoulder and right shoulder and in an affirmed report, dated June 10, 2011, states that the observations of osteophytes and tendinopathy in both shoulders are consistent with degenerative osteoarthritis consistent with the plaintiff's age. He states

that the findings were clearly pre-existing at the time of the accident and could not be the result of an accident less than 2 months earlier. He also states that no post-traumatic changes attributable to the accident are identified in the MRI.

Dr. Thomas P. Nipper, a board certified orthopedic surgeon, retained by the defendant, examined Mr. Herrera on November 2, 2011. Mr. Herrera presented with pain in the neck, mid-back, lower back, right shoulder, left shoulder, right hand and left knee. Dr. Nipper performed quantified and comparative range of motion tests. On examination of the cervical spine he found a 25% limitation of range of motion in extension, no limitations in the thoracic spine, a 17% limitation in forward flexion and extension of the lumbar spine, a slight limitation in range of motion of the right shoulder, a 13% limitation of range of motion of the right shoulder, no limitations in the left shoulder, right wrist and hand and left knee and ankle. Dr. Nipper states that Mr. Herrera has no disability and is capable of working and performing normal activities without limitation. He states that the decreased range of motion on examination is a subjective finding as there are no sensory, motor or reflex deficits. He does state that there is a causal relationship between the injuries sustained and the accident reported.

Defendant also submits the examination report of Dr. Marianna Golden, a board certified neurologist who examined the plaintiff on behalf of the defendants. At her examination of November 2, 2011, the plaintiff exhibited full range of motion of the cervical spine and thoracolumbar spine. Dr. Golden did not report that she examined plaintiff's shoulders despite being aware of the arthroscopic surgery on the left shoulder. She states that plaintiff is not disabled from a neurologic point of view.

In his examination before trial, taken on May 12, 2011, the plaintiff testified that he left the scene of the accident in an ambulance that transported him to the emergency room at Elmhurst Hospital where he was treated and released the same day. Two weeks after the accident the plaintiff began physical rehabilitation treatments at Roosevelt Medical and Diagnostics, P.C. In August 2010 he underwent arthroscopic surgery performed by Dr. Manouel. After the surgery he continued with physical therapy. He stated that he still has pain at his job when lifting heavy things and he still suffers from shoulder pain.

Defendant's counsel contends that the medical reports of Drs. Heiden, Nipper and Golden, as well as plaintiff's testimony at his 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 Larry Hallock, Esq., submits his own affirmation as well as the affidavit of plaintiff Herrera, the affirmed medical report of orthopedic surgeon Mehran Manouel, the records of Roosevelt Medical and Diagnostics PC, and the affirmed medical report of radiologists, Dr. Parnes and Dr Lyons.

In his affidavit, dated May 8, 2012, plaintiff states that he was treated at Roosevelt from June 24, 2010 until December 1, 2010. He discontinued therapy after five months because he condition was not improving and his no fault benefits were discontinued. He was examined by surgeon Dr. Manouel on July 14, 2010 who performed arthroscopic surgery on his left shoulder in August 2010.

Dr. Manouel, an orthopedist, states in his affirmation dated May 23, 2012, that he first examined the plaintiff on July 14, 2010 with respect to the accident of May 26, 2010. On that date his examination showed significantly decreased range of motion of the right shoulder and left shoulder. Dr. Manouel re-examined the plaintiff on April 20, 2012 and found decreased range of motion of the cervical spine, lumbar spine, left shoulder and right shoulder. His conclusion was that the plaintiff sustained a permanent, serious and significant loss of use and significant limitation of use of the right shoulder, left shoulder, cervical spine and lumbar spine as a result of the subject 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]).

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 affirmed medical report of the defendant's examining orthopedist, Dr. Nipper, relied on by the defendant, clearly set forth that upon his examination of the defendant he found significant limitations in the range of motion of the defendant's cervical spine, lumbar spine and right shoulder. Therefore, Dr. Nipper's report is insufficient to eliminate all triable issues of fact (see Raguso v Ubriaco, 2012 NY Slip Op 5405 [2D Dept. 2012]; 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]). Moreover, Dr. Nipper failed to explain the basis for his conclusions that the decreased range of motion is a subjective finding(see Iannello v Vazquez, 78 AD3d 1121 [2d Dept. 2010]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept. 2010]; Quiceno v Mendoza, 72 AD3d 669 [2d Dept. 2010]; Bengaly v Singh, 68 AD3d 1030 [2d Dept. 2009]; Moriera v Durango, 65 AD3d 1024 [2d Dept. 2009]).

In addition although the plaintiff alleged injuries to both shoulders as a result fo the accident, Dr. Goldman failed to perform any range of motion testing on plaintiff's shoulders and as such her report is insufficient to show that the plaintiff did not sustain a serious injury to his shoulders (see Quintanilla v Campion, 94 AD3d 1076 [2d Dept. 2012]; Martinez v Yi Zhong Chen, 91 AD3d 834 [2d Dept. 2012]; McMillian v Naparano, 61 AD3d 943 [2d Dept. 2009]).

Thus, 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]).

In any event, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical report of plaintiff's treating orthopedist, Dr. Manouel, attesting to the fact that the plaintiff had significant limitations in range of motion of the right shoulder and left shoulder both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho,74 AD3d 1328 743 [2d Dept. 2010]).

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

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

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

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ROBERT J. MCDONALD
J.S.C.