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

ETIENNE BONNEANNEE,

Plaintiff,

- against -

JEAN J. BERNARD, MATHIAS VIEL, JOHN JAMES JOSEPH and FIONA CHAPMAN

Defendants.

- x

Index No.:31099/2009

Motion Date: 09/27/12

Motion No.: 6

Motion Seq.: 1

The following papers numbered 1 to 14 were read on this motion by defendants, JEAN J. BERNARD and MATHIAS VIEL, for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the plaintiff's complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits- Memo	1 - 6
Affirmation in Opposition-Affidavits-Exhibits	7 - 11
Reply Affirmation	12 - 14

This is a personal injury action in which the plaintiff, Etienne Bonneannee, seeks to recover damages for injuries he allegedly sustained as a result of a three vehicle accident that occurred on October 11, 2008, on the eastbound lanes of the Belt Parkway at or near the exit for Farmers Boulevard, Queens County, New York.

In his verified Bill of Particulars, the plaintiff states that as a result of the accident, he sustained, inter alia, disc herniations of the cervical spine at C3-4, C4-5, C5-6, and C6-7, as well as a tear of the labrum of the right shoulder.

The 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 JEAN J. BERNARD and MATHIAS VEIL 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. Co-defendants JOHN JAMES JOSEPH and FIONA CHAPMAN have been determined to be uninsured and are in default.

In support of the motion, defendants submit an affirmation from counsel, Bhumika P. Trivedi, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical reports of neuroradiologist, Dr. Jeffrey N. Lang; neurologist, Dr. Roy Shanon; orthopedist, Dr. Salvatore Corso; and a copy of the transcript of the plaintiff's examination before trial.

Dr. Lang reviewed the MRI studies of the plaintiff's cervical spine and right shoulder. He noted herniated discs at C3-4, C5-C6 and C6-C7. However, he stated that the changes were hypertrophic, indicating that the findings are chronic and degenerative and not secondary to an accident. With respect to the MRI of the right shoulder, his affirmed report states that the rotator cuff is intact, the glenoid labrum is intact and that the MRI of the right shoulder is normal.

Dr. Shanon, a neurologist retained by the defendant, examined plaintiff on January 19, 2012. At the time of this examination, plaintiff was 46 years old. As part of his physical examination Dr. Shanon performed objective and comparative range of motion testing. He found no limitations of range of motion of the plaintiff's cervical spine. He states that the plaintiff's diagnosis was "status post cervical sprain resolved." He concludes that the plaintiff has no evidence of a neurological disability and has no permanent injury.

Dr. Corso, an orthopedist retained by the defendants, performed an independent medical examination on December 22, 2011. At that time Dr. Corso performed range of motion testing on

the plaintiff's right shoulder and found no limitations of range of motion of the right shoulder. He states that the plaintiff has no orthopedic disability and that he may work and perform activities of daily living without restriction.

In his examination before trial, taken on October 31, 2011, plaintiff, a respiratory therapist at Kings County Hospital, stated that the accident took place on the Belt Parkway eastbound between Rockaway and Farmers Boulevard. He stated that he was proceeding in the left lane when a black Town Car coming from the middle lane hit the passenger side door of his vehicle causing his vehicle to spin out of control. He left the scene in an ambulance and was taken to the emergency room at Long Island Jewish Hospital. At that time he complained of pain to his chest, neck and right shoulder. About one week later he scheduled an appointment with an orthopedist, Dr. Butani. He continued on a course of physical therapy at Dr. Butani's office for six months. After six months his no fault insurance was terminated he stopped his treatments. He has had no further treatments for his injuries since that time. He stated that after the accident he missed one month from his job. He stated that at the present time he still has pain in his neck and right shoulder.

Defendant's counsel contends that the medical reports of Drs. Corso, Lang, and Shanon, as well as the transcript of the plaintiff's examination before trial in which he states that he returned to work one month post-accident 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, Albert Zafonte, Jr. Esq., contends that the defendants' motion is untimely because it was made more than 120 days after the filing of the plaintiff's note of issue without good cause being proffered for the delay. The note of issue was filed on February 23, 2012. Counsel argues that pursuant to CPLR 3212(a) and the directives of the Preliminary Conference Order dated April 27, 2011 the motion for summary judgment was required to be made no later than 120 days from the filing of the note of issue on February 23, 2012. Thus, the last day to make the motion would have been June 22, 2012.

Counsel argues that because the motion was filed in the County Clerk's Office on June 25, 2012, it was made three days past the deadline date. Plaintiff has not opposed the motion on the merits.

In reply, defense counsel asserts that although the motion was filed with the County Clerk on June 25, 2012, it was served on plaintiff on June 21, 2012, which was one day prior to the expiration of the 120 day time limit and is, therefore, timely made.

This court finds that the defendant's motion for summary judgment was timely. "A motion on notice is made when a notice of the motion or an order to show cause is served" (CPLR 2211; see Cruz v New York City Hous. Auth., 62 AD3d 643 [2d Dept.2009]; Kitkas v Windsor Place Corp., 49 AD3d 607 [2d Dept. 2008]; Reznikova v Levy, 48 AD3d 777 [2d Dept. 2008]; Rivera v Glen Oaks Vil. Owners, Inc., 29 AD3d 560 [2d Dept. 2006]). Further, although the return date of the defendants' motion was more than 120 days after the filing of the note of issue as was the filing date of the motion, the notice of motion was properly served on the plaintiff pursuant to CPLR 2103 (b) within the 120-day period (see Russo v Eveco Dev. Corp., 256 AD2d 566 [2d Dept. 1998]).

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]).

This Court finds that the proof submitted by the defendants, including the affirmed medical reports of Drs. Lang, Shanon and Corso and the plaintiff's examination before

trial in which he stated that he returned to work one month after the accident, were sufficient to meet defendants' 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 to the motion the plaintiff failed to provide any proof which would raise a question of fact as to whether the plaintiff sustained serious injuries which were causally related to the accident (see Choi v Guerrero, 82 AD3d 1080 [2d Dept. 2011]; Srebnick v Quinn, 75 AD3d 637[2d Dept. 2010]).

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

ORDERED, that the defendants' motion for summary judgment is granted and the plaintiff's complaint as against defendants JEAN J. BERNARD and MATHIAS VIEL is dismissed, and it is further,

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: October 1, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD, J.S.C.