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

IOSIF KALENDAREV,

Plaintiff,

- against -

LYNN V. ALLEN,

Defendant.

- x

Index No.: 7332/2011

Motion Date: 12/13/12

Motion Nos.: 53

Motion Seq.: 1

The following papers numbered 1 to 17 were read on this motion by defendant, LYNN V. ALLEN, for an order pursuant to CPLR 3212 granting the defendant summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff has not sustained 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.....8 - 14
Reply Affirmation.....15 - 17

This is a personal injury action in which plaintiff, Iosif Kalendarev, seeks to recover damages for injuries he allegedly sustained on May 18, 2009, as a result of a motor vehicle accident that occurred at or near the intersection of North Broadway and Scott Avenue in Nassau County, New York. Plaintiff alleges that at the time of the accident his vehicle was stopped at a red traffic signal when it was struck in the rear by the vehicle owned and operated by the defendant Lynne V. Allen.

Defendant now moves for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, the defendant submits an affirmation from counsel, Jill Greenfield, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of

the transcript of plaintiff's examination before trial; the unaffirmed re-evaluation report of Dr. Lester Nadel; the unaffirmed narrative report of Dr. Y. George Krementsov dated August 7, 2002 with respect to an accident of October 27, 2000; the IME report of board certified orthopedic surgeon, Dr. Robert Israel; the affirmed medical report of no fault physician Dr. Mark C. Homonoff dated July 22, 2009.

In his verified bill of particulars, the plaintiff states that as a result of the accident he sustained disc bulges at C4-5, L1-2, L2-3, L4-5 and L5-S1; disc herniations at C2-3, C5-6, C6-7, C3-4; and a partial tear of the subscapularis tendon of the left shoulder. He states that he was incapacitated for two days immediately following the date of the subject accident. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

The plaintiff was examined on March 13, 2012 by orthopedic surgeon, Dr. Robert Israel, a physician retained by the defendants. At that time the plaintiff, age 61, reported to Dr. Israel that he was the driver of a motor vehicle that was struck in the rear on May 18, 2009. He told Dr. Israel that he injured his neck, lower back and right and left knee. He reported that he was involved in a previous motor vehicle accident but denied a history of similar conditions. He stated that he still has pain in his neck, lower back and bilateral knees. Dr. Israel performed quantified and comparative range of motion tests. On examination he found no limitations of range of motion of the plaintiff’s left shoulder, cervical spine, thoracic spine, lumbar spine and right and left knees. Dr. Israel states that based upon his examination, his impression was that plaintiff sustained sprains to the cervical spine, thoracic spine, left shoulder, lumbar spine, right and left knees and that all sprains were resolved. He states that “based upon my examination from an orthopedic point of view, the plaintiff has no disability as a result of the accident of record. The plaintiff is capable of work activities and activities of daily living without restrictions.”

Defendant also submits the report of Dr. Krementsov, who examined the plaintiff on August 7, 2002 with respect to a prior accident which occurred on October 27, 2000. The report states, inter alia, that plaintiff sustained posttraumatic herniated discs at C5-6, C6-7 and L4-5 levels. The physician states that as a result of he 2000 accident the plaintiff sustained minor limitations in range of motion (5%- 9%) which were permanent in nature.

Dr. Homonoff who examined the plaintiff on July 22, 2009 at the request of the plaintiff's no-fault insurance carrier found that at that time the plaintiff was capable of resuming his full daily activity.

In his examination before trial, taken on February 16, 2012, the plaintiff testified that the impact caused him to hit his head against the headrest of his seat. From the scene of the accident he drove to his brother's house where he reported that he injured his neck and lower back. The following day he sought treatment and continued with physical therapy three or four times a week for approximately four months. He was also referred for MRIs of his back. He was told after four months that his no-fault benefits had run out. Plaintiff also testified that he had a prior accident in 2006 and "maybe another couple, I don't remember." He went for treatment after the 2006 accident but he doesn't remember where. He also recalled an accident that occurred in 1999 but he did not recall an accident he had on October 27, 2000. He states that as a result of the 2009 accident he gets headaches and he still has pain in his neck and back as a result of which he cannot sit for long periods

Defendants' counsel contends that the affirmed medical report of Dr. Israel as well as the plaintiff's deposition testimony are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system; that he has not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that the plaintiff, who was not confined to bed or home for more than one day after the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff's attorney, Michael A. Stea, Esq., submits plaintiff's initial chiropractic evaluation which took place at Queens-Brooklyn Jewish Medical Rehabilitation, P.C. during plaintiff's initial treatment on May 20, 2009. The evaluation was signed by chiropractor Albert Youssef. However, Dr. Youssef's report is without probative value since it was not presented in affidavit form or otherwise subscribed by a notary (see CPLR 2106; Casco v Cocchiola, 62 AD3d 640 [2d Dept. 2009]; Kunz v Gleeson, 9 AD3d 480 [2d Dept. 2004]; Santoro v Daniel, 276 AD2d 478 [2d Dept. 2000]). The report of acupuncturist Huaquin Chen from the Queens-Brooklyn Jewish Medical Rehabilitation, P.C.

also dated May 20, 2009 is not affirmed and therefore not in admissible form. The report of Dr. John McGee from Queens-Brooklyn Jewish Medical Rehabilitation, P.C. based upon his examination of June 8, 2009 is properly affirmed. Dr. McGee states that he examined the plaintiff on June 8, 2009, three weeks after the accident at which time the plaintiff exhibited significant restrictions of range of motion of the cervical spine, thoracic spine, lumbosacral spine, both shoulders and bilateral knees. Dr. McGee stated that his opinion was that the injuries sustained by the plaintiff were causally related to the subject accident and had completely disabled him for the present time. Dr. McGee, however, did not make reference to any of the plaintiff's prior accidents. The plaintiff also submits unaffirmed reports from radiologist, Dr. Richard Heiden in which he states that after reviewing the plaintiff's MRI studies he observed disc bulges at C4-5, L1-2, L2-3, L4-5 and L5-S1 and disc herniations at L3-4, C3-4, C2-3, C5-6 and C6-7. Dr. Heiden did not state whether any of the plaintiff's injuries were the result of the subject accident. The report of Dr. Poretskaya based upon her examination of September 17, 2009 is also unaffirmed and not in admissible form.

The plaintiff also submits a final narrative report from Dr. Nadel dated November 26, 2009 based upon his examination which was conducted six months after the plaintiff's accident. Dr. Nadel states that at that time the plaintiff still had complaints of severe neck pain, shoulder pain, middle back pain and bilateral knee pain. His examination of the cervical spine showed significant limitations of range of motion as did his examination of the plaintiff's lumbosacral spine, shoulders and knees. He states that the plaintiff was asymptomatic prior to the injuries sustained on May 18, 2009. He states that as a result of this accident the plaintiff had a total permanent restriction in cervical lumbar spines and affected extremities.

Counsel states that the plaintiff has refused to schedule a visit with his treating physician for a recent re-evaluation. Counsel contends, however, that the medical proof submitted by the plaintiff indicates that the plaintiff sustained traumatic injuries to his cervical spine and lumbar spine which are significant and causally related to the accident of May 18, 2009 and are believed to be permanent in nature. Therefore, counsel contends that in view of the conflicting medical evidence there is a question of fact for a jury as to whether the plaintiff sustained a serious accident 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]).

Here, the proof submitted by the defendants, including the affirmed medical report of Dr. Israel, as well as the plaintiff's examination before trial 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, 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 affirmed contemporaneous reports of Drs. Nadel and McGee are sufficient to provide evidence in admissible form show that soon after the accident the plaintiff sustained causally related injuries (see Perl v Meher, 18 NY3d 208 [2011]). However, plaintiff failed to provide any evidence in admissible form that the defendant had limitations of range of motion in a recent examination. Without a medical report in admissible form 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 Sham v. B&P Chimney Cleaning & Repair Co., Inc., 71 AD3d 978 [2d Dept. 2010][any projections of permanence have no probative value in the absence of a recent examination]; Harris v Ariel Transp. Corp., 55 AD3d 323[2d Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barrzey v Clarke, 27 AD3d

600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 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 AD3d 520 [2d Dept. 2005]).

In addition, Mr. Kalendarev testified that he was involved in a prior accident in which he injured his back. His treating physician did not provide evidence ruling out the prior accidents as the cause of plaintiff's limitations (see Wallace v Adam Rental Transp., Inc., 68 AD3d 857 [2d Dept. 2009]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]; Yun v. Barber,63 AD3d 1140 [2d Dept. 2009]; Penaloza v Chavez, 48 AD3d 654 [2d Dept. 2008]).

Further, 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(see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 89 ADd 929 [2d Dept. 2011]; Lewars v Transit Facility Mgt. Corp., 84 AD3d 1176 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury and for the reasons set forth above, it is hereby,

ORDERED, that the defendant’s motion for summary judgment is granted and the plaintiff’s complaint against defendant LYNNE V. ALLEN is dismissed, and it is further,

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

Dated: Long Island City, N.Y.
January 10, 2013

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ROBERT J. MCDONALD
J.S.C.