Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES
Justice IA Part 17

----------x Index No. 10126/10
DERRICK S. JAMES

Motion Date: 5/03/13

Plaintiff,

Motion Cal. No. 48

-against-

Motion Seq. No. 1

BRIAN KEIGH NAILEY and NATACHA MONDESIR,

Defendants.
----------x

The following papers numbered 1 to 7 read on this motion by defendants granting summary judgment in defendants' favor and dismissing the 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.....	1-4
Affidavit in Opposition-Exhibits.....	5-7

Upon the foregoing papers it is ordered that the motion is granted for the following reasons:

This action stems from a motor vehicle accident that occurred on April 18, 2009, in the vicinity of Rockaway Boulevard at the intersection of Brookville Boulevard, Queens, New York. Plaintiff commenced this action and alleged in his complaint that he suffered series injuries from this accident. Defendants now seek summary judgment and dismissal of the complaint. Plaintiff opposes this motion.

It is for the court in the first instance to determine whether plaintiff has established a prima facie case of sustaining a serious injury within the meaning of Insurance Law 5102 (d). *(See Licari v Elliot*, 57 NY2d 230, 237 [1982}; *Armstrong v Wolfe*, 133 AD2d 957, 958 [3rd Dept 1987]). The analysis of the meaning of serious injury has a long history beginning with *Licari v Elliott*, *supra*, and applying what could be discerned from the legislative intent, the Court of Appeals, analyzing the word "significant", wrote that "the word 'significant' as used in the statute pertaining to 'limitation of use of a body function or system' should be construed to mean something more than a minor limitation of use. We believe that a minor, mild or slight limitation of use should be classified as insignificant within the meaning of the statute" (*Licari v Elliott*, supra at 236). The Court of Appeals reiterated this analysis in *Dufel v Green*, 84 NY2d 795 (1995), wherein it wrote that the legislative intent of the "no-fault" legislation was to weed out frivolous claims and limit recovery to major or significant injuries.

To grant summary judgment it must clearly appear that no triable issue of fact is presented. *(Miceli v Purex Corp.*, 84 AD2d 562 [2d Dept 1981]). Additionally, summary judgment should be granted in cases where the plaintiff's opposition is limited to "conclusory assertions tailored to meet statutory requirements" (*Lopez v Senatore*, 65 N.Y.2d 1017). The court need not resolve issues of fact or determine matters of credibility, but must determine whether such issues exist. *(Bronson v March*, 127 AD2d 810 [2d Dept 1987]).

In support of this motion, defendants have submitted an affirmation by Marianna Godden a Neurologist and Psychiatrist who examined plaintiff on May 16, 2009 and found that plaintiff had a normal neurological examination; any complaints were unrelated to the accident and any complaints were insufficient to meet the No-Fault threshold requirement of “serious injury”.

A further medical evaluation was made by Thomas Nipper, an Orthopedic Surgeon, on May 16, 2012 who found that plaintiff did not demonstrate any clinical evidence of radiculopathy. He did find decreased ranges of motion for the cervical spine and lumbar spine such complaints were subjective. Dr. Nippen concluded in his diagnosis that he found no objective evidence of an orthopedic disability and no objective evidence of permanency.

A review of plaintiff's MRI films taken on March 14, 2009 was done on April 20, 2012 by Richard A. Heiden, a Radiologist who found that any bulging and desiccation are consistent with degenerative osteoarthritis and likely pre-existed at the time of the accident since such conditions require years to develop.

Dr. Heiden, on March 30, 2012, also reviewed plaintiff's MRI films of his lumbar spine performed on January 31, 2009, two weeks after the accident. He found that any desiccation and narrowing are consistent with degenerative osteoarthritis and are consistent with plaintiff's age and normal development.

Plaintiff's Bill of Particulars indicates that he suffered posterior herniating at T11/12, L4/5 and L5/S1 with accompanying nerve root compression on the right side nerve L4/5, Lumbar spondylosis with myelopathy, lumbar facet joint syndrome, tenderness in left side paraspinal region at L4 and L5 levels, chronic lower back pain with accompanying shooting pain down left leg, lumbar disc disorder with myelopathy and foraminal encroachment of L4/5 nerve root, posterior central disc hernations at C3/4, C4/5, C6/7 and C7T1, left sided C6 cervical radiculopathy and bilateral median sensory demyelinating entrapment neuropathies at or about level of transcarpal ligaments.

Plaintiff's deposition testimony indicates that he received Medicare and Social Security benefits since January, 2011 due to a disability from his back injury sustained in the accident. At the time of his deposition on March 5, 2012 plaintiff was not taking any medication for his neck or back. At the time of the accident plaintiff was self-employed as a satellite contractor. He started to work about one year after the accident, part-time, for about two months as a survey taker and left because of his injuries.

The Court finds that defendants have submitted proof in admissible form which establishes that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102. Consequently, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. *(see, Gaddy v Eyler*,79 NY2d 955 [1992]; *Greggs v Kurlan*, 290 AD2d 533 [2d Dept 2002]). Plaintiff must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient (*see Powell v Hurdle*, 214 AD2d 720 [2d Dept. 1995].) Further, courts have consistently held that a

plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings (*see Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]). Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff, *(Id.)* In that vein, any significant lapse of time between the cessation of the plaintiff's medical treatments after the accident and the physical examination conducted by his own expert must be adequately explained.(*Id.)* Therefore, in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law § 5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury, *(Id)*. This burden has not been met by plaintiff.

In opposition, plaintiff submitted an attorney's affirmation, his affidavit, documents from the Social Security Administration including a decision by an Administrative Law Judge granting plaintiff certain benefits, records from Jamaica Hospital with a diagnosis of back strain, copies of reports from Dr. Raj Tolat, dated January 22, 2009, a physiatrics, indicating plaintiff sustained a cervical lumbar and spine strain or sprains and rules out cervical and lumbar spine disc herniation.

A further examination was conducted by Dr. Tolat on September 17, 2009 and he now finds multiple cervical and lumbar spine disc herniations as well as radiculopathy.

A report from Stand Up MRI dated March 16, 2009 finds posterior central disc herniations C3/4, C4/5, C5/6, C6/7, C7/T1, a report from All County MRI dated January 31, 2009 finds disc herniation at T12-L1, L4/5, L5-S1 impinging on the anterior aspect of the spinal cord. The reports of Stand Up MRI and All County MRI are not signed or sworn to under oath.

Plaintiff's affidavit indicates he was treated by Dr. Raj Tolat from January 22, 2009 to September 17, 2009 and was discharged. He acknowledges the MRI exams heretofore discussed, and a medical procedure at St. John's Episcopal Hospital on July 15, 2009 and December 28, 2009.

Claims, that as a result of the accident, he was not working. When his "No Fault" benefits were terminated late summer or early fall of 2009, he could no longer obtain any medical treatment.

Plaintiff's proof of an attorney's affirmation is not admissible probative evidence on medical issues (*Armstrong v Wolfe*, 133 AD2d 957, at 958[3d Dept 1987]). Similarly, plaintiff's own deposition testimony is not admissible probative evidence on

medical issues (*Id*). The reports of Dr. Tolat are based on examinations conducted in 2009. Plaintiff has not received any medical treatment since 2009 and fails to indicate his present physical condition. Furthermore, plaintiff has submitted no expert evidence that explains the significance of the findings by defendant's radiologist regarding the degenerative nature of the disc bulges and herniations present in plaintiff's MRI images. *Ciordia v Luchian*, 54 AD3d 708[2d Dept 2008]).

Plaintiff relies upon the finding by the Social Security Administration to support his position that he sustained injuries serious enough to comply with the threshold requirements of the New York State No-Fault Law. The findings by the Social Security Administration have no probative value and are not any evidence that plaintiff's injuries qualify him to be totally disabled under the No-Fault law.

Finally, the plaintiff failed to raise a triable issue of fact as to whether their injuries prevented them from performing substantially all of his customary and usual activities during at least 90 of the first 180 days following the accident *(Id)*.

For all of the reasons set forth above, plaintiff has failed to raise an issue of fact that he suffered a "serious injury" and defendant's motion for an order of summary judgment dismissing the complaint and all counterclaims is granted.

Dated: May 31, 2013

ORIN R. KITZES, J.S.C.