Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Nana Adjei,

Plaintiff,

-against-

Peter Bassey,

Defendant.

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Index No.: 20796/11
Motion Date: 5/21/13
Motion Cal. No.: 3
Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion for an order granting defendant Peter Bassey summary judgment pursuant to CPLR §3212, dismissing the complaint and any and all cross claims against him on the basis that plaintiff did not sustain a "serious injury" under Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

The defendant moves for summary judgment pursuant to CPLR § 3212 on the grounds that plaintiff did not sustain a serious injury under Insurance Law §5102(d).

Facts

Plaintiff Nana Adjei ("Adjei") was involved in a motor vehicle accident with defendant on July 8, 2011. The Bill of Particulars alleges that as a result of the accident, plaintiff suffered the

following injuries: scarring and burns to his left hand, lumbar spinal central and right disc herniation and cervical spine herniations.

Threshold

Defendant moves for summary judgment in its favor on the ground that plaintiff did not sustain a "serious injury" within the meaning of the Insurance law. That statutory provision states, in pertinent part that a "serious injury" is defined as:

> A personal injury which results in...significant disfigurement;...permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured party from performing a substantially all of the material acts which constitute such person's customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrences of the injury or impairment.

(Insurance Law §5102 (d)).

Defendant contends that Adjei did not sustain a serious injury based on the medical report of Dr. Parisien, an Orthopedic Surgeon. The issue of whether Adjei sustained a serious injury is a matter of law to be determined in the first instance by the court. (*Licari v. Elliott*, 57 N.Y. 2d 230 [1982]; *Porcano v. Lehman*, 255 A.D. 2d 430 [2nd Dept. 1998]; *Brown v. Stark*, 205 A.D. 2d 725 [2nd Dept. 1994]). The burden is on the defendant to make a prima facia showing that plaintiff's injuries are not serious (*Toure v. Avis Rent A Car Sys.*, 98 N.Y. 2d 345 [2002]; *Sealy v. Riteway-1, Inc.*, 54 A.D. 3d 1018 [2nd Dept. 2008]; *Meyers v. Bobower Yeshiva Bnei Zion*, 20 A.D. 3d 456 [2nd Dept. 2005]). A defendant can meet his or her prima facie burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's

injuries are not serious within the meaning of Insurance Law § 5102(d). (*See Magarin v. Kropg*, 24 A.D. 3d 733 [2nd Dept. 2005]; *see also Gaddy v. Eyler,* 79 N.Y. 2d 955 [1992]; *Morris v. Edmond*, 48 A.D. 3d 432 [2nd Dept. 2008]).

Defendant met its initial burden of establishing that Adjei did not sustain a serious injury through the submissions of the affirmations from Dr. Parisien stating that he utilized a goniometer to determine that plaintiff exhibited full range of motion in his cervical and lumbar spine and bilateral wrists. (*Gonzales v. Fiallo*, 47 A.D. 3d 760 [2nd Dept 2008]). The diagnosis by Dr. Parisien was that plaintiff had post cervical and lumbar sprain or strain that has been resolved; as well as, resolved post lateral wrist sprain. (*Diaz v. Speedy Rent a Car*, 259 A.D. 2d 604 [2nd Dept. 1999]; *Barrett v. Howard*, 202 A.D. 2d 605 (2nd Dept. 1994); *Rhind v. Naylor*, 187 A.D. 2d 498 [2nd Dept. 1992]). Further, Dr. Parisien establishes there is no evidence of disability. Therefore, the moving defendant made a prima facia showing that Adjei did not sustain serious injury within the meaning of insurance law § 5102(D). Additionally, *Marshall v. Institute for Community Living* is not dispositive here, as Dr. Parisien relates his discovery of no serious injury to the period of time following the accident. 50 A.D. 3d 975 [2nd Dept. 2008]. Thus, the burden now shifts to plaintiff to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury. (*Matthews v. Cupie Transp. Corp.*, 302 A.D. 2d 566 [2nd Dept. 2003]; *see also Gaddy,* 79 N.Y. 2d 955; *Green v. Miranda*, 272 A.D. 2d 441 [2nd Dept. 2000]).

In opposition, plaintiff met his burden to defeat defendant's motion for summary judgment on the issue of serious injury. Plaintiff submits the affirmation of his treating physician, Niyati N. Trivedi, M.D. who examined Adjei 3 days after his motor vehicle accident.[1] According to Dr.

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[1] All unsworn records advanced by plaintiff will not be considered for this motion. (*Grasso v. Angerami*, 79 N.Y. 2d 813 [1991]; *Malave v. Basikov*, 45 A.D. 3d 539 [2nd Dept. 2007]; *Patterson v. N.Y. Alarm Response Corp.* 45 A.D. 3d 656

Trivedi's examination, Adjei suffered restrictions in his lumbar and cervical spine's range of motion. The plaintiff's cervical spine suffered range of motion reduction of 11% to 22% from normal and a lumbar spine range of motion reduction of 25% to 50% from normal. Upon a more recent examination on March 11, 2013, Dr. Trivedi determined the plaintiff's cervical spine suffered range of motion reduction of 11% to 21% from normal and a lumbar spine range of motion reduction of 15% to 30% from normal. Dr. Trivedi asserts, upon continued examinations and treatment, that Adjei suffers from permanent range of motion to his lumbar and cervical spine caused by the motor vehicle accident. Dr. Trivedi makes this assessment based upon objective medical testing. Therefore, the plaintiff submitted evidence raising a triable issue of fact as to whether the alleged injuries to his cervical and lumbar spine were a serious injury under the permanent consequential limitation of use or significant limitation categories of Insurance Law § 5102 (d). (*Perl v. Meher*, 18 N.Y. 3d 208 [2011]). Additionally, the plaintiff also submitted evidence raising a triable issue of fact as to whether those alleged injuries were caused by the accident. (*Id.*; *Jaramillo v. Lobo*, 32 A.D. 3d 417 [2nd Dept. 2006]).

With respect to plaintiff's claims under 90/180 category of serious injury, plaintiff's deposition precludes such claims. According to the plaintiff's own deposition testimony he did not miss any work at Costco, as a baker regularly required to lift 50lbs bags, from injuries sustained by the accident. (Plaintiff Exhibit "E" p 16). Thus, the plaintiff was not prevented from performing substantially all of the material acts which constituted his usual and customary daily actives for not less than 90 days of the first 180 days immediately following the accident. (See *Islam v. Makkar,* 95 A.D. 3d 1277 [2nd Dept. 2012]; *Jean v. Labin-Natochenny*, 77 A.D. 3d 623 [2nd Dept. 2010]). Further, the plaintiff stated that he discontinued therapy after a month because he felt good. (Plaintiff

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[2nd Dept. 2007])

Exhibit "E" p 55). Accordingly, the plaintiff failed to raise a triable issue of fact under the 90/190-day category of Insurance Law § 5102(d).

Conclusion

For the reason set forth above, defendant's motion for summary judgment pursuant to CPLR § 3131 dismissing plaintiff's claims of permanent consequential limitation of use or significant limitation categories of Insurance Law § 5102 (d) is hereby denied. Defendant's motion for summary judgment pursuant to CPLR § 3131 dismissing plaintiff's claims under 90/180 category of serious injury is hereby granted.

Dated: August 15, 2013

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Bernice D. Siegal, J. S. C.