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

CHARLES HANCOCK,

Plaintiff,

- against -

VALLEY VAN and SPORT UTILITIES, INC. and DANESHWAR NIRANJAN,

Defendants.

- x

Index No.: 2535/2012

Motion Date: 10/11/13

Motion No.: 40

Motion Seq.: 2

The following papers numbered 1 to 15 were read on this motion by defendants VALLEY VAN and SPORT UTILITIES, INC. and DANESHWAR NIRANJAN for an order pursuant to CPLR 3212 granting the defendants summary judgment and dismissing the complaint of plaintiff, CHARLES HANCOCK, on the ground that said 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 - 12
Reply Affirmation	13 - 15

This is a personal injury action in which plaintiff, CHARLES HANCOCK, seeks to recover damages for injuries he allegedly sustained on May 13, 2010, as a result of a motor vehicle accident between the vehicle operated by the plaintiff and the vehicle owned by defendant VALLEY VAN and SPORT UTILITIES, INC. and operated by defendant, DANESHWAR NIRANJAN that took place at on Jamaica Avenue at or near the intersection with the Van Wyck Expressway, Queens County, New York. Plaintiff contends that while waiting to make a left turn he was rear-ended by the vehicle operated by the defendant.

Defendants now move 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 defendants submit an affirmation from counsel, Daniel P. McCabe, Esq., a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; the affirmed medical reports of orthopedist, Dr. Isaac Cohen, and neurologist Dr. Daniel J. Feuer, and the unaffirmed reports of plaintiff's treating physician, Dr. David L. Hsu at Hollis Medical Care, P.C.

In his verified bill of particulars, the plaintiff, a supervisor for the Department of Sanitation, age 54, states that as a result of the accident he sustained, inter alia, disc bulges at C2-C3, C3-C4, C5-C6, L3-L4, L4-L5 and L5-S1, and disc herniations at C4-C5 and C6-C7. Plaintiff contends he was confined to his bed and home for approximately two months and was totally incapacitated from employment from May 13, 2010 to July 10, 2010 and partially incapacitated from employment from July 11, 2010 until the present time. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

Plaintiff was examined by defendant's retained orthopedist, Dr. Isaac Cohen. At the time of the examination he stated that he was working as a building supervisor on a full time basis. Plaintiff presented with complaints of occasional stiffness and pain radiating to the legs and feet. Upon his objective range of motion testing Dr. Cohen found that the plaintiff had certain limitations of range of motion including a 25% loss of range of motion of the cervical spine as well as loss of range of motion of the lumbosacral spine. In his discussion of the examination, Dr. Cohen states that his examination of the plaintiff was completely unremarkable. He states that the accident temporarily exacerbated his ongoing preexistant degenerative disc disease but resolution of his symptoms was documented after his treatment. He states that no evidence of functional disability is present and no evidence of sequelae related to the accident is documented. He states that "the soft tissue complaints resolved uneventfully with the passage of time without any permanency present."

On May 10, 2013, plaintiff underwent an independent neurological examination performed by Dr. Daniel J. Feuer. The plaintiff stated to Dr. Feuer that he feels somewhat better although he still gets stiffness in his neck and back. He also told Dr. Feuer that he was involved in a prior motor vehicle accident ten years ago in which he sustained injuries to the neck

and back. Dr. Feur conducted range of motion testing using a goniometer and found normal range of motion of the cervical spine however he found a 25% limitation of range of motion of the lumbar spine. He states that "range of motion was restricted secondary to body habitus." The plaintiff was reported to be 6'1" tall and weighing 302 pounds. The doctor's impression was that "there are no clinical findings to support a diagnosis of focal radiculopathy of either the cervical or lumbar spine." His conclusion was that the neurological examination was normal. He states that in his opinion the plaintiff does not demonstrate any objective neurological disability or neurological permanency. He is neurologically stable to engage in full active employment as a supervisor, as well as the full activities of daily living including driving his car without restriction.

In his examination before trial taken on January 22, 2013, plaintiff stated that he is employed by the City of New York, Department of Sanitation. He presently works full time as a supervisor. He states that as a result of the accident of May 13, 2012 he missed over two months from work, returning in July 2010 in a limited capacity. He worked in a reduced capacity for three months. On the date of the accident he was traveling on Jamaica Avenue waiting to make a left turn onto the service road of the Van Wyck Expressway when his vehicle was struck in the rear with a heavy impact by the vehicle being operated by the defendant, Daneshwar Niranjan. He left the scene in an ambulance and was transported to the emergency room at Jamaica Hospital. He was treated in the emergency room for pain to his back and neck and released the same day. The following day he began physical therapy and chiropractic treatment with Dr. Hsu at Hollis Medical Care for pain in his neck and back. He treated with Dr. Hsu for approximately four months before he stopped his treatments. He stated that he was confined to his home as a result of the injuries for approximately three months following the accident. He stated that he stopped his treatments because he felt better from the therapy. Plaintiff also testified that he was involved in a prior motor vehicle accident prior to 2006 where he injured his back but he had no symptoms from that accident when this accident occurred in 2012. He states that he still has occasional back discomfort as a result of the subject accident.

Defendant's counsel contends that the affirmed medical reports of Drs. Feuer and Cohen are sufficient to establish, prima facie, that the plaintiff has not sustained a fracture, 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

returned to work less than three months after he 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, Stuart Sears, Esq., submits the affirmed radiological report of Dr. Steven Winter stating that he reviewed the plaintiff's MRI and found that the plaintiff sustained posterior bulges of the cervical spine at C2-3, C3-4, C5-6 and lumbar spine at L4-5, L3-4 and disc herniations of the cervical spine at C4-5.

Plaintiff also submits the affirmed medical report of Dr. Latortue stating that he evaluated the plaintiff on August 8, 2013 and found significant loss of range of motion of the plaintiff's cervical and lumbar spines which he states is causally related to the subject accident.

The plaintiff also submitted an affidavit of merit from the plaintiff, dated May 30, 2013, stating that he was incapacitated from work for two months following the accident. He states that he still has problems with his daily activities and pain in his neck and lower back. He also stated that he was involved in a prior accident in which he sustained injuries to his neck and back. However, he states that after a few months he did not have any residual pain or discomfort related to the prior accident.

The records submitted from Hollis Medical Care and Dr. Hsu are not affirmed or certified and thus not admissible for purposes of the instant motion for summary judgment.

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 defendant's 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 defendants failed to meet their prima facie burden of showing 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]). Defendants failed to establish, prima facie, that plaintiff did not sustain a serious injury under the permanent loss of use, permanent consequential limitation of use or significant limitation of use categories as a result of the accident (see Insurance Law § 5102 [d]).

As stated above, in their affirmed medical reports, both Dr. Feuer and Dr. Cohen stated that upon examination of the plaintiff's lumbar spine and cervical spine, plaintiff exhibited significant range of motion limitations. Despite these objective findings, the defendant's physicians concluded that th respective physical examinations did not reveal objective evidence of a disability. In addition, despite the 25% limitation of range of motion neither doctor explained or substantiated, with any objective medical evidence, the basis for their conclusions that plaintiff had fully recovered, had no disability and the examinations were normal. Therefore, Dr. Feuer's's and Dr. Cohen's's reports are insufficient to eliminate all triable issues of fact (see Raguso v Ubriaco, 97 AD3d 560 [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]). Dr. Cohens's and Dr. Feuer's findings alone raise an issue of fact as to whether the plaintiff suffered a significant limitation of use of a body function or system (see Williams v Fava Cab Corp., 90 AD3d 912 [2d Dept. 2011]; Iannello v Vazquez, 78 AD3d 1121 [2d Dept. 2010]; Granovskiy v Zarbaliyev, 78 AD3d 656 [2d Dept.2010]; Britt v Bustamante, 77 AD3d 781[2d Dept. 2010]).

As the defendants failed to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition are sufficient to raise a triable issue 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]; Held v Heideman, 63 AD3d 1105 [2d Dept. 2009]; Landman v Sarcona, 63 AD3d 690 [2d Dept. 2009]; Alam v Karim, 61 AD3d 904 [2d Dept. 2009]; Liautaud v Joseph, 59 AD3d 394 [2d Dept. 2009]).

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

ORDERED, that the defendants' motion for an order dismissing the plaintiff's complaint is denied.

Dated: October 22, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.