Solomon v Boodram
2013 NY Slip Op 33107(U)
November 21, 2013
Supreme Court, Queens County
Docket Number: 24941/11
Judge: Bernice D. Siegal

Short Form Order

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

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Anthony Solomon,

Plaintiff,

-against-

Jagram Boodram and Rajendra Permaul,

Defendants.

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Index No.: 24941/11
Motion Date: 8/8/13
Motion Cal. No.: 104
Motion Seq. No.: 3

The following papers numbered 1 to 12 read on this motion for an order granting defendants Jagram Boodram and Rajendra Permaul summary judgment pursuant to CPLR §3212, dismissing the complaint and any and all cross claims against her 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:

Facts

The defendants Jagram Boodram and Rajendra Permaul (collectively "Defendants) move for summary judgment pursuant to §3212, dismissing the complaint and all cross claims against them on the basis that the plaintiff Anthony Solomon (the "Plaintiff") did not sustain a serious injury as defined under Insurance Law §5102(d). This case arises as a result of a motor vehicle accident between the plaintiff and the defendants that occurred on April 14, 2010. The Bill of

Particulars alleges that as a result of the accident, the plaintiff suffered injury to lumbar and cervical spine.

Analysis

Defendants' motion for summary judgment pursuant to CPLR §3212 dismissing plaintiff's cause of action is partially denied and partially granted as more fully set forth below.

Threshold

Defendants move for summary judgment in their favor on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance law §5102(d). This statutory provision defines a "serious injury" as:

> A personal injury which results in…significant disfigurement; permanent consequential limitation of use of a body or 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 substantially all of the material acts which prevents the injured party from performing substantially all of the material acts which constitute such person's 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. (Insurance Law §5102(d).)

Defendants contend that plaintiff did not sustain a serious injury based on the medical report Affirmation of Dr. Alan Zimmerman, an orthopedic surgeon, plaintiff's Bill of Particulars and plaintiff's deposition testimony transcript. The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. (*Licari v. Elliot*, 57 N.Y.2d 230, 441 N.E.2d 1088 [1982]; *Zecca v. Ricardelli*, 293 A.D.2d 31, 742 N.Y.S.2d 76 [2nd Dept 2002]; *Charles v. U.S. Fleet Leasing*, 140 A.D.2d 481, 528 N.Y.S.2d 593 [2nd Dept 1988].) In moving for summary judgment, the defendant has the burden to demonstrate a prima facie showing that the plaintiff's alleged injuries are not serious within the meaning of No-Fault Insurance Law. (*Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, N.E.2d 1197 [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].) The defendants can meet their burden by submitting the affirmations or affidavits of medical experts where it is determined, through their objective medical testing, that the plaintiff's injuries are not serious. (*Magarin v. Kropf*, 24 A.D.3d 733 [2nd Dept 2005]; *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 [1992]; *Morris v Edmond*, 48 A.D.3d 432 [2nd Dept 2008].) After establishing entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence, in admissible form, that will demonstrate a genuine dispute of the material facts and will require trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980].)

In submitting Dr. Zimmerman's medical report, defendants meet their initial burden in establishing that the plaintiff did not sustain a serious injury to his cervical and lumbar spine. During his examination of plaintiff, using a goniometer, Dr. Zimmerman tested plaintiff's cervical and lumbar range of motion. Dr. Zimmerman determined that plaintiff's range of motion were within the

normal limits and that there was no disability as result of the accident. The report further disputed the existence of a cervical and lumbar disc herniation or radiculopathy. Once the defendants demonstrated that they were entitled to summary judgment the burden then shifted to plaintiff to demonstrate that he had sustained a serious injury and that there remains a triable issue of facts. (*See Napoli v Cunningham*, 273 AD2d 366 [2nd Dept 2000]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept 2000].)

To defeat a motion for summary judgment, the court requires objective, not subjective, evidence of a plaintiff's injury in order to satisfy the serious injury threshold. (*Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, N.E.2d 1197 [2002]; see also *Georgia v. Ramautar*, 180 A.D.2d 713, 579 N.Y.S.2d 743 [2nd Dept 1992].) In his opposition motion, the plaintiff submitted affirmed medical reports from his chiropractor Dr. Ernest Buberman, his treating physician Dr. Lester Nadel, Dr. Ayoob Khodadadi, a radiologist, and Dr. Lyudmila Poretskaya, a neurologist.

Dr. Lester Nadel, who treated the Plaintiff on April 21, 2010, one week after the accident, declared that the plaintiff had restricted range of motion of his cervical and lumbar spine. According to results, the plaintiff's cervical spine had suffered a range of motion reduction of 33% to 50% from normal and a lumbar spine range of motion reduction of 43% to 50% from normal.

In the most recent examination dated May 21, 2013, Dr. Buberman evaluated the plaintiff's range of motion using a goniometer and determined that, more than three years after the accident, the plaintiff continued to show a range of motion limitation of 25% to 45% from normal in his cervical spine and 10% to 40% from normal range of motion limitation in his lumbar spine. Although Dr. Buberman's affidavit failed to set forth the various range of motion

findings, he incorporated by reference various office notes that set forth range of motion findings. (*e.g. Thomas v. NYLL Management LTD.*, 110 A.D.3d 613 [1st Dept 2013]; *Cotto v. JND Concrete & Brick, Inc.*, 41 A.D.3d 415 [2nd Dept 2007]; *Heath v. Allerton*, 279 A.D.2d 872 [3rd Dept 2001].) Additionally, Dr. Buberman reviewed the MRI and the NCV/EMG reports and medical records created by Doctors Nadel and Poretskaya, and determined that the plaintiff's injuries are permanent in nature and were causally related to the accident of April 14, 2010. Although in plaintiff's deposition, he attributes his gap in treatment to the fact that the medical center "moved," we find that Dr. Buberman's explanation that plaintiff had "reached maximum medical improvement" and that "further treatment would have been palliative in nature" adequately explains the significant gap between plaintiff's last treatment and when he was last examined. (*Pommels v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 [2005].

We agree that the unsworn hospital reports are inadmissible since to defeat a summary judgment motion the opponent must make "a showing by producing evidentiary proof in admissible form", unless he or she demonstrates an "acceptable excuse for [the] failure to meet the strict requirement of tender in admissible form." (*Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 [2nd Dept 1992] citing *Zuckerman v. City of New York*, 49 NY2d 557 [1980].)

However, the plaintiff's contemporaneous MRI and NCV/EMG reports coupled with Dr. Buberman's objective evaluation successfully raise a triable issue of fact as to whether the alleged injuries to his cervical and lumbar spine are a "serious injury" under the permanent consequential limitation of use or significant limitation categories of Insurance Law § 5102 (d). (*Harris v. Boudart*, 70 A.D.3d 643, 893 N.Y.S.2d 631 [2nd Dept 2010]; *Fraser-Baptise v. New*

York City Transit Authority, 81 A.D.3d 878, 917 N.Y.S.2d 670 [2nd Dept 2011].) Therefore, this portion of defendant's summary judgment motion is denied.

With respect to the plaintiff's argument that the defendants did not demonstrate prima facie entitlement to judgment on the "90/180-day" category, we disagree with their conclusions. In his deposition, the plaintiff testifies that he was only confined to his home for "about two months" after the accident. This evidence does not sufficiently raise an issue of fact as to whether the plaintiff's injuries prevented him from "performing substantially all" of the material acts constituting his customary daily activities during the at least 90 out of the first 180 days following the accident." (*Richards v. Tyson*, 64 A.D.3d 760, 883 N.Y.S.2d 575 [2nd Dept 2009]; *Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.*, 48 A.D.3d 664, 852 N.Y.S.2d 287 [2nd Dept 2008]; *Letellier v. Walker*, 222 A.D.2d 658, 635 N.Y.S.2d 682 [2nd Dept 1995].) Therefore, it became the plaintiff's burden to rebut defendant's prima facie entitlement to summary judgment and bring forth admissible medical proof that he sustained a "medically determined injury of a non-permanent nature" which prevented him from performing his usual and customary activities for 90 out of the 180 days. (*Sorto v. Morales*, 55 A.D.3d 718, 868 N.Y.S.2d 67 [2nd Dept 2008].) Accordingly, the plaintiff failed to raise a triable issue of fact under the "90/180-day" category of Insurance Law § 5102(d).

Conclusion

For the reason set forth above, defendants' motion for summary judgment pursuant to CPLR § 3212 dismissing plaintiff's claims for permanent consequential limitation of use or significant limitation categories of Insurance Law § 5102 (d) is denied. However, defendant's

motion for summary judgment pursuant to CPLR § 3212 dismissing plaintiff's claims under "90/180-day" category of serious injury is hereby granted.

Dated: November 21, 2013

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Bernice D. Siegal, J. S. C.