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

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VIXAMAR CARRE — Index No.: 6934/2012

Plaintiff, — Motion Date: 01/09/14

- against - — Motion Nos.: 29 and 30

LAURA L. BRUDECKI and ROBERT F. KELLEHER, — Motion Seq Nos.: 4 and 5

Defendants.

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The following papers numbered 1 to 20 were read on the two respective motions, one by defendant LAURA BRUDECKI (Seq. 4), and the second by defendant, ROBERT F. KELLEHER (Seq. 5), for an order pursuant to CPLR 3212 granting the defendants summary judgment and dismissing the complaint of plaintiff, VIXAMAR CARRE, on the ground that said plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Brudecki Notice of Motion-Affidavits-Exhibits.....1 - 7
Kelleher Notice of Motion-Affidavits-Exhibits.....8 - 12
Plaintiff's Affirmation in Opposition.....13 - 16
Brudecki Reply Affirmation.....17 - 18
Kelleher Reply Affirmation.....19 - 20

This is a personal injury action in which plaintiff, VIXAMAR CARRE, seeks to recover damages for injuries he allegedly sustained on July 1, 2011, at approximately 10:40 p.m., as the result of a motor vehicle accident which took place at the intersection of Meachem Avenue and N Street in Nassau County, New York. It is alleged that the defendant was making a left turn from the southbound lane of Meacham Avenue onto N Street when it was struck in the intersection by the vehicle operated by defendant Kelleher. Immediately thereafter, the plaintiff's

vehicle sustained a second impact from the rear by the vehicle operated by defendant Laura L. Brudecki. Plaintiff alleges that as a result of the accident he sustained, inter alia, herniated and bulging discs of the cervical and lumbar spines.

Plaintiff commenced the instant action by filing a summons and complaint on April 2, 2012. Plaintiff filed a Note of Issue on August 2, 2013 and the matter is presently scheduled for trial in the Trial Scheduling Part on March 10, 2014.

Defendants Laura L. Brudecki and Robert F. Kelleher, now move for an order pursuant to CPLR 3212, dismissing the complaint of plaintiff, Vixamar Carre, 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, defendants submit a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; and a copy of the affirmed medical reports of orthopedic surgeon, Dr. Joseph Y. Margulies and radiologist, Dr. Peter Ross.

In his verified bill of particulars, the plaintiff, age 21, states that as a result of the accident, he sustained inter alia, disc herniations of the cervical spine at C3-C4; and bulging discs at C4-C5, C5-C6, C6-C7, L4-L5, and L5-S1. The plaintiff contends that he sustained a serious injury as defined in Insurance Law §5102(d).

Plaintiff, Vixamar Carre, was deposed on June 14, 2013. He stated that he is a full-time student at York College majoring in occupational therapy. He stated that on July 1, 2011, he was operating his friend’s vehicle when he was involved in an accident in Elmont, New York, at the intersection of Meacham Avenue and N Street. He was proceeding south on Meacham with five passengers in the vehicle and entered the intersection intending to turn left onto N Street. He states there was a silver Jeep proceeding northbound on Meacham as well as another car behind him. He states he does not know “who hit who first.” His vehicle sustained damage from one impact to the driver’s side and damage to the rear when it was struck from behind in a second impact. He testified that he bumped his head on the steering wheel. When asked at the scene if he needed medical attention he stated no and one of his friends drove him home. He stated that a day or two after the accident he sought medical treatment with a physician in Valley Stream. Subsequently, he began a course of physical therapy for treatment for pain to his upper back and head which lasted three or four months. He stated that he stopped

physical therapy because he had to return to college when the next semester began. He stated that as a result of the accident there is nothing he can no longer do at all but he does have trouble with his daily activities and still experiences pain in his neck and back. He testified that as a result of the accident he was confined to his bed for two or three weeks post-accident and not confined to his house for any period of time. He began the fall semester of college two months after the accident and did not miss any school as a result fo the accident.

The plaintiff was seen for an independent medical evaluation on July 16, 2013 by orthopedic surgeon, Dr. Joseph Y. Margulies, a physician retained by the defendants. The plaintiff reported to Dr. Margulies that as a result of the accident he injured his neck, back, and right shoulder. Dr. Margulies tested the plaintiff's range of motion using an orthopedic goniometer and found that the plaintiff had no limitations of range of motion of the cervical spine, lumbar spine, thoracic spine, lumbosacral spine and bilateral shoulders. Dr. Margulies states that based upon his examination there are no residual objective orthopedic findings and no functional disabilities resulting from the motor vehicle accident of July 1, 2011.

Radiologist, Dr. Ross states that his review of the plaintiff's MRI studies indicates that all of the changes to the cervical spine are degenerative or chronic in nature and pre-existing to the subject accident.

Defendants' counsel contends that the affirmed medical reports of Dr. Margulies and Ross are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system and 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 his bed or home for more than two weeks

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, Craig A. Ginsberg, Esq. submits his own affirmation as well as the affidavit of plaintiff Vixamar Carre and the affirmed medical affirmations of Drs. Kim and radiologist Dr. Bonheim.

Dr. Paul Bonheim states his review of the plaintiff's cervical MRI indicates a disc herniation at C3-C4 and disc bulging at C4-5, C5-6 and C6-C7. His review of the MRI of the lumbar spine indicates disc bulging at L4-L5 and L5-S1. Dr. Bonheim does not note any causal relationship between the plaintiff's injuries and the accident of July 1, 2011.

Dr. Kim first examined the plaintiff on March 27, 2013, 21 months after the accident. Dr. Kim's range of motion testing at that time showed significant loss of range of motion of the cervical spine and lumbar spine. Dr. Kim states that based upon his examination, the plaintiff's injuries and loss of range of motion were causally related to the motor vehicle accident of July 1, 2011. He re-examined the plaintiff on October 17, 2013 and found that plaintiff still exhibited loss of range of motion of the cervical and lumbar spines. He states that based upon his examination, his opinion is that the injuries are significant and permanent in nature and that the plaintiff is partially disabled as a result of the injuries sustained in 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 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 competent proof submitted by the defendants, including the affirmed medical reports of Drs. Margulies and Ross, as well as the plaintiff's deposition testimony, in which

he stated that he was not confined to his home after the accident and returned to school two months after the accident, are sufficient to meet defendants' 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, the plaintiff failed to raise a question of fact. Although Dr. Kim found that the plaintiff had limited range of motion of the cervical and lumbar spines in March 2013 and October 2013, the plaintiff did not submit competent objective medical evidence that revealed any treatment or the existence of an injury to plaintiff's neck or back that was contemporaneous with the subject accident. Although a quantitative assessment or numerical assessment of range of motion of injury is not required on an initial or contemporaneous examination, the courts still require a contemporaneous qualitative assessment of injuries from an examination close to the time of the accident. As stated in Perl v Meher, 18 NY3d 208[2011], "a contemporaneous doctor's report is important to proof of causation." The absence of a contemporaneous medical report invites speculation as to causation (see Griffiths v Munoz, 98 AD3d 997 [2d Dept. 2012]). As stated by the Appellate Division, First Judicial Department, "while the Court of Appeals in Perl rejected a rule that would make contemporaneous quantitative assessments a prerequisite to recovery...Perl did not abrogate the need for at least a qualitative assessment of injuries son after the accident (see Rosa v Mejia, 95 AD3d 402 [1st Dept. 2012]). Thus, Perl "confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question" [Rosa v Mejia, supra]).

Although the plaintiff's counsel refers to contemporaneous reports of Dr. Ahmed and Dr. Karakizis in his affirmation in opposition to the motion, the reports of said examining physicians are not annexed as exhibits to either one of the plaintiff's affirmations in opposition.

Here, the accident occurred in July, 2011 and the plaintiff testified that he received treatment following the accident however, the plaintiff did not submit any competent medical evidence regarding the extent of his injuries until his examination by Dr. Kim almost two years after the accident. Therefore, this Court does not have before it evidence of contemporaneous treatment resulting from the plaintiff's

accident. Dr. Kim's affirmation describing the plaintiff's medical condition in 2013 is insufficient in and of itself to raise a triable issue of fact as to whether plaintiff's alleged injuries existed for a sufficient period of time to constitute a serious injury under the limitations of use categories of the Insurance Law. Thus, the plaintiff's opposition papers do not raise a triable issue of fact as to whether he sustained a serious injury under the permanent consequential limitation of use or the significant limitation of use category of Insurance Law § 5102 (d) (see Taylor v Flaherty, 65 AD3d 1328 [2d Dept. 2009]; Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept. 2008]).

With respect to the 90/180 day category, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained in the subject accident rendered him unable to perform substantially all of his usual and customary daily activities for not less than 90 days of the first 180 days following the subject accident (see Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]). In this regard, the plaintiff admitted at his deposition that he was not confined to his bed or home for more than three weeks immediately following the accident and he returned to college on a full time basis in September following the July accident(see Bleszcz v Hiscock, 69 AD3d 890 [2d Dept. 2010]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that the respective motions by defendants, LAURA L. BRUDECKI and ROBERT F. KELLEHER, for summary judgment are granted and the complaint of plaintiff VIXAMAR CARRE is dismissed as against each defendant.

Dated: January 27, 2014
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.