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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 22

Index Number : 102221/2011
ANDRUS, DERRICK
vs
UZHCA-ALVEAR, C.S.
Sequence Number : 002
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

summary judgment
serious injury

The following papers, numbered 1 to 5, were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1
Answering Affidavits — Exhibits No(s). 2
Replying Affidavits — Dr. Gordon No(s). 3, 4, 5
Pl's medical
Pl's reply to Dr. Gordon's records
Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

JUN 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/26/14

HON. ARLENE P. BLUTH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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DERRICK ANDRUS,

Plaintiff,

Index No. 102221/11

- against-

C.S. UZHCA-ALVEAR

Defendant.

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ARLENE P. BLUTH, J.:

The defendant C.S. Uzhca-Alvear moves, pursuant to CPLR 3212, for an order dismissing the complaint on the ground that the injuries claimed by the plaintiff Derrick Andrus fail to satisfy the serious injury threshold requirement of Insurance Law § 5102 (d). The motion is denied.

This is an action to recover damages for personal injuries suffered by plaintiff in a motor vehicle collision which occurred on October 2, 2009. Plaintiff was a passenger in a van which collided at an intersection with defendant's taxi.

To prevail on a motion for summary judgment defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396, 396 [1st Dept 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v*

Catanzaro, 1 AD3d 195, 197 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, "defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident" (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). Once the defendant meets his initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he sustained a serious injury (see *Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a qualitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

In the verified bill of particulars (exhibit C to moving papers, ¶ 10), plaintiff claims a disc herniation at C3-C4, C5-C6, and C6-C7, and a disc bulge at C4-5. Plaintiff also claims impingement syndrome of the right shoulder, reduced range of motion, headaches, and pain. Plaintiff also makes a 90/180 claim (exhibit C to moving papers, ¶ 25). Finally, plaintiff claims that he had no symptoms prior to the accident, and that he suffers from pain in his neck, back and shoulder, such that he is permanently unable to continue working as a construction laborer. For the first week after his accident on October 2, 2009, plaintiff attempted to return to work as a laborer. Plaintiff found that he

was unable to continue working, and was told by his physician Dr. Gordon, that he was disabled. Plaintiff did not work until May 2011, when he found work as a home health aide. Plaintiff was under treatment the whole time, and remains under treatment to the present date.

Preliminarily, the Court notes that plaintiff's attorneys were unable to obtain the affirmation of Dr. Gordon, plaintiff's treating doctor, in time to oppose the motion. Rather, they opposed the motion with a plethora of his records, none of which were admissible without his affirmation. In the opposition, the attorneys made clear that they were using their best efforts to obtain his affirmation, but of course he was not under the plaintiff's control. Plaintiff was finally able to obtain Dr. Gordon's affirmation very shortly after this motion was submitted in the motion submission part and before it came up for oral argument. Because, despite the best efforts of plaintiff's attorneys, they could not get the affirmation until they ultimately did, the Court allowed the late submission and allowed defendant the opportunity to submit another reply so Dr. Gordon's affirmation could be addressed. It would simply be unfair to plaintiff to dismiss his case just because his treating doctor had other priorities (such as sick patients) rather than preventing plaintiff's lawsuit from being dismissed. Because here it is possible for the motion to be determined on the merits, with Dr. Gordon's affirmation, it should be.

There is no question that, since the date of the accident, plaintiff has never returned to his job as a construction laborer. In the original moving papers, defendant

states that plaintiff has no 90/180 claim because there is no proof that any doctor told him to stay out of work. In the original opposition, Dr. Gordon's records showed that Dr. Gordon rendered plaintiff disabled from working for more than the required 90/180 days after the accident, but of course Dr. Gordon himself did not say it in an affirmation. He did, however, say it in his finally-obtained affirmation. And in defendant's sur-reply to that affirmation, defendant completely ignored the 90/180 claim.

Plaintiff, through the affirmation of Dr. Gordon, has established that Dr. Gordon rendered plaintiff disabled from his work due to his injuries from this accident. Therefore, plaintiff has shown a medically-determined injury which prevented him from his usual daily activities for at least 90/180 days after the accident. Accordingly, plaintiff has raised a triable issue of fact as to the 90/180 serious injury category and the motion is denied.

ORDERED that defendant's motion for summary judgment is denied.

This is the decision and order of the Court.

Dated: New York, New York
June 26, 2014

ENTER:

J.S.C.

HON. ARLENE P. BLUTH