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

NORUTAN H. POORUN,

Plaintiff,

- against -

DECOSA ENTERPRISES, INC. and DANIEL Y. HEILPERN,

Defendants.

- x

Index No.: 700929/2013

Motion Date: 09/15/14

Motion No.: 112

Motion Seq.: 2

The following papers numbered 1 to 12 were read on this motion by plaintiff, for an order pursuant to CPLR 2221(a) granting leave to renew the prior order of this court, dated July 10, 2014, which granted the motion of defendants, Decosa Enterprises, Inc. and Daniel Y. Heilpern, for summary judgment and dismissed the plaintiff's complaint on the ground that plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 8
Affirmation in Opposition-Affidavits-Exhibits	9 - 10
Reply Affirmation	11 - 12

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is a personal injury action stemming from a motor vehicle accident which took place on September 10, 2012, as a result of a motor vehicle accident that took place on Rockaway Boulevard at or near the intersection with Guy R. Brewer Boulevard, Queens County, New York.

Defendants, Decosa Enterprises, Inc. and Daniel Y. Heilpern, moved for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

By decision dated July 10, 2014, this Court held that the proof submitted by the defendant, including the affirmed medical reports of Drs. Desrouleaux, Springer, and Haydock, and the deposition testimony of the plaintiff were sufficient for defendant to meet its 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]).

This Court also held that in opposition, the plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 006]). This Court found that although the plaintiff submitted unaffirmed treatment records of the examination performed by Dr. Kanter one week following the plaintiff's accident, the unaffirmed reports of Dr. Kanter were not admissible and the plaintiff did not submit any other competent medical evidence in admissible form regarding the extent of his injuries from September 2012 through June 2013 when he was first examined personally by Dr. Narkhede. This Court found that the plaintiff failed to provide sufficient admissible evidence of the existence of a significant limitation in his cervical and/or lumbar spine that was contemporaneous with the subject accident.

In support of the motion to reargue, plaintiff's counsel submits and affirmation stating that by inadvertent omission plaintiff failed to include the Certified Hospital Chart of North Shore Long Island Jewish Medical Center and the sworn Affirmation of Dr. Miriam Kanter which detailed plaintiff's contemporaneous treatment nine days following the motor vehicle accident of September 10, 2012. Counsel asserts that the inadvertent omission of a sworn affirmation is a reasonable excuse to justify considering the newly submitted documents (citing Hayden v Gordon, 91 AD3d 819 [2d Dept. 2013]; Brightly v Dong Liu, 77 AD3d 874 [2d Dept. 2010]; Acosta v Rubin, 2 AD3d 657 [2d Dept. 2003]).

The certified records from the plaintiff's emergency room admission at Long Island Jewish Hospital on September 10, 2012 indicate that the plaintiff complained of chest and neck pain as a result of a motor vehicle accident that occurred that afternoon.

Dr. Kanter states in her affirmed report dated July 18, 2014, that she first examined the plaintiff on September 19, 2012 for injuries allegedly sustained in the motor vehicle accident of September 10, 2012. At that time the plaintiff made complaints of severe neck and back pain and pain radiating down his right shoulder. Upon examination, Dr. Kanter states that the plaintiff showed significant limitations of range of motion of the cervical and lumbar spines. At that time she placed the plaintiff on a plan for physical therapy. She continued to examine and treat the plaintiff on a monthly basis through May 13, 2013. Based on her examination of the plaintiff, Dr. Kanter concludes that the plaintiff sustained a disc bulge at the C3-C4 level and disc bulges at the L1-2 through L5-S1 levels and that the subject accident was the sole competent producing cause of the plaintiff's injuries.

In opposition, defendant argues that the motion to renew is only appropriate when based upon facts not known at the time of the original motion. Counsel asserts that plaintiff fails to offer a reasonable justification for failing to submit an affirmation of Dr. Kanter until after the court rendered its decision. Moreover, the defendants argue that the motion is not based upon new facts which were not known to the plaintiff at the time of the original motion.

Upon review and consideration of the plaintiff's motion to renew, defendant's affirmation in opposition, and the plaintiff's reply thereto, this court finds that the motion to renew is granted and upon reewal the initial decision of this court dated July 10, 2014 and entered on July 16, 2014 is vacated and the defendant's motion for summary judgment on the issue of serious injury is denied.

As stated above, the proof submitted by the defendant, was sufficient for defendant to meet its 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. However, based upon the affirmed report of Dr. Kanter stating that she initially treated the plaintiff on September 19, 2010, nine days after the accident, as well as the affirmed reports of Dr. Nitin Narkhede; the affirmation of orthopedic surgeon, Dr. Andrew Merola; and the affirmation of radiologist, Dr. John Himmelfarb, this court finds that the plaintiff has raised triable issues of fact by submitting evidence attesting to the fact that the plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and resulted from trauma

causally related to the accident (see Dixon v Fuller, 79 AD3d 94 [2d Dept. 2010]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury of his cervical and lumbosacral spine under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

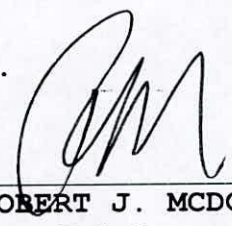
The Courts have consistently held that where there is an inadvertent omission and a showing of lack of prejudice to the defendant, the court may accept facts which were known at the time of the original motion (see Joseph v Board of Educ. of the City of New York, 91 AD3d 528 [1st Dept. 2012]; Brightly v Dong Liu, 77 AD3d 874 [2d Dept. 2010]; Wilder v May Dep't Stores Co., 23 AD3d 646 [2d Dept. 2005]; Acosta v Rubin, 2 AD3d 657 [2d Dept. 2003]). Telep v Republic Elevator Corp., 267 AD2d 57 [1st Det. 1999][a court has broad discretion to grant renewal even where the newly submitted facts were known at the time of the original motion, provided that the movant has a reasonable excuse for failing to submit the material originally]). The failure to provide an affirmed report from Dr. Kanter was inadvertent and defendant was not prejudiced having previously been provided with all of Dr. Kanter's records with respect to her treatment of the plaintiff.

Accordingly, based upon the foregoing, it is hereby,

ORDERED, that plaintiff's motion for an order granting renewal is granted and upon renewal the prior order of this Court dated July 10, 2014 and entered on July 16, 2014 is vacated and defendant's motion to dismiss the plaintiff's complaint is denied, and it is further,

ORDERED, that upon service of a copy of this order upon the Clerk in Room 140 in the Queens Supreme Court in Jamaica, the Clerk of Court shall restore this matter to the trial calendar.

Dated: November 13, 2014
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.