

Poorun v Decosa Enter., Inc.
2014 NY Slip Op 33343(U)
July 10, 2014
Supreme Court, Queens County
Docket Number: 700929/2013
Judge: Robert J. McDonald
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ORIGINAL

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

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NORUTAN H. POORUN,

Index No.: 700929/2013

Plaintiff,

Motion Date: 06/05/14

- against -

Motion No.: 126

DECOSA ENTERPRISES, INC., and
DANIEL Y. HEILPERN,

Motion Seq.: 1

Defendants.

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The following papers numbered 1 to 15 were read on this motion by defendants, DECOSA ENTERPRISES, INC., and DANIEL Y. HEILPERN, for an order pursuant to CPLR 3212 granting the defendant summary judgment and dismissing the complaint of plaintiff, NORUTAN H. POORUN, on the ground that the plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....	1 - 7
Affirmation in Opposition-Affidavits.....	8 - 12
Reply Affirmation.....	13 - 15

This is a personal injury action in which Plaintiff, NORUTAN H. POORUN, seeks to recover damages for personal injuries he allegedly sustained 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.

The plaintiff commenced this action by filing a summons and complaint on March 18, 2013. Issue was joined by service of defendant's verified answer dated April 19, 2013. Plaintiff filed a Note of Issue on February 11, 2014. The matter is presently on the calendar of the Trial Scheduling Part on August 21, 2014.

FILED
JUL 16 2014
COUNTY CLERK
QUEENS COUNTY

Defendant now moves 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 defendant submits an affirmation from counsel, Cynthia Hung, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial; and the affirmed medical reports of board certified neurologist, Dr. Jean-Robert Desrouleaux; radiologist, Dr. Scott Springer; and the affirmed report of Dr. Timothy G. Haydock, board certified in emergency medicine.

In his verified bill of particulars, the plaintiff states that as a result of the accident he sustained, inter alia, a posterior disc bulge at the C3-C4 level encroaching on the thecal sac; and posterior disc bulges at L1-L2 through L5-S1 levels. The plaintiff contends that he sustained a serious injury as defined in Insurance law §5102(d).

In his examination before trial taken on October 2, 2013, the plaintiff, age 25, testified that on the date of the accident September 10, 2012, he was employed full time as a courier at Quick International in Jamaica, Queens. As a result of the injuries he sustained in the accident he missed three weeks from his job. His girlfriend, who he had picked up at Queensboro Community College was seated in the front passenger seat. He was proceeding on Guy R. Brewer Boulevard. As he was crossing the intersection with Rockaway Boulevard, the defendants' vehicle, a Lincoln Town Car, struck his vehicle on the rear door of the driver's side. The impact caused his vehicle to spin around and be propelled into the lane for oncoming traffic where his vehicle was struck in the front by a Nissan Murano. Plaintiff's arm and chest were struck by the air bags as they deployed. A co-worker picked him up at the scene and took him to the emergency room at North Shore LIJ Hospital. At that time he had pain to both legs, his neck, upper back, lower back and chest. He was treated and released the same day. However, he returned to the hospital the following day due to continued pain in his neck. Two days after the accident he sought treatment at the office of Dr. Jeffrey Krupen his family doctor in Bayside. The following week he began a course of physical therapy at Avenue Medical Center. For six months he was treated five times per week. The following two months he went to physical therapy twice a week. Plaintiff testified that he has continued to treat at a rate of once a week up to the present time. He was referred for MRIs of his neck and

chest. He states that he continues to have pain in his back, legs, neck and chest.

Plaintiff was examined by defendant's retained neurologist, Dr. Jean-Robert Desrouleaux on October 31, 2013. At that time the plaintiff reported to the examining physician that he injured his neck, right shoulder, chest, lower back, bilateral knees and right ankle as a result of the subject accident. He presented with pain to his neck, right shoulder, chest and lower back. Dr. Desrouleaux conducted objective range of motion testing and found that the plaintiff had no loss of range of motion of the cervical spine and lumbar spine. He states that as a result of the accident the plaintiff sustained an injury to the cervical and lumbar spine which has resolved. He concludes that there is no permanence and no residual effects of the plaintiff's injuries.

Dr. Scott Springer, a radiologist retained by the defendants, examined the MRIs taken of the plaintiff's cervical spine and lumbar spine. With regard to both MRIs he found no fracture, subluxation or acute disc herniation. He stated that there are no posttraumatic changes causally related to the subject accident.

Dr. Timothy G. Haydock, board certified in emergency medicine, reviewed the records of the plaintiff's emergency room admissions. He finds that the records he reviewed are inconsistent with the injuries alleged in the bill of particulars and, in his opinion, the claimed injuries do not have an acute traumatic origin and could not be causally related to the accident of September 10, 2012.

Defendant's counsel contends that the affirmed medical reports of Drs. Desrouleaux, Springer and Haydock and the plaintiff's examination before trial 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 returned to work three weeks after the accident and therefore 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 (see Canelo v Genolg Tr., Inc., 82 AD3d 584 [1st Dept. 2011]; McIntosh v O'Brien, 69 AD3d 585 [2d Dept. 2010]; Kearse v New York City Tr. Auth., 16 AD3d 45 [2d Dept. 2005]).

Further, defendant asserts that evidence of disc herniations and disc bulges are insufficient to raise a triable issue of fact under the permanent consequential limitation of use and the significant limitation of use categories of Insurance Law § 5102(d) absent objective proof of the extent and duration of the alleged physical limitations resulting from the injury (see Simanovskiy v Barbaro, 72 AD3d 930 [2d Dept. 2010][the existence of bulging discs and torn ligaments is not evidence of a serious injury in the absence of objective evidence of the extent and duration of the alleged physical limitations resulting from these injuries]; Yakubov v CG Trans Corp., 30 AD3d 509 [2d Dept. 2006]; Piperis v Wan, 49 AD3d 840 [2d Dept. 2008]).

In opposition, plaintiff's attorney, Raquel J. Greenberg, Esq., submits her own affirmation as well as the affirmed medical report of Dr. Nitin Narkhede; the affirmation of orthopedic surgeon, Dr. Andrew Merola; and the affirmation of radiologist, Dr. John Himmelfarb.

In his affirmation, Dr. Nitin Narkhede states that he is a physician with an office at Kanter Physical Medicine and Rehab, P.C. He states that he is the treating physician for the plaintiff, Noorutan H. Poorun. He states that the plaintiff was initially seen by his colleague Miriam Kanter on September 19, 2012. Relying on Dr. Kanter's unaffirmed and uncertified "Initial Physiiatric Evaluation" of September 19, 2012, Dr. Narkhede states that on his initial visit plaintiff made complaints of severe neck and back pain. The physical examination performed by Dr. Kanter revealed loss of range of motion of the cervical spine and lumbar spine. He states that Dr. Kanter placed the plaintiff on a course of physical therapy for his neck and back. Dr. Narkhede did not personally examine the plaintiff until June 27, 2013, at a follow-up evaluation nine months after the accident. At that time he found that the plaintiff's range of motion was significantly limited in his neck and back. He opined that as a result of the accident of September 10, 2013 the plaintiff sustained disc bulges at C3-4, L4-5 and L5-S1 and that his loss of mobility is permanent.

Dr. Andrew Merola, an orthopedic surgeon, states in his affirmed report that he first examined the plaintiff on November 27, 2013, more than one year after his accident. At that time Dr. Merola found that the plaintiff's active range of motion of the cervical spine and lumbar spine were limited in all areas. His review of plaintiff's MRI films showed disc bulges at C3-C4, L4-L5, and L5-S1 levels. In his recent examination of the plaintiff performed on January 17, 2014, Dr. Merola found significant limitations of range of motion of the plaintiff's cervical spine

and lumbar spine. Based upon his examination he concluded that the plaintiff sustained cervical and lumbar disc bulges as a result of the subject accident and that the loss of mobility is permanent.

Radiologist, Dr. John Himmelfarb states in his affirmed report that on his examination of the plaintiff's MRI studies performed in October 2012, he observed disc bulges at C3-4 and L1-L2 through L5-S1.

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). 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. Desrouleaux, Springer, and Haydock, as well as the deposition testimony of the plaintiff stating that he only missed three weeks of work immediately following the accident, is 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]).

In opposition, the plaintiff failed to raise a question of fact. Although Dr. Narkhede found that the plaintiff had limited range of motion of the cervical and lumbar spines when he first examined him in June 2013, nine months after the accident, the plaintiff did not submit competent objective medical evidence that revealed any treatment or the existence of an injury to his 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 (see Perl v Meher, 18 NY3d 208 [2011] [a contemporaneous doctor's report is important to proof of causation]; Griffiths v Munoz, 98 AD3d 997 [2d Dept. 2012]; Rosa v Mejia, 95 AD3d 402 [1st Dept. 2012]).

Although the plaintiff submitted unaffirmed treatment records of the evaluation performed by Dr. Kanter one week following the plaintiff's accident, the unaffirmed reports of Dr. Kanter are not admissible and the plaintiff did not submit any 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. Thus, Dr. Narkhede's statements based upon Dr. Kanter's unaffirmed and unsworn reports are inadmissible (see Lazu v Harlem Group, Inc., 89 AD3d 435 [1st Dept. 2011] quoting Migliaccio v Maraca, 56 AD3d 393 [1st Dept. 2008] [statements and reports by the injured party's examining and treating physicians that are unsworn or not affirmed to be true under penalty of perjury do not meet the test of competent, admissible medical evidence sufficient to defeat a motion for summary judgment]). And as stated, the unaffirmed conclusions and opinions of Dr. Kanter were not submitted in admissible form necessary to demonstrate a contemporaneous injury (see Irizarry v Lander, 110 AD3d 846 [2d Dept. 2013]; Schemer v Brown, 91 AD3d 751 [2d Dept. 2012]; Berner v Torres, 79 AD3d 776 [2010]; Marziotto v Striano, 38 AD3d 623 [2d Dept. 2007]; Iusmen v Konopka, 38 AD3d 608 [2d Dept. 2007]; Mahoney v Zerillo, 6 AD3d 403 [2d Dept. 2004]).

Therefore, this Court does not have before it competent evidence of contemporaneous treatment resulting from the plaintiff's accident. Dr. Narkhede's affirmation describing the plaintiff's medical condition based upon his personal evaluation in June 2013, is insufficient 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 plaintiff 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 Shu Chi Lam v Wang Dong, 84 AD3d 515 [1st Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]). In this regard, plaintiff testified that he returned to work as a three weeks after the accident (see Bleszcz v Hiscock, 69 AD3d 890 [2d Dept. 2010]).

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury and for the reasons set forth above, it is hereby,

ORDERED, that the defendants' motion for summary judgment is granted and the plaintiff's complaint against defendants DECOSA ENTERPRISES, INC., and DANIEL Y. HEILPERN is dismissed, and it is further,

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: July 10, 2014
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.