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

LUIS GUZMAN,

Plaintiff,

- against -

JUDY FEDER,

Defendant.

- x

Index No.: 6101/2012

Motion Date: 10/29/15

Motion No.: 85

Motion Seq.: 1

The following papers numbered 1 to 8 read on this motion by defendant, JUDY FEDER, for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 4
Affirmation in Opposition-Exhibits	5 - 6
Reply Affirmation-Exhibits	7

This is a personal injury action in which plaintiff, LUIS GUZMAN, seeks to recover damages for injuries he allegedly sustained on August 4, 2011 in a motor vehicle accident, which occurred at or near the intersection of Union Turnpike and 168th Street, Queens County, New York. Plaintiff alleges that as a result of the collision he sustained, inter alia, disc herniations at C5-C6 and L5-S1 levels.

Plaintiff commenced this action by filing a summons and verified complaint on March 21, 2012. Issue was joined by service of defendant's verified answer dated April 18, 2012. A Note of Issue has not been filed.

Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing plaintiff's complaint on the ground that plaintiff did not suffer a serious injury as defined by Insurance Law § 5102. In support of the motion, defendant submits an affirmation from counsel, Susan L. Cicio, Esq.; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the Preliminary Conference Order; a copy of the Compliance Conference Order; a copy of the transcript of the examination before trial of plaintiff taken on February 11, 2015; the affirmed medical report of orthopedic surgeon, Gary Kelman, M.D.; and the affirmed medical report of radiologist, Scott S. Coyne, M.D.

Plaintiff asserts that he sustained a serious injury as defined in Insurance Law § 5102(d) in that he sustained a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constitute his 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.

Dr. Kelman examined plaintiff on March 27, 2015. Plaintiff stated to Dr. Kelman that he feels pain in the mid back, lower back, and left shoulder. He also complained of headaches. Plaintiff stated that he feels better now, compared to when he first started treatments, which was approximately two weeks after the subject accident. Dr. Kelman performed objective range of motion testing with the assistance of a goniometer which revealed no limitations of range of motion of plaintiff's cervical spine, thoracic spine, lumbar spine, right shoulder, left shoulder, right elbow, and left elbow. His impression was that there is no objective evidence of orthopedic permanency and/or residual effects from the subject accident.

Dr. Coyne reviewed plaintiff's cervical spine MRI taken on October 28, 2011, left elbow MRI taken on September 9, 2011, and lumbosacral spine taken on October 11, 2011. He found, inter alia, that there are age-appropriate, degenerative disc and facet joint changes which are certainly chronic, long-standing, preexistent, and causally unrelated to the subject accident. Dr. Coyne further states that there is no evidence of any osseous or soft tissue abnormality or other trauma causally related to the subject accident.

In his examination before trial, plaintiff states that he refused an ambulance at the scene of the accident and that his vehicle was operable from the accident scene. He did not seek medical attention until two weeks after the subject accident. Plaintiff states that at the time of the accident, and presently, he worked at Brookdale Hospital as a housekeeper. He testified that he missed three days from work following the subject accident. He returned to work following a one week vacation that was scheduled before the accident and he did not cancel any plans he had for the vacation. He returned to work without any change to his duties. He also had a second job working at St. John's as a cook at the time of the subject accident and he only missed five days of work from St. John's following the accident.

Defendant's counsel contends that the medical reports of Drs. Kelman and Coyne, as well as plaintiff's deposition testimony in which he stated that he missed three days of work following the accident, are sufficient to demonstrate that plaintiff has not sustained a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constitute his 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.

In opposition, plaintiff's attorney, David P. Lesch, Esq., submits his own affirmation; plaintiff's own affidavit; MRI reports of William Weiner, D.O.; records from Primary Care, PC; and excerpts from case law.

In his affidavit, plaintiff states that as a result of the subject accident he does not function as well in that he cannot sit for a long time and he gave up his job as a cook. He states that he feels tired more often, still feels pain in his low back, and has to take Tylenol everyday.

Dr. Weiner performed an MRI on plaintiff's cervical spine and found osteophyte disc complex and right lateral disc herniation at the C5-C6 level. Dr. Weiner also performed the MRI of plaintiff's lumbar spine and found disc desiccation and central disc herniation at the L5-S1 level. He performed the MRI of plaintiff's left elbow and found increased signal along the course of the medial collateral ligament consistent with a tear.

The records submitted from Primary Care, PC indicate that plaintiff first started treating there on December 7, 2011 and indicate restrictions in ranges of motion of plaintiff's cervical and lumbar spine. The records also indicate that plaintiff followed up at Primary Care, PC on August 4, 2011, September 21, 2011, November 2, 2011, November 23, 2011, and February 6, 2012.

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 (see Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that a 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 defendant's 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]).

Upon review and consideration of defendant's motion, plaintiff's opposition, and defendant's reply thereto, this Court finds that the proof submitted by defendant, including the affirmed medical report of Drs. Kelman and Coyne, together with plaintiff's testimony that he only missed three days of work immediately following the accident, are sufficient to meet defendant's prima facie burden by demonstrating that 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, plaintiff failed to raise a question of fact. Here, plaintiff submitted records of the examinations performed at Primary Care, PC and the MRI reports from Dr. Weiner. However, the records and MRI reports are not affirmed, and therefore 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]).

Moreover, plaintiff failed to provide any evidence that he had any limitations of range of motion in a recent examination. Without a medical report in admissible form indicating plaintiff's current physical condition, plaintiff's submissions are insufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury (see Sham v. B&P Chimney Cleaning & Repair Co., Inc., 71 AD3d 978 [2d Dept. 2010] [any projections of permanence have no probative value in the absence of a recent examination]; Cornelius v Cintas Corp., 50 AD3d 1085 [2d Dept. 2008]; Sullivan v Johnson, 40 AD3d 624 [2d Dept. 2007]; Barzey v Clarke, 27 AD3d 600 [2d Dept. 2006]; Farozes v Kamran, 22 AD3d 458 [2d Dept. 2005][in order to raise a triable issue of fact the plaintiff was required to come forward with objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion].

Lastly, plaintiff failed to submit competent medical evidence that the injuries allegedly sustained by him as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days following the accident. Plaintiff himself testified that he did not miss more than three days of work as a result of the accident (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 89 ADd 929 [2d Dept. 2011]; Lewars v Transit Facility Mgt. Corp., 84 AD3d 1176 [2d Dept. 2011]).

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 defendant’s motion for summary judgment is granted and plaintiff’s complaint is dismissed, and it is further,

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

Dated: November 16, 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.