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SUPREME OURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 23A

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GEORGE SCOTT,

Index No.: 22249/2014E

Plaintiff,

Decision and Order

-against-

MINIER WENDY PORTORREAL and CITY LIVERY LEASING INC.,

Defendants.

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HON. ALEXANDER W. HUNTER, JR.:

The motion by Minier Wendy Portorreal and City Livery Leasing, Inc. (collectively "defendants") for an order pursuant to CPLR 3212, granting summary judgment in favor of the defendants and dismissing the complaint on the grounds that the plaintiff has not met the threshold requirements for having sustained a serious injury pursuant to Section 5102(d) of the New York State Insurance Law, is granted in part and denied in part.

This is an action to recover for personal injuries allegedly sustained by the plaintiff in an automobile accident that occurred on February 14, 2014 at or near the intersection of Walton Avenue and 144th Street in the County of Bronx at approximately 6:55AM. Plaintiff George Scott was traveling southbound on Walton Avenue behind a motor vehicle owned by defendant City Livery Leasing Inc, and operated by defendant Minier Wendy Portorreal. Plaintiff alleges that at the intersection of 144th, defendant Portorreal began making a left turn, accordingly, plaintiff bypassed the defendants' vehicle on the right and continued straight through the intersection. As plaintiff reached the middle of the intersection, defendant Portorreal abandoned making a left turn and attempted to enter the plaintiff's lane, striking plaintiff's vehicle on the left side.

In his complaint and verified bill of particulars, plaintiff alleges that he sustained serious injuries, sufficient in degree to satisfy the requirement of Article 51 of the New York State Insurance Law. In particular plaintiff alleges serious injuries to the right and left knee.

Defendants argue that plaintiff has failed to meet the threshold standard for a "serious injury" as defined in Insurance Law 5102(d), since plaintiff has not provided objective and competent medical evidence that proves he sustained permanent loss of use or significant limitation of the use of a body organ, member, function or system or any injury that has prevented him from performing substantially all of his usual and customary daily activities for ninety days immediately following the accident.

In support of their motion to dismiss, defendants submit: (1) an independent radiological review of plaintiff's MRI examination of the left and right knee by Audrey Eisenstadt, M.D., Board Certified Radiologist; (2) a medical affirmation by John H. Buckner, M.D., Board Certified Orthopedist; and (3) a peer review of the plaintiff's Bill of Particulars, police report, and emergency room records conducted by Stacey M. Donegan, M.D., Board Certified Emergency Medicine physician.

Plaintiff opposes defendants' motion in its entirety and argues that defendants have failed to meet their initial burden of establishing a prima facie case that the plaintiff did not sustain a serious injury. Specifically, plaintiff argues that defendants' expert, Dr. Buckner did not examine the plaintiff until a year after the subject accident, thus his examination is insufficient to establish that the plaintiff did not sustain a medically determined injury or impairment, which prevented him from performing his customary and daily activities for more than ninety of one hundred and eighty days from the date of the accident, and even if defendants have met their burden, there remains ample evidence to raise a triable issue of fact that plaintiff sustained a serious injury as a result of the accident.

It is well established that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact. **Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); CPLR 3212(b).** For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party. **Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 N.Y.2d 1065 (1979).** The court's function on a motion for summary judgment is issue finding rather than issue determination. **Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957).** A defendant can satisfy the initial burden by submitting a sworn or affirmed statement of their examining physician, plaintiff's sworn testimony or plaintiff's unsworn medical records. **Brown v. Achy, 9 A.D.3d 30 (1st Dept. 2004); Arjona v. Calcano, 7 A.D.3d 279 (1st Dept. 2004); Nelson v. Distant, 308 A.D.2d 338 (1st Dept. 2003).** Once the moving party has made a prima facie showing of entitlement the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that would require a trial of the action. **Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986).**

In opposition, plaintiff must submit objective medical evidence of a serious injury. **Toure v. Avis Rent A Car Sys., Inc., 98 NY2d 345 (2002).** The objective medical findings must include "either a specific percentage of the loss of range of motion or a sufficient description of the qualitative nature of plaintiff's limitations based on the normal function, purpose and use of the body part." (internal quotations omitted) **Bent v. Jackson, 15 A.D3d 46, 49 (1st Dept. 2005).** A plaintiff's subjective testimony as to her own pain or inability to perform specific tasks is insufficient to sustain a claim of serious injury. **Glover v. Capres Contracting Corp., 61 A.D.3d 549 (1st Dept. 2009).**

Defendants have made a prima facie showing that plaintiff did not suffer a serious injury under the "permanent consequential limitation" and "significant limitation" categories. The affirmed medical report of Dr. Buckner prepared after a review of the medical records, physical

examination and objective medical testing of plaintiff on March 9, 2015 indicated no casually related injury or disability in the right or left knee. In addition, Dr. Donegan found that the ER records are inconsistent with the injuries alleged in the Bill of Particulars and show that the claimed injuries do not have an acute traumatic origin and therefore could not be causally related to the subject accident. Furthermore, it is her opinion that there is no acute traumatic finding casually related to the plaintiff's accident and claimed injuries.

The burden then shifted to plaintiff to set forth sufficient evidence to raise a triable issue of fact to preclude summary judgment. **See Gaddy v. Eyler, 79 N.Y.2d 955 (1992)**. This court finds that the plaintiff properly raised triable issues of fact sufficient to defeat defendants' motion for summary judgment as to the plaintiff's alleged injury to the right knee only. Plaintiff submitted an affidavit from his own treating physician, Mark Bursztyn, M.D., a board certified orthopedic surgeon. Dr. Bursztyn performed surgery on the plaintiff on June 13, 2014, and noted that he continues to exhibit residual pain and symptoms including range of motion restrictions. In his conclusion, Dr. Bursztyn opines that the patient's injury to the right knee and subsequent treatment is related to the subject and is permanent.

This court is mindful that the Court of Appeals has instructed that an expert's qualitative assessment of the seriousness of a plaintiff's injury may be sufficient to defeat summary judgment if it is "supported by objective evidence." **Toure, 98 N.Y.2d at 350-351**. It is noted however, that the plaintiff has failed to provide any evidence sufficient to preclude summary judgement as to the plaintiff's alleged injury to the left knee. Thus, based upon the foregoing, an issue of fact exists precluding summary judgment as to whether the plaintiff sustained a "serious injury" pursuant to Insurance Law 5102 as to the right knee only.

This court also finds, that defendants have met their burden with regard to the 90/180-day claim. To prevail, a plaintiff must demonstrate through competent, objective proof, the existence of a "medically determined injury or impairment of a nonpermanent nature which would have caused the alleged limitations on the plaintiff's daily activities," (**Monk v. Dupuis, 287 A.D.2d 187, 191 [3rd Dept. 2001]**), and, furthermore, a curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment." **Licari v. Elliott, 57 N.Y.2d 230, 236 (1982)**. However, where evidence shows that the plaintiff actually returned to work within the first ninety (90) days after the accident, it is proper to dismiss 90/180 claims. **See, Byong Yol Yi v. Canela, 70 A.D.3d 584 (1st Dept. 2010); Brantley v. New York City Metro. Transit Auth., 48 A.D.3d 313 (1st Dept. 2008)**. Here, plaintiff admitted that he returned to work a week after the accident with no restrictions. Moreover, his surgery, which did not fall within the 90/180 timeframe is insufficient to create a triable issue of fact. **Cartha v. Quin, 50 A.D.3d 530 (1st Dept. 2008)**.

Accordingly, the motion by defendants for an order pursuant to CPLR 3212, granting summary judgment in defendants' favor and dismissing the complaint on the ground that plaintiff has not sustained a "serious injury" pursuant to Insurance Law 5102(d), is denied as to plaintiff's injury to the right knee only and granted as to plaintiff's injury to the left knee. Defendants' motion for summary judgment as to the 90/180 claims is granted, and that portion of plaintiff's complaint is dismissed

Defendants are directed to serve a copy of this order with notice of entry upon the plaintiff and file proof thereof with the clerk's office.

This constitutes the decision and order of this court

Dated: 9/28/15

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR.