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

SAHIBZADA J. NASIR,

Plaintiff,

- against -

JAIME ROBLES and D&N AUTO LEASING CO INC.,

Defendants.

- x

Index No.: 712170/2018

Motion Date: 12/23/21

Motion No.: 14

Motion Seq.: 3

The following electronically filed documents read on this motion by defendants for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint of plaintiff on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 44 - 61
Affirmation in Opposition-Exhibits	EF 66 - 79
Affirmation in Reply	EF 80

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on December 18, 2017. As a result of the accident, plaintiff alleges that he sustained serious injuries to his bilateral shoulders, cervical spine, and lumbar spine.

Plaintiff commenced this action by filing a summons and complaint on August 6, 2018. Defendants joined issue by service of an answer on August 23, 2019. Defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed by plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff appeared for an examination before trial on January 28, 2020 and testified that he was involved in the subject accident. Immediately following the accident, he missed one week from work as a taxi driver. No doctor told him to miss work. He was released from Forest Hills Hospital on the same date of the accident without films being taken or assistive devices being given to him. A few days after the accident, he visited with a doctor in Queens. He underwent physical therapy from 2017 until 2019. No injections were administered. He was confined to his bed for two to three non-consecutive times a week. Currently, he has trouble lifting heavy items, and he has difficulty working as a cab driver.

Thomas P. Nipper, M.D. performed an independent orthopaedic examination on plaintiff on December 22, 2020. Plaintiff presented with current complaints of low back pain. Dr. Nipper identifies the records reviewed prior to rendering his report. Dr. Nipper performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's cervical spine, and bilateral shoulders. All other objective testing performed was negative. Dr. Nipper concludes that there is no disability or permanency. Plaintiff is able to perform his activities of daily living. There is no causal relationship between the alleged injury and the subject accident. All injuries have fully resolved. There are no indications for further orthopaedic treatment. Plaitniff did not sustain any significant or permanent injury as a result of the subject accident.

Mark J. Decker, M.D. reviewed the MRIs of plaintiff's bilateral shoulders, cervical spine, and lumbar spine. Dr. Decker concludes that there is no evidence to suggest that an acute traumatic injury was sustained. All findings are longstanding and not causally related to the subject accident.

Defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body organ, member, function or system. Defendants also contend that plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him for not less than 90 days during the immediate 180 days following the occurrence from performing substantially all of his usual daily activities.

In opposition, plaintiff submits an affidavit, affirming that since the date of the accident, he has been experiencing

ongoing pain in his left shoulder, lower back, and neck, which limit his everyday activities. He is a driver, and he can no longer do the daily 12-hour shifts, 7 days per week, that he used to do before the accident. Immediately following the accident, he was unable to work for two weeks. For approximately one year after the accident, he was working part-time, 2-3 days per week for 6 hours. Currently, he has been forced to reduce his daily hours from 12 to 6 hours. In the first 6 months following the accident, he missed a total of 108 days of work due to his injuries. Most recently, Dr. Mah recommended that he resume chiropractic care, and Dr. Yoo recommended a cortisone injection for the pain in his left shoulder. He has not been able to run or do pushups since the accident. These activities along with all other activities of daily living have been affected by the subject accident have lowered his quality of life and damaged his ability to enjoy life has he knew it.

Daniel J. Yoo, M.D. submits an affirmation, affirming that on June 1, 2018, he performed a left shoulder arthroscopy, subacromial decompression, rotator cuff tendon debridement along the supraspinatus and subscapularis, labral debridement, glenoid chondroplasty and partial synovectomy. Most recently, he examined plaintiff on December 4, 2021. Range of motion testing in plaintiff’s left shoulder was limited. Dr. Yoo concludes, inter alia, that plaitniff is suffering from a partial disability that is permanent, significant, and progressive in nature. Even after surgery, plaintiff’s long-term prognosis is guarded. Based on his review of the MRI film and his examinations, the tears in plaitniff’s left shoulder were causally related to the subject accident. Dr. Yoo further confirms that the injuries would have disabled plaintiff for not less than 90 out of the 180 days immediately following the accident.

Sangwoo Mah, D.C. submits an affidavit, affirming that he most recently examined plaintiff on December 4, 2021. Plaintiff still exhibits decreased ranges of motion in his cervical spine and lumbar spine. Dr. Mah opines that based on a review of the MRIs, the subject accident caused the injuries.

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 (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]).

Here, the competent proof submitted by defendants, including the affirmed medical reports of Drs. Nipper and Decker, and plaintiff's own testimony, is sufficient to meet defendants' 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

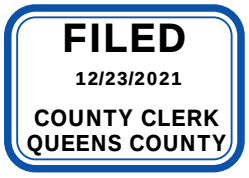
In opposition, this Court finds that plaintiff raised triable issues of fact as to whether he sustained a serious injury by submitting evidence that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 AD2d 367 [2d Dept. 2009]).

Moreover, regarding the 90/180-day category, plaintiff raised triable issues of fact by attesting to the fact that he is still unable to perform many activities of daily living and by submitting the affirmation of Dr. Yoo confirming that the injuries would have disabled plaintiff for not less than 90 out of the 180 days immediately following the accident (see Rodriguez v McCullough, 184 AD3d 735 [2d Dept. 2020]).

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that defendants' motion is denied.

Dated: December 23, 2021
Long Island City, N.Y.



Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.