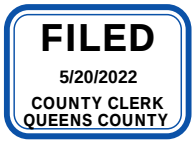
SHORT FORM ORDER

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

MAURICE G. CHRISTIAN, Index No.: 717918/2018



Plaintiff, Motion Date: 5/19/2022

- against - Motion No.: 10

MY CAR AUTO TRANSPORT, INC. AND ALONSO LAZARO, Motion Seq.: 2

Defendants.

- x

The following electronically filed documents read on this motion by defendants for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing plaintiff's complaint 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	31 - 49
Affirmation in Opposition-Memo. of Law-Exhibits.....EF	51 - 58
Reply Affirmation-Exhibit.....EF	59 - 60

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on August 6, 2018. Plaintiff alleges that he sustained serious injuries to his lumbar spine, bilateral knees, and cervical spine.

This action was commenced by the filing of a summons and complaint on November 21, 2018. Defendants joined issue by service of an answer on March 1, 2021. Defendants now seek an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Initially, although the motion for summary judgment is untimely, this Court finds that defendants have established good cause for the late summary judgment motion. Good cause for delay in filing a summary judgment motion is established when there is significant discovery outstanding at the time the Note of Issue is filed, and the movant had yet to receive the discovery by the deadline by which the motion was to be made (see Brill v City of New York, 2 NY3d 648 [2004]; Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124 [2000]; Parker v LIJMC-Satellite Dialysis Facility, 92 AD3d 740 [2d Dept. 2012]). Here, after plaintiff filed the Note of Issue, the records and authorizations were provided.

Plaintiff appeared for an examination before trial on June 19, 2020 and testified that at the scene of the accident, he denied any injuries. He left the scene on foot. He was about a ten minute walk from his house, and was able to make it home unassisted. Four days after the accident, he first sought medical attention with his primary care physician.

Eial Faierman, M.D. performed an independent medical examination on plaintiff on November 17, 2020. Plaintiff presented with lower back and knee pains on prolonged walking and intermittently on stair climbing. Dr. Faierman identifies the records reviewed prior to rendering the report. Dr. Faierman performed range of motion testing with a goniometer, and recorded normal ranges of motion in plaintiff's cervical spine, lumbar spine, bilateral shoulders, and bilateral knees. All other objective testing performed was negative and normal. Dr. Faierman concludes that there are no objective findings or traumatic pathology on examination of the cervical spine, lumbar spine, or bilateral knees. Plaintiff does not require any further treatment.

Saran S. Rosner, M.D. performed an independent medical examination on plaintiff on June 24, 2021. Dr. Rosner identifies the records reviewed prior to rendering the report. Dr. Rosner performed range of motion testing with a goniometer, and recorded decreased ranges of motion in plaintiff's lumbar spine and cervical spine. Straight leg testing was positive. Dr. Rosner concludes that there is no evidence of disability. Plaintiff's limitations are subjectively based and consistent with an individual who has reached his eighth decade of life.

Defendants also submit plaintiff's records from August 10, 2018 in which Dr. Vaysman indicated that there is no recent trauma, and the onset of the back pain was sudden and began without a clear precipitating event. The records from plaintiff's initial consultations on August 14, 2018 at Alan Medical

Services, PC, Amilor Acupuncture, and Demetrios Karakizis, DC, PC also do not include any complaints of knee pain.

Defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained a serious injury as a result of the subject accident.

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]).

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]).

Here, the conclusion that plaintiff did not suffer a disability or impairment as a result of the subject accident was directly contradicted by Dr. Rosner who examined plaintiff more than three years after the subject accident and recorded objectively-measured limitations in range of motion (see Sook Houng v Beers, 151 AD3d 995 [2d Dept. 2017]; Mercado v Mendoza, 133 AD3d 833 [2d Dept. 2015]; Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Grant v Parsons Coach, Ltd., 12 AD3d 484 [2d Dept. 2004]; Lopez v Sentaroe, 65 NYS2d 1017 [1985][finding that providing evidence of a ten degree limitation in range of motion is sufficient for the denial of summary judgment to defendants]).

Thus, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury within the meaning of Insurance Law §

5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]).

Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]).

In any event, in opposition, plaintiff raised triable issues of fact as to whether he sustained a serious injury by submitting, inter alia, his medical records from Alan Medical Services, and the reports of Dov J. Berkowitz, M.D. and Vadim Lerman, D.O., finding that plaintiff had suffered serious injuries and had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are 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]).

Accordingly, and based on the above reasons, it is hereby,

ORDERED, that the motion is denied.

Dated: May 19, 2022
Long Island City, N.Y

FILED
5/20/2022
COUNTY CLERK
QUEENS COUNTY

Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.