Osmun v Doe
2017 NY Slip Op 30179(U)
January 30, 2017
Supreme Court, Queens County
Docket Number: 703231/2015
Judge: Robert J. McDonald

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

MOHAMMAD H. OSMUN,

Plaintiff,

- against -

JOHN DOE and FIROUZ NIKNAMFARD,

Defendants.

Index No.: 703231/2015

Motion Date: 1/11/17

Motion No.: 131

Motion Seq.: 1

- x

The following electronically filed documents read on this motion by defendant, FIROUZ NIKNAMFARD, 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 §§ 5104(a) and 5102(d):

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 9
Affirmation in Opposition-Exhibits	EF 10 - 13
Reply Affirmation	EF 14

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 July 9, 2012 on Yellowstone Boulevard at or near its intersection with Queens Boulevard, in Queens County, New York. In the supplemental verified bill of particulars, plaintiff alleges that he sustained serious injuries to his cervical spine, including disc bulges and a disc herniation.

Plaintiff commenced this action by filing a summons and complaint on April 3, 2015. Issue was joined by service of defendant's answer dated May 5, 2015. 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, Kelly Green, Esq.; a copy of the pleadings; a copy of the verified bill of particulars and supplemental verified bill of particulars; a copy of the note of issue; a copy of the transcript of plaintiff's examination before trial taken on April 21, 2016; and a copy of the affirmed medical report of Dr. Leon Sultan, M.D.

At his deposition, plaintiff testified that he was riding a bicycle at the time of the accident. He was taken to New York Hospital via ambulance. He complained of pain in his back, neck, head, and right hand. He was discharged that same day after a CT scan was performed. The following day, he saw his primary care physician. A couple of months after the accident, he returned to the Emergency Room at New York Hospital two or three times. He was not admitted. He had an MRI performed of his back and head at Forest Hills Hospital. He saw Dr. Tse, a neurologist at AdvanatageCare Physicians approximate two or three times, and was prescribed Advil twice daily and muscle relaxers. He also began physical therapy at AdvanatageCare Physicians. At the time of the deposition, he was still receiving physical therapy, which includes exercise, electronic stimulation, massages, and heat therapy. He did not have injections performed as a result of the subject accident. At the time of the accident, he was self-employed, making deliveries for various businesses using his bicycle. He has not held a job since the accident. He was confined to bed for around four or five months following the accident, and confined to his home for eight to nine months following the accident. He can no longer ride his bicycle more than one or two miles.

Dr. Sultan examined plaintiff on May 23, 2016. Plaintiff presented with current complaints of intermittent neck pain and constant lower back pain. Dr. Sultan identifies the medical records he reviewed, and performed objective range of motion testing using a goniometer. He found full range of motion in plaintiff's cervical spine and thoracolumbar spine. All other objective tests were negative. He concludes that plaintiff is neurologically stable and neurologically intact. There is no ongoing causally related orthopedic or neurologic impairment related to the subject accident, and there is no ongoing disability or functional impairment related to the subject accident.

Defendant's counsel contends that the submitted evidence is sufficient to demonstrate that plaintiff did not sustain 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 plaintiff 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.

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 the 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, this Court finds that the competent proof submitted by defendant is 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]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

Although plaintiff argues that defendant failed to satisfy his prima facie burden because Dr. Sultan relied upon unsworn and unaffirmed reports in forming his opinion, a defendant may submit unsworn medical reports and records of the plaintiff in support of a motion for summary judgment to demonstrate the lack of a serious injury (see Kearse v New York City Transit Authority, 16

AD3d 45 [2d Dept. 2005]; Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). However, in so doing, the defendant opens the door for the plaintiff to rely upon these same unsworn or unaffirmed reports and records in opposition to the motion see Kearse v New York City Transit Authority, 16 AD3d 45 [2d Dept. 2005]; Pech v Yael Taxi Corp., 303 AD2d 733 [2d Dept. 2003]).

In opposition, plaintiff submits an affirmation from counsel, John M. Porchia, III, Esq.; an affirmation from Eric Cantos, M.D. with an annexed MRI of plaintiff's cervical spine; copies of New York Hospital's Emergency Room records; and copies of records from Queens Long Island Medical Group, P.C.

This Court finds that plaintiff failed to raise a triable issue of fact. Here, plaintiff failed to provide any evidence in admissible form 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 the plaintiff sustained a serious injury (see Sham v. B&P Chimney Cleaning & Repair Co., Inc., 71 AD3d 978 [2d Dept. 2010] [finding that 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][finding that 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]; Ali v Vasquez, 19 AD3d 520 [2d Dept. 2005]).

Regarding the 90/180 day category, 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 Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]). Plaintiff's testimony that he cannot ride his bike any longer, was confined to his bed following the accident for about nine months, cannot sit still for long periods of time, cannot run or lift anything heavier than ten pounds, cannot work or keep a job, and cannot sleep, without more, is insufficient to defeat a motion for summary judgment (see Cullum v Washington, 227 AD2d 370 [2d Dept. 1996]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that defendant FIROUZ NIKNAMFARD's summary judgment motion is granted, plaintiff's complaint is dismissed, and the Clerk of the Court shall enter judgment accordingly.

Dated: January 30, 2017
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C