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

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HAROLD DANGERVILLE,

Plaintiff,

- against -

JOSE H. MEJIA,

Defendant.

- x

Index No.: 12645/2009

Motion Date: 12/15/11

Motion No.: 8

Motion Seq.: 2

The following papers numbered 1 to 10 were read on this motion by defendant, JOSE H. MEJIA, for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the complaint of HAROLD DANGERVILLE 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-Affidavits-Exhibits-Memorandum of Law...	1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 10

This is a personal injury action in which plaintiff, JOSE H. MEJIA, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on August 14, 2008, on Route 904, approximately 100 feet north of Eastview Lane in Nassau County, New York.

At the time of the accident, plaintiff was traveling southbound on Glen Cove Road. He intended to make a u-turn through a path in the median so that he could proceed in a northbound direction. He was stopped in the turning lane facing east when he observed the defendant's car strike the left rear of his vehicle.

The plaintiff commenced this action by filing a summons and complaint on May 14, 2009. Issue was joined by service of defendant's verified answer dated June 3, 2009. Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the 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, Joseph T. Schnurr, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; the affirmed medical report of neurologist Dr. Daniel Feuer; and a copy of the transcript of the examination before trial of plaintiff Harold Dangerville.

In his verified Bill of Particulars, plaintiff, age 29, states that as a result of the accident he sustained, inter alia, disc herniations at C4-C5, C5-C6 and L5-S1 as well as disc bulging at L1-L2, L2-L3, L3-L4 and L4-L5.

Plaintiff contends 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 or 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 the 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.

Dr. Daniel Feuer, a board certified neurologist retained by the defendant, examined Mr. Dangerville on December 14, 2010. Plaintiff presented with recurrent pain to the neck and lower back. Dr. Feuer performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine and lumbosacral spine. He concluded that the plaintiff's neurological examination was within normal limits. He states that in his opinion, the plaintiff did not demonstrate any objective neurological disability or neurological permanency which is causally related to the accident of August 14, 2008. He states that the plaintiff is neurologically stable and is able to engage in full active employment as well as full activities of daily living without restriction.

Defendant's counsel contends that the medical report of Dr. Feuer is sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or 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 the plaintiff from performing substantially all of the material acts which constitute her 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 his examination before trial taken on September 1, 2010, plaintiff testified that subsequent to the accident he began treating with Dr. Rosner where he received physical therapy for ten months following the accident, three times per week. He continued his treatments to the present time but more sporadically.

In opposition, plaintiff's attorney, Thomas J. Solomon, Esq., submits his own affirmation as well as the affidavit of chiropractor Dr. Jeff Rosner. Dr. Rosner states that he first examined the plaintiff on August 21, 2008, one week after the accident of August 14, 2008. At that time he found significant limitations of range of motion of the plaintiff's cervical spine and lumbar spine which were quantified and compared to normal. He treated plaintiff through May 26, 2010 when treatment was discontinued as the plaintiff had reached maximum medical and chiropractic benefit. Dr. Rosner re-examined the plaintiff on June 15, 2011 at which time objective testing revealed that the plaintiff's range of motion of the cervical and lumbar spines was still significantly restricted. It is Dr. Rosner's opinion that plaintiff's complaints of pain and discomfort in his cervical and lumbar spine with the resulting loss of range of motion are directly and causally related to his motor vehicle accident of August 14, 2008 and that his injuries and disabilities are permanent.

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]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' 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 proof submitted by the defendant, including the affirmed medical report of Dr. Feuer was sufficient to meet its prima facie burden by demonstrating that the 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]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affidavit of Dr. Rosner attesting to the fact that the plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and permanent and resulted from trauma causally related to the accident (see Ortiz v. Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 ADd 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]).

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

ORDERED, that the defendant's motion for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: December 19, 2011
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.