Vishaj v Anderson
2012 NY Slip Op 33005(U)
December 17, 2012
Supreme Court, Queens County
Docket Number: 9969/10
Judge: Bernice D. Siegal
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

--X

Binak Vishaj,

Plaintiff,

-against-

Ian A. Anderson and Kyung Kim,

Defendants.

--X

Index No.: 9969/10
Motion Date: 10/10/12
Motion Cal. No.: 23
Motion Seq. No.: 04

The following papers numbered 1 to 13 read on this motion for an order pursuant to CPLR §3212, granting summary judgment to defendant, Kyung Kim, and against the plaintiff, on the ground that the personal injuries allegedly sustained by the plaintiff do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the Comprehensive Motor Vehicle Insurance Reparations Act of the State of New York, insurance Law Section 5101 et seq., and thus, plaintiff's claim for non-economic loss is thereby barred under section 5104(a) for the statue.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.................................	1 - 4
Notice of Cross-Motion..	5 - 6
Affirmation in Opposition..	7 - 10
Reply...	11 - 13

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Facts

The defendant Kyung Kim ("Defendant" or "Kim") moves for summary judgment pursuant to CPLR §3212 on the grounds that plaintiff Binak Vishaj ("Plaintiff" or "Vishaj") did not sustain a serious injury under Insurance Law §5102(d). Defendant Ian Anderson cross-moves for the same

relief and incorporates Kim's contentions. Plaintiff was involved in a motor vehicle accident with the defendant on July 18, 2007. The Bill of Particulars allege that as a result of the accident, plaintiff suffered injury to his lumbar and cervical spine.

Analysis

Defendants motions for summary judgment pursuant to CPLR §3212 dismissing plaintiff's cause of action are granted as more fully set forth below.

Threshold

Defendant moves for summary judgment in his favor on the ground that plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law. That statutory provision states, in pertinent part, that a "serious injury" is defined as:

> A personal injury which results in... significant disfigurement; a fracture... permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured party from performing substantially all of the material acts which constitute such person's 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. (Insurance Law §5102(d).)

Defendant contends that Vishaj did not sustain a serious injury based on the medical reports of Robert Israel, MD, Orthopedic Surgeon and Jean-Robert Desrouleaux, MD, Neurologist. The issue of whether Vishaj sustained a serious injury is a matter of law to be determined in the first

instance by the court. (*Licari v. Elliot*, 57 N.Y.2d 230 [1982]; *Porcano v. Lehman*, 255 A.D.2d 430, 431 [2nd Dept. 1998]; *Brown v. Stark*, 205 A.D.2d 725 [2nd Dept. 1994].) The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. (*Toure v. Avis Rent A Car Sys.,* 98 N.Y.2d 345 [2002]; *Sealy v. Riteway-1, Inc.*, 54 A.D.3d 1018 [2nd Dept. 2008]; *Meyers v. Bobower Yeshiva Bnei Zion*, 20 A.D.3d 456 [2nd Dept. 2005].) A defendant can meet his or her prima facie burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d). (*see Margarin v. Kropf*, 24 A.D.3d 733 [2nd Dept. 2005]; *see also Gaddy v. Eyler*, 79 N.Y.2d 955,956 [1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008].)

Defendant met his initial burden of establishing that Vishaj did not sustain a serious injury through the submission of the affirmations of Dr. Nason and Dr. Desrouleaux . (*Jilani v. Palmer*, 83 A.D.3d 786, 787 [2nd Dept. 2011]; *Khaimov v. Armanious*, 85 A.D.3d 978 [2nd Dept. 2001].) Dr. Nason measured the range of motion of plaintiff's cervical, and lumbar spine, as well as his right elbow and right wrist. The ranges of motion were measured using a goniometer and the specific measurements, when compared to the norms, were all within the normal ranges. (*Staff v. Yshua*, 59 A.D.3d 614 [2nd Dept. 2009]. Dr. Nason concluded that while the plaintiff's neck injury is related to the subject accident, the claimant has "no objective evidence of disability or permanent impairment." The affirmation of Dr. Desrouleaux confirmed Dr. Nason's finding of lack of serious injury. Dr. Nason and Dr. Desrouleaux's objective and quantified range of motion tests are sufficient to establish a prima facie case that there was no "significant limitation of use of a body function or system" under the meaning of Insurance Law §5102(d). (*Kasim v. Defretias*, 28 A.D.3d 611, 612 [2nd Dept. 2006]; *Staff v. Yshua,* 59 A.D.3d 614 [2nd Dept. 2009]; *Kerzhner v. N.Y. Ubu Taxi Corp.,* 17

A.D.3d 410 [2nd Dept. 2005].)

Through the submission of the affirmed medical reports of defendant's experts, the defendant established that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d). (*See Pommells v. Perez*, 4 N.Y.3d 566 [2005].) Defendant's evidence being sufficient to make a prima facie showing that Vishaj did not sustain a serious injury, the burden of proof shifts to the plaintiff. (*Gaddy v. Eyler*, 79 N.Y.2d 955, 957 [1992]; *Attivissimo v. Kugler*, 226 A.D.2d 658 [2nd Dept. 1996].)

In opposition to the within motion, Vishaj a attempted to raise a triable issue of fact as to whether he sustained a serious injury to his cervical and lumbar spine through the affirmed medical report of Vishaj's treating physician, Samuel Kelman, D.O.

Dr. Kelman examined the plaintiff on November 2, 2009 and again on June 27, 2012. Dr. Kelman concluded in an affirmed report that VIshaj had restricted range of motion in his cervical and thoracoumbar spine. However, Dr. Kelman's initial report is insufficient to raise a triable issue of fact as it was done more than two years after the subject accident. (*Sorto v. Morales*, 55 A.D.3d 718 [2nd Dept 2008]; *Perdomo v. Scott*, 50 A.D.3d 1115 [2nd Dept 2008].)

Neither plaintiff nor his doctor adequately explained the gap in the plaintiff's treatment from the time he discontinued treatment, in November of 2009, and his most recent visit in June of 2012. (*Ayala v. Katsionis*, 67 A.D.3d 836 [2nd Dept 2009]; citing *Pommells v. Perez*, 4 N.Y.3d 566 [2005].) However, a failure to sufficiently explain a significant gap in treatment is not dispositive of the claim of serious injury under the 90/180 day category. (Johnson v. Singh, 32 Misc.3d 1219(A) [Sup. Ct. Bronx 2009] citing *Gomez v. Ford Motor Credit Co.*, 10 Misc.3d 900 [Sup.Ct. Bronx 2005].)

Nonetheless, Defendants also met their burden with respect to the 90/180 category of

Insurance Law §5102(d). Plaintiff failed to provide evidence proving he missed work for at least 90 days following the accident as a result of the subject accident. Plaintiff testified at his deposition that he was as self-employed limousine driver and that his limousine was damaged by the subject accident. Plaintiff further testified that he was unable to work for six months following the accident because his vehicle was damaged. (Deposition pp69, 70.) Furthermore, plaintiff's doctor's affirmation fails to properly address the 90/180–day claim, it merely asserts that plaintiff has pain while lifting. (See *Vishnevsky v. Glassberg*, 29 A.D.3d 680 [2nd Dept 2008] see also *Sayas v. Merrick Transp.*, 23 A.D.3d 367 [2nd Dept 2005].) Therefore, Vishaj has failed to prove there was a serious injury under the 90 to 180 day category.

Conclusion

For the reasons set forth above, defendants' motion and cross-motion for summary judgment on the issue of "serious injury" is granted and the complaint is dismissed.

Dated: December 17 , 2012

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Bernice D. Siegal, J. S. C.