Short Form Order

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

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SIMKHO MULLOKANDOV,

Plaintiff,

-against-

JOHN L. MADRI,

Defendant.

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Index No.: 14827/10
Motion Date: 1/23/13
Motion Cal. No.: 10
Motion Seq. No.: 3

The following papers numbered 1 to 13 read on this motion for an order pursuant to CPLR §3212, dismissing plaintiff's complaint upon the ground that the complaint fails to state a cause of action as the plaintiff's alleged injuries do not meet the threshold required by Insurance Law §5102.

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

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

Facts

Defendant John Madri ("Defendant") moves for summary judgment pursuant to CPLR § 3212, dismissing the complaint and any and all cross-claims against her, on the grounds that plaintiff Simkho Mullokandov ("Plaintiff") did not sustain a serious injury under Insurance Law § 5102(d). This case arises as a result of a motor vehicle accident between the plaintiff and the defendant that occurred on November 3, 2009. The Bill of Particulars alleges that as a result of

the accident, Plaintiff sustained serious injuries to his cervical and lumbar spine.

Analysis

Defendant's motion for summary judgment pursuant to CPLR § 3212 dismissing Plaintiff's cause of action is denied as more fully set forth below.

Threshold

Defendant moves for summary judgment in its favor on the ground that Plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). The statutory provision states, in pertinent part that a "serious injury" is defined as:

> A personal injury which results in...significant disfigurement;...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 a person's customary daily activities for not less than ninety days during one hundred eighty days immediately following the occurrence of the injury or impairment.

Insurance Law § 5102(d).

Defendant contends that Plaintiff did not sustain a serious injury based on the medical report of Dr. Robert Israel, an Orthopedic Surgeon and Dr. Daniel Feuer, a Neurologist. The issue of whether plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. (*Licari v Elliot,* 57 NY2d 230 [1982]; *Porcano v Lehman,* 255 AD2d 430,

431 [2nd Dept 1998]; *Brown v Stark,* 205 AD2d 725 [2nd Dept 1994].) When moving for summary judgment on threshold, the burden is on the defendant to make a prima facie showing that the injuries the plaintiff sustained from the subject accident are not serious as defined within the meaning of Insurance Law §5102(d). (*Toure v Avis Rent A Car Sys.,* 98 NY2d 345 [2002]; *Lewis v John,* 81 AD3d 905 [2nd Dept 2011].) A defendant can meet this burden by submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that the plaintiff's injuries are not serious. (*see Magarin v Kropf,* 24 AD3d 733 [2nd Dept 2005]; *see also Gaddy v Eyler,* 79 NY2d 955, 956 [Ct. App. 1992]; *Morris v Edmond,* 48 AD3d 432 [2nd Dept 2008].) Where the defendant fails to meet his or her prima facie burden, the motion will be denied, and the court need not review the papers submitted by the plaintiff in opposition. (*Coscia v 938 Trading Corp.,* 283 AD2d 538 [2nd Dept 2001].) Thus, consideration is only given to the plaintiff's opposing papers if the defendant-movant makes a prima facie showing that the plaintiff did not sustain a serious injury. (*Toure v Avis Rent A Car Sys.,* 98 NY2d 345 [2002].)

Defendant met his initial burden of establishing that Plaintiff did not sustain a serious injury to his lumbar and cervical spine. Dr. Israel tested the range of motion of Plaintiff's cervical and lumbar spine. Dr. Israel then compared the results elicited from the goniometer testing to the norms, finding Plaintiff's range of motion within normal limits and finding that Plaintiff was not disabled as a result of the subject accident. Therefore, Defendant has made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). The burden now shifts to the plaintiff, to demonstrate the existence of a triable issue of fact as to whether he sustained a serious injury. (*Matthews v Cupie Transp. Corp.,* 302 AD2d 566, 567

[2nd Dept 2003]; *see also Gaddy v Eyler,* 79 NY2d 955, 956 [1992]; *Greene v Miranda,* 272 AD2d 441 [2nd Dept 2000].)

In opposition, Plaintiff met his burden to defeat Defendant's motion for summary judgment on the issue of serious injury. Plaintiff submitted affirmed medical reports of Dr. Paul Lerner, an Neurologist; Dr. John McGee, an Orthopedist, and Dr. Joseph Leadon, a Radiologist. This evidence was sufficient to raise a triable issue of fact as to whether Plaintiff's alleged injuries are serious within the meaning of Insurance Law § 5102(d).

Dr. McGee, who examined the plaintiff following the accident on December 2, 2009, asserts that plaintiff had restricted range of motion of his cervical and lumbar spine following the accident. Dr. McGee, using objective medical testing, established that Plaintiff sustained a loss of range of motion as a result of the subject accident. Dr. Lerner, who examined Plaintiff on October 29, 2012, asserts that Plaintiff has restricted range of motion of his cervical and lumbar spine as a result of the subject accident.

Defendant, in reply, contends that Plaintiff's injuries were as a result of a subsequent accident on May 14, 2012. However, the court notes that Defendant failed to offer sufficient evidence to establish that Plaintiff's injuries were caused by a subsequent accident. (*Bozza v. O'Neill*, 43 A.D.3d 1094 [2nd Dept 2007].) Furthermore, the testimony of Plaintiff's doctors clearly establishes a basis upon which a jury could reasonably conclude that the injured plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident, rather than as a result of the subsequent accident. (*Lalla v. Connolly*, 17 A.D.3d 322 [2nd Dept 2005].) Specifically, Dr. Lerner acknowledges the May 14, 2012 accident in his affirmation and concludes that Plaintiff's injuries are "causally related to the motor vehicle accident of 11/3/09."

In addition, Plaintiff adequately explained the gap in treatment by stating that no-fault benefits were terminated. (*Jean-Baptiste v. Tobias*, 88 A.D.3d 962 [2nd Dept 2011]; *Abdelaziz v. Fazel*, 78 A.D.3d 1086 [2nd Dept 2010].)

For the reasons set forth above, Defendant's motion for summary judgment on the issue of "serious injury" is denied.

Dated: March 29 , 2013

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Bernice D. Siegal, J. S. C.