

Ieremici v Seven Transit, LLC
2013 NY Slip Op 31213(U)
June 4, 2013
Sup Ct, Queens County
Docket Number: 7806/11
Judge: Bernice Daun 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
Nica Ieremici,

Plaintiff,

-against-

Seven Transit, LLC, and Raynald Lamonthe,

Defendants.
-----X

Index No.: 7806/11
Motion Date: 4/30/13
Motion Cal. No.: 93
Motion Seq. No.: 1

The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §3212 granting defendants summary judgment dismissing the complaint upon the ground that plaintiff has failed to sustain a “serious injury” within the meaning of Insurance Law §5102(d).

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

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

Defendants, Steven Transit, LLC and Raynald Lamonthe (collectively as “defendants”) move for an Order pursuant to CPLR §3212 granting defendants summary judgment dismissing the complaint upon the ground that plaintiff, Nice Ieremici (“Ieremici” or “plaintiff”) has failed to sustain a “serious injury” within the meaning of Insurance Law §5102(d).

Facts

Plaintiff commenced the within action to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on December 26, 2010. The Bill of Particulars alleges that as a result of the accident, Plaintiff suffered injuries to his cervical and lumbar spine and right shoulder.

Analysis

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

Threshold

Defendants move for summary judgment in its favor on the ground that Plaintiff did not sustain a "serious injury" within the meaning of the 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)

It has been well established that in a motion for summary judgment the proponent must tender evidentiary proof in admissible form to eliminate any material issues of fact, and if the proponent succeeds, the burden then shifts to the party opposing the motion to submit evidentiary proof in admissible form. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].)

Accordingly, when moving for summary judgment on threshold, the burden is on the defendant to make a prima facie showing that the injuries plaintiff sustained as a result of the subject accident are not serious as defined within the meaning of Insurance Law § 5102(d). (*Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [Ct App. 1982]; *Lewis v. John*, 81 A.D.3d 905 [2nd Dept. 2011].) Where the defendant fails to meet his or her prima facie burden, the motion will be denied, and the court need not review plaintiff's paper's in opposition. (*Cosica v. 938 Trading Corp.* 283 A.D.2d 538 [2nd Dept. 2001].)

Defendants contend that Ieremici did not sustain a serious injury based on the medical report of Marianna Golden, MD, a Neurologist and Kumar Reddy, MD, an Orthopedist. The issue of whether Ieremici sustained a serious injury is a matter of law to be determined in the first instance by the court. (*Licari v. Elliott*, 57 N.Y.2d 230 [Ct App. 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 [Ct App. 2002]; *Sealy v. Riteway-I, 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 Magarin v. Kropf*, 24 A.D.3d

733 [2nd Dept. 2005]; *see also Gaddy v. Eylar*, 79 N.Y.2d 955, 956 [Ct. App. 1992]; *Morris v. Edmond*, 48 A.D.3d 432 [2nd Dept. 2008]).

Defendants met their initial burden of establishing that Ieremici did not sustain a serious injury through the submission of the affirmations of Dr. Golden and Dr. Reddy wherein they concludes that plaintiff's cervical and lumbar sprains are orthopedically stable and neurologically intact and that there is no causally related orthopedic or neurological impairment. Dr. Golden compared the results elicited from the goniometer testing to the normal range of motion testing and found that Ieremici's range of motion in her cervical and lumbar spine to be normal. Dr. Golden also found that plaintiff's injuries to his cervical and lumbar spine were degenerative, pre-existing and not caused by the accident.

Therefore, the moving defendants' made a prima facie showing that Ieremici 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 A.D.2d 566, 567 [2nd Dept. 2003]; *see also Gaddy*, 79 N.Y.2d at 957; *Greene v. Miranda*, 272 A.D.2d 441 [2nd Dept. 2000]).

In opposition, the plaintiff raised a triable issue of fact through the affirmation of Dr. Mihir Bhatt, the plaintiff's treating physician. Dr. Bhatt examined plaintiff shortly after the subject accident, and has rendered continuous treatment, including a recent reexamination. According to Dr. Bhatt, his initial examination revealed significant restrictions in plaintiff's range of motion of his lumbar and cervical spine. Dr. Bhatt, further asserts, based on a recent examination, that Bhatt continues to have significant restricted range of motion of his cervical

and lumbar spine. Dr. Bhatt using objective medical testing, established that the plaintiff sustained a loss of range of motion as a result of the subject accident.

Dr. Bhatt also concluded, based on his contemporaneous and most recent examinations of the plaintiff that the plaintiff's injuries were permanent and were as a result of the subject accident. Therefore, Dr. Bhatt's findings are sufficient to raise a triable issue of fact as to whether, as a result of the subject accident, the plaintiff sustained a serious injury to his lumbar and cervical spine under the permanent consequential limitation of use and/or the significant limitation of use categories of Insurance Law § 5102(d)." (*See Perl v. Meher*, 18 NY3d 208 [2011]; *Young Chool Yoo v. Rui Dong Wang*, 88 A.D.3d 991 [2nd Dept 2011]; *Dixon v. Fuller*, 79 A.D.3d 1094 [2nd Dept 2010].)

In addition, plaintiff attaches the affirmation Ji Han, who began treating the plaintiff on November 25, 2011. On December 22, 2011 and January 12, 2012, Dr. Han administered epidural steroid injections to relieve plaintiff's discomfort. On March 27, 2012, Dr. Han performed a discectomy. Dr. Han also states that plaintiff's injuries were causally related to the subject accident and that plaintiff has a "partial permanent disability."

Conclusion

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

Dated: June 4, 2013

Bernice D. Siegal, J. S. C.