[* 1] SCANNED ON 8/7/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 22

Index Number : 111943/2011
HEARTFIELD, CHRISTOPHER
vs.
AMPADU, KWASI
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for D's MSJ

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8.1.13

_____, J.S.C.
HON. ARLENE P. BLUTH

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

CHRISTOPHER HEARTFIELD,

DECISION AND ORDER

Plaintiff,

Index No. 111943/11
Motion Seq 01

- against-

KWASI AMPADU,

HON. ARLENE P. BLUTH, JSC

Defendant.

Defendant's motion for summary judgment dismissing this action on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5012 (d) is denied.

In this action, plaintiff alleges that on June 25, 2011 he sustained personal injuries when he was in a motor vehicle accident with defendant on the FDR Drive in Manhattan.

To prevail on a motion for summary judgment the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396 [1st Dept 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], quoting *Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). In order to establish prima facie entitlement to summary judgment under the 90/180 category of the statute, a "defendant must provide medical evidence of the absence of injury precluding 90 days of normal activity during the first 180 days following the accident" (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]). However, a defendant can establish prima facie entitlement to summary judgment on

this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.*).

Once the defendant meets his initial burden, the plaintiff must then demonstrate a triable issue of fact as to whether he sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a qualitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

In the verified bill of particulars (exh C to moving papers, ¶ 5), plaintiff claims a host of injuries, primarily to the lower back/lumbar spine and left ankle. Plaintiff had broken his left ankle almost a year before the accident when he slipped on ice, but claimed re-injury in this accident. Plaintiff also makes (exh B to moving papers, ¶ 16) a 90/180-day claim.

Defendant has satisfied his prima facie showing that the plaintiff did not sustain a permanent consequential or significant limitation to his lumbar spine and left ankle by offering the affirmed report of defendant's orthopedist, Dr. Robert Israel (exh D), who affirmed that after reviewing extensive medical records (including the reports of Dr. Goldenberg dated July 6 and 20, 2011, August 17, 2011, October 26, 2011 and December 19, 2011) he examined the plaintiff. In that examination, which took place on June 27, 2012, Dr. Israel affirmed that he found, among other things, full ranges of motion in plaintiff's left foot/ankle and lumbar spine. Additionally, defendant met his initial burden with respect to plaintiff's 90/180-day claim by submitting

plaintiff's testimony that he was confined to bed or home for only three days after the accident (exh 6, para. 6).

In opposition, plaintiff raises an issue of fact with respect to his claimed lumbar injuries by submitting the affirmed report of his treating physician, Dr. Goldenberg (exh C to opp), who found, in her examination of September 19, 2012, decreased range of motion in the lumbar spine. The Court focuses on two planes: right rotation and left rotation, where Dr. Goldenberg found 44% loss of range of motion in right rotation (25/45 degrees normal) and 40% loss in left rotation (27/45 degrees normal). This is significant because conspicuously absent from Dr. Israel's affirmation is any measurement of lumbar spine rotation.

The Court describes the absence of lumbar rotation measurements from Dr. Israel's report as "conspicuous" because he claims to have reviewed Dr. Goldenberg's 2011 reports dated July 6 and 20, August 17, October 26, and December 19. The July 6, 2011 report is annexed to the opposition as exhibit D; although it is not affirmed, the same measurements are contained within Dr. Goldenberg's affirmed report (opp., ex. C). The fact is that Dr. Israel, after reading Dr. Goldenberg's reports, knew full well of the tremendous reduction in lumbar rotation range of motion (when 45 degrees is normal, on July 6, 2011, Dr. Goldenberg measured only 19 degrees on lumbar right rotation and 16 degrees on left lumbar rotation).

Because Dr. Israel did not report lumbar rotation – even though he knew Dr. Goldenberg found significant limitations in those planes – there exists an issue of fact for trial. There is no excuse for his failure to measure lumbar rotation, or if he did measure it, any excuse for the failure to disclose the measurements in his report would be suspect. Either way, the jury is entitled to hear it and evaluate accordingly.

However, plaintiff fails to raise an issue of fact as to whether his claimed injuries prevented him from "performing substantially all of the material acts which constitute[d his] usual and customary daily activities" (Insurance Law § 5102 [d]; *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]). Plaintiff's bill of particulars claims only that he missed three days of work and his affidavit in support of the motion does not set forth a 90/180 claim. Therefore, defendant is granted summary judgment dismissing plaintiff's 90/180-day claim (*Colon v Torres*, 106 AD3d 458, 965 NYS2d 90 [1st Dept 2013], *Martin v Portexit Corp.*, 98 AD3d 63 [1st Dept 2012]).

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing this action on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5012 (d) is granted only to the extent that plaintiff's 90/180-day claim is dismissed, and is otherwise denied.

This is the Decision and Order of the Court.

Dated: New York, NY
August 1, 2013

Hon. Arlene P. Bluth, JSC