 FILED Sep 16 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

CHESTER FABYANSKI,

Plaintiff,

DECISION/ORDER

-against-

Index No.: 300464/12

ANDREA NINA KELLER and AIR TRAVEL CAR RENTAL CORP.,

Defendants.

The following papers numbered 1 to 6 read on this motion for summary judgment noticed on October 24, 2013 and duly transferred on December 30, 2014.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Affirmation in Opposition & Exhibits	**4, 5**
Reply Affirmation	**6**

Upon the foregoing papers, and after reassignment of this matter from Justice Sharon A.M. Aarons on December 30, 2014, Defendant, Andrea Nina Keller, seeks an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d).

This is an action to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on January 27, 2010, on the Staten Island Expressway at or near the Slosson Avenue exit, in the County of Richmond, State of New York

On August 15, 2013, the Plaintiff appeared for an orthopedic examination conducted by Defendant's appointed physician Dr. Alexios Apazidis. Upon examination and review of Plaintiff's medical records, Dr. Apazidis determined that Plaintiff suffered cervical spine sprain, lumbar spine sprain and right shoulder sprain, all of which had, at the time of the examination,

resolved. Dr. Apazidis finds full range of motion in Plaintiff's lumbar spine and right shoulder with no paraspinal muscle spasm or tenderness. With regard to Plaintiff's cervical spine, Dr. Apazidis finds full range of motion in flexion, rotation and lateral flexion but not in Plaintiff's neck extension which he explains is not related to the accident in question. Dr. Apazidis further opines that Plaintiff has reached maximum medical improvement and that there are no residual findings or permanency related to the accident of January 27, 2010.

The court has read the March 27, 2014 Affidavit of Plaintiff's treating chiropractor, Steven T. Coachman D.C., who treated Plaintiff from March 18, 2010 until July 9, 2010 and then conducted another examination on November 15, 2013. Plaintiff has also submitted the Affirmation of Dr. Jack Baldassare, a radiologist who conducted an MRI of Plaintiff's cervical spine but who did not causally relate his findings to the accident in question. The Court notes that Dr. Coachman fails to adequately address or explain the gap in treatment of over three years from July 9, 2010 to his November 15, 2013 examination of Plaintiff. See *Pommels v. Perez*, 4 N.Y.3d 566 (2005). Plaintiff's self-serving statement that he ended treatment because he felt it was not helping is an insufficient explanation for ending treatment. Furthermore, Dr. Coachman fails to address Defendant's evidence of preexisting medical conditions for which Plaintiff sought prior neck and back chiropractic treatment. See *Smith v. Cherubini*, 44 A.D.3d 520 (1st Dept. 2007).

Any reports, Affirmations or medical records not submitted in admissible form were not considered for the purpose of this Decision and Order. See: *Barry v. Arias*, 94 A.D.3d 499 (1st Dept. 2012).

Under the "no fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained. *Licari v. Elliot*, 57 N.Y.2d 230 (1982).

The proponent of a motion for summary judgment must tender sufficient evidence to the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on Defendants to establish, by submission of evidentiary proof in admissible form, that Plaintiff has not suffered a "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728 (1st Dept. 1986) *aff'd* 69 N.Y.2d 701 (1986). Where a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden then shifts and it is incumbent upon the plaintiff to produce *prima facie* evidence in admissible form to support the claim of serious injury. *Licari,* supra; *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). Further, it is the presentation of objective proof of the nature and degree of a plaintiff's injury which is required to satisfy the statutory threshold for "serious injury". Therefore, simple strains and even disc bulges and herniated disc alone do not automatically fulfil the requirements of Insurance Law §5102(d). See: *Cortez v. Manhattan Bible Church,* 14 A.D.3d 466 (1st Dept. 2004). Plaintiff must still establish evidence of the extent of his purported physical limitations and its duration. *Arjona v. Calcano*, 7 A.D.3d 279 (1st Dept. 2004).

In the instant case Plaintiff has not demonstrated by admissible evidence an objective and quantitative evaluation that he has suffered significant limitations to the normal function, purpose and use of a body organ, member, function or system sufficient to raise a material issue of fact for determination by a jury. Further, he has not demonstrated by admissible evidence the extent and duration of his physical limitations sufficient to allow this action to be presented to a trier of facts. The role of the court is to determine whether bona fide issues of fact exist, and not to resolve issues of credibility. *Knepka v. Tallman,* 278 A.D.2d 811 (4th Dept. 2000). The moving party must tender evidence sufficient to establish as a matter of law that there exist no triable

issues of fact to present to a jury. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320 (1986). Based upon the exhibits and deposition testimony submitted, the Court finds that Defendant has met that burden.

Therefore it is

ORDERED, that Defendant, Andrea Nina Keller's motion for an Order granting summary judgment dismissing Plaintiff's Complaint for failure to satisfy the serious injury threshold under Insurance Law §5102(d) is **granted**.

Dated: September 14 2015

Hon. Ben R. Barbato, A.J.S.C.