SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Honorable Ben R. Barbato

ANDRE RIVERA,

Plaintiff,

DECISION/ORDER

-against-

Index No.: 303820/14

HASANUZ ZAMAN and PRIVOZ HACKING CORP.,

Defendants.

The following papers numbered 1 to 7 read on this motion for summary judgment noticed on January 8, 2016 and duly transferred on April 27, 2016.

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1, 2, 3**
Affirmation in Opposition & Exhibits	**4, 5**
Reply Affirmation & Exhibit	**6, 7**

Upon the foregoing papers, and after reassignment of this matter from Justice Howard H. Sherman on April 27, 2016, Defendants, Hasanuz Zaman and Privoz Hacking Corp., seek 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 December 9, 2013 on Broadway at or near West 185th Street, in the County, City and State of New York.

On June 15, 2015, the Plaintiff appeared for an orthopedic examination conducted by Defendants' retained physician Dr. John H. Buckner. Upon examination and review of Plaintiff's medical records, Dr. Buckner determined that Plaintiff did not sustain any injury as a result of the subject accident. Dr. Buckner reports a normal examination of all areas of

Plaintiff's spine except for feigned variable motion in Plaintiff's cervical spine. Dr. Buckner finds no tenderness, spasm or any deformity in Plaintiff's spine and reports a normal examination of Plaintiff's right shoulder except for healed arthroscopy incisions. Dr. Buckner opines that Plaintiff has no causally-related injury or disability with respect to his cervical spine, lumbar spine or right shoulder. Dr. Buckner further opines that there is no permanency as a result of the subject accident and that Plaintiff may work without causally-related restrictions.

Defendants also offer the affirmed reports of Dr. David A. Fisher, a radiologist appointed by Defendants to review the MRI films of Plaintiff's cervical spine, lumbar spine and right shoulder. Dr. Fisher's review of Plaintiff's multiple MRI films revealed a normal examination of the right shoulder and cervical spine and degenerative changes at L4-5 in Plaintiff's lumbar spine. Dr. Fisher found no radiographic evidence of traumatic or causally related injury to Plaintiff's cervical spine, lumbar spine or right shoulder.

Defendants also submit the affirmed report of Dr. Nicholas D. Caputo, dated April 12, 2015. Upon review of Plaintiff's Emergency Department records, MV-104 and Bill of Particulars, Dr. Caputo determined that there were no acute traumatic findings to causally relate Plaintiff's injuries to the accident of December 9, 2013.

The Court has read the Affirmation of Plaintiff's treating physician, Dr. Jerry A. Lubliner, the certified records of Dr. Richard E. Pearl, the certified records of Dr. Clyde H. Weissbart and MotionPro Physical Therapy, as well as the MRI reports of Dr. Robert Scott Schepp, radiologist, presented by Plaintiff.

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, 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 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 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 Defendants have not met that burden. However, based upon the medical evidence and testimony submitted, Plaintiff has not established that he has been unable to perform substantially all of his normal activities for 90 days within the first 180 days immediately following the accident and as such is precluded from raising the 90/180 day threshold provision of the Insurance Law.

Therefore it is

ORDERED, that Defendants, Hasanuz Zaman and Privoz Hacking Corp.'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** to the extent that Plaintiff is precluded from raising the 90/180 day threshold provision of the Insurance Law.

This constitutes the Decision and Order of this Court.

Dated: June 28, 2016

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