Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
**Justice**

- - - - - - - - - - - - - - - - - - - - x

EMMANUEL MOULTRIE,

Plaintiff,

- against -

ALAN J. BLANCHARD and DU HWAN SUNG ,

Defendants.

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Index No.: 7023/2016

Motion Date: 11/16/17

Motion No.: 126

Motion Seq No.: 1

The following papers numbered 1 to 9 read on this motion by defendant DU HWAN SUNG for an order pursuant to CPLR 3212, granting defendant DU HWAN SUNG summary judgment and dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits | 1 - 4 |
| Affirmation in Opposition-Exhibits | 5 - 7 |
| Reply Affirmation | 8 - 9 |

This is a personal injury action in which plaintiff seeks to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on June 16, 2014 on Northern Boulevard at its intersection with Morgan Street, in Queens County, New York. As a result of the accident, plaintiff alleges that he sustained serious injuries his cervical spine and lumbar spine.

Plaintiff commenced this action by filing a summons and complaint on April 16, 2015. Defendant Du Hwan Sung joined issue by service of a verified answer with cross-claim dated August 11, 2015. Defendant Alan J. Blanchard joined issue by service of a verified answer with cross-claim dated October 6, 2015. Defendant Du Hwan Sung (hereinafter movant) now seeks an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff appeared for an examination before trial on December 2, 2016. He testified that he was involved in the subject accident. As a result of the impact, his upper body came in contact with the steering wheel and back of the chair. The vehicle's airbags did not deploy. He did not lose consciousness. After the accident, he exited the vehicle. He then drove his vehicle to the emergency room of North Shore Manhasset Hospital. Within a week after the accident, he went to see a doctor on Long Island. He treated there more than ten times. Treatment consisted of electrical stimulation, acupuncture, and chiropractic treatment. He also saw a psychologist there. His main complaints were regarding his neck, back, and head. He was prescribed a medication for sleeping. He was sent for MRIs. He did not know when his last treatment occurred, but he had not seen any doctors regarding the subject accident in the last year. At the time of the deposition, he was not taking any medications. Since the accident, he did not have any surgeries or injections. As a result of the accident, he is afraid of someone hitting him from behind while driving. He does not remember if he was employed at the time of the accident or if he missed time from work. Prior to the subject accident he was involved in an incident while working at Old Navy in January 2007 and was involved in a prior motor vehicle accident.

In support of the mtoion, movant submits an affirmed medical report from P. Leo Varriale, M.D. Dr. Varriale performed an independent orthopedic evaluation on plaintiff on February 7, 2017. Plaintiff presented with current complaints of on and off pain in the low back and stiffness in the neck. Dr. Varriale identifies the records reviewed prior to rendering his report. He performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff's cervical spine, lumbar spine, thoracic spine, bilateral shoulders, bilateral elbows, bilateral wrists, bilateral hips, bilateral knees, and bilateral ankles. All other objective tests were normal. Dr. Varriale opines that the injuries are partly related to the subject accident and partly related to previous injuries to the lower back. The resolved cervical and lumbosacral strains are related and superimposed on the prior back condition. Dr. Varriale concludes that there is no medical necessity for any further physical therapy or orthopedic treatment. There is no medical necessity for transportation, household help, durable medical equipment or future diagnostic testing. Dr. Varriale concludes that plaintiff can perform all the activities of daily living including working with no restrictions.

Movant contends that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an

injury which resulted in a significant disfigurement; fracture; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; or significant limitation of use of a body organ, member, function or system. Movant also contends that as plaintiff testified that he could not recall whether he missed any time from work as a result of the subject accident, plaintiff did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented him for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff submits an affidavit dated October 31, 2017. He affirms that he first began treating with Dr. Gerald Surya, M.D. on June 25, 2014. He continued treating with Dr. Surya through February 2015. He also treated with Dr. Charles Nguyen, D.C. who performed an initial chiropractic examination on August 26, 2014. He ended treatment at Sun Medical Care because he had reached the maximum medical level of improvement. He continues to experience pain in his neck and back on a daily basis. He did sustain minor injuries and received physical therapy as a result of the prior accident. However, at the time of the subject accident, he was not experiencing any pain in his cervical spine, thoracic spine, or lumbar spine. He has not been involved in any subsequent accidents.

Plaintiff also submits the Emergency Room records from North Shore University Hospital and an affirmation from Marvin Moy, M.D. Dr. Moy basis his report on Dr. Surya's affirmed records. He affirms that plaintiff appeared for medical evaluation, rehabilitation and treatment for his injuries at Sun Medical Care of Nassau, P.C. on June 25, 2014. Dr. Surya performed an initial medical examination, performed range of motion testing, and noted significant limitations regarding plaintiff's cervical spine, thoracic spine, and lumbar spine. Plaintiff continued to treat with Dr. Surya through November 25, 2014. Dr. Surya opined that there is a direct causal relationship between the subject accident and plaintiff's injuries. Dr. Surya also noted that at the time of his last examination, plaintiff did continue to experience pain and limited ranges of motion which affect his activities of daily living. Dr. Surya's affirmed final narrative report is annexed to Dr. Moy's report. Dr. Moy affirms that plaintiff treated at Sun Medical Care of Nassau P.C. on approximately eighty occasions over a seven month period. Plaintiff ended treatment because he had reached the maximum medical level of improvement, yet his symptoms persisted. He further affirms that he advised plaintiff to follow a home exercise program. Most recently, Dr. Moy performed range of

motion testing on plaintiff on July 26, 2017. He recorded limited ranges of motion regarding plaintiff's cervical spine and lumbar spine. Dr. Moy notes that plaintiff was advised to refrain from activities such as prolonged standing and sitting, squatting, bending, traveling up and down stairs, and reaching overhead. As a result of plaintiff's injuries, he missed six weeks of work. Dr. Moy advised plaintiff to limit his work activities that would require bending or lifting. Plaintiff was advised to not perform any activities involving lifting objects over ten pounds or prolonged bending. Additionally, plaintiff was advised to use caution when lifting grocery bags, performing household chores, and participating in any recreational activities. Dr. Moy notes that plaintiff was involved in a prior accident, but was fully recovered when he began treating for the injuries arising out of the subject accident. It is Dr. Moy's opinion that plaintiff has sustained a permanent partial disability to his lumbar spine, cervical spine and thoracic spine which is causally related to the subject accident.

Here, the competent proof submitted by movant, including the affirmed medical reports of Dr. Varriale and plaintiff's own testimony, is sufficient to meet movant's prima facie burden by demonstrating that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, this Court finds that plaintiff raised triable issues of fact as to whether he sustained a serious injury by submitting the affirmations from Drs. Moy and Surya attesting to the fact that plaintiff sustained injuries as a result of the subject accident, finding that plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident (see Perl v Meher, 18 NY3d 208 [2011]; David v Caceres, 96 AD3d 990 [2d Dept. 2012]; Martin v Portexit Corp., 98 AD3d 63 [1st Dept. 2012]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado,59 AD2d 367 [2d Dept. 2009]).

Additionally, Dr. Moy adequately explained the gap in treatment by affirming that plaintiff ended treatment because plaintiff had reached the maximum medical level of improvement, even though plaintiff's symptoms persisted (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency,

Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

As such, plaintiff demonstrated issues of fact as to whether he sustained a serious injury under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident, and whether he sustained a serious injury under the 90/180-day category (see Khavosov v Castillo, 81 AD3d 903 [2d Dept. 2011]; Mahmood v Vicks, 81 AD3d 606 [2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091 [2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendant DU HWAN SUNG for an order granting summary judgment and dismissing plaintiff's complaint is denied.

Dated: November 27, 2017
Long Island City, N.Y.

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**ROBERT J. MCDONALD**
**J.S.C.**