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

ALADINO VAZQUEZ AND JULIO C VALDES,

Plaintiffs,

- against -

CHARNJIT KAUR AND VIIXI TAXI, INC.,

Defendants.

- x

Index No.: 11728/2013

Motion Date: 7/20/15

Motion No.: 128

Motion Seq No.: 2

The following papers numbered 1 to 9 read on this motion by defendants CHARNJIT KAUR AND VIIXI TAXI, INC. for an order pursuant to CPLR 3212 granting defendants summary judgment and dismissing the complaint of plaintiffs ALADINO VAZQUEZ AND JULIO C VALDES on the ground that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d)

Papers Numbered

Notice of Motion-Affirmation-Exhibits-Memo. of Law...1 - 5
Affirmation in Opposition-Exhibits.....6 - 7
Reply Affirmation-Exhibits.....8 - 9

This is a personal injury action in which plaintiffs seek to recover damages for injuries they allegedly sustained on March 15, 2013 in a motor vehicle accident which occurred on East 13th Street and First Avenue, in New York County, New York. Plaintiff Vazquez alleges that as a result of the accident he sustained injuries to his right shoulder, cervical spine, and lumbar spine. Plaintiff Valdes alleges that as a result of the accident he sustained injuries to his cervical spine, lumbar spine, and thoracic spine.

Plaintiffs commenced this action by filing a summons and verified complaint on June 18, 2013. Defendants joined issue by service of a Verified Answer dated July 11, 2013. Defendants now move for an order pursuant to CPLR 3212, dismissing plaintiffs' complaint on the ground that the injuries claimed by plaintiffs fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

In support of the motion, defendants submit an affirmation from counsel; a copy of the pleadings; plaintiffs' verified bill of particulars; copies of Emergency Room records from Forest Hills Hospital for both plaintiffs; copies of the affirmed medical reports of Christopher J. Cassels, M.D. for both plaintiffs; and copies of the transcripts of both plaintiffs' examination before trial taken on August 19, 2014.

The Emergency Room records from the date of the accident indicate that Vazquez had full range of motion of his right shoulder and only mild tenderness. The records also indicate that Vazquez's neck and back were normal.

At his deposition, Vazquez testified that he was not working at the time of the accident, but since the accident he has returned to work as a floor and carpet installer. Vazquez states that he is performing the same job as before, but is not able to do it as quick as before. Vazquez also testified that he was confined to bed and home for only two days after the accident and two days after the surgery.

On October 15, 2014, Dr. Cassels performed an independent orthopedic medical examination of Vazquez. Dr. Cassels notes that plaintiff had normal range of motion in the lumbar spine, right shoulder, and cervical spine. He opines that Vazquez did not sustain any permanent injury to his lumbar or cervical spine as a result of the subject accident and that this accident could not have been the cause of Valdez's right shoulder injury.

Valdes' Emergency Room records from the date of the accident indicate that he had full ranges of motion and only mild tenderness in his neck and back. Valdes was diagnosed with neck strain.

At his deposition, Valdes testified that he missed two weeks of work as a result of the accident and then returned to the same job as before. Valdes stated that there is nothing that he cannot do today that he was able to do before the accident. He also stated that he resumed his physical therapy the day after his surgery and was confined to bed for two weeks after the surgery.

On October 15, 2014, Dr. Cassels also performed an independent orthopedic medical examination of Valdes. Dr. Cassels opines that Valdes did not sustain any permanent injury to the lumbar spine or cervical spine as a result of the subject accident and that the lumbar spine and cervical spine had age related degenerative changes.

Defendants' counsel contends that the evidence submitted is sufficient to establish, prima facie, that plaintiffs have not sustained a permanent loss of a body organ, member, function or system and that they have not sustained a permanent consequential limitation of a body organ or member or a significant limitation of use of a body function or system. Counsel also contends that plaintiffs, who were only confined to their homes for two weeks after the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented them, for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of their usual daily activities.

In opposition plaintiffs submit an affirmation from their counsel; their own affidavits; the affirmed medical report of Miriam Kanter, M.D. regarding Vazquez; the affirmed medical report of Emmanuel Hostin, M.D. regarding Vazquez; a copy of the MRI reports taken of Vazquez's lumbar spine, cervical spine, and right shoulder; the medical report of Sima Anand, M.D. regarding Valdes; the affirmed medical report of Tim Canty, M.D. regarding Valdes; and the affirmed MRI report of Daniel Schlusselberg, M.D. regarding Valdes.

Vazquez began treating with Dr. Kanter on March 27, 2013 who recommended a physical therapy regimen of three to five times per week and referred Vazquez for MRIs of his neck, back, and right shoulder. On July 10, 2013, Vazquez sought treatment with Dr. Hostin, an orthopedic surgeon, who recommended surgery to Vazquez's right shoulder. Dr. Hostin diagnosed Vazquez with right shoulder post traumatic labral tear and impingement. On September 13, 2013, Vazquez underwent surgery to his right shoulder.

On April 11, 2015, Dr. Kanter re-evaluated Vazquez and performed range of motion testing on his cervical spine, lumbar spine, and right shoulder. Dr. Kanter found limited ranges of motion. Based on Dr. Kanter's review of Vazquez's prior medical records and history, she diagnosed Vazquez with cervical radiculitis; lumbar radiculitis; right shoulder derangement/arthroscopic surgery; and disc bulges at C3-4, C4-5, C5-6 and C6-7 levels. She opines that the injuries sustained are causally related to the accident and that the injuries are permanent in nature and will inhibit his ability to carry out his normal activities of daily living. She further states that the surgery to the right shoulder was necessitated as a result of the subject accident.

Valdes originally sought treatment on March 28, 2013 with Dr. Anand. Dr. Anand's reports are not sworn to or affirmed under penalties of perjury. Therefore, Dr. Anand's reports are not competent and not admissible (see Grasso v Angerami, 79 NY2d 813 [1991]; Varveris v France, 71 AD3d 1128 [2d Dept. 2012]); Malave v Basikov, 45 AD3d 539[2d Dept. 2007]).

Dr. Canty originally treated Valdes on June 26, 2013 and performed range of motion testing on his cervical and lumbar spine, which revealed limitations in motion. Dr. Canty diagnosed Valdes with cervical radiculitis/radiculopathy; lumbar radiculitis; bulge at L1-L2; disc bulge at L2-L3; disc herniation at L3-L4; disc bulge at L4-L5; disc bulge at L5-S1; disc herniations at C3-C4 and C4-C5; and disc bulge at C5-C7. On June 27, 2013, Dr. Canty administered a lumbar epidural steroid injection at L4-L5. On August 16, 2013, Valdes underwent surgery to his lumbar spine including a percutaneous discectomy and thermal ablation of the annulus L5-S1. Dr. Canty opines that the injection and the surgery were a direct result of the accident.

On April 15, 2015, Dr. Canty re-evaluated Valdes and found continued limitations in ranges of motion in Valdes' lumbar and cervical spine. Dr. Canty concludes that the injuries sustained by Valdes are permanent in nature and his limitations are significant and will inhibit his daily activities.

In reply to plaintiffs' opposition, defendants argue that there are discrepancies in the various doctors' reports that have not been explained. The discrepancies are an issue of credibility which is for a jury to determine (see Francis v Basic Metal, 144 AD2d 634 [2d Dept. 1988]).

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "A defendant can establish that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the competent proof submitted by defendants is sufficient to meet defendants' prima facie burden by demonstrating that each 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]).

However, this Court finds that plaintiffs raised triable issues of fact by submitting the affirmed medical reports attesting to the fact that each plaintiff sustained injuries and underwent surgery as a result of the accident, finding that each plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in recent examinations, and concluding that their limitations are permanent and resulted from trauma, not degenerative conditions, 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]).

As such, plaintiffs demonstrated issues of fact as to whether they 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 (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]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 743 [2d Dept. 2010]). In light of this finding, the court need not address the 90/180 category.

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

ORDERED, that the motion by defendants for an order granting summary judgment dismissing plaintiffs' complaint is denied; and it is further

ORDERED, that this matter remains on the calendar of the Trial Scheduling Part for October 13, 2015.

Dated: Long Island City, N.Y.
September 8, 2015

ROBERT J. MCDONALD
J.S.C.

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