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

KRISHNA LEKHRAJ, Index No.: 27583/2010

Plaintiff, Motion Date: 01/18/13

- against - Motion No.: 55

EMMATTIE DHANRAJ and MARIA DIGENNARO, Motion Seq.: 2

Defendants.

- x

EMMATTIE DHANRAJ,

Plaintiff,

-against-

MARIA DIGENNARO,

Defendant,

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The following papers numbered 1 to 20 were read on this motion by defendant, MARIA DIGENNARO, and cross-motion of defendant, EMMATTIE DHANRAJ, for an order pursuant to CPLR 3212 granting the defendants summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff has not sustained a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 7
Cross-Motion-Affidavits-Exhibits.....9 - 10
Affirmation in Opposition-Affidavits.....11 - 15
Reply Affirmation.....16 - 20

This is a personal injury action in which plaintiff, Krishna Lekhraj seeks to recover damages for injuries he allegedly sustained on May 14, 2009, as a result of a motor vehicle

accident that took place on eastbound Liberty Avenue and Crossbay Boulevard, Queens County, New York. At the time of the accident the plaintiff was a passenger in the vehicle being operated by defendant Dhanraj when it collided with the vehicle being operated by co-defendant Maria Digennaro. As a result of the accident the plaintiff alleges that he sustained several disc herniations and disc bulges of the cervical and lumbosacral spine.

Defendant, Maria Digennaro, and codefendant, Emmattie Dhanraj, move respectively for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint on the ground that the injuries claimed by the plaintiff fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. In support of the motion, defendant Digennaro submits an affirmation from counsel, Tracy Morgan, Esq; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of plaintiff's examination before trial and a copy of the medical report of orthopedist Dr. Salvatore Corso.

Counsel for co-defendant Emmattie Dhanraj, Donald Munson, Esq. cross-moves for the same relief and states that in the interest of brevity, defendant Dhanraj adopts the arguments and proof submitted by the co-defendant with respect to that portion of their motion that pertains to serious injury.

In his verified bill of particulars, the plaintiff states that as a result of the accident he sustained disc bulging at L2-L3, L4-L5, L5-S1 as well as disc herniations at C5-C6, C6-C7 and L3-L4. The plaintiff states that he was confined to bed for a period of one week following the accident and confined to his house for a period of five weeks following the accident. The plaintiff contends that he sustained a serious injury as defined in Insurance Law §5102(d).

The plaintiff was examined on January 5, 2012 by orthopedist, Dr. Anthony Corso, a physician retained by the defendants. The plaintiff reported that on the date of the accident, May 14, 2009 he injured his neck, right shoulder and lower back. He presented with complaints of neck and lower back pain. Dr. Corso performed quantified and comparative range of motion tests. He found that there was no limitation of range of motion of the plaintiff's cervical spine, right shoulder and thoracolumbar spine. His diagnosis was "status post cervical strain and lumbar strain - resolved, and status post right shoulder sprain resolved. He states that, "based on today's objective physical evaluation, there is no evidence of an orthopedic disability."

In his examination before trial, taken on December 7, 2011, the plaintiff, age 46, testified that he is employed as a truck driver working for Swiss Port USA. At the time of the accident he was employed off the books doing custodial work. He missed less than a month of work after the accident. From the scene of the accident he was driven to a medical clinic where he began treatments for pain to his lower back and right shoulder. After approximately one week he transferred his care to a second clinic where he received physical therapy treatments multiple times per week for ten or eleven months. He stated that he presently suffers from back pain intermittently a few days per week. He stated that he has no other pain in any other parts of his body. He stated that his daily life is effected by the injury only as far as when he drives or stands up for a long time. He stated that the pain in his neck stopped two or three months after he began treatments. He has no future appointments to treat injuries resulting from the accident.

Defendants' counsel contends that the affirmed medical report of Dr. Corso, as well as the plaintiff's EBT testimony stating that he missed less than one month from work immediately following the accident, are sufficient to establish, prima facie, that the plaintiff has not sustained a permanent loss of a body organ, member, function or system; that he has 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 the plaintiff, who was not confined to bed or home for more than five weeks after the accident, did not sustain a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff, for not less than 90 days during the immediate one hundred days following the occurrence, from performing substantially all of his usual daily activities.

In opposition, plaintiff's attorney, Richard S. Gershman Esq., submits unaffirmed medical reports from the plaintiff's treating physicians Dr. Justine Lachmann and Dr. Haddad. Plaintiff also submits an affidavit from chiropractor, Dr. Richard Amato as well as the affirmed reports of radiologist Dr. Paul Bonheim and certain affirmed reports from Dr. Theodore. Plaintiff also submits his own affidavit dated December 2012.

The report of Dr. Justine Lachmann, who examined the plaintiff on May 26, 2009, two weeks after the accident, is not affirmed and therefore not in admissible form (see Scheker v Brown, 91 AD3d 751 [2d Dept. 2012]; Lively v Fernandez, 85 AD3d 981 [2d Dept. 2011]). Dr. Theodore, at Best Medical first examined the plaintiff on November 19, 2009 six months after the accident. His affirmed report indicates that at that time he

found that the plaintiff had limitations of range of motion of the cervical spine and lumbosacral spine. Dr. Haddad's reports are not signed and not affirmed and also not in admissible form. The radiological reports of Dr. Bonheim indicated that plaintiff has disc herniations at C5-C6 and C6-C7 as well as disc bulging at L2-L3, L4-L5 and L5-S1 and disc herniation at L3-L4.

Chiropractor, Dr. Richard Amato examined the plaintiff on November 7, 2012, and submits an affidavit stating that he reviewed the reports of Dr. Lachmann at Best Care Medical as well as the MRIs. He states that the plaintiff was treated with physical therapy for eleven months. The symptoms did not resolve and he had reached the point of maximum benefit from medical treatment for his injuries. Dr. Amato states that at the time of his examination in November 2012, the plaintiff still had complaints of pain in his lower back and neck. Dr. Amato performed objective range of motion testing and found that the plaintiff had significant limitations of range of motion of the lumbar spine ane cervical spine. Dr. Amato states that because there has been little change in restriction of range of motion that plaintiff exhibited over the past three years, it is his belief that the injuries are permanent and have resulted in a consequential limitation of the back and neck and significant limitation of use of a body system which is causally related to the accident of May 14, 2009.

In his affidavit the plaintiff states that subsequent to his accident he came under the care of Best Medical Practice, Dr. Leslie Theodore, and Dr. Richard Amato. He treated continuously for eleven months following the accident. He then stopped treatment because he was told that he reached maximum benefit. He also states that his no fault benefits were terminated and he could not afford to have further treatment. He states that he still experiences pain from the injuries sustained in the accident on a daily basis for which he takes over the counter pain relievers.

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 [a] 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 proof submitted by the defendants, including the affirmed medical report of Dr. Corso, as well as the plaintiff's examination before trial in which he testified that missed less than a month of work after the accident, were sufficient to meet defendants' prima facie burden by demonstrating that the 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]).

The plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury under the permanent loss, permanent consequential limitation of use, and/or significant limitation of use categories of Insurance Law § 5102 (d) because he failed to submit competent medical evidence that revealed the existence of a significant limitation in his cervical spine and lumbar spine that was contemporaneous with the subject accident (see Pierson v Edwards, 77 AD642 [2d Dept. 2010]; Srebnick v Quinn, 75 AD3d 637 [2d Dept. 2010]; Catalano v Kopmann, 73 AD3d 963 [2d Dept. 2010]; Here although Dr. Lachman examined the plaintiff on May 26, 2009, soon after the accident, as stated above, her report is not affirmed and therefore not in admissible form. The earliest admissible proof submitted by the plaintiff is the Initial Consultation report of Dr. Theodore which is affirmed but was conducted on November 19, 2009 over 6 months after the accident(see Soho v Konate, 85 AD3d 522 [2d Dept. 2011][doctor's operative report is not contemporaneous because he did not examine plaintiff until five months after the accident]; Resek v Morreale, 74 AD3d 1043 [2nd Dept. 2010] [affirmed medical report from an independent orthopedist who examined the injured plaintiff on more than five months post-accident was not contemporaneous with the accident]; Jack v Acapulco Car Serv., Inc., 72 AD3d 646 [2nd Dept. 2010]; Camacho v John H. Dwelle, 54 AD3d 706 [2d Dept. 2008]). Thus, without admissible proof regarding the plaintiff's initial examination, plaintiff's medical proof does not provide evidence of an injury contemporaneous with this accident. "Although the Court of

Appeals in Perl v Meher, 18 NY3d 208 [2011] rejected a rule that would make contemporaneous quantitative assessments a prerequisite to recovery, Perl did not abrogate the need for at least a qualitative assessment of injuries son after the accident (see Rosa v Mejia, 95 AD3d 402 [1st Dept. 2012]). Thus, Perl "confirmed the necessity of some type of contemporaneous treatment to establish that a plaintiff's injuries were causally related to the incident in question" [Rosa v Mejia, supra]).

Lastly, the plaintiff, who returned to work one month after the accident, failed to submit competent medical evidence that the injuries allegedly sustained by him as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days following the accident(see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Valera v Singh, 89 ADd 929 [2d Dept. 2011]; Lewars v Transit Facility Mgt. Corp., 84 AD3d 1176 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, because the evidence relied upon by plaintiff is insufficient to create a triable issue of fact with respect to any of the statutory categories of serious injury and for the reasons set forth above, it is hereby,

ORDERED, that the defendant’s motion for summary judgment is granted and the plaintiff’s complaint against defendants EMMATTIE DHANRAJ and MARIA DIGENNARO is dismissed, and it is further,

ORDERED, that the Clerk of Court is directed to enter judgment accordingly.

Dated: January 30, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.