SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

JOHN MANSUETO,

Plaintiff,

-against-

FRANTZ MORNECY, ALPHA BAH and DAVID MANASHEV,

Defendants.

INDEX NO.: 001682/07
MOTION SEQ. NOS.: 005, 006

MOTION DATE: 3/10/09

The following papers read on this motion (numbered 1-6):

Notice of Motion.....1
Affirmation in Opposition.....2
Notice of Cross Motion.....3
Reply Affirmation.....4
Affirmation in Reply.....5
Further Affirmation in Reply.....6

The motion by defendants ALPHA BAH and DAVID MANASHEV for summary judgment and the cross motion by defendant FRANTZ MORNECY for summary judgment pursuant to **CPLR §3212** are determined as follows.

Plaintiff JOHN MANSUETO, age 31, alleges that on June 23, 2006, at approximately 7:50 a.m., he was a passenger in a taxi cab operated by defendant ALPHA BAH and owned by defendant DAVID MANASHEV which came into contact with a vehicle owned and operated by defendant FRANTZ MORNECY. The accident occurred at the intersection of West 31st and 9th Avenue, in New York City. Defendants ALPHA BAH and DAVID MANASHEV now move and defendant FRANTZ MORNECY cross moves for an order dismissing plaintiff's complaint pursuant to **CPLR §3212**, on grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)**.

Insurance Law §5102(d) provides that a "serious injury means a personal injury which results in (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment" (numbered by the Court). The Court's consideration in this action is confined to whether plaintiff's injuries constitute a permanent consequential limitation of use of a body organ or member (7) or significant limitation of use of a body function or system (8). The Court finds that plaintiff has demonstrated a *prima facie* failure to prove a medically determined injury which prevented plaintiff from performing all of the material acts constituting his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident (9).

In support of their motion for summary judgment, defendants submit an affirmed report of examination, dated February 5, 2008, of orthopedist Salvatore Corso, MD, covering an examination of that date, and an affirmed report of examination, dated February 5, 2008, of neurologist Edward M. Weiland, MD, covering an examination of that date.

Dr. Corso reported that physical examination of plaintiff's cervical spine, right shoulder, right elbow, thoracolumbar spine, right knee, right wrist and left wrist revealed normal range of motion results, comparing the results to norms. Dr. Corso set forth the tests performed and found no muscle atrophy, normal muscle strength, and normal reflexes throughout. With respect to the right elbow, which is one of the areas plaintiff testified at his deposition may require future surgery, Dr. Corso found "point tenderness over the lateral epicondyle" but noted normal range of motion and no valgus stress, effusion, soft tissue deformity, swelling or muscle atrophy. With respect to the right knee, Dr. Corso, noted

"some tenderness around the patella", but found negative patellar grind, no valgus stress and negative results in several specified orthopedic tests. Dr. Corso diagnosed cervical sprain, right elbow lateral epicondylitis, right shoulder sprain, lumbar sprain, right knee contusion and bilateral sprain. Dr. Corso concluded that plaintiff "can continue in his current occupation" and "perform his normal activities" without restrictions.

Dr. Weiland performed range of motion testing on plaintiff's cervical and lumbar spines and shoulders and noted normal results comparing the results to norms. Dr. Weiland found straight leg raising was "unlimited at 90 degrees", intact sensation, normal deep tendon reflexes and normal gait. Dr. Weiland reported that "there were subjective complaints of pain with light palpation over the lower cervical and lumbar regions as well as the extensor surface of the right elbow and right knee." However, Dr. Weiland noted that there was no joint crepitus or effusions with range of motion of the right elbow, right shoulder or right knee and noted no range of motion deficits in plaintiff's cervical and lumbar spines and shoulder. Dr. Weiland found that there was "no objective evidence of any neuromuscular dysfunction [to] substantiate [plaintiff's] claim of injury to the central or peripheral nervous system". Dr. Weiland concluded that plaintiff "is not disabled from a neurological point of view and is able to perform normal activities of daily living as well as occupational duties without restrictions."

Defendants Bah and Manashev also submit the deposition testimony of plaintiff conducted on January 11, 2008. Plaintiff testified that after the accident, he walked one and one half miles to his job site, and after reporting that he had been in an accident, traveled to his home by subway and train (Deposition testimony, pp. 43-45). Later that day plaintiff saw his primary care physician, Dr. Bocci, complaining of pain in his right knee and right arm, and was told to return "if anything else starts bothering [him]" (Deposition testimony, pp. 45-46). At plaintiff's second and last visit with Dr. Bocci, plaintiff also complained of pain in his neck and back and was referred to an orthopedist, Dr. Silverberg (Deposition testimony, p. 48). Plaintiff could not recall when he had his first appointment with Dr. Silverberg

(Deposition testimony, p. 48). Dr. Silverberg did x-rays and sent him for physical therapy at Plainview Physical Therapy (Deposition testimony, p. 49) which continued for two months (Deposition testimony, p. 51). Plaintiff had no physical therapy in 2007 or physical therapy at any other facilities (Deposition testimony, p. 52, 54). Plaintiff testified that he saw Dr. Silverberg five to six times, the last time in June of 2007 (Deposition testimony, pp. 49, 69) and had a scheduled appointment three weeks after the deposition to discuss possible surgery on a tendon in his right elbow. (Deposition testimony, p. 50). Plaintiff also testified that Dr. Silverberg sent him for three to four MRIs and a EMG/NCV test (not in the record) and told plaintiff that he had tendonitis or a tendon problem in his right elbow, bulges in his neck and joint fusion in his right knee (Deposition testimony, pp. 54-57). Plaintiff received two cortisone injections in his right elbow (Deposition testimony, pp. 50, 56).

Plaintiff testified that as a result of the accident, he missed two weeks of work and returned to the same responsibilities and duties as he had prior to the accident (Deposition testimony, p. 17, 76). With respect to activities, plaintiff testified that could no longer engage in bow hunting or "[hold] his kid for a long period of time" (Deposition testimony, pp. 61-62) and that it is difficult for him to lift over thirty pounds without discomfort and to turn wrenches (Deposition testimony, p. 63). Plaintiff testified that he feels pain in his right arm, right knee and neck seven days per week although some of the pain is intermittent (Deposition testimony, pp. 64-65). Plaintiff also testified that he had a work related accident in 2000 and injured his lower back, left knee and left ankle, had surgery on his left knee and left ankle, and received physical therapy to his lower back (Deposition testimony, pp. 69-75).

The Court finds that the report of defendants' examining physicians are sufficiently detailed in the recitation of the various clinical tests performed and measurements taken during the examinations to satisfy the Court that an "objective basis" exists for their opinions. The Court finds notes that Drs. Corso and Weilands' reports of plaintiff's complaints of pain and tenderness were not supported by objective findings such as restricted

range of motion or spasms. Accordingly, the Court finds that defendants have made a *prima facie* showing, that plaintiff John Mansueto did not sustain a serious injury within the meaning of **Insurance Law §5102(d)**. With that said, the burden shifts to plaintiff to come forward with some evidence of a "serious injury" sufficient to raise a triable issue of fact. **Gaddy v. Eyler**, 79 NY2d 955, 957.

Plaintiff submits (1) an affirmed report of orthopedist, Scott A. Silverberg, MD, dated November 6, 2008, covering examinations conducted on August 8, 2006, September 5, 2006, October 3, 2006, October 9, 2006, December 18, 2006, April 17, 2007. February 7, 2008 and May 5, 2008; (2) copies of Dr. Silverberg's unaffirmed notes covering these appointments affirmed by Dr. Silverberg in his November 6, 2008 affirmation to be true and accurate; (3) MRI report of plaintiff's cervical spine, performed on September 20, 2006, and affirmed by radiologist Jeffrey Kaufman, MD, PhD by affirmation dated May 6, 2008; (4) MRI report of plaintiff's right knee, performed on September 22, 2006, and affirmed by Dr. Kaufman by affirmation dated May 6, 2008; and (5) MRI report of plaintiff's right elbow, performed on November 3, 2006, and affirmed by radiologist Jonathan Lerner, MD by affirmation dated May 7, 2008.

Dr. Silverberg generally reports findings of tenderness in plaintiff's cervical spine, right shoulder, right knee and lumbar spine and reports of plaintiff's complaints of pain on certain range of motion testing. Dr. Silverberg also provides results of examinations conducted by Dr. Boccio, and physical medicine and rehabilitation physician, Alan P. Wolf, MD. Dr. Silverberg concludes that "nearly two years [after the accident] plaintiff continues to experience pain and tenderness in his right elbow, right knee and neck" and states that plaintiff is "partially disabled" and "continues to be limited with respect to the activities of daily living such as walking, holding his infant daughter and lifting objects." The Court notes that the portion of Dr. Silverberg's affirmation covering the reports of Drs. Boccio and Wolf is based, in part, on unsworn reports of other physicians and therefore cannot be considered. *See* **Ferber v. Madorran**, 60 AD3d 725; **Sorto v. Morales**, 55 AD3d 718;

Gonzales v. Fiallo, 47 AD3d 760; **Ali v. Mirshah**, 41 AD3d 748; **Phillips v. Zilinsky**, 39 AD3d 728; **Sammut v. Davis**, 16 AD3d 658; **Friedman v. U-Haul Truck Rental**, 216 AD2d 266.

The MRI reports submitted by plaintiff make the following findings: (1) the MRI report of plaintiff's cervical spine notes a "mild straightening" and "mild disc bulge" at C5-C6; (2) the MRI report of plaintiff's right knee notes "small joint effusion"; and (3) the MRI report of plaintiff's right elbow notes findings consistent with "tendonitis with adjacent subcutaneous inflamation."

It is the determination of this Court that plaintiff has failed to submit *objective* medical evidence (of either a quantitative or qualitative nature) sufficient to raise a triable issue as to whether or not he sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**. Dr. Silverberg's report failed to quantify any range of motion findings, except to state that plaintiff reported pain upon certain movements. *See* **Ly v. Holloway**, 60 AD3d 1006; **LaMarre v. Michelle Taxi, Inc.**, 60 AD3d 911; **Sirma v. Beach**. 59 AD3d 611; **Friscia v. Mak Auto, Inc.**, 59 AD3d 492; **Gochnour v. Quaremba**, 58 AD3d 680; **Sharma v. Diaz**, 48 AD3d 442; **Duke v. Saurelis**, 41 AD3d 770. In fact, the Court notes that the medical reports covering Dr. Silverberg's examinations of plaintiff on August 8, 2006 (the initial examination following the accident), September 5, 2006, October 9, 2006, October 18, 2006, April 17, 2007 and February 7, 2008 makes notations of normal range of motion throughout. Furthermore, although Dr. Silverberg reports in his affirmation that at the examination of February 7, 2008, plaintiff's "biggest problem continued to be the elbow", and at the most recent examination of May 5, 2008, states that plaintiff "complained of recurrent pain in his right elbow and right knee, the elbow was worse than the knee", the examination notes covering Dr. Silverberg's first two examinations of plaintiff after the accident, did not even address an elbow injury. Plaintiff's elbow injury was not addressed by Dr. Silverberg until his October 3, 2006 examination. This renders Dr. Silverberg's statement that all plaintiff's injuries, including injuries to his elbow, are "directly and

causally related" to the accident, highly speculative. Dr. Silverberg's affirmation and notes also fail to specify the objective tests performed. *See* **Sapienza v. Ruggiero**, 57 AD3d 643; **Gastaldi v. Chen**, 56 AD3d 420; **Budhram v. Ogunmoyin**, 53 AD3d 640; **Patalano v. Curreri**, 30 AD3d 497; **Vazquez v. Basso**, 27 AD3d 728; **Edwards v. New York City Transit Authority**, 17 AD3d 628. Accordingly, the Court finds that Dr. Silverberg's report is generally conclusory and tailored to meet statutory requirements *See* **Lopez v. Senatore**, 65 NY2d 1017; **Cornelius v. Cintas Corporation**, 50 AD3d 1085; **Slavin v. Associates Leasing, Inc.**, 273 AD2d 372.

The accident occurred on June 23, 2006 but Dr. Silverberg did not examine plaintiff until August 8, 2006. Plaintiff has failed to provide records of his treating physician, Dr. Boccio, whom he purportedly saw on the day of the accident. As such, plaintiff has failed to provide any competent medical evidence contemporaneous with the accident. *See* **Fung v. Uddin**, 60 AD3d 992; **Garcia v. Lopez**, 59 AD3d 593; **Luizzi-Schwenk v. Singh**, 58 AD3d 811; **Kuchero v. Tabachnikov**, 54 AD3d 729; **Sealy v. Riteway-1, Inc.**, 54 AD3d 1018; **Silla v. Mohammad**, 52 AD3d 681.

In addition, the Court finds that the "gap in treatment" may be fatal to plaintiff's claim that the evidence submitted is sufficient to raise a triable issue as to whether or not plaintiff sustained a "serious injury" within the meaning of **Insurance Law §5102(d)**
"Even where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury–such as a gap in treatment, an intervening medical problem or a pre-existing condition–summary dismissal of the complaint may be appropriate." **Pommells v. Perez**, 4 NY3d 566 at 572. *See generally* **Ferebee v. Sheika**, 58 AD3d 675; **Sealy v. Riteway-1, Inc.**, *supra*; **Kuchero v. Tabachnikov**, *supra*; **Cornelias v. Cintas Corp.**, *supra*. Dr. Silverberg fails to discuss the gaps in treatment between his examination of plaintiff on April 17, 2007 and February 7, 2008 and then again on May 5, 2008 and did not address the short duration of plaintiff's physical therapy treatment. In fact, Dr. Silverberg's notes covering his December 18, 2006 examination state

that plaintiff was to return for reevaluation in one month (although the next documented visit occurred on April 17, 2007), and on April 17, 2007, Dr. Silverberg noted that if either plaintiff's right knee or right elbow problem persists in a month, plaintiff was to return for another visit (although the next documented visit occurred on February 7, 2008).

Moreover, Dr. Kaufman did not express an opinion as to the cause of the mild disc bulge in plaintiff's cervical spine or joint effusion in plaintiff's right knee and Dr. Lerner did not express an opinion as to the cause of tendonitis in plaintiff's right elbow. *See* **Garcia v. Lopez**, *supra*; **Luizzi-Schwenk v. Singh**, *supra*; **Penaloza v. Chavez**, 48AD3d 654; **Collins v. Stone**, 8 AD3d 321. The Court notes that the existence of a radiologically confirmed disc injury or tear alone will not suffice to defeat summary judgment. *See* **Pommells v. Perez**, *supra* at 574; **Byrd v. J.R.R. Limo**, 2009 WL 1098637; **Niles v. Lam Pakie Ho**, 2009 WL 943712; **Magid v. Lincoln Services Corp.**, 60 AD3d 1008; **Ferber v. Madorran**, 60 AD3d 725; **Pompey v. Carney**, 59 AD3d 416; **Luizzi-Schwenk v. Singh**, *supra*; **Luna v. Mann**, 58 AD3d 699; **Sealy v. Riteway-1, Inc.**, *supra*; **Cornelias v. Cintas Corp.**, *supra*; **Schvartsman v. Vildman**, 47 AD3d 700; **Kearse v. New York City Transit Authority**, 16 AD3d 45.

There is also insufficient evidence that plaintiff's alleged injuries are permanent **§5102(d)**((7)). Dr. Silverberg's assertion that plaintiff's injuries are permanent is conclusory as he fails to offer any evidence of permanency. "Mere repetition of the word 'permanent' in the affidavit of a treating physician is insufficient to establish 'serious injury' and [summary judgment] should be granted for defendant where plaintiff's evidence is limited to conclusory assertions tailored to meet statutory requirements." **Lopez v. Senatore**, *supra* at 1019. *See also* **Williams v. Toshiko**, 237 AD2d 350; **Lincoln v. Johnson**, 225 AD2d 593; **Orr v. Miner**, 220 AD2d 567. Any statements of permanency of plaintiff's injuries are belied by his deposition testimony that he missed only two weeks of work as a elevator mechanic whereupon he returned to the same responsibilities he had before the accident (Deposition testimony, pp. 11, 17, 76). *See* **Relaford v. Valentine**, 17 AD3d 339.

Moreover, the affirmation of Dr. Silverberg is not based on a recent examination of plaintiff which renders the finding of permanency by Dr. Silverberg speculative. *See* **Niles v. Lam Pakie Ho**, *supra*; **Luizzi-Schwenk v. Singh**, *supra*; **Diaz v. Lopresti**, 57 AD3d 832; **Sapienza v. Ruggiero**, *supra*; **Landicho v. Rincon**, 53 AD3d 568; **Cornelius v. Cintas Corp.**, *supra*. Plaintiff's complaints of subjective pain at his deposition do not by themselves satisfy the "serious injury" requirement of the no-fault law (*See* **Scheer v. Koubek**, 70 NY2d 678; **Dantini v. Cuffie**, 59 AD3d 490; **Rudas v. Petschauer**, 10 AD3d 357; **Coloquhoun v. 5 Towns Ambulette, Inc.**, 280 AD2d 512; **LeBrun v. Joyner**, 195 AD2d 502). Plaintiff testified that he was out of work for only two weeks (D-eposition testimony, p. 17) and has failed to submit competent medical evidence that the injuries that he sustained rendered him unable to perform all of his usual and customary daily activities for ninety days of the first one hundred eighty days following the accident.

The Court has examined the parties' remaining contentions and find them to be without merit.

ORDERED, the motion by defendants ALPHA BAH and DAVID MANASHEV and the cross motion by defendant FRANTZ MORNECY for summary judgment dismissing the complaint of plaintiff JOHN MANSUETO, on the grounds that plaintiff failed to sustain a "serious injury" within the meaning of **Insurance Law §5102(d)** is **granted**.

This constitutes the Order of the Court.

Dated: May 14, 2009

J.S.C.

ENTERED
JUN 04 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE