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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JHP BARBARA JAFFE J.S.C. **PART** 5

Index Number : 401008/2010

ALAMEDA, MARCUS

VS

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

CAL # 3

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 **were read on this motion to/for** dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ **Yes** ☑ **No**

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/4/11
APR 04 2011

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/JUDG.** ☐ **SETTLE ORDER /JUDG.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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MARCUS ALAMEDA,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY FIRE DEPARTMENT, DAVID MARZULLO, FRANTZ ETIENNE and LOUIS S. JOLICOUER,

Defendants.

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Index No. 401008/10

Motion Date: 2/22/11
Motion Seq. No.: 001
Motion Cal. No.: 3

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendants Etienne/Jolicouer:
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By notice of motion dated June 7, 2010, defendants Etienne and Jolicouer move pursuant to CPLR 3212 for an order summarily dismissing plaintiff's complaint. Plaintiff opposes the motion.

I. BACKGROUND

On November 26, 2007, plaintiff was allegedly injured as a result of a motor vehicle accident involving defendants. (Affirmation of Joseph W. Sands, Esq., dated June 7, 2010 [Sands Aff.]). On or about February 5, 2008, plaintiff served his summons and complaint upon defendants, and on or about March 7, 2008, movants served their answer. (*Id.*, Exhs. A, B).

On August 6, 2008, plaintiff testified at an examination before trial, as pertinent here, that he missed four days of work immediately after the accident and less than 10 days of work total as

a result of the accident, and that he was confined to his bed and home for two to three days after the accident. (*Id.*, Exh. H).

On or about September 25, 2008, plaintiff served a supplemental bill of particulars in which he alleged that he sustained various injuries to his left shoulder, cervical and lumbar spine, and head and that on August 14, 2008, he underwent surgery on his left shoulder. (*Id.*).

II. CONTENTIONS

Movants argue that plaintiff did not sustain a serious injury as defined by Insurance Law 5102(d), relying on a review of plaintiff's MRI films by Dr. David L. Milbauer, who concluded that there are no findings to indicate that any injuries to plaintiff's left shoulder and lumbar and cervical spine were sustained in the accident, and that any bulges or changes are unrelated to trauma or preexist the accident. (Sands Aff., Exh. E). They also submit the reports of Dr. Edward M. Weiland, who conducted a neurological examination of plaintiff on September 4, 2008, and Dr. Salvatore Corso, who performed an orthopedic evaluation the same day, who both found that plaintiff's range of motion, tested by a goniometer, of his lumbar and cervical spine was normal. (*Id.*, Exh. F, G). Movants also observe that plaintiff testified that he missed less than 15 days of work and was confined to his bed and home for only two to three days after the accident. (*Id.*).

Plaintiff maintains that based on the following documents, there are issues of fact as to whether he suffered a serious injury:

(1) his affidavit, dated September 2010, in which he states that he was out of work for two weeks immediately after the accident and for three weeks after his surgery, and that his everyday activities, such as driving, standing, sitting, walking, and sleeping, have been substantially limited due to his injuries;
(2) affirmed MRI reports of Dr. Ronald Wagner, a radiologist, who found that

plaintiff had disc bulges in his cervical spine and disc bulges and a left foraminal extension of the disc bulge at L3-4 in his lumbar spine;

(3) an affirmed MRI report of Dr. Robert Diamond, a radiologist, who found that plaintiff had various injuries, including a partial tear, in his left shoulder;

(4) an affirmation from Dr. John S. Vlattas, a physiatrist who treated plaintiff for his injuries and states that he examined plaintiff on December 3, 2007 and conducted range of motion testing using a goniometer, which revealed that plaintiff's range of motion of his cervical and lumbar spine and left shoulder was below normal limits, that another examination on January 7, 2008 again revealed plaintiff's range of motion was below normal limits, that on January 31, 2008 plaintiff's range of motion was restricted, that between March 2008 and June 2008 plaintiff's range of motion was restricted along with other positive objective findings, that on July 28, 2008 plaintiff's range of motion, tested by a goniometer, was below normal limits, that between October 2008 and July 2009 plaintiff had restricted range of motion and positive objective findings, and that on August 5, 2010 plaintiff's range of motion, tested by a goniometer, was below normal limits. Vlattas opines that plaintiff suffers from permanent restrictions and limitations and permanent injury which are causally related to the accident and observes that plaintiff had no prior history of back or shoulder injuries and had not suffered previous trauma or been in an accident; and

(5) a report dated February 29, 2008 from Dr. David S. Pereira, in which he diagnosed plaintiff with "left shoulder recurrent dislocations stemming from a traumatic dislocation" and recommended arthroscopic surgery;

(Affirmation of Nick Base, Esq., dated Sept. 30, 2010 [Base Aff.], Exhs. A, C, E, F).

In reply, movants observe that plaintiff contradicted his deposition testimony when he swore in his affidavit as to the length of time he was unable to work or confined to home following the accident. They thus contend that plaintiff failed to prove that his injuries were caused by the accident, that plaintiff's affidavit and his counsel's affirmation do not constitute admissible proof on medical issues, and that Vlattas did not rebut movants' experts' opinion that plaintiff's injuries were pre-existing. (Reply Affirmation, dated Oct. 15, 2010).

III. ANALYSIS

Pursuant to section 5102(d) of the Insurance Law, a serious injury is defined as:

a personal injury which results in . . . permanent loss of use of a body organ, member,

> function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or 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.

Here, movants established, *prima facie*, through their affirmed medical reports and plaintiff's deposition testimony that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102. (*See Pisani v First Class Car and Limousine Serv. Corp.*, 2011 WL 1045762, 2011 NY Slip Op 02119 [1st Dept] [defendant met burden through report of orthopedic surgeon who determined that plaintiff had normal range of motion in cervical and lumbar spine, report of radiologist who opined that disc bulges and changes were degenerative and pre-existed accident, and plaintiff's deposition testimony that he missed only three days of work after accident]).

However, Vlattas's finding, based on objective, quantitative range of motion tests, that plaintiff had significant limitations in his range of motion immediately after the accident and continuing almost three years later, and his opinion that plaintiff's injuries were caused by the accident, raise triable issues as to whether plaintiff suffered a serious injury. (*See Pisani*, 2011 WL 1045762, 2011 NY Slip Op 02119 [triable issues raised by plaintiff's doctors' determinations based on objective, quantitative tests that plaintiff had significant limitations in range of motion of cervical and lumbar spine and opinions that plaintiff's injuries were causally related to accident]; *Jacobs v Rolon*, 76 AD3d 905 [1st Dept 2010] [plaintiff's physician found that plaintiff had significant range of motion limitations immediately after accident and three years later and that injuries were caused by accident and not degenerative in nature]).

Moreover, plaintiff sufficiently rebutted Milbauer's conclusory opinion that his injuries were unrelated to any trauma or pre-existed the accident with Vlattas's opinion that plaintiff's injuries were caused by the accident, which was based in part on the fact that plaintiff had had no prior history of back or shoulder injury and had not been involved in a previous accident or suffered any trauma, and as the doctor who performed the MRIs after the accident did not mention that there was evidence of a pre-existing injury or condition. (*See Jacobs*, 76 AD3d at 905-906 [plaintiff adequately rebutted claim that injuries were degenerative as plaintiff had no prior history or signs of degenerative disc disease and MRI doctor made no mention of degeneration]; *Johnson v Garcia*, 2011 WL 904365, 2011 NY Slip Op 01949 [1st Dept] [physicians' differences in opinion as to whether injuries were caused by accident or resulted from degeneration raised factual issue]).

However, as plaintiff missed at most two weeks of work within the first 180 days after the accident and was confined to his home and bed for only two to three days immediately after the accident, his allegation that his everyday activities have been substantially limited is unsupported by medical evidence and thus insufficient to establish that he sustained a serious injury under the 90/180 day category. (*See Torain v Bah*, 78 AD3d 588 [1st Dept 2010] [dismissal of 90/180 day claim appropriate as plaintiff continued to work after accident, although in diminished capacity, and there was no medical finding that she had been unable to engage substantially in customary activities for 90 days out of first 180 days after accident]; *Pinkhasov v Weaver*, 57 AD3d 334 [1st Dept 2008] [plaintiff's subjective statements that he was unable to perform usual and customary activities for 90 days insufficient absent objective medical evidence]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Etienne's and Jolicouer's motion for summary judgment is granted solely to the extent of dismissing plaintiff's 90/180 day serious injury claim.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 4, 2011
New York, New York

APR 04 2011

FILED

APR 05 2011

NEW YORK
COUNTY CLERK'S OFFICE