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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

JI WON YUN,

Plaintiff(s),

ORIGINAL RETURN DATE:02/25/11
SUBMISSION DATE: 04/18/11
INDEX No.: 16819/09

-against-

KAWAL PREET SINGH and SHARAN & SON TRUCKING, LLC,

MOTION SEQUENCE #3

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	2
Reply.....	3
Defendants' Memorandum of Law.....	4

Motion by defendants pursuant to CPLR 3212 for summary judgment dismissing the complaint is decided as follows:

On July 19, 2009, plaintiff was stopped in the far left turning lane at a red light on College Point Boulevard, a three-lane road in Queens County, New York. Plaintiff alleges that his car, while still stopped at the light, was struck by a tractor-trailer which was attempting to make a left turn from the center lane of the road, *i.e.*, the lane directly adjacent to where plaintiff's car was waiting at the light (Yun Dep., 29-30, 36-39, 44).

According to plaintiff, the truck dragged his car about ten feet forward after the initial impact took place, although plaintiff was later able to drive his vehicle from the scene and did not seek emergency room treatment after the accident occurred (Yun Dep., 46-49; 53-57). Plaintiff, a licensed real estate agent, testified that he missed two weeks from work as a result of the accident (Yun Dep., 11-14, 57-59). Notably, plaintiff is not making any claim for lost wages (BOP, ¶ 14[a]).

Within days after the accident, plaintiff treated with Yong S. Tak, M.D., who performed various range of motion tests during his initial examination and allegedly found significant limitations in plaintiff's lumbar and cervical spines, as well as his knees (Tak Aff., ¶¶ 4-5).

Plaintiff continued treatment with Dr. Tak post-accident until April 2010 and, during that period, underwent electrodiagnostic testing and magnetic resonance imaging ["MRI"] procedures on both knees and his lumbar/cervical spines. The MRI studies allegedly revealed meniscus and anterior cruciate ligament tears in both knees and disc herniations in the cervical and lumbar spines, while the EMG results revealed, *inter alia*, evidence of L5 radiculpathy (Hahm Aff., Exhs., "B"-"D"; Yun Dep., 69-70; Yun Aff., ¶¶ 4-5).

After plaintiff ceased treatment with Dr. Tak in April 2010, he saw him again for the first time some ten months later after defendants' motion was made. Plaintiff contends, however, that he suspended treatment in 2010 because his no-fault benefits were exhausted and he lacked the financial resources to pay for further treatment out of pocket (Yun Aff., ¶ 7).

Plaintiff thereafter commenced the within action alleging that he sustained a "serious injury" within the meaning of Insurance Law § 5102(d). Plaintiff has alleged, among other things, that he sustained a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system, as set forth in Insurance Law § 5102(d). Plaintiff's bill also alleges that he was unable to perform his usual daily activities for at least 90 out of the 180 days immediately following the accident, although no claim for lost wages had been made (BOP, ¶¶ 14[a], 23).

Defendants have answered, denied the material allegations of the complaint and interposed various affirmative defenses. Discovery and depositions have been conducted, and defendants move for summary judgment dismissing plaintiff's complaint. The motion should be granted to the limited extent indicated below.

By submitting the affirmed medical affirmation of Leon Sultan, M.D., together with the various other materials attached to their papers, defendants have established their *prima facie* entitlement to judgment as a matter of law with respect to plaintiff's claims.

Specifically, Dr. Sultan has affirmed that he examined plaintiff and conducted various goniometric-derived range of motion tests and other diagnostics procedures, all of which allegedly established that, *inter alia*, plaintiff did not suffer from any orthopedic and neurological maladies attributable to the underlying automobile accident (Sultan Aff., at 2-3 [Duffy Aff., Exh., "E"]).

However, in response to the motion plaintiff's opposing submissions have generated a triable issue of fact to the extent indicated below (*see, Mitchell v. Casa Redimix Concrete Corp.*. ___AD3d___, 2011 WL 1602863 [2d Dept. 2011]; *Bernier v. Torres*, 79 AD3d 776, 777; *Abdelaziz v. Fazel*, 78 AD3d 1086). In order to demonstrate the existence of a significant

limitation of use of a body function or system, a plaintiff must "show the duration of the alleged injury and the extent or degree of the limitations associated therewith" (*Rovelo v. Volcy*, ___AD3d___, 2011 WL 1601598 [2d Dept. 2011] *see, Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). Moreover, "'[w]hether a limitation of use or function is 'significant' or 'consequential' (*i.e.*, important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part'" (*Toure v. Avis Rent A Car Sys.*, 98 NY2d, at 353, *quoting from*, *Dufel v. Green*, 84 NY2d 795, 798, [1995]).

Here, plaintiff's treating physician, Dr. Tak, has submitted an affirmation and annexed reports indicating that he conducted tests on the date of the subject accident which revealed significant, contemporaneously existing limitations in plaintiff's lumbar/cervical spines as well as both of his knees (*Mitchell v. Casa Redimix Concrete Corp., supra*; *Smiley v. Johnson*, 79 AD3d 850, 851; *Abdelaziz v. Fazel, supra*, 78 AD3d 1086). Further, a subsequent and recent examination conducted by Dr. Tak in February 2011 substantiated the durational extent of those range of motion limitations, including lumbar and cervical deficits, which Dr. Tak causally linked to the subject July 2009 accident (*Harris v. Boudart*, 70 AD3d 643) (Tak Aff.,¶¶ 2-3 [Hahm Affd., Exh., "C"]). Dr. Tak also assessed the "qualitative nature" of the alleged injuries by attributing the limitations discerned to the injuries sustained (*Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). "Considered in the light most favorable to plaintiff, this evidence was sufficient to defeat defendants' motion for summary judgment" with respect to the "limitation of use" category of recovery (*Toure v. Avis Rent A Car Sys.*, 98 NY2d, at 353).

Contrary to defendants' contentions, plaintiff has adequately explained the treatment gap by stating that he suspended treatment in April 2010 because his no-fault insurance coverage expired and he could not afford to pay for further treatment out of his own pocket (*Jacobs v. Rolon*, 76 AD3d 905; *Francovig v. Senekis Cab Corp.*, 41 AD3d 643, 644 *see, Khavosov v. Castillo*, 81 AD3d 903; *Abdelaziz v. Fazel*, 78 AD3d 1086; *see generally, Pommells v. Perez*, 4 NY3d 566, 577 [2005]).

However, plaintiff has failed to raise a triable issue of fact with respect to the claims that: (1) his injuries are permanent in nature; and (2) that he sustained a medically-determined injury of a nonpermanent nature which prevented him from performing his usual and customary activities for 90 of the 180 days immediately following the accident.

Although Dr. Tak's post-motion "Final Narrative & Physical Examination" includes certain range of motion findings and concludes that plaintiff is "currently" disabled, the key evaluative or "prognosis" portion of the report is equivocal and makes no clear findings with respect to the permanency of plaintiff's alleged injuries. Rather, Dr. Tak's report merely speculates that the alleged injuries "*may* never be as flexible or elastic as [their] original counterparts"; that they "*may* result in permanent reduction in the normal range of motion"; and lastly, that plaintiff's injuries "*could* result in continued pain upon the performance of ordinary functions" (plaintiff's Ex. D [emphases added]). Dr. Tak's April 2011 affirmation also makes no express reference to the allegedly permanent nature of the injuries and symptoms identified.

Similarly, and with respect to plaintiff's 90/180 claim, the record establishes that plaintiff missed only two weeks from work (*see generally, Geliga v. Karibian, Inc.*, 56 AD3d 518, 519; *Leeber v. Ward*, 55 AD3d 563, 564), and the record does not otherwise establish that he suffered from a medically-determined injury that prevented him from performing her usual activities for the statutory period (*e.g.*, *Husbands v. Levine*, 79 AD3d 1098; *West v. Martinez*, 78 AD3d 934; *Posa v. Guerrero*, 77 AD3d 898), or do the medical records submitted establish that plaintiff was affirmatively directed by his treating physician to refrain from working for any significant period of time following the accident (*Hamilton v. Rouse*, 46 AD3d 514, 516-517).

Plaintiff's subjective assertions with respect to the 90/180 day claim are lacking in probative value in opposition to the motion (*Riley v. Randazzo*, 77 AD3d 647, 648; *Leeber v*; *Sainte-Aime v. Ho*, 274 AD2d 569, 569-70).

The Court has considered defendants' remaining contentions and concludes that they do not otherwise warrant dismissal of plaintiff's complaint, except to the extent indicated above.

Accordingly, the motion for summary judgment dismissing the complaint is granted with respect to those claims predicated on: (1) the allegedly permanent nature of plaintiff's injuries; and (2) the alleged existence of a medically-determined injury preventing plaintiff from performing his customary, daily activities within the meaning of Insurance Law § 5102(d). The motion to dismiss is otherwise denied.

This decision constitutes the order of the court.

Dated: 5-17-11

HON THOMAS P. PHELAN

J.S.C.

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