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

PRESENT: Hon. George J. Silver, Justice PART 22

YAW AGYEN-KYEI

vs.

SPANISH TRANSPORTATION SERVICE CORP., CECILIO HEREDIA and MARACAP CONSTRUCTION INDUSTRIES, INC.

INDEX NO. 107512/2008

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 7 were read on this motion to/for SUMMARY JUDGMENT

	Papers Numbered
Notice of Motion/Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits, Cross Motion	4, 5, 6, 7

FILED
OCT 07 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ■ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendant MARACAP Construction Industries, Inc., ("Defendant") moves pursuant to CPLR §3212 for an order granting summary judgment on the issue of liability and dismissing Plaintiff Yaw Agyen-Kyei's ("Plaintiff") complaint. Co-defendants Spanish Transportation Service Corp., and Cecilio Heredia (collectively "Co-defendants") cross move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the Plaintiff's complaint on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). The accident occurred on October 31, 2006, when Plaintiff was traveling on the George Washington Bridge at that point the roadway separated into two lanes, the left lane heading towards the exit for 178th Street and the right lane exiting onto the Henry Hudson Parkway. There was a concrete barrier erected by Defendant that separated the left lane from the construction site and another unrelated concrete barrier that was not built or maintained by Defendant that separated the left lane from the right exit lane. Plaintiff changed lanes from the left lane to the right lane and then changed back to the left lane in order to take the exit for 178th Street. As Plaintiff changed lanes back into the left lane, he collided with a minivan owned by Co-defendant and became wedged between the minivan and the concrete barrier that separated the 178th Street exit from the Henry Hudson Parkway exit lane. The minivan was pushed into Defendant's concrete barrier. Defendant alleges that it did not erect the concrete barrier that Plaintiff impacted with and therefore contends that it was not the proximate cause of the accident and should be granted summary judgment.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 476 N.E.2d 642 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate: ..... MOTION ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE

existence of triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718 [1980]).

In support of its motion, Defendant submits the deposition transcripts of Plaintiff, Co-defendant Cecilio Heredia and William McTigue, a representative for Defendant MARACAP who also witnessed the accident. Plaintiff testified that at that point on the George Washington Bridge there were two lanes of traffic, the right that went to the Henry Hudson Parkway and the left that is the exit for 178th Street. Plaintiff stated that he was in the right lane when he moved to the left lane quickly. Plaintiff also stated that he switched lanes abruptly because the position of the concrete barrier, though it is unclear to the court which concrete barrier he was referring to. Co-defendant Heredia testified that he was traveling in the left lane to take the 178th Street exit when Plaintiff switched lanes abruptly in front of him causing the collision. Mr. McTigue, superintendent of the construction project, testified that he was walking down to the job site when he witnessed the accident. He stated that Plaintiff quickly switched lanes without leaving room for Co-defendants' vehicle, causing the accident. Mr. McTigue also testified that the concrete barricade that separated the left side of left lane from the construction site was erected on September 21, 2006 in accordance with the specifications provided by the Port Authority and was not moved until January 2007, when it was removed. Defendant has established its *prima facie* entitlement to summary judgment on the issue of liability by demonstrating the concrete barrier it erected was in no way involved in causing the accident.

In opposition, Plaintiff submits an uncertified copy of the motor vehicle accident report that states that Co-defendants' vehicle was traveling straight when Plaintiff's vehicle cut in front of him striking Co-defendants' vehicle and the concrete barrier between the two exit lanes. The concrete barrier that Plaintiff allegedly struck was not constructed or erected by Defendant. As a result of the impact, Co-defendants' vehicle was pushed into the concrete divider erected by Defendant that separated the left most lane from the construction area. Plaintiff also submits his own affidavit stating that the accident occurred "due to a construction barrier in my lane causing my vehicle to be impacted." However, Plaintiff does not submit any expert evidence as to the concrete barrier's placement or its alleged creation of a dangerous condition. Co-defendants also oppose Defendant's motion and contends that the deposition transcripts submitted by Defendant are inadmissible because they are unsworn. However, in reply Defendant corrects this procedural error by submitting the sworn copy of Mr. McTigue's Errata sheet. Further, Co-defendant submits a properly admissible copy of Plaintiff's deposition in support of its cross motion. The evidence submitted by Plaintiff and Co-defendants is insufficient to create a factual issue that the concrete barrier erected by Defendant created an unsafe condition at the time of the accident (*Thomas v Halmar Builders of New York, Inc.*, 290 AD2d 502, 736 NYS2d 404 [2d Dept 2002]).

Co-defendants' Cross Motion

Co-defendants cross move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the Plaintiff's complaint on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). Plaintiff alleges in his Verified Bill of Particulars that, as a result of the accident, he sustained a serious injury including head cephalgia, bulging discs at C2-C3, L3-L4 and L4-L5, disc herniations at C3-C4, C4-C5, C5-C6, C5-C6 and C6-C7 with impingement and radiculopathy and left shoulder sprain/strain. Under New York Insurance Law §5102(d), a "serious injury" is defined as a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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.

"[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, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

In support of this motion, Co-defendants submit the expert affirmations of Dr. Michael Katz and Dr. Daniel Feuer. Dr. Katz conducted an orthopedic examination of Plaintiff on May 24, 2010. He examined Plaintiff's head and found no deformities. Dr. Katz also conducted range of motion testing using a goniometer and found no limitations in range of motion for Plaintiff's cervical and lumbar spine. He also examined Plaintiff's left shoulder, right arm and shoulder, right elbow, bilateral knees and bilateral legs. Dr. Katz concluded that Plaintiff had sustained a cervical strain, lumbosacral strain and left shoulder contusion, which have all resolved. He further opined that there is no correlation between the findings allegedly found in Plaintiff's MRI reports and the physical orthopedic examination. Dr. Feuer performed a neurological examination of Plaintiff on May 24, 2010. He found Plaintiff's head to be normocephalic and atraumatic. Dr. Feuer also conducted range of motion testing using a goniometer and visual inspection and found no limitations in Plaintiff's range of motion when compared to normal for his cervical or lumbosacral spine. He concluded that Plaintiff does not demonstrate any neurological disability. Dr. Katz's and Dr. Feuer's expert reports satisfy Co-defendants' burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In order to rebut Co-defendants' *prima facie* case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *Toure v Avis Rent A Car Sys.*, Inc., 98 NY2d 345, 350 [2002]). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]). In opposition to Co-defendants' motion, Plaintiff submits the expert reports of Dr. David Payne and Dr. Gregori Pasqua, Plaintiff's chiropractor. Dr. Payne, a radiologist, reviewed Plaintiff's cervical spine MRI taken on November 30, 2006 and found C2-C3 and C7-T1 bulging discs and C3-C4, C4-C5, C5-C6 and C6-C7 disc herniations. The lumbosacral spine MRI also taken on November 30, 2006 revealed L3-L4, L4-L5 bulging discs and L5-S1 disc herniation. However, Dr. Payne does not opine as to the causation of these injuries. As such, his report is insufficient to satisfy Plaintiff's

burden (*see Feliz v Fragosa*, --- NYS2d ----, 2011 WL 2150006 [1st Dept 2011]; *Pommells v Perez*, 4 NY3d 566, 579 [2005]; *Rodriguez v Abdallah*, 51 AD3d 590, 590–591 [2008]).

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyler*, 79 NY2d 955 [1992]). The Court of Appeals has held that a minor, slight or mild limitation of use is considered insignificant within the meaning of the Insurance Law (*Licari v. Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]). Dr. Pasqua first examined Plaintiff on November 8, 2006. At that time he conducted computerized range of motion and found significant limitations in Plaintiff's range of motion of his cervical and lumbar spine when compared to normal. Despite Co-defendants' arguments in reply, computerized range of motion testing is a proper form of objective testing (*see Kraemer v Henning*, 237 AD2d 492, 655 NYS2d 96 [2d Dept 1997], *Sclafani v City of New York*, 22 AD3d 827, 803 NYS2d 182 [2d Dept 2005]). Dr. Pasqua most recently examined Plaintiff on March 5, 2011. At that time he conducted computerized range of motion testing and found limitations in Plaintiff's cervical spine of 10 degrees in flexion, 20 degrees in extension, 15 degrees in left lateral, 20 degrees in right lateral and 15 degrees in right rotation. Range of motion on the lumbar spine revealed limitations of 20 degrees in flexion, 5 degrees in extension and 10 degrees in right lateral motion. While Dr. Pasqua's report does reveal range of motion limitations in Plaintiff's most recent examination, these limitations are only slight and minor and do not satisfy Plaintiff's burden (*see Ikeda v Hussain*, 81 AD3d 496, 916 NYS2d 109 [1st Dept 2011] [20 degree limitation in Plaintiff's range of motion considered minor and slight], *Sone v Qamar*, 68 AD3d 566, 889 NYS2d 845 [1st Dept 2009]). Therefore, Plaintiff failed to raise an issue of fact sufficient to rebut Co-defendant's *prima facie* case (*Nieves v Castillo*, 74 AD3d 535, 902 NYS2d 91 [1st Dept 2010]; *Gibbs v Hee Hong*, 63 AD3d 559, 559, 881 NYS2d 415 [2009]).

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars states that following the accident, he was confined to bed for one week and confined to home intermittently for three months. Plaintiff has not sufficiently shown that his curtailment of daily activities was medically determined (see *Antonio v Gear Trans Corp.*, 2009 NY Slip Op 6370 [treating physician's statements that they were "medically disabled," and were to refrain from any work or activities that caused pain were too general to raise the inference that plaintiff's confinement to bed and home was medically required]; *see Gorden v Tibulcio*, 50 AD3d 460, 463, 855 N.Y.S.2d 515 [2008]). Accordingly, Co-defendant's summary judgment motion as to Plaintiff's 90/180 claim under New York Insurance Law §5102(d) is granted.

Accordingly, it is

ORDERED that Defendant MARACAP's motion is granted and Co-defendants Spanish Transportation Service Corp., and Cecilio Heredia's cross motion is granted and the Plaintiff's complaint is dismissed in its entirety with costs and disbursements to said

Defendant and Co-defendants as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendant is to serve a copy of this order upon all parties with Notice of Entry, within 30 days.

This constitutes the decision and order of the Court.

Dated: OCT 07 2011
New York, New York

George J. Silver, J.S.C.
George J. Silver, J.S.C.

GEORGE J. SILVER

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