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

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

CHAD M. GRIFFIN and JOHN H. COOK

vs.

JUAN R. ZAPATA, HECTOR R. ZAPATA, JOSE BAEZ and YICEL M. BAEZ

INDEX NO. 110690/2009

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 6 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	4, 5

Cross-Motion: ■ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Defendants Jose Baez and Yicel M. Baez (collectively "Defendants") move pursuant to CPLR §3212 for summary judgment, dismissing Plaintiff Chad Griffin and John Cook's (collectively "Plaintiffs") Complaint and all cross-claims asserted as against Defendants. The motor vehicle accident is alleged to have occurred on January 20, 2008, when there was a three car accident on Audubon Avenue at its intersection with West 184th Street. Plaintiff Cook was a passenger in Chad Griffin's vehicle. In support of their motion, Defendants submit the deposition testimony of Plaintiff Griffin, Plaintiff Cook and Defendant Jose Baez. Co-defendants Juan Zapata and Hector Zapata (collectively "Co-defendants") were precluded from testifying at trial or submitting an affidavit in support of or in opposition to a dispositive motion. Defendants allege that Co-defendant Juan Zapata drove through a red light causing the motor vehicle accident.

Plaintiff Cook testified that the traffic light turned red as the vehicle approached the intersection. He stated that their vehicle was stopped for approximately forty-five seconds before it was hit by Co-defendants' vehicle. Plaintiff Griffin testified that he brought his vehicle to a stop in front of the red traffic light. He further corroborated Plaintiff Cook's version of events. Defendant Jose Baez testified that he was traveling straight ahead with a green light in his favor when he was struck by Co-defendants' vehicle. He stated that Co-defendants' vehicle struck his vehicle, then continued on to collide with Plaintiff's vehicle that was waiting at the traffic light in other direction.

The moving party must make a *prima facie* showing of entitlement to judgment as a matter or law, tendering sufficient evidence to demonstrate the absence of any material issue of fact to win on a summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Further, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*see Bank of New York v*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE

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

Granat, 602 NYS2d 942, 943 [2d Dept 1993]; *Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Royal v Brooklyn Union Gas Co.*, 122 AD2d 132, 504 NYS2d 519 [2d Dept 1986]; *Stone v Goodson*, 8 NY2d 8 [1960]). There has been no evidence presented to contradict Defendants' version of events that they were driving through the intersection with a green light in their favor. As such, Defendants' motion for summary judgment is granted.

Defendants also move and Co-defendants Juan Zapata and Hector Zapata (collectively "Co-defendants") cross move pursuant to CPLR §3212 for an order granting summary judgment and dismissing Plaintiffs' Complaint on the grounds that Plaintiffs did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). 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 and 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]).

Plaintiff Chad Griffin

Plaintiff alleges in his Verified Bill of Particulars that, as a result of the accident, he sustained a serious injury including L4-L5 and L5-S1 disc herniations, cervical spine muscle spasm, cervical, thoracic and lumbar spine sprain/strain, left ankle contusion and tibial nerve neuropathy. In support of this cross motion, Defendants submit the expert reports of Dr. Jessica Berkowitz, Dr. Lisa Nason and Dr. Michael Carciente.

Dr. Berkowitz reviewed Plaintiff's lumbar spine MRI. She reported that there was no evidence of disc bulges or herniations. Dr. Berkowitz also stated that there was no evidence of acute trauma. Dr. Nason conducted an orthopedic examination of Plaintiff on September 23, 2010. She conducted range of motion testing and found no limitations for Plaintiff's cervical and lumbar spine. Dr. Nason also noted no tenderness of in the thoracic spine. She found normal range of motion of Plaintiff's left ankle. Dr. Nason concluded that Plaintiff was status post lumbar and left ankle sprain/strain and exhibited no objective evidence of disability. Dr. Carciente performed a neurological examination of Plaintiff on September 22, 2010. He noted that though Plaintiff made subjective complaints, there was no objective evidence of injury. Defendants also submit Plaintiff's left ankle and left foot X-ray film reports and his left ankle CT scan report. The X-rays indicate normal findings and the CT scan finds no evidence of fracture and also notes that the soft tissues are unremarkable. Defendants have satisfied their 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 opposition, Plaintiff submits the expert report of Dr. Peter Kwan. Dr. Kwan conducted a neurological evaluation of Plaintiff on April 27, 2011. He conducted range of motion testing, using a goniometer, and found limitations in Plaintiff's cervical and lumbar spine. Dr. Kwan concluded that Plaintiff had sustained a traumatic injury of the cervical spine, L4-L5 and L5-S1 posterior protruded lumbar disc herniations, clinical right S1 radiculopathy and traumatic injury of the left ankle. Dr. Kwan further causally linked these injuries to the present accident.

Plaintiff additionally submits medical records from Dr. Christopher Rizzo of Morris Medical, MRI reports of his cervical spine and lumbosacral spine, and Dr. Lily Sarhin of O&M Medical, P.C. Dr. Kwan's addendum specifically states that he reviewed and relied upon the records from Morris Medical and the MRI reports. Further, Defendants' expert, Dr. Nason reported that she reviewed the same records as well as Dr. Sarhin's report. As such, this medical evidence is in admissible form (*see Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 915 NYS2d 529 [1st Dept 2011]; *Thompson v Abbasi*, 15 AD3d 95, 97, 788 NYS2d 48 [2005]; *Gonzalez v Vasquez*, 301 AD2d 438, 754 NYS2d 7 [2003]).

Dr. Rizzo first examined January 23, 2008, three days post accident. He conducted range of motion testing and found limitations in Plaintiff's cervical and lumbar spine. Dr. Rizzo diagnosed Plaintiff with cervical, thoracic and lumbar spine sprains/strains, radicular symptoms, left shoulder derangement and left ankle derangement. He ordered radiology and recommend that Plaintiff start physical therapy. Plaintiff's MRI reports find reversal of normal cervical curve consistent with muscular spasm and L4-L5 and L-S1 posterior protruded disc herniation. Dr. Zarhin reported left tibial nerve neuropathy based on the electrodiagnostic studies she conducted.

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]). Plaintiff's submissions are sufficient to rebut Defendants' *prima facie* case.

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 he was confined to bed and home for three weeks after the accident. In opposition, Plaintiff submits "disability certificates" by Dr. Rizzo, stating that he cannot return to work. However, this evidence does not mention any other daily activities, nor do the certificates cover a ninety day period (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, Defendants' summary judgment motion as to Plaintiff's 90/180 claim under New York Insurance Law §5102(d) is granted.

Plaintiff John Cook

Plaintiff alleges in his Verified Bill of Particulars that, as a result of the accident, he sustained a serious injury including Type I labrum right shoulder tear, supraspinatus tendon tear of the right shoulder, right sensory ulnar nerve neuropathy, left sural nerve neuropathy, right shoulder derangement, L5-S1and C5-C6 disc herniations and cervical and lumbar derangement. Defendants submit the expert reports of Dr. Jessica Berkowitz, Dr. Lisa Nason and Dr. Michael Carciente.

Dr. Berkowitz examined Plaintiff's right shoulder MRI film. She reported a tiny amount of subacromial/subdeltoid bursitis of nonspecific etiology. Dr. Berkowitz found no evidence of acute traumatic injury to the shoulder. Dr. Berkowitz also reviewed Plaintiff's cervical spine MRI films. She identified a C5-C6 disc bulge and straightening of the normal cervical lordosis. Dr. Berkowitz noted that the cervical lordosis straightening was a nonspecific finding that may be due to positioning. She further reported that disc bulges are chronic and degenerative in origin. Dr. Berkowitz additionally reviewed Plaintiff's lumbar spine MRI films. She did not find any evidence of acute traumatic injury. Dr. Nason performed an orthopedic examination of Plaintiff on September 23, 2010. She concluded that Plaintiff underwent right shoulder surgery as a result of "pre-existing impingement syndrome, which is degenerative in nature." Dr. Nason found no limitations in Plaintiff's range of motion for his right shoulder and stated that Plaintiff's shoulder injuries were unrelated to the present accident. Dr. Carciente conducted a neurological examination of Plaintiff on September 22, 2010. He concluded that Plaintiff had a normal neurological examination with no evidence supporting the presence of radiculopathy. Defendants have satisfied their 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 opposition, Plaintiff submits the affidavit of Dr. Mark Kramer and Dr. Peter Kwan. Dr. Kramer first examined Plaintiff on March 27, 2008. He concluded that Plaintiff had sustained traumatic impingement syndrome of the right shoulder. Dr. Kramer further stated that an MRI of Plaintiff's right shoulder confirmed his diagnosis. Dr. Kramer recommended that Plaintiff undergo arthroscopic surgery. Plaintiff underwent surgery and continued treating with Dr. Kramer. Most recently, Dr. Kramer examined Plaintiff on September 22, 2011. He conducted range of motion testing and found limitations to Plaintiff's right shoulder. Further, Dr. Kramer stated that Plaintiff stopped treating due to no fault benefits running out and an inability to pay out of pocket as well as, having reached maximum benefit from a consistent course of physical therapy. Dr. Kwan conducted a neurological examination on July 20, 2011. He performed range of motion testing and found limitations in Plaintiff's spinal range of motion when compared to normal. Dr. Kwan diagnosed Plaintiff with traumatic injury of the cervical and lumbar spine, C5-C6 and L5-S1 disc herniations and a labrum tear status post surgery.

Plaintiff additionally submits medical records from Dr. Christopher Rizzo of Morris Medical, MRI reports, Dr. Kramer's surgical report and Dr. Lily Sarhin of O&M Medical, P.C. Dr. Kwan's addendum specifically states that he reviewed and relied upon these records . As such, this medical evidence is in admissible form (*see Lee Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 915 NYS2d 529 [1st Dept 2011]; *Thompson v Abbasi*, 15 AD3d 95, 97, 788 NYS2d 48 [2005]; *Gonzalez v Vasquez*, 301 AD2d 438, 754 NYS2d 7 [2003]).

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]). Plaintiff's submissions are sufficient to rebut Defendants' *prima facie* case.

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 he was confined to bed and home for four weeks after the accident and one week following his shoulder surgery. In opposition, Plaintiff submits his affidavit stating that he was confined to his home for four months and that he has great difficulty performing his usual and customary daily activities. However, Plaintiff does not submit any evidence to show 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, Defendants' summary judgment motion as to Plaintiff's 90/180 claim under New York Insurance Law §5102(d) is granted.

Accordingly, it is hereby

ORDERED that Defendants Jose Baez and Yicel Baez's motion for summary judgment is granted and Plaintiffs' complaint is dismissed in its entirety as to said Defendants and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining Co-defendant Juan Zapata and Hector Zapata; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that Defendants serve a copy of this order with notice of entry upon all parties with Notice of Entry, within 30 days and upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that Co-defendant Juan Zapata and Hector Zapata's cross motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Co-defendant Juan Zapata and Hector Zapata's cross motion for summary judgment is granted as to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that the remaining parties appear for a Pre-trial conference on September 7, 2012 at 9:30 a.m., in room 136, 80 Centre Street, New York, New York 10013.

This constitutes the decision and order of the Court.

Dated: JUL 10 2012
New York, New York

George J. Silver, J.S.C.

George J. Silver, J.S.C.