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SHORT FORM ORDER

INDEX No. 12-7444

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 11-18-13
ADJ. DATE 8-6-14
Mot. Seq. # 001 - MD

SANTOS E. SARAVIA,	PORTNOY & PORTNOY
	Attorney for Plaintiff
Plaintiff,	315 Walt Whitman Road, Suite 216
	Huntington Station, New York 11746
- against -	
	RUSSO & TONER, LLP
MARCO S. CORTEZ and YESENIA D. MERCADO,	Attorney for Defendants
	33 Whitehall Street, 16th Floor
	New York, New York 10004
Defendants.	

Upon the following papers numbered 1 to 14 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 9; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 10-12 (untabbed); Replying Affidavits and supporting papers 13-14; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendants, Marco S. Cortez and Yesenia D. Mercado, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Santos E. Saravia, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

This action sounds in negligence arising out of an automobile accident wherein the plaintiff, Santos E. Saravia, seeks damages for serious personal injury he alleges to have sustained on May 1, 2009, on Brightside Avenue, east of Peters Boulevard, in Central Islip, New York, when plaintiff's vehicle, and the vehicle operated by defendant Marcos S. Cortex and owned by Yesenia D. Mercado, were involved in a collision.

In this motion served prior to filing the note of issue and certificate of readiness, defendants seek summary dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means 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

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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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On this motion for summary judgment on the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the moving party to present evidence in competent form, showing that the plaintiff did not sustain a serious injury as a result of the accident (*see* ***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does exist (*see* ***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of motion (001), defendants submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answer, and plaintiff's verified bill of particulars[1]; transcript of the examination before trial of plaintiff; and the reports of Michael D. Winn dated February 3, 2011, concerning his review of the MRIs of plaintiff's left shoulder, cervical spine and lumbar spine, Stuart N. Kandell, M.D. dated August 14, 2013 concerning his orthopedic examination of the plaintiff, and Naunihal Sachdev Singh, M.D. dated August 1, 2013 concerning his independent neurological examination of the plaintiff.

It is determined that even if defendants had provided a complete copy of plaintiff's verified bill of particulars, they have failed to establish prima facie entitlement to summary judgment dismissing the complaint as to either category of injury defined in Insurance Law § 5201 (d).

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[1]Defendants have failed to provide a complete copy of plaintiff's verified bill of particulars as required pursuant to CPLR 3212.

None of the medical records and reports reviewed by defendants' examining and reviewing physicians have been provided with the moving papers as required pursuant to CPLR 3212 and 4518 (***Friends of Animals v Associated Fur Mfrs.***, *supra*. Expert testimony is limited to facts in evidence (*see* ***Allen v Ch***, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom***, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

While Dr. Winn reviewed plaintiff's left shoulder, cervical and lumbar MRIs, copies of the original reports prepared by plaintiff's examining physician have not been provided. In searching the record, however, it is noted that plaintiff has provided copies of said MRI reports.

The MRI report of plaintiff's cervical spine dated July 13, 2009 provides the impression: straightening of the cervical spine; C3-4 through C5-6 disc hydration loss and disc bulging; C3-4 and C4-5 central disc herniations abutting the ventral cord; C5-6 anterior disc extension and a left paramedian disc herniation impressing on the left ventral cord; prominence of level 11 lymph nodes at the level of the posterior aspect of the submandibular glands measuring 11 mm in short dimension on the left and 10 mm in short dimension on the right-to be assessed clinically to determine the need for further evaluation. Dr. Winn, upon his review of this study, provided the impression of disc desiccation from C2-3 through C6-7; spondylosis from C3-4 through C6-7; disc space narrowing with mild diffuse and concentric bulging of the intervertebral disc at C5-6, and shallow lordosis. He opined that these findings represent typical manifestations of degenerative disc disease which would have to antedate the accident of May 1, 2009 in etiology, however, he reports no duration for his findings as required (***Estella v Geico Insurance Company***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]). It is noted that Dr. Winn does not address the disc herniations reported at C3-4, C4-5, and C5-6, creating factual issues with his review. It is determined that Dr. Winn's opinion is conclusory and does not provide basis for this opinion to support his conclusion, precluding summary judgment.

The MRI report of plaintiff's lumbar spine dated July 13, 2009 provides the impression of diffuse reversal of the lumbar lordosis with the apex at T12/L1; posterior disc bulges that impress on the thecal sac at L1-2 through L5-S1; L4-5 level right superimposed right lateral disc herniation that is abutting the right L4 nerve root in the neural foramen; vertebral body demonstrates a less than 1 cm hemangioma along the right aspect; inferior T12 vertebral Schmorl's node is present; hypertrophy of the facets is present at L3-4 and L4-5 encroaching on the thecal sac posteriorly. Upon his review of plaintiff's lumbar MRI, Dr. Winn's impression was that the plaintiff had mild degenerative spondylosis and facet joint osteoarthritis from L3-4 through L5-S1, with disc space narrowing and disc desiccation at L4-5 and L5-S1. He opined that these findings are consistent with degenerative disc disease, and that the mild facet joint hypertrophy from L3-4 through L5-S1 is consistent with osteoarthritis, all antedating the accident. He does not address the findings reported in the MRI report of disc herniation at L4-5, posterior disc bulges at L1-2 through L5-S1, or the herniation abutting the L4 nerve root in the neural foramen, creating factual issues which preclude summary judgment. Moreover, Dr. Winn's affidavit is conclusory, unsupported with the basis for his opinions, and does not state the duration of the findings or address causation, precluding summary judgment (***Estella v Geico Insurance Company***, *supra*; ***Partlow v Meehan***, *supra*).

The MRI of plaintiff's left shoulder dated July 11, 2009 provided the impression: supraspinatus tendon bulbous and inhomogeneous with tendinosis; productive acromioclavicular joint changes associated with low lying position of the anterior acromion which abuts the underlying supraspinatus. Dr. Winn set forth in his report that his impression upon reviewing the left shoulder MRI was mild hypertrophic degenerative change of the left acromioclavicular joint, otherwise unremarkable MRI of the shoulder. Dr. Winn opined that this represents typical manifestation of degenerative changes at the acromioclavicular joint which would have to antedate the accident of May 1, 2009. However, his opinion does not provide a basis for the duration of those findings, the cause of the changes noted, or a basis for his statement that the injury predates the accident (***Estella v Geico Insurance Company***, *supra*; ***Partlow v Meehan***, *supra*).

Neither Doctors Winn, Kandell or Singh have provided copies of their respective curriculum vitae to qualify as experts in this matter. Turning to Dr. Kandel's report, he set forth the records, materials, and reports for CAT scans and MRI studies which he reviewed but which have not been provided to this court. While Dr. Kandel set forth the range of motion values he determined upon examination of the plaintiff's cervical and thoracolumbar spine, right shoulder, left wrist and left knee, he compared his findings to the average normal range of motion defined in a spectrum or range rather than a specific normal range of motion value (*see* ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). By failing to compare his range of motion findings to the normal range of motion, Dr. Kandel's report leaves it to the court to speculate as to whether the range of motion reported is normal or abnormal (*see* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Additionally, Dr. Kandel, has not set forth the age group, sex, or other variable factors considered in determining an average range of motion, thus leaving it to this court to speculate as to what is meant by "average". His report does not exclude the possibility that plaintiff suffered a serious injury in the accident, (*see* ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]).

Dr. Singh also evaluated the plaintiff and performed range of motion evaluation of his cervical, lumbar and thoracic spine, and shoulders, and compared those findings to the normal range of motion values. The range of motion values to which he compared his findings differed from those set forth by Dr. Kandel, creating factual issues which preclude summary judgment. While Dr. Singh reported that the plaintiff has pain in his neck with radiation of the pain to his shoulders, and lower back pain with radiation of the pain to his left leg, he concluded that the plaintiff had diabetic neuropathy with loss of ankle reflexes, leaving this court to speculate as to the basis of his opinion. Dr. Singh has not ruled out radiculopathy or other nerve injury as a cause of the neuropathy, especially in light of the reported L4-5 level right superimposed lateral disc herniation abutting the right L4 nerve root in the neural foramen. Dr. Singh's opinions are conclusory and without basis, precluding summary judgment.

Defendants' examining physicians offer no opinion as to whether the plaintiff was incapacitated from substantially performing his activities of daily living for a period of ninety days in the 180 days following the accident, and they did not examine the plaintiff during that statutory period (*see* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). They offer no opinion with regard to this category of serious injury as well (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), raising factual issues concerning whether the

plaintiff sustained a serious injury with regard to this second category of injury.

The plaintiff testified that he is a foreman, has worked for ITT for 30 years, and makes airplane parts for the government. While he only lost three days from work, he had to report to work to advise people what to do. He had a lot of vacation time which he used. Since the accident, he has to work less due to pain in his back. He has difficulty driving. He cannot vacuum or wash his car and stated that he is very limited in doing many things due to pain. He lost consciousness at the scene of the accident and did not regain consciousness until he arrived at Good Samaritan Hospital's emergency room. He sustained injury to his left elbow, left shoulder, and had terrible pain in his neck and back. He started treating with physicians the following day and received physical therapy and chiropractic treatment for his back and neck, left leg and left arm three to four times a week for approximately six months. He had no further injuries after the accident.

The factual issues raised in defendants' moving papers preclude summary judgment, as the defendants failed to satisfy the burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) under either category (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law, it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, motion (001) by the defendants for summary dismissal of the complaint is denied

Dated: 8/20/14

J.S.C.
HON. JERRY GARGUILO

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION