Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
**Justice**

- - - - - - - - - - - - - - - - - - - - x

DOMINICK JOHN PELLEGRINO and MICHELLE MALESKI,

Plaintiffs,

- against -

GEICO INSURANCE COMPANY,

Defendant.

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Index No.: 13563/2016

Motion Date: 3/19/18

Motion No.: 103

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by defendant GEICO INSURANCE COMPANY for an order pursuant to CPLR 3212, granting defendant summary judgment and dismissing the complaint on the ground that neither plaintiff sustained a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d):

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits | 1 - 4 |
| Affirmation in Opposition-Exhibits | 5 - 7 |
| Reply Affirmation-Exhibit | 8 - 10 |

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This is a personal injury action in which plaintiffs seek to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on August 31, 2011 at the intersection of Beach 20th Street and Seagirt Boulevard, in Queens County, New York. As a result of the accident, plaintiff Dominick John Pellegrino alleges that he sustained serious injuries to his cervical spine, thoracic spine, lumbar spine, left shoulder, and left hip. Plaintiff Michelle Maleski alleges that as a result of the accident, she sustained serious injuries to her cervical spine and lumbar spine.

Plaintiffs commenced this action by filing a summons and complaint on November 21, 2016. Defendant joined issue by service of a verified answer dated January 10, 2017. Defendant now seeks

an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law.

Plaintiff Dominick John Pellegrino appeared for an examination before trial on July 10, 2017. He testified that he was involved in the subject accident. He did not bleed and did not lose consciousness. He exited his vehicle under his own power. An ambulance did not arrive at the scene of the accident. He drove home from the scene. He could not recall the first time he sought medical treatment following the accident. He believes he sought treatment with Dr. Lefcort, a chiropractor, within a week of the accident. Treatment with Dr. Lefcort consisted of physical therapy, acupuncture, and chiropractic adjustments. He also treated with Dr. Chen and at Neurological Surgery. In January 2017, he was involved in a subsequent motor vehicle accident. Following the subsequent accident, he returned to Dr. Lefcort. He did not recall if he lost time from work or how long he was confined to his home or bed following the subject accident.

Elizabeth Morrison, M.D. performed an independent medical examination on plaintiff Pellegrino on August 21, 2017. He presented with current complaints of pain in his neck, left shoulder, and lower back. Dr. Morrison identifies the records reviewed prior to rendering her report. She performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff Pellegrino's cervical spine, left shoulder, thoracic spine, lumbar spine, and left hip. All other objective tests were normal. Dr. Morrison opines that there is no objective evidence of a disability.

Plaintiff Michelle Maleski appeared for an examination before trial on July 10, 2017. She testified that she was involved in the subject accident. She was not bleeding and did not lose consciousness. She was able to exit the vehicle under her own power. She returned home following the accident. She first sought medical treatment after Labor Day. She treated at Perry Physical Medicine. She received physical therapy, electrical stimulation, and massages. She stopped treating at Perry Physical Medicine after a few weeks. She then treated with Dr. Lefcort. Treatment at Dr. Lefcort's office consisted of physical therapy, chiropractic treatment, acupuncture, and electrical stimulation. She also treated with Dr. Chen, a neurologist, approximately five or six times. For a few months, she treated at a facility where she received physical therapy, massages, electrical stimulation, and chiropractic adjustments.

She did not undergo any surgery. At the time of the deposition, she did not have any future medical appointments scheduled. In 1992, she was involved in a prior motor vehicle accident wherein she injured her neck. Following the subject accident, she was confined to her bed for one week and missed one week from work.

Dr. Morrison performed an independent medical examination on plaintiff Maleski on August 21, 2017. Plaintiff Maleski presented with current complaints of pain in her neck and lower back. Dr. Morrison identifies the records reviewed prior to rendering her report. She performed range of motion testing with a goniometer and found normal ranges of motion in plaintiff Maleski's cervical spine and lumbar spine. All other objective tests were normal. Dr. Morrison opines that there is no objective evidence of a disability.

Defendant contends that the evidence submitted is sufficient to establish, prima facie, that neither plaintiff sustained an injury which resulted in death; dismemberment; a significant disfigurement; fracture; loss of 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 organ, member, function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented them for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of their usual daily activities.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[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 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the

existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the competent proof submitted by defendant, including the affirmed medical reports of Dr. Morrison and the submitted testimony, is sufficient to meet defendant's prima facie burden by demonstrating that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]).

In opposition, plaintiff Pellegrino submits an affidavit dated March 1, 2018. He affirms that a week and a half after the accident, he presented to Dr. Lefcort. He was also seen by Dr. Chen. He went to physical therapy approximately two to three times a week, but stopped in September 2012 because his no-fault benefits ran out. Dr. Lefcort referred him to a pain management specialist in October 2011. He was examined by Dr. Raj who recommended lumbar epidural steroid injections. He received two rounds of lumbar epidural steroid injections. In November 2011, Dr. Lefcort referred him to Dr. Madhok who performed two rounds of lumbar epidural steroid injections. He still had pain in his neck and lower back. He was recommended for surgery. He underwent three surgical procedures with manipulation under anesthesia in May 2012 at Queens Surgi-Center. He received cervical epidural steroid injections in August 2012. In September-October 2012, he received three rounds of medial branch blocks in his lumbar spine which required anesthesia. In April 2016, he was examined by Dr. Vora. Dr. Vora performed lumbar medial branch blocks in his lumbar spine under anesthesia. He received three more rounds of lumbar medial branch blocks in May-August 2016 and cervical epidural injections in June 2016. Dr. Goldman examined him in October 2014 and February 2018. As a result of the accident, he cannot stand or sit for long periods of time or run. He has difficulty sleeping and doing basic household chores. He continues to experience pain in his neck, back, left hip, and left shoulder.

Plaintiff Pellegrino also submits medical records from Bayside Physical Therapy PLLC; MRI reports of the cervical spine and lumbar spine from Next Generation Radiology; medical records from North Shore LIJ Medical Group; medical records from Neurological Surgery, P.C.; medical records from Anesthesiology and Pain Professional Practice LLC; medical records from Queens

Surgi-Center; operative reports from Hackensack Surgical Center; medical records from Park Avenue Surgery Center; and Dr. Goldman's reports.

The medical records from North Shore LIJ Medical Group, Anesthesiology and Pain Professional Practice LLC, and Queens Surgi-Center, and the operative reports from Hackensack Surgical Center are unsworn and uncertified, and thus, are inadmissible (see Grasso v Angerami, 79 NY2d 813 [1991]; Lazu v Harlem Group, Inc., 89 AD3d 435 [1st Dept. 2011], quoting Migliaccio v Maraca, 56 AD3d 393 [1st Dept. 2008][statements and reports by the injured party's examining and treating physicians that are unsworn or not affirmed to be true under penalty of perjury do not meet the test of competent, admissible medical evidence sufficient to defeat a motion for summary judgment]). Although plaintiffs argue that the records are admissible because Dr. Morrison relied upon them in rendering her report, Dr. Morrison merely lists the records in her report under records reviewed. Thus, as Dr. Morrison did not actually rely upon the unsworn and uncertified records in rendering her report, the records remain inadmissible (see Rodriguez v Huerfano, 46 AD3d 794 [2d Dept. 2007]; Walker v Whitney, 132 AD3d 478 [1st Dept. 2015][finding that the records did not become admissible merely because defendants' experts reviewed them]; Hernandez v Almanzar, 32 AD3d 360 [1st Dept. 2006]).

Regarding the records from Bayside Physical Therapy PLLC, the Affirmation and Certification of Business Records executed by Lawrence J. Lefcort, D.C., a chiropractor, is not subscribed to by a notary, and thus, are inadmissible (see CPLR 2106; Doumanis v Conzo, 265 AD2d 296 [2d Dept. 1999]). Although Dr. Chen's affirmation is proper, it does not indicate that he is affiliated with Bayside Physical Therapy PLLC, which is the only identifying information on the records.

In any event, the records from Bayside Physical Therapy PLLC, the MRI reports of the cervical spine and lumbar spine from Next Generation Radiology, the medical records from Neurological Surgery, P.C., and the medical records from Park Avenue Surgery fail to demonstrate that plaintiff Pellegrino's alleged injuries were proximately caused by the subject accident (see Finkelshteyn v Harris, 280 AD2d 579 [2d Dept. 2001]; Alcalay v Town of Hempstead, 262 AD2d 258 [2d Dept. 1999]). It is the plaintiff's burden to demonstrate that the plaintiff's injuries were proximately caused by the subject accident and not a prior or subsequent injury or condition (see Finkelshteyn v Harris, 280 AD2d 579 [2d Dept. 2001]; Alcalay v Town of Hempstead, 262 AD2d 258 [2d Dept. 1999]). Although Dr. Goldman concludes that the

injuries indicated in his report were sustained in the subject accident, plaintiff Pellegrino did not submit competent objective medical evidence that revealed any treatment or the existence of an injury that was contemporaneous with the subject accident. Dr. Goldman's examination of plaintiff Pellegrino occurred nearly three years after the subject accident. As such, Dr. Goldman's opinion that plaintiff Pellegrino's injuries were sustained in the subject accident is speculative (see Perl v Meher, 18 N.Y.3d 308 [2011]["a contemporaneous doctor's report is important to proof of causation"]; Griffiths v Munoz, 98 A.D.3d 997 [2d Dept. 2012]; Singh v City of New York, 71 A.D.3d 1121 [2d Dept. 2010]). Moreover, this Court notes that the October 10, 2011 report of Dr. Maden K. Raj indicates that plaintiff's range of motion was full and all objective tests were normal.

Plaintiff Michelle Maleski submits an affidavit dated March 1, 2018. She affirms that she was involved in the subject accident. Approximately one week after the accident, she presented to Perry Physical Medicine. She treated there for a few weeks. She then went to Drs. Lefcort and Chen. Dr. Chen gave her an epidural steroid injection. Since she was still feeling pain in her neck, back, and right shoulder, Dr. Lefcort referred her to Dr. Shaheda Quraishi who recommended epidural steroid injections in the neck. Dr. Goldman also evaluated her in October 2014 and February 2018. As a result of the accident, she cannot stand or sit in front of her computer for long periods of time without pain. She also cannot play tennis or take certain exercise classes. She has difficulty doing basic cleaning chores. She still experiences pain in her neck, back, and left shoulder.

Plaintiff Maleski also submits medical records from Bayside Physical Therapy PLLC; MRI reports of the cervical spine and lumbar spine from Next Generation Radiology; medical records from North Shore LIJ Medical Group; and Dr. Goldman's reports.

The medical records from North Shore LIJ Medical Group are unsworn and uncertified, and thus, are inadmissible (see Grasso v Angerami, 79 NY2d 813 [1991]; Lazu v Harlem Group, Inc., 89 AD3d 435 [1st Dept. 2011], quoting Migliaccio v Maraca, 56 AD3d 393 [1st Dept. 2008]). The records from Bayside Physical Therapy PLLC and the MRI reports fail to demonstrate that plaintiff Maleski's alleged injuries were proximately caused by the subject accident (see Finkelshteyn v Harris, 280 AD2d 579 [2d Dept. 2001]; Alcalay v Town of Hempstead, 262 AD2d 258 [2d Dept. 1999]). Although Dr. Goldman concludes that the injuries indicated in his report were sustained in the subject accident, plaintiff Maleski did not submit competent objective medical evidence that revealed any treatment or the existence of an injury that was contemporaneous with the subject accident. Dr. Goldman's examination of plaintiff Maleski occurred nearly three years after the subject accident.

As such, Dr. Goldman's opinion that plaintiff Maleski's injuries were sustained in the subject accident is speculative (see Perl v Meher, 18 N.Y.3d 308 [2011]; Griffiths v Munoz, 98 A.D.3d 997 [2d Dept. 2012]; Singh v City of New York, 71 A.D.3d 1121 [2d Dept. 2010]).

Regarding the 90/180 day category, plaintiffs failed to submit competent medical evidence that the injuries allegedly sustained in the subject accident rendered them unable to perform substantially all of their usual and customary daily activities for not less than 90 days of the first 180 days following the subject accident (see Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Sainte-Aime v Ho, 274 AD2d 569 [2d Dept. 2000]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that defendant GEICO INSURANCE COMPANY's summary judgment motion is granted, the complaint is dismissed, and the Clerk of the Court shall enter judgment accordingly.

Dated: April 5, 2018
Long Island City, N.Y.

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**ROBERT J. MCDONALD**
**J.S.C.**