SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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MATTHEW IGBINEDION,

Plaintiff,

- against -

CENTURY WASTE SERVICES, LLC, NICHOLAS MARTINEZ,

Defendants.

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DECISION AND ORDER

Index No. 303935/2015

John R. Higgitt, J.

Defendants' summary judgment motion was denied by order dated June 8, 2018 (Mills, J.), on the ground that counsel failed to appear for oral argument. Defendants move for reargument of the June 8, 2018 order, and upon granting reargument, seek summary judgment on the ground that plaintiff's injuries failed to satisfy the threshold requirements of Insurance Law § 5102(d).1

Defendants provide a reasonable excuse for failing to appear at oral argument (*see* CPLR 2005, 2221[a] and 5015[a][1]). Counsel states that the office failed to properly calendar the prior motion for oral argument based upon a mistaken belief that the return date for the motion was only for the submission of papers. The default was not willful, defendants moved expeditiously to vacate the default, and there is no evidence that defendants intended to abandon their defense or that plaintiff would in any way be prejudiced by the delay in the determination, on the merits, of defendants' arguments (*see* CPLR 2221[a]; *Kramarenko v New York Community Hosp.*, 134 AD3d 770, 772 [1st Dept 2015]; *Brinson v Pod*, 129 AD3d 1005 [2d Dept 2015]; *Suede v Suede*, 124 AD3d 869 [2d Dept 2015]; *Felsen v Stop & Shop Supermarket Co., LLC*, 83 AD3d 656 [2d

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[1] As Judge Mills' June 8, 2018 order was entered on default, the undersigned may decide the motion (*see* CPLR 2221[a][2]; *see O'Ferral v City of N.Y.*, 8 AD3d 457 [2d Dept 2004]).

Dept 2011]). Accordingly, leave to reargue is granted and the motion is determined as follows:

Plaintiff alleged in his verified bill of particulars that he sustained permanent and/or significant serious injuries to his left shoulder, cervical spine, lumbar spine, and knee, and that all were causally related to the accident. Defendants seek summary judgment dismissing the complaint on the ground that plaintiff's injuries do not satisfy the serious injury "threshold" requirements of Insurance Law § 5102(d).

A defendant seeking summary judgment in an action governed by Insurance Law § 5102 must demonstrate that the plaintiff did not sustain a "serious injury" or that the plaintiff's injuries were not causally related to the accident at issue (*see Baez v Rahamatali*, 6 NY3d 868 [2006]; *Pommells v Perez*, 4 NY3d 566 [2005]). In the event defendant meets this burden, plaintiff must come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). A plaintiff's subjective claim of pain and limitation of motion must be corroborated by verified objective medical findings (*see Stevens v Bolton,* 135 AD3d 647 [1st Dept 2016]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Bent v Jackson*, 15 AD3d 46 [1st Dept 2005]).

Defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) under the categories of permanent loss, permanent consequential limitation or significant limitation (*see Malupa v Oppong,* 106 AD3d 538 [1st Dept 2013]; *Barry v Arias,* 94 AD3d 499 [1st Dept 2012]; *see also Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986], affd 69 NY2d 701[1986]; *see also Rose v Tall,* 149 AD3d 554 [1st Dept 2017]). Defendants submit a copy of the pleadings; the verified bill of particulars; plaintiff's deposition transcript; and the affirmed medical reports of Dr. Robert S. Goldstein, an orthopedic surgeon, and that of Dr. Jessica Berkowitz, a radiologist. Also submitted is the

affirmed no-fault report of Dr. Joseph C. Eifenbein.

Dr. Elfenbein noted degenerative changes in plaintiff's MRIs of the cervical and lumbar spines as well as degenerative changes in the x-ray of plaintiff's lumbar spine. He reviewed plaintiff's x-rays for both knees, noting normal findings. Dr. Elfenbein reviewed the x-ray and MRI of plaintiff's left shoulder and noted that the x-ray revealed an acromion process compatible with acromloclavicular joint injury, and that the MRI report prepared by plaintiff's radiologist, Dr. David R. Payne, indicated a posterosuperior quadrant labral tear with intact rotator cuff. He also performed a physical examination of plaintiff using objective means of measurement (i.e., a goniometer), with comparisons to normal ranges of motion, and found that plaintiff had no limitations with regard to any body parts alleged to have sustained "serious injury" causally related to the subject accident.

Dr. Berkowitz examined plaintiff's MRI films for his cervical and lumbar spines and noted that plaintiff exhibited degenerative disease in both body parts. She also examined plaintiff's MRI films for the left shoulder, finding no rotator cuff tear, and further, that plaintiff exhibited a developmental condition in the left shoulder unrelated to the subject accident. Dr. Berkowitz specifically stated in her affirmed report that she disagreed with the original radiological report noting that plaintiff had sustained a rotator cuff tear in the left shoulder.[1]

Dr. Goldstein also examined plaintiff using a goniometer, with comparisons to normal ranges of motion, and found that plaintiff had completely recovered from his alleged injuries. He reviewed plaintiff's MRI films for the cervical and lumbar spines and left shoulder, finding a posterosuperior quadrant labral tear of the left shoulder with an intact rotator cuff. He reviewed

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[1] In opposition, plaintiff submits a copy of Dr. Payne's MRI report of the left shoulder. Although Dr. Berkowitz's affirmed report notes that she disagreed with a finding of a rotator cuff tear in plaintiff's original MRI report, Dr. Payne specifically states in that report's impression, that plaintiff had "a postereosuperior quadrant labral tear [and an i]ntact rotator cuff."

the operative report concerning plaintiff's left shoulder surgery approximately three months after the date of the subject accident wherein plaintiff's orthopedic surgeon, Dr. John Mitamura, began his report with a preoperative diagnosis of a rotator cuff tear in the left shoulder and concluded after surgery a postoperative diagnosis of impingement with a partial thickness rotator cuff tear. He also reviewed procedure notes and EMG results from plaintiff's neurologist, Dr. Robert Marini, indicating lumbar radiculopathy. Dr. Goldstein reviewed plaintiff's MRI images for the cervical spine and lumbar spine, noting disc bulge, herniation and spondylosis in the cervical spine and no disc herniations in the lumbar spine. He did note a disc bulge and hypertropic changes at L4-L5. As to plaintiff's left shoulder, Dr. Goldstein reviewed the MRI, finding "an absent anterosuperior labrum consistent with a Buford complex, developmental in nature."

In opposition to defendants' prima facie showing, the burden shifts to plaintiff to come forward with evidence demonstrating the existence of a triable issue of fact (*see Gaddy v Eyler*, 79 NY2d 955 [1992]). A plaintiff's subjective claim of pain and limitation of motion must be corroborated by verified objective medical findings (*see Stevens v Bolton,* supra; *see also Toure v Avis Rent A Car Sys.*, supra).

Plaintiff raises triable issues of fact as to whether the claimed injuries to his spine and shoulder satisfy the significant limitation category. Plaintiff relies upon uncertified and certified medical records of his treating medical providers, including Dr. Payne, a radiologist (*see Diaz v Almodovar*, 147 AD3d 654 [1st Dept 2017]; *Walker v Whitney*, 132 AD3d 478 [1st Dept 2015]), as well as the sworn report of his treating chiropractor, Dr. Gregori S. Pasqua. Dr. Pasqua's recent examination fails to identify the objective means of measurement by which it was determined that plaintiff had a permanent injury, however, the "lack of a recent examination, while sometimes relevant, is not dispositive by itself in determining whether a plaintiff has raised

a triable issue of fact in opposing a defendant's prima facie evidence under the 'significant limitation' category" (*Vasquez v Almanzar*, 107 AD3d 538, 539–40 [1st Dept 2013]).[2]

To the extent that any of the records submitted by plaintiff are not properly certified or sworn, they are admissible, as they were reviewed and incorporated into the affirmed reports of plaintiff's own medical experts (*see Duran v Kabir*, 93 AD3d 566 [1st Dept 2012]; *Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491 [1st Dept 2010]; *Rice v Moses*, 300 AD2d 213 [1st Dept 2002]). The unauthenticated medical records may be considered on this motion because defendants' medical experts reviewed these records and provided sufficient detail regarding the contents of those records in the preparation of their affirmed reports (*see Boateng v Ye Yiyan*, 119 AD3d 424 [1st Dept 2014]; *see also Kearse v New York City Tr. Auth.*, 16 AD3d 45 [2d Dept 2005]).

Plaintiff's medical records indicate plaintiff had no relevant prior history and that any positive findings were from examinations performed contemporaneously with the date of the subject accident. Plaintiff's medical experts reviewed plaintiff's MRI reports and causally connected positive findings of serious injuries to the subject accident. Plaintiff's medical records explicitly contradict the findings of defendants' medical experts (*see Shapiro*, supra; *Francis*, supra).

Although plaintiff's medical experts did not specifically address the findings of defendants' radiologist regarding degenerative disease, given the sudden onset of symptoms after the date of the subject accident, the opinions of plaintiff's medical experts, particularly that of his orthopedic surgeon, Dr. Mitamura, who concluded that plaintiff had sustained an impingement

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[2] Plaintiff failed to raise an issue of fact as to his alleged knee injury. The conclusory assertion that plaintiff's range of motion was "restricted" and "painful" is insufficient to support a determination that any such restriction was significant or consequential (*see Moore v Almanzar*, 103 AD3d 415 [1st Dept 2013]).

with a partial thickness rotator cuff tear, sufficiently set forth a "different, yet altogether equally plausible, cause" (*Fathi v Sodhi*, 146 AD3d 445, 445–46 [1st Dept 2017] [internal citations omitted]), namely, the subject accident, warranting denial of the relief sought herein (*see Rosario v Cablevision Sys.*, 160 AD3d 545, 546 [1st Dept 2018]; *Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017]). Although acknowledged in their reports, none of defendants' medical experts specifically addressed the surgical report for plaintiff's left shoulder documenting a rotator cuff tear and impingement (*see id.*). Furthermore, to the extent defendants' medical experts attribute any findings with regard to plaintiff's injuries as degenerative or otherwise preexisting in nature, none expressed their opinions "clearly or unequivocally" (*Karounos*, supra).

Plaintiff failed to raise an issue of fact as to whether he sustained a permanent consequential limitation injury to his spine and shoulder as a result of the subject accident. However, "[i]f a trier of fact determines that plaintiff sustained [serious injury to his left shoulder], plaintiff is entitled to recover damages for all injuries causally related to the accident" *(see Bonilla v Vargas–Nunez*, 147 AD3d 461, 462 [1st Dept 2017], citing *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549–50 [1st Dept 2010]).

It is obvious that plaintiff has not sustained a permanent loss of use of a body organ, member, function or system. Such loss must be total, and there is an absence of such proof here. The claim under that category is therefore dismissed (*see Swift v N.Y. Transit Auth.*, 115 AD3d 507 [1st Dept 2014]).

Plaintiff raises a triable issue of fact regarding his claims under the 90/180 day-category (*see Stevens v Bolton*, supra; *Long v Taida Orchids, Inc.*, 117 AD3d 624 1st Dept 2014]; *Pinkhasov v Weaver*, 57 AD3d 334 [1st Dept 2008]; *Sougstad v Meyer*, 40 AD3d 839 [2d Dept 2007]; *Blackmon v Dinstuhl*, 27 AD3d 241 [1st Dept 2006]). Plaintiff's assertions that his ability

to do everyday activities had been significantly limited coupled with the findings of disability from employment by his treating chiropractor were sufficient to raise a triable issue of fact (*see De La Rosa v Okwan,* 146 AD3d 644 [1st Dept 2017] *lv den* 29 NY3d 908 [2017]; *Vasquez v Almanzar*, 107 AD3d 538 [1st Dept 2013]; *Colon v Bernabe*, 65 AD3d 969 [1st Dept 2009]; *Uddin v Cooper*, 32 AD3d 270 [1st Dept 2006]).

Accordingly, it is

ORDERED that the aspect of defendants' motion for leave to reargue the decision and order of June 8, 2018 is granted; and it is further

ORDERED, that, upon reargument, the aspects of defendant's motion for summary judgment on the ground that plaintiff has not sustained a "serious injury" under the categories of permanent loss of use and permanent consequential limitation are granted; and it is further

ORDERED, that, upon reargument, the aspect of defendants' motion for summary judgment on the ground that plaintiff has not sustained a "serious injury" with respect to his left knee is granted; and it is further

ORDERED that defendants' motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: October 15, 2018

John R. Higgitt, A.J.S.C.