SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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MICHAEL J. CROSBY,

Plaintiff,

-against -

PETER PISCITELLO and GREGORY PISCITELLO,

Defendants.

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DECISION/ORDER

Index No. 033823/2017

ACTION #1

(Motions #2 and 3)

MICHAEL J. CROSBY

Plaintiff,

-against-

CARLOS A. CARETTO,

Defendant.

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Index #157018/2017

ACTION #2

HON. SHERRI L. EISENPRESS, A.J.S.C.

The following papers, numbered 1- 8, were read in connection with (i) Defendants Peter Piscitello and Gregory Piscitello's (collectively "Piscitello") Notice of Motion for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d) in Action #1; and (ii) Defendant Carlos Caretto's ("Caretto") Notice of Motion for summary judgment and dismissal of the Complaint on the ground that there are no triable issues of fact, in that the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d) in Action #2:

PAPERS	**NUMBERED**
Motion #2	
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A"-"J"/ MEMORANDUM OF LAW IN SUPPORT	1-3
AFFIRMATION IN OPPOSITION/EXHIBITS "A-Y"	4
REPLY AFFIRMATION	5

Motion #3

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A-B" 6-7

AFFIRMATION IN OPPOSITION 8

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

The above captioned consolidated matter arises out of two separate rear-end motor vehicle accidents. The first accident involving Plaintiff and Defendant Carlos Caretto occurred on September 2, 2014, on the FDR Expressway, in the County, City and State of New York, and was originally commenced in New York County. (Action #2) The second accident, involving Plaintiff and Defendant Piscitello, occurred two weeks later on September 16, 2014, in the Town of Stony Point, Rockland County, New York, and was commenced in Rockland County. (Action #1). By Order dated December 14, 2018, the New York County action was transferred to Rockland County and both actions were consolidated under Rockland County Index #033823/2017 (Action #1).

Plaintiff, who was 27 years old at the time of the accidents, alleges that as a result of the accidents he sustained the following injuries: EMG evidence of right C7 radiculopathy; neck pain; right foraminal annular tear L4-5; disc herniation L4-5; contracture of lumbar paraspinals; low back pain; right transforaminal epidural steroid injection; sacroiliac joint derangement; sacroilititis; EMG evidence of left lateral femoral cutaneous neuropathy; meralgia paresthetica, left; and restricted range of motion in the left leg. Additionally, in June 2018, Plaintiff served Supplemental Verified Bills of Particular and alleged further injuries including bilateral compression of sciatic at pereformus; bilateral compression of superficial peroneal nerve; bilateral compression of tibial nerve at tarsal tunnel; compression at right sural; and possible future surgical intervention.

The Piscitello Defendants move for summary judgment on the ground that Plaintiff cannot meet the "serious injury" threshold under the No-Fault Law. In support of their

motion, they submit the affirmed medical report of Dr. Neustadt, who examined Plaintiff on July 16, 2018. Dr. Neustadt summarizes Plaintiff's extensive medical treatment related to the subject accidents. Upon neurological examination, Dr. Neustadt finds no objective evidence of any significant structural, intracranial, myelpathic, radiculopathic or neuropathic dysfunction. Measuring with the use of a goniometer, Dr. Neustadt found no limitation of motion in either the cervical or lumbar spine. He states that by history alone, the Plaintiff's symptoms would appear to be partially causally related to the 9/16/2014 accident and notes that he had similar symptoms from the prior motor vehicle accident two weeks before on September 2, 2016.

In an addendum dated March 13, 2019, Dr. Neustadt states that upon review of additional records, it is his opinion that at the time of his exam, he saw nothing to suggest a piriformis syndrome and in any event, he does not believe that a motor vehicle accident with a rear end collision would be a common cause of the syndrome. Defendants argue that based upon Dr. Neustadt's report and his review of the medical records, Plaintiff's injuries do not satisfy the "permanent consequential" and/or "significant limitation of use categories. Additionally, they argue that Plaintiff does not satisfy the 90/180 category, as his own Verified Bill of Particulars include admissions that he was only confined to a hospital for one day, home for three days and missed only three days of work following the accident. Defendant Crosby also moves for summary judgment but essentially submits an affirmation incorporating the arguments and evidence submitted by the Piscitello Defendants.

In opposition thereto, Plaintiff notes that after the first accident where his vehicle was struck in the rear, he consulted his primary care physical and started a course of physical therapy before the second accident. After the second accident, Plaintiff presented that day to Nyack Hospital and then consulted Dr. Robinson with complaints of low pack pain, whereupon lumbar injections were administered. As the low back and neck pain continued, he saw Dr. Rochelle Brief who referred him to Dr. Marshall Kurtz and Dr. Widenbaum. When Dr. Kurtz believed Plaintiff may be suffering from sacroiliac joint dysfunction, he was referred to Dr.

Pavell who administered two or three bilateral sacroiliac joint injections. Plaintiff began treating with Dr. Shar Hashemi in June 2018, whereupon he began to receive injections into the piriformis muscle. Presently, Plaintiff testified he suffers from pins and needs in his feet, has low back pain, thigh numbness and deep pain in the bilateral buttocks.

Plaintiff also submits the affidavit of Plaintiff's treating physician, Dr. Shar Hashemi, a peripheral nerve surgeon, who began to treat him June of 2018. Dr. Hashemi's examination noted positive tinel sign bilateral sciatic nerve at prirformis, bilateral superficial peroneal and tibial nerves at tarsal tunnel and administered left and right sciatic nerve block. Dr. Hashemi opines that based upon is examination and objective testing, it is his professional opinion that as a result of the September 2014 accidents, the plaintiff suffered post-traumatic stretch traction injury to sciatic nerve at prirformis left and right; superficial peroneal nerve at calf, left and right and tibial nerve at the tarsal tunnel, left and right. Dr. Hashemi further opines that more than 4/12 years post-accident, the Plaintiff continues to have complaints of pain in his bilateral buttocks, thighs and calves, all of which have resulted in restriction of use and activity of the injured areas, and has a guarded prognosis with respect to these permanent injuries sustained as a result of the accidents. While Dr. Hashemi explains that Plaintiff had a subsequent accident on August 1, 2018, he opines that his injuries were caused by the motor vehicle accidents in September 2014, and then aggravated by the subsequent accident in 2018. Plaintiff argues that Defendants' summary judgment motions must be denied because they have failed to meet their prima facie burden in that Dr. Neustadt did not perform objective neurological testing, or in the alternative, there are triable issues of fact based upon Plaintiff's medical records, testimony and expert affidavit.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320

(1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). In the instant matter, Defendants' examining physician found full range of motion in Plaintiff's cervical and lumbar spine; found no neurological conditions based upon objective testing, and opined that Plaintiff has not sustained piriformis syndrome, and if he did, it was not causally related to the subject accidents. As such, Defendants have met their burden on summary judgment and the burden shifts to Plaintiff to demonstrate a triable issue of fact.

A plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105 AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, an expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. Id. By establishing that any one of

several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident. Bonner v Hill, 302 AD2d 544, 756 N.Y.S.2d 82 (2d Dept 2003); O'Neill v O'Neill, 261 AD2d 459, 690 N.Y.S.2d 277 (2d Dept 1999).

Contrary to Defendants' contention, the affidavit of treating physician Dr. Hashimi, Plaintiff's medical records made contemporaneous to the accident through the present, and the testimony of Plaintiff, demonstrate triable issues of fact sufficient to defeat summary judgment. Dr. Hashemi opines that more than 4/12 years post-accident, the Plaintiff continues to have complaints of pain in his bilateral buttocks, thighs and calves, all of which have resulted in restriction of use and activity of the injured areas, and has a guarded prognosis with respect to these permanent injuries sustained as a result of the accidents of September 2014.

Where conflicting medical evidence is offered on the issue as to whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury. Martinez v Pioneer Transportation Corp., 48 A.D.3d 306, 851 N.Y.S.2d 194 (1st Dept 2008). Further, when discrepancies between the competing reports of the physicians create issues of credibility, those issues of fact should not be resolved on summary judgment and require a trial. Francis v Basic Metal, Inc., 144 AD2d 634 (2d Dept 1981); Cassagnol v Williamsburg Plaza Taxi, 234 AD2d 208, 651 N.Y.S.2sd 518 (1st Dept 1996). As such, the triable issues of fact require denial of Defendants' summary judgment motion with respect to the categories of significant limitation of use and permanent consequential limitation of use.

However, plaintiff has failed to allege that he was disabled for the minimum duration necessary to state a claim for serious injury under the 90/180 day category. His allegation that he had some restrictions with regard to his activities, coupled with his failure to submit medical evidence which documents that he was prevented from performing "substantially all" of his usual and customary activities for the requisite period, See Rubin v.

SMS Taxi Corp., 71 A.d.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010), is insufficient to sustain his burden upon summary judgment. As such, that claim is hereby dismissed.

Accordingly, it is hereby

ORDERED that Defendants Peter Piscitello and Gregory Piscitello's Notice of Motion (#2) for summary judgment, pursuant to CPLR § 3212, is DENIED, except with respect to Plaintiff's claim based upon the 90/180 no-fault category, which is dismissed; and it is further

ORDERED that Defendant Caretto's Notice of Motion (#3) for summary judgment, pursuant to CPLR § 3212, is DENIED, except with respect to Plaintiff's claim based upon the 90/180 no-fault category, which is dismissed; and it is further

ORDERED that this matter is scheduled for an appearance in the Trial Readiness Part on **WEDNESDAY, OCTOBER 23, 2019, at 9:30 a.m.**

The foregoing constitutes the Opinion, Decision & Order of the Court on Motions #2 and #3.

Dated: New City, New York
September 24, 2019

HON.SHERRI L. EISENPRESS, A.J.S.C.

TO:
All Parties (by e-file)