SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

JOHN J. ANDERSEN,

Plaintiffs,

-against-

YOHANI A. HERRERA and LUIS M. PERALTA,

Defendants.

Index No.
623812/17

Motion Seq: 002
MG
Decision/Order

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	21-27
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Defendants Yohani A. Herrera and Luis M. Peralta move for summary judgment dismissal of the plaintiff's bodily injury claims made in the amended complaint pursuant to CPLR 3212.[1] After review and consideration of the submitted papers, defendants' summary judgment motion concerning plaintiff's bodily injury claims is granted.

Plaintiff claims to have suffered injuries to his right shoulder and left hip as the result of a motor vehicle accident that occurred on September 24, 2016, between his vehicle and the defendants' vehicle. Plaintiff specifically claims that he sustained a serious injury as defined in Insurance Law 5102 (d), under the following statutory categories of injury: 1) permanent loss of use of a body organ, member, function or system; 2) permanent consequential limitation of a body organ or member; 3) significant limitation of use of a body function or system, and 4) a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment (90/180 claim).

[1] The amended complaint filed on June 27, 2018 added a second cause of action for property damage.

Defendants move to dismiss plaintiff's bodily injury claims, arguing that the alleged injuries sustained do not rise to the level of "serious injury" under any of the categories claimed by plaintiff.

As a proponent of the summary judgment motion, the defendants herein have the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the categories of injury claimed in the Bill of Particulars (*see* ***Toure v Avis Rent a Car Sys.***, 98 NY2d 345, 352 [2002]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A defendant can satisfy the initial burden by relying on the sworn statements of defendants' examining physician and plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians (***Pagano v Kingsbury***, 182 AD2d 268, 270 [2d Dept 1992]). A defendant can demonstrate that plaintiff's own medical evidence does not indicate that plaintiff suffered a serious injury and that the alleged injuries were not, in any event, causally related to the accident (***Franchini v Palmieri***, 1 NY3d 536, 537 [2003]). Defendants' medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (***Browdame v. Candura***, 25 AD3d 747, 748 [2d Dept 2006]).

The Court notes that, a tear in tendons, as well as a tear in a ligament or bulging disc is not evidence of a serious injury under the no-fault law in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (***Little v. Locoh***, 71 AD3d 837 [2d Dept 2010]; ***Furrs v. Griffith***, 43 AD3d 389 [2d Dept 2007]; ***Mejia v. DeRose***, 35 Ad3d 407 [2d Dept 2006]). Thus, regardless of an interpretation of an MRI study, plaintiff must still exhibit physical limitations to sustain a claim of serious injury within the meaning of the Insurance Law. Furthermore, to qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total (***Oberly v. Bangs Ambulance Inc.***, 96 NY2d 295, 299, [2001]).

Here, defendants have made a *prima facie* showing that plaintiff did not sustain any injuries under any of the categories claimed in his Bill of Particulars by submitting for the Court's consideration the pleadings, the affirmed report of Edward A. Toriello, M.D. and plaintiff's own deposition transcript.

Dr. Toriello, defendants' examining physician, conducted an independent medical examination of plaintiff on January 7, 2019. According to Dr. Toriello's affirmed report, he reviewed the Bill of Particulars and ten sets of plaintiff's medical records, including MRI reports concerning plaintiff's right shoulder and right thigh. Dr. Toriello noted that the December 5, 2016 MRI report concerning plaintiff's right shoulder revealed "degenerative changes in the rotator cuff and minimal low grade partial tear of the rotator cuff as well as degenerative changes of the AC joint." Plaintiff complained of right shoulder pain on the date of the examination. Further according to the report, plaintiff takes ibuprofen for pain, but he did not take any on the date of the examination.

Dr. Toriello examined plaintiff's shoulders, hips and knees. He performed certain orthopedic tests, and measured plaintiff's range of motion in those areas of plaintiff's body. Plaintiff was thirty-three (33) years old at the time of the examination. All the orthopedic tests yielded normal results. Dr.

Toriello did not detect any erythema, ecchymosis, swelling or tenderness in the areas examined. Additionally, Dr. Toriello states that there is no evidence of shoulder girdle muscle atrophy or instability in the plaintiff's shoulders. Range of motion testing yielded normal results without complaints of pain. Range of motion was measured with a goniometer or an inclinometer, and the values obtained were compared to normal values as per the American Medical Association's "Guides to the Evaluation of Permanent Impairment, 5th Edition." Dr. Toriello's impression is that plaintiff "reveals evidence of a resolved right shoulder contusion, resolved left hip contusion. He reveals no objective evidence of continued disability. He is able to work and do his normal daily activities without restriction. He does not require any further orthopedic care."

Since plaintiff did not exhibit any physical limitations during the independent orthopedic examination, there is no evidence of a serious injury in the categories of permanent loss of use, permanent consequential limitation of use, or significant limitation of use provided for by Insurance Law § 5102 (d) regardless of the "minimal low grade partial tear of the rotator cuff" noted in the December 5, 2016 MRI report (***Little***, ***supra***).

Defendants have also established their *prima facie* entitlement to summary judgment as to plaintiff's 90/180 claim by submitting plaintiff's deposition testimony (***Kuperberg v. Montalbano***, 72 AD3d 903 [2d Dept 2010]; ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664 [2d Dept 2008]).

Plaintiff testified that he is a plant utilities engineer at the Stony Brook power plant and has been employed in that title for the last two years. His duties include repairing HVAC equipment and performing preventive maintenance. Two other people assist him in his duties. The pieces of equipment that they work on are large and they use "chain falls" to lift various pieces of equipment. The "chain falls" consist of chains and gears. Plaintiff worked full-time, five days per week, and sometimes six days with overtime, prior to and since the subject accident. He works a 7:30 a.m. to 3:30 p.m. shift. Based upon his testimony, his hours and duties have not changed since the accident.

Plaintiff returned to work shortly after the accident. When asked how much time he missed from work, plaintiff replied, "[h]onestly, I don't remember;" "[p]robably a few days. I don't remember." He also testified that he did the same things he normally did at work when he returned after the accident. Plaintiff's Bill of Particulars alleges that he was "disabled from his employment for approximately two (2) days."

Further according to his testimony, he initially accepted the police officer's offer to call an ambulance made at the accident scene, but plaintiff "then declined when the ambulance was there because I had coffee all over me because I had coffee in the cup- holder so I wanted to take a shower." Plaintiff went home after the accident and took a shower. He did not seek medical treatment until the next day when he presented himself to a local hospital complaining of what he testified to was right shoulder and right hip pain.

Notably, later in his testimony, plaintiff corrected himself and testified that, "it was the left hip the whole time. Like I said it's not bothering me anymore. I guess I was confused about the left and right side."

In any event, plaintiff stated that x-rays of his right shoulder and right hip were taken at the hospital, but nothing was broken, and he was released within the course of a few hours. Plaintiff did not receive any medication or injections at the hospital, and he was not provided with a prescription of any kind. Plaintiff returned home after the hospital visit.

Following the hospital visit, plaintiff sought additional medical care from his primary care physician, but he did not recall when he went to that physician. Plaintiff testified that he sought care for his right shoulder and right hip. According to plaintiff, the primary care physician "might have referred [him] to physical therapy. I'm not sure."

Apparently, plaintiff attended physical therapy sessions at Orlin & Cohen for two or three months after the accident, approximately two times per week, but plaintiff did not remember specifically when he commenced physical therapy treatments, or how long he went. Plaintiff was also unable to recall if he stopped treating because no-fault insurance payments stopped; however, plaintiff had medical insurance through his job.

Following treatment at Orlin & Cohen, plaintiff went to another physical therapy facility, but he testified that he went there only two or three times. At this other facility, plaintiff saw a Dr. Richard Tabershaw. Plaintiff did not remember if Dr. Tabershaw made any treatment recommendations to him.

Although he could not recall which provider ordered testing, plaintiff acknowledged that an MRI study of his shoulder was performed at "Zilkha." He believed that the results showed a tear in the rotator cuff. According to plaintiff, physical therapy was recommended for the tear, but if that did not help, "then surgery." There is no evidence that plaintiff has had any surgery.

Plaintiff testified that he last treated with a medical provider for the injuries allegedly sustained as a result of the subject accident in April 2017, although he stated that he subsequently went for physical therapy, but he could not remember how long/how many times he attended.

Plaintiff's deposition was held on October 29, 2018, more than two years after the subject accident. As to his physical complaints at the time of deposition, plaintiff testified that only his right shoulder was bothering him. His hip/leg and his knees no longer bothered him.

The only physical limitations/restrictions about which plaintiff testified were that his right shoulder is a "little painful" when he uses it while showering, that he has some difficulty with the "chain falls" at work, and that he cannot play baseball with his eleven-year-old nephew for as long as he could prior to the accident. At first, plaintiff testified that, after the accident, he did not even try to go to the gym to which he belonged. He later testified that he joined another gym, and that he runs on the treadmill but cannot lift weights. Aside from the foregoing, plaintiff did not testify to any other restrictions, limitations or difficulties in performing his activities of daily living.

Plaintiff's own deposition testimony is insufficient to demonstrate that he was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (***Omar v. Goodman***, 295 AD2d 413 [2d Dept 2002]; ***Lauretta v. County of Suffolk***, 273 AD2d 204 [2d Dept 2000]).

Plaintiff is now required to come forward with viable, valid objective evidence to verify his complaints of pain, permanent injury and incapacity (***Farozes v. Kamran***, 22 AD3d 458 [2d Dept 2005]).

In opposition, plaintiff submits the affirmation of counsel, which is not evidence. Aside from the affirmation in opposition, plaintiff submits a copy of the Zilkha Radiology report of the right shoulder MRI performed on December 5, 2016 and an affirmation from the interpreting radiologist, Michael Setton, M.D. The report's "Impression" section reiterates that there is "mild supraspinatus tendinopathy with irregularity and/or minimal low grade partial tear of its posterior bursal surface fibers. Miniscule low grade interstitial tear of the distal subscapularis tendon. No labral pathology or osseous injury identified. Mild hypertrophic acromioclavicular joint degeneration." More importantly, Dr. Setton's accompanying affirmation fails to causally relate any of the findings to the subject accident; therefore, neither the MRI report nor the doctor's affirmation are sufficient to raise a triable issue of fact.

Glaringly absent is any evidence that plaintiff suffered a *medically determined* injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury.

Also, plaintiff has completely failed to adequately explain the lengthy gap in treatment from on or about April 2017 to the present (***Pommels v. Perez***, 4 NY3d 566 [2005]).

Defendants' summary judgment motion is granted, and the bodily injury claims made in the amended complaint are dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: June 6, 2019
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL ISPOSITION [X]