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

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JESUS ARIAS,

Plaintiff,

- against -

MAYAMU KONNEH,

Defendant.

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DECISION AND ORDER

Index No. 20715/2018E

John R. Higgitt, J.

Upon defendants' May 13, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendant's May 20, 2019 supplemental affirmation in support and the exhibit submitted therewith; plaintiff's December 6, 2019 affirmation in opposition and the exhibits submitted therewith; and due deliberation; defendant's motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject February 10, 2017 motor vehicle accident is granted in part.

Plaintiff alleges injuries to his shoulders and the cervical and lumbar aspects of his spine, and claims "serious injury" under the Insurance Law § 5102(d) categories of permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury (*see* CPLR 3043[a][6]).

In support of the motion, defendant submits the affirmed reports of emergency medicine specialist Dr. Caputo, orthopedist Dr. Krishnamurthy, radiologist Dr. Berkowitz and biomechanical engineer Dr. Toosi, and the transcript of plaintiff's July 27, 2018 deposition testimony.

Dr. Caputo reviewed the initial treatment and emergency room records. Given the emergency room findings, including a normal neurological examination, the absence of swelling, tenderness, erythema, ecchymosis, radiating pain, motor weakness, parethesias or other evidence

of acute injury and the lack of specialty consultations or second-level imaging orders, he opined that the claimed injuries were inconsistent with plaintiff's initial presentation. Plaintiff made no complaints regarding his shoulders, complaining of only his neck and back, and was discharged with a diagnosis of cervical pain.

Dr. Krishnamurthy examined plaintiff on August 15, 2018, approximately a year and a half after the accident. Dr. Krishnamurthy measured ranges of motion in plaintiff's cervical and lumbar spine that, while not compared to norms, he stated to be within normal limits for plaintiff, given the absence of objective orthopedic findings. Dr. Krishnamurthy measured reduced ranges of motion (as compared to norms) in plaintiff's shoulders. Dr. Krishnamurthy diagnosed plaintiff with neck, back and shoulder pain. Dr. Krishnamurthy also reviewed the films from the March 6, 2017 MRIs of plaintiff's shoulders, finding labral tears of indeterminate age, and concluding that they did not show acute injury causally related to the accident.

Dr. Berkowitz reviewed the films from the March 6, 2017 MRIs of plaintiff's shoulders, finding that they depicted degenerative changes without evidence of acute traumatic injury.

Dr. Toosi's report is inadmissible. Plaintiff objected to the court's consideration of it on that basis, and defendant submitted no explanation for the failure to submit the report in admissible form. The report is thus not considered (*cf. Sanchez v Oxcin*, 157 AD3d 561 [1st Dept 2018]).

The reports of Drs. Caputo and Berkowitz were sufficient to demonstrate, prima facie, that plaintiff did not sustain a shoulder injury causally related to the accident (*see Jenkins v Livo Car Inc.*, 176 AD3d 568 [1st Dept 2019]). Dr. Caputo's report was sufficient to demonstrate, prima facie, that plaintiff did not sustain a cervical or lumbar injury causally related to the accident (*see De Los Santos v Basilio*, 176 AD3d 544 [1st Dept 2019]; *Streety v Toure*, 173

AD3d 462 [1st Dept 2019]). Because defendant established, prima facie, a lack of causal connection between the accident and the claimed injuries, Dr. Krishnamurthy's failure to compare cervical and lumbar ranges of motion to norms does not defeat this showing (*see e.g. Mercado-Arif v Garcia*, 74 AD3d 446 [1st Dept 2010]). The finding of a lack of causal connection is sufficient (*see Simpson v Montag*, 81 AD3d 547 [1st Dept 2011]).

Defendant also asserts, in paragraphs 19 and 29 of the moving affirmation, that there is an unexplained cessation in plaintiff's treatment that severs the causal connection between the accident and plaintiff's injuries (*see Pommells v Perez*, 4 NY3d 566, 574 [2005] ["a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so"]), shifting the burden of explanation to plaintiff (*see Arias v Martinez*, 176 AD3d 548 [1st Dept 2019]). Plaintiff testified that he ceased all treatment after six months, which requires explanation (*see Cruz v Lugo*, 67 AD3d 495 [1st Dept 2009]). Plaintiff failed to explain why he ceased therapy a month after his lumbar surgery occurring approximately five months after the accident; accordingly, he failed to raise an issue of fact as to whether he sustained a permanent consequential limitation (*see Morales v Cabral*, 2019 NY Slip Op 08516 [1st Dept 2019]; *Arias, supra*; *Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]; *Holmes v Brini Transit Inc.*, 123 AD3d 628 [1st Dept 2014]).

In opposition, plaintiff submitted the affirmations of Dr. McMahon, who performed arthroscopy on plaintiff's shoulders, and Kaisman, who performed a lumbar discectomy; the affirmed reports from the MRIs of plaintiff's shoulders and cervical and lumbar spine; and various certified medical records documenting diagnoses and treatment, including range-of-motion limitations contemporaneously with the accident and recently. Drs. McMahon and

Kaisman opined that the conditions they viewed and addressed during the respective surgeries were traumatic and acute in origin. They further opined that, based upon their treatment, review of records and imaging studies, and plaintiff's medical history indicating a lack of prior similar injuries, the accident was the cause of plaintiff's injuries and limitations. This was sufficient to raise an issue of fact as to causation (*see Hamilton v Marom*, 2019 NY Slip Op 08615 [1st Dept 2019]), particularly given the absence of degeneration documented in plaintiff's own medical records (*see Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019]; *Jenkins*, *supra*). This evidence was also sufficient to raise an issue of fact as to whether plaintiff sustained a significant limitation (*see Morales*, *supra*).

With respect to plaintiff's 90/180-day injury claim, plaintiff's deposition testimony that he was confined to home for only one week following the accident was sufficient to meet defendant's prima facie burden and warrant dismissal of the claim (*see Williams v Laura Livery Corp.*, 176 AD3d 557 [1st Dept 2019]; *Pouchie v Pichardo*, 173 AD3d 643 [1st Dept 2019]; *Streety, supra*; *Curet v Kuhlor*, 172 AD3d 634 [1st Dept 2019]; *Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019]; *Tejada, supra*; *Rosario v Cablevision Sys.*, 160 AD3d 545 [1st Dept 2018]; *Latus v Ishtarq*, 159 AD3d 433 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518 [1st Dept 2018]; *Sanchez, supra*; *Fernandez v Hernandez*, 151 AD3d 581 [1st Dept 2017]; *Rose v Tall*, 149 AD3d 554 [1st Dept 2017]). Plaintiff's proof was insufficient to raise issue of fact as to whether he was prevented from performing substantially all of the material acts constituting plaintiff's usual and customary daily activities for the statutory period (*see Pouchie*, *supra*; *Moreira*, *supra*; *Sanchez*, *supra*; *Fernandez*, *supra*), even though he was receiving treatment (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]).

It is obvious that plaintiff did not sustain a permanent loss of use. Such loss must be total

(*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295 [2001]), and evidence of mere limitations of use are insufficient (*see Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

Accordingly, it is

ORDERED, that the aspects of defendant's motion for summary judgment dismissing plaintiff's claims of "serious injury" under the Insurance law § 5102(d) categories of permanent loss of use, permanent consequential limitation, and 90/180-day injury are granted, and those claims are dismissed; and it is further

ORDERED, that the motion is otherwise denied.

The parties are reminded of the February 3, 2020 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: December 30, 2019

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