SHORT FORM ORDER

INDEX No. 2658/2018
CAL. No. 20190216MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD

Justice of the Supreme Court

MOTION DATE 3/13/20 (002)
MOTION DATE 3/20/20 (003)
ADJ. DATE 8/20/20
Mot. Seq. # 002 - MD
 # 003 - MD

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JAGNARINE BOODRAM and URMELA BOODRAM,

Plaintiffs,

- against -

WALTER C. REUTLINGER, SAYVILLE FIRE DEPARTMENT, COUNTY OF SUFFOLK and TOWN OF ISLIP,

Defendants.

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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendantsReutlinger and Sayville Fire Department, filed February 12, 2020; by plaintiffs, filed February 25, 2020 ; Notice of Motion/Order to Show Cause and supporting papers ___; Answering Affidavits and supporting papers by defendants Reutlinger and Sayville Fire Department, filed March 18, 2020 ; Replying Affidavits and supporting papers ___; Other _____; it is

ORDERED that the motion by defendants Walter Reutlinger and Sayville Fire Department, and the motion by plaintiffs Jagnarine Boodram and Urmela Boodram are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Walter Reutlinger and Sayville Fire Department for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by plaintiffs Jagnarine Boodram and Urmela Boodram for summary judgment in their favor on the issue of liability is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiffs Jagnarine Boodram and Urmela Boodram as a result of a motor vehicle accident, which occurred on January 10, 2017, Corbin Avenue, at or near its intersection with Grand Boulevard, in the Town of Islip, New York. The accident allegedly occurred when a vehicle owned by defendant Sayville Fire Department and operated by defendant Walter Reutlinger struck the rear of plaintiffs' vehicle. Jagnarine Boodram alleges that he suffered various injuries as a result of the accident, including disc herniations in the cervical and thoracic regions of his spine, disc bulges in his lumbar region, and a right shoulder sprain. Urmela Boodram alleges that she suffered various injuries as a result of the accident, including disc bulges in the cervical and lumbar regions of her spine, disc herniations in her thoracic region, a supraspinatus tear in her right shoulder, and a left shoulder sprain. By stipulation dated May 6, 2019, the action has been discontinued against the County of Suffolk and the Town of Islip.

Mr. Reutlinger and Sayville Fire Department seek an order granting summary judgment dismissing the complaint on the grounds that plaintiffs did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). They submit, among other things, copies of the pleadings, the bills of particulars, the transcripts of the deposition testimony and General Municipal Law 50-h hearing testimony of plaintiffs, and the affirmed medical reports of orthopedic surgeon William Healy, M.D., radiologist David Fisher, M.D., and neurologist Howard Reiser, M.D. No papers were submitted in opposition.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden to establish, prima facie, that the plaintiff did not sustain a "serious injury" (***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in . . . 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 function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

Findings of a defendant's own witnesses must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to summary judgment (***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's treating medical providers (***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Pagano v Kingsbury***, *supra*). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***McLoud v Reyes***, *supra*; ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]). Further, an injury under the "90/180-day" category of "serious injury" must be "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). Specifically, plaintiff's usual activities must have been curtailed to a "great extent" to satisfy the 90/180-day category (***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

The submissions failed to establish a prima facie case that the alleged injuries to Mr. Boodram's spine and right shoulder do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). The affirmed medical report of Dr. Healy stated, in relevant part, that during a May 2019 orthopedic examination, Mr. Boodram exhibited significant range of motion limitations in the cervical and lumbar regions of his spine (*see* ***Williams v Maleachern***, 128 NYS3d 851, 2020 NY Slip Op 04998 [2d Dept 2020]; ***Pierre v Wagner***, 127 NYS3d 900, 2020 NY Slip Op 04885 [2d Dept 2020]; ***Bertuccio v Murdolo***, 172 AD3d 988, 101 NYS3d 192 [2d Dept 2019]; ***Rivas v Hill***, 162 AD3d 809, 79 NYS3d

225 [2d Dept 2018]). In addition, Dr. Healy failed to show reported degrees of motion in Mr. Boodram's joints were measured objectively, such as through the use of a goniometer or inclinometer, as he stated that "all range of motion was performed under direct visual inspection" (*see* ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]; ***Gamberg v Romeo***, 289 AD2d 525, 736 NYS2d 64 [2d Dept 2001]; ***Junco v Ranzi***, 288 AD2d 440, 733 NYS2d 897 [2d Dept 2001]; *see also* ***Bayk v Martini***, 142 AD3d 484, 35 NYS3d 923 [2d Dept 2016]; ***Schilling v Labrador***, *supra*; ***Durand v Urick***, 131 AD3d 920, 15 NYS3d 475 [2d Dept 2015]). Therefore, Dr. Healy's report is insufficient to establish that Mr. Boodram did not suffer a permanent consequential limitation, permanent loss, or significant limitation.

Dr. Reiser's affirmed medical report stated, in relevant part, that a May 2019 neurological examination of Mr. Boodram revealed only equivocal responses on straight leg raising bilaterally. He stated that there was no evidence of motor, sensory, or reflex radiculopathy or myelopathy at any level. Dr. Reiser opined that he found no evidence of an "objective ongoing neurological disorder causally related" to the accident. However, Dr. Reiser failed to provide additional objective medical evidence showing that the accident did not result in significant physical limitations (*see* ***Pommells v Perez***, *supra*; ***Hayes v Vasilios***, *supra*; ***Scheker v Brown***, *supra*).

Dr. Fisher opined that the x-ray and magnetic resonance imagining ("MRI") examinations of Mr. Boodram's cervical region conducted approximately four weeks after the accident showed moderate to severe degenerative changes, particularly at the C5-6 and C6-7 levels. He opined that these examinations revealed multiple disc bulges and a chronic posterior herniation of C4-5. Dr. Fisher found no acute herniations or fractures. Dr. Fisher opined that the x-ray and MRI examinations of Mr. Boodram's lumbar region conducted approximately four weeks after the accident showed mild to moderate degenerative changes, but no herniations or fractures. Dr. Fisher opined that the x-ray and MRI examinations of Mr. Boodram's right shoulder conducted approximately four weeks and 12 weeks after the accident, respectively, showed mild hypertrophy at the acromioclavicular joint. He also found that the rotator cuff and labrum were intact. Dr. Fisher opined that there was no radiographic evidence of recent traumatic or causally related injury to Mr. Boodram's spine or right shoulder. However, Dr. Fisher failed to provide additional objective medical evidence showing that the accident did not result in significant physical limitations (*see* ***Pommells v Perez***, *supra*; ***Hayes v Vasilios***, *supra*; ***Scheker v Brown***, *supra*).

The submissions also failed to establish a prima facie case that the alleged injuries to Mrs. Boodram's spine and shoulders do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). The affirmed medical report of Dr. Healy stated, in relevant part, that during a May 2019 orthopedic examination, Mrs. Boodram exhibited significant range of motion limitations in the lumbar region of her spine (*see* ***Williams v Maleachern***, *supra*; ***Pierre v Wagner***, *supra*; ***Bertuccio v Murdolo***, *supra*; ***Rivas v Hill***, *supra*). Dr. Healy opined that "[Mrs. Boodram] was less than forthcoming on her physical examination," but such statement does not adequately explain and substantiate the insinuation that Mrs. Boodram's limits may have been self-imposed (*see* ***Mercado v Mendoza***, *supra*). In addition, Dr. Healy failed to show reported degrees of motion in Mrs. Boodram's joints were measured

objectively, such as through the use of a goniometer or inclinometer, as he stated that "all range of motion was performed under direct visual inspection" (*see* ***Black v Robinson***, *supra*; ***Gamberg v Romeo***,*supra*; ***Junco v Ranzi***, *supra*; *see also* ***Bayk v Martini***, *supra*; ***Schilling v Labrador***, *supra*; ***Durand v Urick***, *supra*). Further, Dr. Healy examined Mrs. Boodram's cervical region, but failed to provide any range of motion values. Finally, Dr. Healy failed to examine Mrs. Boodram's thoracic region entirely. Therefore, Dr. Healy's report is insufficient to establish that Mrs. Boodram did not suffer a permanent consequential limitation, permanent loss, or significant limitation.

Dr. Fisher opined that the x-ray and MRI examinations of Mrs. Boodram's cervical region conducted approximately four weeks after the accident showed mid to moderate degenerative changes degenerative changes, particularly at the C3-4, C4-5, and C5-6 levels. He opined that the MRI examinations performed 16 and 26 months after the accident revealed the same degeneration in her cervical region. Dr. Fisher opined that the x-ray and MRI examinations of Mrs. Boodram's thoracic spine conducted approximately four weeks after the accident showed moderate degenerate changes. He concluded that the examinations revealed a chronic posterior disc herniation at T1-2, and that no acute herniations or fractures were present. Dr. Fisher opined that the x-ray and MRI examinations of Mrs. Boodram's lumbar region conducted approximately four weeks after the accident showed mild to moderate degenerative changes without herniations or fractures. Dr. Fisher opined that there was no radiographic evidence of recent traumatic or causally related injury to Mrs. Boodram's spine. Dr. Fisher also opined that the x-ray and MRI examinations of Mrs. Boodram's right shoulder conducted approximately four weeks, and 12 weeks after the accident, respectively, revealed moderate hypertrophy at the acromioclavicular joint. Finally, Dr. Fisher opined that the x-ray and MRI examinations of Mrs. Boodram's left shoulder revealed moderate hypertrophy at the acromioclavicular joint. He concluded that the mild rotator cuff pathology in her shoulders was compatible with the degenerative changes present. However, Dr. Fisher failed to provide additional objective medical evidence showing that the accident did not result in significant physical limitations (*see* ***Pommells v Perez***, *supra*; ***Hayes v Vasilios***, *supra*; ***Scheker v Brown***, *supra*).

In light of Mr. Reutlinger and Sayville Fire Department's failure to meet their prima facie burden, the Court now turns to the motion by plaintiffs for summary judgment in their favor on the issue of liability. Plaintiffs argue that Mr. Reutlinger was negligent in the operation of the vehicle owned by Sayville Fire Department. Plaintiffs submit, in support of the motion, copies of the pleadings, the bill of particulars, an uncertified police report, the transcripts of plaintiffs' General Municipal Law 50-h hearing testimony, and the transcript of Mr. Reutlinger's deposition testimony.

CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the Court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (*see also* ***Caban v Mastrosimone***, 129 AD3d 757, 10 NYS3d 615 [2d Dept 2015]). Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). The "good cause" requirement set forth in CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion – a satisfactory

explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy" (***Brill of City of New York***, *supra*, at 652).

Here, the statutory 120-day period for making a summary judgment motion expired on Saturday, February 22, 2020, which extended the time to file until Monday, February 24, 2020. However, plaintiffs' motion was made on February 25, 2020, the date it was served (*see* CPLR 2211). As defendants have not shown "good cause" for their delay in seeking summary judgment, their motion is denied as untimely (*see* CPLR 3212[a]; ***Brill v City of New York***, *supra*; ***Kershaw v Hospital for Special Surgery***, 114 AD3d 75, 978 NYS2d 13 [2d Dept 2013]).

Accordingly, the motions are denied.

Dated: October 14, 2020
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION