SHORT FORM ORDER

INDEX No. 608762-17
CAL. No. 19-00791OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 9-24-19 (001)
MOTION DATE 12-17-19 (002)
ADJ. DATE 6-23-20
Mot. Seq. # 001 - MG; CASEDISP
002 - MD

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MARK ROBINSON,

Plaintiff,

- against -

PAT PELUSO and BARBARA PELUSO,

Defendants.

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Upon the following papers read on these e-filed motion and cross motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants, dated August 27, 2019; Notice of Cross Motion and supporting papers by plaintiff, dated November 21, 2019 ; Answering Affidavits and supporting papers by defendants, dated December 12, 2019 and by plaintiff, dated February 14, 2020 ; Replying Affidavits and supporting papers by plaintiff, dated February 20, 2020 ; Other __; (~~and after hearing counsel in support of and opposed to the motion~~) it is

ORDERED that the motion by defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the cross motion by plaintiff for summary judgment in his favor on the issue of liability is denied, as moot.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when his vehicle was rear-ended by a vehicle owned by Barbara Peluso and operated by defendant Pat Peluso. The accident allegedly occurred on May 12, 2014, at approximately 3:00 p.m., on Montauk Highway, near the intersection with Lambert Avenue, in Shirley, New York. By the bill of particulars, plaintiff alleges that, as a result of the accident, he sustained various serious injuries and conditions, including ulnar neuropathy at the elbows and numbness and tingling in two fingers of his left hand. Plaintiff underwent a left elbow ulnar nerve surgery on October 21, 2015.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]).

Here, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of defendants' examining physicians (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]). On January 31, 2019, approximately four years and seven months after the subject accident, defendants' examining orthopedist, Dr. Teresa Habacker, examined plaintiff and performed certain orthopedic and neurological tests, including the Tinel's test. Dr. Habacker found that all the test results were negative or normal, except for the positive Tinel's test result on the left elbow, and that there was no erythema, deformity, edema, or tenderness. Dr. Habacker also performed range of motion testing on plaintiff's elbows, using a goniometer to measure his joint movement. Dr. Habacker found that plaintiff exhibited normal joint function. Dr. Habacker opined that plaintiff's alleged left elbow injury was not causally related to the subject accident, and that plaintiff had no orthopedic disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). On February 11, 2019, defendants' examining neurologist, Dr. Mathew Chacko, examined plaintiff and performed certain neurological tests. Dr. Chacko found that all the test results were negative or normal. Dr. Chacko states that although plaintiff reported diminished touch and pinprick sensation in the tip of the left pinky finger on sensory examination, there were no other focal sensory abnormalities noted to touch or pinprick sensation bilaterally in the extremities. Dr. Chacko opined that there is no objective evidence of any limitations from a neurological standpoint.

Further, at his deposition, plaintiff testified that following the accident, he missed only one day from work and that there was no change in working hours. He testified that there is no activity that he is unable to perform because of the accident, and that he plays golf. Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, defendants met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose, and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]).

Plaintiff opposes the motion, arguing defendants' expert reports are insufficient to meet their burden on the motion. Plaintiff also argues that the medical reports prepared by his treating physicians raise a triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). Plaintiff submits, inter alia, the uncertified medical records of Robert Wilutis Occupational and Physical Therapy, the unsworn medical reports of Dr. Augustine Romano, the unsworn medical reports of Dr. Steven Puopolo, the uncertified medical records of Orthopedic Associates of Long Island, and the unsworn MRI report of Dr. Jonathan Lerner. The uncertified and unsworn medical reports submitted by plaintiff are insufficient to raise a triable issue of fact, as they are not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Ramirez v Elias-Tejada***, 168 AD3d 401, 405, 92 NYS3d 188 [1st Dept 2019]). In any event, even assuming that plaintiff was entitled to rely on the unaffirmed reports of Dr. Lerner and Dr. Romano, such reports are insufficient to warrant denial of defendants' motion for summary judgment because they were not contemporaneous. Dr. Romano first saw plaintiff on March 19, 2015, more than 10 months after the subject accident. Dr. Lerner first saw plaintiff on August 8, 2016, more than two years and three months after the accident.

Dr. Steven Puopolo's affirmation set forth plaintiff's complaints and the findings, including numbness and tingling in the left hand with the ulnar neuropathy at his initial consultation on August 3, 2015, more than 14 months after the subject accident. However, Dr. Puopolo failed to provide any medical evidence concerning plaintiff's condition contemporaneous to the accident (*see* ***Sukalic v Ozone***, 136 AD3d 1018, 269 NYS3d 188 [2d Dept 2016]; ***Griffiths v Munoz***, 98 AD3d 997, 998, 950 NYS2d 787 [2d Dept 2012]). A contemporaneous doctor's report is important to proof of causation (*see* ***Perl v Meher***, *supra*), and the absence of a contemporaneous medical report invites speculation as to causation (*see* ***Griffiths v Munoz***, *supra*). Dr. Puopolo's affirmation, therefore, is insufficient to raise a triable issue of fact.

In his report, Dr. Stuart Stauber, an independent internal medicine physician, states that he first examined plaintiff on November 14, 2014, six months after the subject accident. During the initial consultation, Dr. Stauber diagnosed cervical sprain and strain and decreased sensation in the left ring and pinky fingers. He opined that plaintiff was presently not disabled secondary to the injuries sustained in

the subject accident, and that he can continue to work and perform his regular activities of daily living without any restrictions. Dr. Stauber's report, therefore, is insufficient to raise a triable issue of fact.

Finally, plaintiff failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform his normal daily activities for at least 90 of the 180 days immediately following the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 921, 976 NYS2d 151 [2d Dept 2013]).

Thus, defendants' motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is granted. Accordingly, plaintiff's cross motion for summary judgment on the issue of liability is denied, as moot.

Dated: July 16, 2020

Martha L. Luft
A.J.S.C.
HON. MARTHA L. LUFT

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION