SHORT FORM ORDER

INDEX No. 609178-18
CAL. No. 19-01938MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2-27-20
ADJ. DATE 6-25-20
Mot. Seq. # 003 - MG; CASEDISP

ERIC BARNES,

Plaintiff,

- against -

ROLDAN PAUKAR and STEPHEN RUSSELL IZZO,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motions/Order to Show Cause and supporting papers by defendants, dated January 31, 2020 ; Notice of Cross-Motion and supporting papers __; Answering Affidavits and supporting papers by plaintiff, dated June 5, 2020 ; Replying Affidavits and supporting papers by defendants, dated June 25, 2020 ; Other __; it is

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

This is an action to recover personal damages for injuries allegedly sustained by the plaintiff when his vehicle collided with a vehicle owned by defendant Roldan Paukar and operated by defendant Stephen Izzo. The accident allegedly occurred on December 26, 2017, at the intersection of Rosevale Avenue and Mon Repos Lane, in Smithtown, New York. By the bill of particulars, the plaintiff alleges that, as a result of the accident, he sustained various serious injuries and conditions, including bulging discs, sprains, and strains in the cervical and lumbar regions. The plaintiff also alleges that due to the left shoulder injuries he suffered in the subject accident, he underwent left shoulder arthroscopy in March 2018.

The defendants move for summary judgment dismissing the complaint on the ground that the 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 N YS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]).

Here, the defendants made a prima facie showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of the 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 July 26, 2019, approximately one year and seven months after the subject accident, defendants' examining orthopedist, Dr. Dorothy Scarpinato, examined the plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test and the impingement sign. Dr. Scarpinato found that all the test results were negative or normal. Dr. Scarpinato also performed range of motion testing on plaintiff's cervical and lumbar regions and left shoulder, using a goniometer to measure his joint movement. Dr. Scarpinato found that the plaintiff exhibited normal joint function. Dr. Scarpinato opined that the 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]).

Further, at his deposition, the plaintiff testified that following the accident, he was not confined to his bed or home. He testified that there is no activity that he is unable to perform because of the accident, except for carrying something heavy. 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, the defendants met their initial burden of establishing that the 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 the 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]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

The plaintiff opposes the motion, arguing that the defendants' expert reports are insufficient to meet their burden on the motion. The 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). In opposition, plaintiff submits, *inter alia*, the unsworn medical reports of Dr. Ahmed Elfiky and Dr. Alexandre De Moura, which were certified by a custodian. "The certification of the medical records and reports by the records custodian of the subject medical facility was not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury" (***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296 [2d Dept 2013]; *see* ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]; ***Buntin v Rene***, 71 AD3d 938, 896 NYS2d 894 [2d Dept 2010]). The plaintiff also submits, *inter alia*, the uncertified medical records of Pain Management, including the unsworn medical reports of Dr. Timothy Groth. The uncertified and unsworn medical reports submitted by the 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 the plaintiff was entitled to rely on the unaffirmed reports of Dr. Groth, who found a significant restriction to the range of motion in plaintiff's lumbar region, such reports are insufficient to warrant denial of the defendants' motion for summary judgment because Dr. Groth failed to state how he measured the joint function in said region.

In his report, Dr. John Velez states that he first examined the plaintiff on December 27, 2017, one day after the day of the subject accident. During the initial consultation, he administered range of motion testing on plaintiff's cervical and lumbar regions and left shoulder, using a goniometer to measure his joint movement. Dr. Velez found that there were significant range of motion restrictions in said regions. On February 19, 2020, Dr. Velez administered range of motion testing on plaintiff's cervical and lumbar regions and left shoulder. Dr. Velez found that the plaintiff exhibited minor to mild limitation of use of her cervical region: 50 degrees of flexion (normal 50 degrees), 50 degrees of extension (normal 60 degrees), and 70 degrees of right rotation (80 degrees normal). Dr. Velez found a mild limitation of use of the plaintiff's lumbar extension of 25 degrees (normal 30 degrees). Dr. Velez also found the minor to mild limitation of use of the plaintiff's left shoulder: 160 degrees of flexion (normal 180 degrees) and 150 degrees of abduction (normal 180 degrees). Dr. Velez's finding of minor to mild limitations is insufficient to raise a triable of fact as to whether the plaintiff sustained a serious injury (*see* ***Mendoza v L. Two Go, Inc.***, 171 AD3d 462, 96 NYS3d 576 [1st Dept 2019]; ***Nakamura v Montalvo***, 137 AD3d 695, 696, 29 NYS3d 285 [1st Dept 2016]).

In his narrative, Dr. Joseph Carfi states that during the initial consultation on February 26, 2019, he administered range of motion testing on plaintiff's cervical and lumbar regions and left shoulder. Dr. Carfi found that there were significant range of motion restrictions in said regions. However, Dr. Carfi failed to state how he measured the joint function in plaintiff's cervical and lumbar regions and left shoulder. The

Court can only assume that Dr. Carfi's tests were visually observed with the input of the plaintiff. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Harney v Tombstone Pizza Corp.***, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; ***Herman v Church***, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]). Moreover, Dr. Carfi failed to compare these findings to the normal range of motion (*see* ***Rivera v Gonzalez***, 107 AD3d 500, 967 NYS2d 60 [1st Dept 2013]; ***Lopez v Felton***, 60 AD3d 822, 875 NYS2d 550 [2d Dept 2009]; ***Perez v Fugon***, 52 AD3d 668, 861 NYS2d 86 [2d Dept 2008]). Although Dr. Carfi attempted to compare his findings to the normal range of motion on May 28, 2020, 15 months after the range of motion testing was performed, he provided different normal range of motion for the plaintiff's cervical flexion. While Dr. Velez states that the plaintiff's cervical flexion was 50 degrees (normal 50 degrees), Dr. Carfi states that the flexion was 55 degrees (normal 80 degrees). When the measurements that the plaintiff's physician considered normal for his or her range of motion testing differ every time he or she tested, the Court is left to speculate as to which is the correct normal value (*see* ***Cracchiolo v Omerza***, 87 AD3d 674, 928 NYS2d 644 [2d Dept 2011]; ***Frey v Fedorciuc***, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]). Dr. Carfi's narrative, therefore, is insufficient to raise a triable issue of fact.

In his narrative, Dr. Justin Mirza states that during the initial consultation on January 25, 2018, he found "decreased range of motion secondary to pain and stiffness" in the plaintiff's left shoulder. Dr. Mirza states that due to the left shoulder injuries the plaintiff suffered in the subject accident, he underwent left shoulder arthroscopy and synovectomy on March 13, 2018. However, Dr. Mirza failed to quantify the results of his range of motion testing (*see* ***Simanovskiy v Barbaro***, 72 AD3d 930, 932, 899 NYS2d 324 [2d Dept 2010]; ***Barnett v Smith***, 64 AD3d 669, 671, 883 NYS2d 573 [2d Dept 2009]).

In his affirmation, Dr. Robert Diamond states that he interpreted the magnetic resonance imaging (MRI) examination reports conducted on December 31, 201 and January 4, 2019, which revealed that the plaintiff had fluid in the glenohumeral joint, distal anterolateral supraspinatus tendinosis/tendinopathy, and anterior glenoid marginal spur in the left shoulder. In his affirmation, Dr. Robert Waxman states that he interpreted the MRI examination reports conducted on January 11, 2018, which revealed that the plaintiff had bulging discs in the cervical and lumbar regions. The mere existence of a herniated or bulging disc or a tear, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]; ***Byrd v J.R.R. Limo***, 61 AD3d 801, 878 NYS2d 95 [2d Dept 2009]).

Finally, the 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, the defendants' motion for summary judgment based on the plaintiff's failure to meet the serious injury threshold is granted.

Dated: JUL 23 2020

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION