SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 15

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Freddy Reyes,

Plaintiff,

- against -

Julio Melendez and Bronx Merchant Funding Service, LLC.,

Defendants.

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DECISION AND ORDER

Index No. 24513/2017E

Mary Ann Brigantti, J.

Upon the foregoing papers, the defendants move for summary judgment dismissing the complaint for plaintiff's failure to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102 (d). Plaintiff opposes the motion.

On or about May 29, 2017, plaintiff commenced this action for personal injuries allegedly sustained as a result of an October 10, 2016 motor vehicle accident that occurred at or near Bedford Park Boulevard at or near its intersection with Decatur Avenue, in the County of The Bronx.

Plaintiff alleges that he sustained injuries to his lumbar spine and cervical spine. Plaintiff alleges "serious injuries" under the categories of permanent loss of use, permanent consequential limitation, significant limitation, and 90/180-day injury.

When a defendant seeks summary judgment alleging that a plaintiff does not meet the "serious injury" threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v Plameri*, 1 NY3d 536 [2003]). "Such evidence includes affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011]). If the defendants fails to meet their prima facie burden, the burden does not shift to plaintiff and the motion for summary judgment can be denied without the need to consider plaintiff's showing in opposition (*see Karounos v Doulalas*,

153 AD3d 1166, 1167 [1st Dept 2017]). However, once defendant's initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

Dr. John H. Buckner performed an orthopedic examination on March 25, 2019. Dr. Buckner states with respect to the cervical spine, "He turns his head left and right 80 degrees. He tilts his head backwards 45 degrees and forwards 60 degrees. With his head and neck extended, be tilts side to side 20 degrees."

With respect to the lumbar spine, Dr. Bucker states, "He does not report tenderness, and there is no palpable spasm, visible deformity in his lumber spine. He bends to the left and right a measured 45 degrees. Straight leg raising is negative; Lastgue's sign negative; McNabits test is negative and the FABER maneuver is s negative." Dr. Bucker made no comparison to normal ranges of motion as he stated that such norms are "medically meaningless." He concluded that there was no medical evidence of injury.

Dr. Bucker's affirmation establishes a prima facie case despite the comparison of plaintiff's range of motion to stated norms. "While Dr. Buckner did not compare Plaintiff's range of motion values to normal values, he nevertheless examined Plaintiff's lumbar spine, left shoulder, and left knee, and opined that there was no objective evidence of injury after administering diagnostic tests resulting in negative findings." (*Ortega v Paramount Agami Trans. Corp*., 2020 N.Y. Misc. LEXIS 1358, *2 [Sup Ct, Bronx Co. Brigantti, J.] [citing *Rodriguez v Konate*, 161 A.D.3d 565 [1st Dept 2018].))

Defendants further rely on the report of radiologist Dr. Darren Fitzpatrick, who reviewed plaintiff's cervical and lumbar MRI films taken on October 27, 2016, shortly after the October 10, 2016 accident herein. Dr. Fitzpatrick' review of the cervical MRI film states that the plaintiff's condition is "unremarkable" and "normal," with no evidence of disease or trauma.

The affirmations of defendants' experts raise a prima facie case.

In opposition, plaintiff's submissions are sufficient to raise triable issues of fact as to whether plaintiff sustained significant and permanent consequential limitations of use of his cervical spine and right shoulder as a result of the subject accident (*see Pouchie v Pichardo*, 173 AD3d 643, 644 [1st Dept 2019]; *Munoz v Robinson*, 170 AD3d 414, 414 [1st Dept 2019]). Plaintiff submits certified medical records which detail contemporaneous range of motion limitations of the plaintiff's cervical and lumbar spine and shoulder, as compared to stated norms, as well as a recent examinations which detail continuing significant range of motion limitations of the plaintiff's cervical and lumbar spine and right shoulder. (*See Streety v Toure*, 173 AD3d 462, 462 [1st Dept 2019]; *Hayes v Gaceur*, 162 AD3d 437, 438 [1st Dept 2018]; *Moreira v Mahabir*, 158 AD3d 518, 518 [1st Dept 2018]; *Frias v Gonzalez-Vargas*, 147 AD3d 500, 501 [1st Dept 2017]).

The affirmed reports of radiologist Dr. Allen C. Pomerantz report that plaintiff's MRI films show cervical bulging, as well as lumbar bulging at L4-5, and herniation at L5-S1. Dr. Kaisman, plaintiff's treating orthopedist, states that the plaintiff required a discectomy and decompression surgery of the L5-S1, which he performed on May 3, 2017, and states that with a reasonable degree of medical certainty, Mr. Reyes' injuries to his lumbar spine as well as his need for lumbar spine surgery are causally related to his accident of 10/10/16.

The initial examination of the plaintiff by Dr. Nair, as stated in Dr. Nair's affirmed report, shows that on October 11, 2016, plaintiff had significant loss of range of motion of his lumbar and cervical spine, as compared to stated norms, as a result of the accident. Dr. Nair further states that treatment stopped as No Fault benefits were terminated, and plaintiff was unable to pay for further treatment.

The recent examination of the plaintiff performed by Dr. Paul Lerner, MD, on August 1, 2019, states that, "Cervical ROM shows 50 degrees flexion (50 degrees normal), 60 degrees

extension (60 degrees normal), 80 degrees L Rotation (80 degrees normal) and 80 degrees R Rotation (80 degrees normal). Lumbar ROM shows 45 degrees flexion (60 degrees normal, 25% loss) and 20 degrees extension (25 degrees normal, 20% loss)…" The recent examination indicates full functioning of the cervical spine, which rules out permanence. Because plaintiff did not submit evidence of a recent examination finding limitations in cervical range of motion, plaintiff failed to raise an issue of fact as to limitations of a permanent nature as to that area of the body. (*De Los Santos v Basilio*, 176 AD3d 544, 545 [1st Dept 2019] [trial court dismissed significant limitation and consequential limitation claims; Appellate Division re-instated significant limitation claim]).

With respect to plaintiff's claim of "serious injury" under the 90/180-day category, plaintiff states in his EBT that he was confined to home for approximately one week, and that two months post-accident he began to work as an Uber driver (he was unemployed at the time of the accident). Plaintiff's 90/180-day claim is therefore properly dismissed based on his deposition testimony that he was not confined to bed or home as a result of the accident. (*Bianchi v Mason*, 2020 N.Y. App. Div. LEXIS 492, *3 [1st Dept. 2020].) Plaintiff's self-serving statements concerning inability to perform certain tasks are insufficient to raise an issue of fact as to this category of serious injury.

Plaintiff alleged permanent loss of use as a category of recovery in plaintiff's bill of particulars. In order to prove a permanent loss of use of a body organ, member, function or system under the Insurance Law, the permanent loss of use "must be total." Plaintiff fails to establish any evidence of total loss of use (*Oberly v Bangs Ambulance*, 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [1st Dept 2010]).

Plaintiff is therefore entitled to pursue the claims for lumbar injury under the

significant limitation and permanent consequential limitation categories of serious injury, and to pursue claims for cervical injury under the significant limitation category of serious injury

Accordingly, it is hereby,

ORDERED, that the motion is granted to the extent of dismissing the claims under the permanent loss of use and the 90/180-day categories of serious injury, as well as the claim for cervical injury in the category of permanent consequential limitation.

This constitutes the Decision and Order of this Court.

Dated: 5/15/20

Mary Ann Brigantti, J.S.C.