| **Jimenez v Amjed** |
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| 2021 NY Slip Op 32880(U) |
| December 21, 2021 |
| Supreme Court, Kings County |
| Docket Number: Index No.: 518567/2019 |
| Judge: Carl J. Landicino |
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, On the 21st day of December, 2021.

PRESENT:
CARL J. LANDICINO, J.S.C.

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EMMANUEL JIMENEZ,
*Plaintiff,*

- against -

MOHAMMAD AMJED and LILLY TRANSPORTATION CORP.,

*Defendants.*

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Index No.: 518567/2019

DECISION AND ORDER

Motion Sequence #3

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:**

| | Papers Numbered (NYSCEF) |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | 34-42, |
| Opposing Affidavits (Affirmations) | 45-47, |
| Reply Affidavits (Affirmations) | |

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This action concerns a motor vehicle accident that occurred on February 18, 2019. The Plaintiff, Emmanuel Jimenez (hereinafter the "Plaintiff"), alleges in his Complaint that on that date he suffered personal injuries when his vehicle was involved in a vehicle operated by Defendant Mohammad Amjed and owned by Defendant Lilly Transportation Corp. (hereinafter either referred to individually or collectively as the "Defendants"). The Plaintiff alleges that the collision occurred on the JFK Expressway outbound, in Queens, New York. The Plaintiff claims in his Verified Bill of Particulars that he sustained a number of serious injuries including, *inter alia*, injuries to his right shoulder (two surgeries), left knee, lumbar and cervical spines. The Plaintiff also alleges that he was prevented from performing "substantially all of the material acts that constituted plaintiff's usual and customary daily activities for

not less than ninety days during one hundred eighty days immediately following the accident." ("90/180 claim").

The Defendants move (motion sequence #3) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by the Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of this application, the Defendants rely on the deposition of the Plaintiff and the reports of Dr. John Denton and Dr. Jessica F. Berkowitz.[1]

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that the Defendants have failed to meet their *prima facie* evidentiary showing. The Plaintiff also avers that even assuming that the Defendants had made a *prima facie* showing, there are sufficient issues of fact raised by the reports of the Plaintiff's physicians which serve to support the denial of the Defendant's summary judgment motion.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d

[1] The Court finds that the Defendants have shown that there was discovery outstanding (Plaintiff's IME) at the time the Hon. Lawrence Knipel, J.S.C. issued his October 27, 2020 Order and as a result there was sufficient cause to make the instant motion after the requisite period. *See Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 [2004]; *Parker v. LIJMC-Satellite Dialysis Facility*, 92 A.D.3d 740, 742, 939 N.Y.S.2d 96, 98 [2nd Dept, 2012].

923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

*Insurance Law § 5102(d)*

In support of their motion (motions sequence #3) the Defendants proffer the affirmed medical reports of Dr. John Denton and Dr. Jessica F. Berkowitz. Dr. Denton conducted an orthopedic medical examination of Plaintiff on November 13, 2020, more than a year and six months after the subject collision. Dr. Denton reviewed the Plaintiff's Bill of Particulars (BP) and does not indicate that he reviewed any other medical records. In his report, Dr. Denton detailed his findings based upon his personal observations and objective testing. Dr Denton performed an orthopedic examination of the Plaintiff's cervical and lumbar spines, right shoulder and left knee, with the use of a hand held goniometer. Regarding the cervical spine, Dr. Denton found "flexion at 40 degrees (50 degrees normal), extension at 50 degrees (60 degrees normal), right lateral flexion at 40 degrees (45 degrees normal), left lateral flexion at 40 degrees (45 degrees normal), and right rotation at 60 degrees (80 degrees normal), and left right rotation at 60 degrees (80 degrees normal)." Regarding the lumber spine, Dr Denton found "flexion at 60 degrees (60 degrees normal), extension at 15 degrees (25 degrees normal), right lateral bending at 20 degrees (25

degrees normal), left lateral bending at 20 degrees (25 degrees normal)." Regarding the right shoulder, Dr. Denton found "forward flexion at 140 degrees (180 degrees normal), extension at 50 degrees (40 degrees normal), abduction at 140 degrees (180 degrees normal), adduction at 30 degrees (30 degrees normal), internal rotation at 70 degrees (80 degrees normal) and external rotation at 80 degrees (90 degrees normal)." Regarding the left knee, Dr. Denton found " flexion at 105 degrees (150 degrees normal) and extension at 0 degrees (0 degrees normal)." As to these limitations in range of motion Dr. Denton stated, in conclusory fashion, that "[d]ecrease of motion of the neck, low back [sic], right shoulder and left knee carries no medical significance, and it was the degree allowed by the claimant." Dr. Denton also opined that "[t]here is no disability or permanency." (See Defendants' Motion, Report of Dr. Denton, Exhibit E).

Dr. Jessica F. Berkowitz did not examine the Plaintiff but reviewed the MRI of the Plaintiff's cervical spine, left knee, lumbar spine and right shoulder. The cervical spine MRI was performed on March 7, 2019, one month after the Plaintiff's accident. Dr. Berkowitz states that "[a] minimal right subarticular disc herniation and spondylosis are noted at C6-7 slightly narrowing the right lateral recess." Dr. Berkowitz also stated that "[t]here is no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma." The left knee MRI was performed on February 21, 2019, less than a month after Plaintiff's accident. Dr. Berkowitz states that "[t]here is a very small joint effusion." As to the left knee, Dr. Berkowitz also stated that "[t]here is no evidence of acute traumatic injury to the knee such as fracture, traumatic bone marrow edema, meniscal or ligamentous tear." The lumbar spine, MRI was performed on March 15, 2019, less than a month after Plaintiff's accident. Regarding the lumbar spine Dr. Berkowitz states that "[t]here is slight right convex scoliosis of the lumbar spine." Dr. Berkowitz also stated that "[t]here is no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous rupture or epidural hematoma."

Dr. Berkowitz reviewed two MRIs of the Plaintiff's right shoulder, the first conducted on February 21, 2019 and the second conducted on October 14, 2019. In relation to the February 21, 2019 MRI, Dr. Berkowitz stated that "[n]o rotator cuff tear is identified." Dr. Berkowitz also stated that "[t]here is no evidence of acute traumatic injury to the shoulder such as fracture, traumatic bone marrow edema or musculotendinous junction tear." In relation to the MRI conducted on October 14, 2019, Dr. Berkowitz stated that "[t]here are degenerative changes of the acromioclavicular joint and now edema in the distal clavicle." Dr. Berkowitz also stated that "[a] tiny degenerative cyst is noted in the humeral head." Regarding the Plaintiff's medical procedure, Dr. Berkowitz stated that "[i]f this is tendinopathy, it is related to chronic repetitive microtrauma to the tendon." (See Defendants' Motion, Report of Dr. Berkowitz, Exhibit F).

Turning to the merits of the motion made by the Defendants, the Court finds that the Defendants have failed to meet their *prima facie* burden. This is because the Plaintiff was examined by Dr.Denton, more than one year after the accident, and neither Dr. Denton nor Dr. Berkowitz related their findings to the 90/180 category of serious injury alleged by the Plaintiff for the relevant period of time immediately following the accident. See *Owens-Stephens v. PTM Mgmt. Corp.,* 191 A.D.3d 691, 137 N.Y.S.3d 734 [2d Dept 2021]; R*ouach v. Betts*, 71 AD3d 977, 977, 897 N.Y.S.2d 242, 243 [2d Dept 2010]; *see also Epstein v. MTA Long Island Bus*, 161 AD3d 821, 823, 75 N.Y.S.3d 532, 534 [2d Dept 2018]; *Stead v. Serrano*, 156 AD3d 836, 837, 67 N.Y.S.3d 244 [2d Dept 2017]; *Nembhard v. Delatorre*, 16 AD3d 390, 791 N.Y.S.2d 144 [2d Dept 2005]; *Peplow v. Murat*, 304 AD2d 633, 758 N.Y.S.2d 160, 161 [2d Dept 2003]; *Frier v. Teague*, 288 AD2d 177, 732 N.Y.S.2d 428 [2d Dept 2001].

It is true that when a Bill of Particulars contains conclusory allegations of a 90/180 claim and the Deposition and/or affidavit of Plaintiff does not support, or reflects that there is no such claim, Defendant movant may utilize those factors in support of its motion. *See Master v. Boiakhtchion*, 122 AD3d 589,

590, 996 N.Y.S.2d 116, 117 [2d Dept 2014]; *Kuperberg v. Montalbano*, 72 AD3d 903, 904, 899 N.Y.S.2d 344, 345 [2d Dept 2010]; *Camacho v. Dwelle*, 54 AD3d 706, 863 N.Y.S.2d 754 [2d Dept 2008]. However, in the instant proceeding, the Plaintiff sets forth in his verified Bill of Particulars that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. The Plaintiff's BP also indicates that Plaintiff missed nine months of work. (See Defendant's Motion Exhibit D, Paragraph 13). When asked in his deposition how much time he lost from work the Plaintiff stated "[f]rom February to November, which would be total [sic] of nine months." (See Defendant's Motion Exhibit G, Page 11). As a result, the Defendants have failed to meet their *prima facie* burden regarding this claim. *See Owens-Stephens v. PTM Mgmt. Corp.*, 137 N.Y.S.3d 734, 735 [2d Dept 2021]; *Hall v. Stargot*, 187 AD3d 996, 996, 131 N.Y.S.3d 250, 251 [2d Dept 2020]; *Che Hong Kim v. Kossoff*, 90 AD3d 969, 969, 934 N.Y.S.2d 867 [2d Dept 2011].

Even assuming, *arguendo,* that the Defendants had met their *prima facie* burden, the Court finds that the Plaintiff has raised material issues of fact relating to the Plaintiff's ability to meet the threshold required by Insurance Law 5102. The Plaintiff relies on an initial evaluation from Scott Leist D.C., and an MRI report from Dr. Guenadi Amoachi. Dr. Leist conducted medical examinations of Plaintiff on February 19, 2019 (one day after the accident) and April 6, 2021. As part of this examination, Dr. Leist performed an examination of the Plaintiff's cervical and lumbar spines, with the use of a hand held goniometer. Dr. Leist found limited range of motion in the cervical spine. Specifically, as to the cervical spine, Dr. Leist found flexion 30° (normal 45°), extension 30° (normal 55°), right lateral flexion 50° (normal 40°), left lateral flexion 30° (40° normal), right rotation 40° (normal 70°) and left rotation 40° (normal 70°). As to the lumbar spine, Dr. Leist found flexion 50° (normal 90°) , extension 10° (normal

30°), right lateral bending 20° (normal 35°) left lateral bending 20° (normal 35°), right rotation 10° (normal 30°), left rotation 10° (normal 30°). On April 6, 2021, Dr. Leist conducted range of motion testing of the Plaintiff's lumbar and cervical spines and found limited range of motion. As to the cervical spine he found flexion 40° (normal 50°), extension 40° (normal 60°), right lateral flexion 45° (normal 50°), left lateral flexion 40° (50° normal), right rotation 35° (normal 80°) and left rotation 40° (normal 80°). As for the lumbar spine, Dr. Leist found flexion 70° (normal 90°) , extension 30° (normal 40°), right lateral bending 25° (normal 40°) left lateral bending 30° (normal 40°), right rotation 25° (normal 40°) and left rotation 30° (normal 40°). Dr. Leist opined that the accident "caused restriction of motion in the patient's cervical spine and lumbar spines." Dr. Leist also opined that "[i]t is my professional opinion within a reasonable degree of chiropractic certainty that the patient's aforementioned injuries and limitations are permanent in nature and were directly caused, precipitated, aggravated and/or exacerbated by the February 18, 2019, motor vehicle accident and are not degenerative nor from any prior accident." Dr. Leist further explained his conclusions with specificity (See Affirmation in Opposition, Report of Dr. Leist, Exhibit A).

Dr. Guenadi Amoachi did not examine the Plaintiff but reviewed the MRI of the Plaintiff's cervical spine, left knee, lumbar spine and right shoulder. Dr. Amoachi found that the MRI of the lumbar spine revealed "mild dextroscoliosis of the lumbar spine." The MRI of the left knee revealed "contusion versus intrasubstance changes in the posterior horn of the medial meniscus." As to the cervical spine, Dr. Amoachi found "disc bulge with no associated spinal stenosis or neural foraminal narrowing." Finally, as to the right shoulder, Dr. Amoachi opined that "findings suggesting a tear of the superior to mid portion of the anterior glenoid labrum."

Plaintiff's evidence, namely the affirmed reports of Dr. Leist and Dr. Amoachi served to raise triable issues of fact with regard to the Plaintiff's claim that he sustained a serious injury as defined by the

statute. *See McNeil v. New York City Transit Auth.*, 60 A.D.3d 1018, 1019, 877 N.Y.S.2d 351, 351 [2nd Dept, 2009]. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system."*Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; *see Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendants (motions sequence #3) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

**Carl J. Landicino, J.S.C.**

KINGS COUNTY CLERK
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