SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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DONMARKENDY SENAT,

Plaintiff,

-against-

TRACY LAROSE and DERRICK HILAIRE,

Defendants.

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Index Number: 711100/2019

Motion Date: August 9, 2021

Motion Seq. No.: 1

The following electronically filed (EF) papers filed by defendant Derrick Hilaire, for an Order: pursuant to CPLR 3212 dismissing the plaintiff's Complaint as a matter of law; and for such other and further relief as this Court may deem just and proper. Defendant Tracy Larose cross moves for an Order: pursuant to CPLR 3212 granting summary judgment in the favor of the defendant(s), dismissing the plaintiff's Summons and Complaint; and for such other and further relief as this Court may deem just and proper.

	Papers Numbered
Notice of Motion - Statement of Facts - Affirmation - Exhibits.....	EF 10-19
Notice of Cross-Motion - Exhibits.....	EF 20-23
Affirmation in opposition to Motion - Exhibits.....	EF 26-29
Affirmation in opposition to Cross-Motion - Exhibits.....	EF 30-33
Affirmation in Reply to Motion……..	EF 35

Upon the foregoing papers, it is Ordered that the aforementioned motions are determined as follows:

Plaintiff commenced this personal injury action seeking to recover damages allegedly sustained in a motor vehicle collision that occurred on or about July 29, 2017, at or near the intersection of Francis Lewis Boulevard and 104th Avenue, County of Queens, State of New York where a vehicle operated by defendant Tracy Larose ("defendant Larose") made contact with a vehicle operated by defendant Derrick Hilaire ("defendant Hilaire"). At the time of the collision, plaintiff was a passenger in defendant Derrick's vehicle. Plaintiff alleges that as a result of the collision he sustained serious injuries as defined in New York Insurance Law ("NYIL") § 5102.

Defendant Hilaire filed this summary judgment motion pursuant to CPLR 3212 seeking summary judgment and dismissing the complaint of the plaintiff, on the grounds that plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the New York State Insurance Law. In support of defendant's motion, it submits the following evidence: a copy of the summons and complaint; a copy of the verified bill of particulars; a copy of plaintiff's

examination before trial ("EBT") testimony deposition transcript; copy of the expert witness exchange notice; and a copy of plaintiff's medical report by Stuart Hershon, M.D.; and a copy of plaintiff's medical report by Marianna Golden, M.D.

Defendant Larose cross-moves pursuant to CPLR 3212 seeking summary judgment and dismissing plaintiff's complaint, alleging on the grounds that the plaintiff's injuries do not satisfy the "serious injury" threshold requirement pursuant to NYIL §of Section 5102(d) of the New York State Insurance Law. In support of the defendant Larose's motion, it submits the following evidence: a copy of the summons and complaint; a copy of defendant's Larose verified answer and cross claims; and a copy of the verified bill of particulars.

Plaintiff opposes both defendants' motions and avers that plaintiff did sustain serious injuries as defined pursuant to NYIL § 5102(d) warranting denial of defendants' motions. In support of plaintiff opposition papers, it submits the following evidence: a copy of the plaintiff's affidavit; a copy of the verified bill of particulars; a copy of plaintiff's left shoulder operative report by Andrew Dowd M.D; and a copy of plaintiff's medical report by Andrew Dowd, M.D.

"It is well settled that 'the proponent of a summary judgment motions must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*see Pullman v. Silverman*, 28 NY3d 1060 [2016]) quoting (*Alvarez v. Prospect Hosp*., 68 NY2d 320 [1986]). Failure to make such a *prima facie* "showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez*, 68 NY2d 320; *Winegrad*, 64 NY2d 851). The burden rests on defendant to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury" (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury (*Lopez v. Senatore*, 65 NY2d 1017 [1985]). In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Once the burden shifts, it is incumbent upon the plaintiff upon plaintiff, in opposition to the defendant's motion, to submit proof of serious injury in "admissible form". (*Licari v. Elliott,* 57 NY2d 230 [1982]). A medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury is deemed competent medical evidence (*see Yunatanov v Stein*, 69 AD3d 708 [2d Dept 2010]). Thus, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

Pursuant to NYIL New York Insurance Law § 5102(d), "'serious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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."

The Court of Appeals has long recognized that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*see Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002] *citing* (*Dufel v Green,* 84 NY2d 795 [1995]); *see also Licari,* 57 NY2d at 234-235). As such, objective proof of a plaintiff's injury is required in order to satisfy the statutory serious injury threshold (*see e.g. Dufel,* 84 NY2d at 798; *Lopez,* 65 NY2d 1017); subjective complaints alone are not sufficient (*see e.g. Gaddy v Eyler,* 79 NY2d 955 [1992]; *Scheer v Koubek,* 70 NY2d 678 [1987]). "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (*Toure,* 98 NY2d at 345). "As such, [courts require] objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold" [citations omitted] (*see Toure,* 98 NY2d at 350). "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" (*Id.*).

DISCUSSION

According to the bill of particulars plaintiff alleges he sustained injuries to his left shoulder and cervical, thoracic, and lumbar spine and, as a result, suffered serious injuries as prescribed pursuant to NYIL § 5102(d), under the following categories: permanent consequential limitation; significant limitation; and 90/180-day.

I. DEFENDANT HILAIRE'S SUMMARY JUDGMENT MOTION

A. Permanent Consequential Limitation, Significant Limitation of Use of a Body Function or System

Defendant Hilaire contends that plaintiff's injuries do not qualify as a serious injury under the permanent consequential limitation category of NYIL § 5102(d).

Here, defendant Hilaire submits *inter alia* a medical report dated February 26, 2020 from by Stuart Hershon, M.D. ("Dr. Hershon"), who examined the plaintiff on February 26, 2020. The affirmed report by Dr. Hershon in relevant part, reads as follows:

"CURRENT COMPLAINTS
At the time of this examination, Mr Senot states he has pain in his left shoulder
PAST MEDICAL HISTORY:

> Mr Senat denies having any poor motor vehicle or work-related accidents or injuries He denies any serious Illnesses […] He does not currently take medication
> WORK HISTORY:
> The claimant was employed as an office agent at the time of the accident He did not miss any time from work He is currently working on a full-time basis with full duties.
> MEDICAL EXAMINATION:
> Normal ranges of motion are as per the AMA "Guides To The Evaluation Of Permanent Impairment", fifth edition and are performed with the assistance of a goniometer
> […]
> DIAGNOSIS:
> • Status post cervical spine sprain/strain and confusion, resolved.
> • Status post thoracic spine sprain/strain and confusion, resolved.
> • Status post lumbar spine sprain/strain and confusion, resolved
> • Status post left shoulder surgery, clinically healed
> CLINICAL IMPRESSION:
> Based on my examination and lack of objective findings, there is no evidence of an orthopedic disability He can perform all of his activities of daily living and work without restrictions or limitations There are no residual effects or functional impairment."

Additionally, Dr. Hershon's report also concluded that the plaintiff's cervical spine, thoracic spine, and lumbar spine finding no tenderness, no muscle spasms, and normal range of movement. He also performed the following objective tests: O'Brien's, Yergason, Speed's, Hawkins and Drop Arm tests, attesting that the results were all negative.

Defendant Hilaire also submits a medical report dated February 26, 2020 from Marianna Golden, M.D ("Dr. Golden"), who examined the plaintiff on February 26, 2020. The affirmed report from Dr. Golden in relevant part, reads as follows:

> "PRESENT COMPLAINTS
> At this time, Mr Senat states his present complaints are pain in his left shoulder No other complaints were reported
> […]
> OCCUPATIONAL STATUS.
> At the time of the accident, Mr Senat was employed as an office agent He did not miss any time from work He is currently working on a full-time basis performing his full duties.
> […]
> IMPRESSION.
> Based on my examination, there is no objective evidence of a neurologic disability or permanency, from a neurological viewpoint There are no objective neurological findings to substantiate the claimant's subjective complaints There is no clinical evidence of radiculopathy The claimant is neurologically intact with normal reflex, motor and sensory examinations."

The Court finds defendant Hilaire has made a *prima facie* showing that plaintiff did not suffer permanent consequential limitation, permanent loss, or significant limitation use of a body organ, member, function, or system in accordance with NYIL § 5102(d) through the submission of Dr. Hershon and Dr. Golden's affirmations. The burden now, shifting the burden of proof to the plaintiff. (*see Staff v Yshua*, 59 AD3d 614, 614 [2d Dept 2009] [finding that an orthopedist's affirmation that plaintiff's goniometer readings were normal, and that the plaintiff could live his daily activities without restrictions was prima facie evidence that the plaintiff's injury was not serious]).

In opposition, the plaintiff submits an affirmation from Andrew Dowd, M.D. ("Dr. Dowd") an orthopedic surgeon, who examined the plaintiff examined plaintiff on April 22, 2021. Dr. Dowd's affirmation in relevant part reads, as follows:

> "This patient was seen by me on August 22, 2017 following a motor vehicle accident on 07/29/2017 […] It was medically necessary to perform arthroscopic surgery on the patient's left shoulder, which I performed on August 26, 2017.
> […]
> Today he complains of stiffness and pain in the shoulder and difficulty with heavy lifting. He feels these symptoms are continuing and unchanged over the past several years.
> […]
> PHYSICAL EXAMINATION:
> Examination of the left shoulder vs as performed with the use of a goniometer. Objective range of motion revealed tenderness over the anterior left shoulder and restricted limitations and pain upon flexion to 70 degree (normal range 0-90), extension to 40 degree (normal rage 0-50) abduction to 70 degree (normal 0-90) lateral and medial rotation to 80 degree (normal range 0-90).
> He has positive impingement signs at 100 on forward elevations and a painful are abduction seen at approximately 160 degrees. Internal rotation was normal. Apprehension sign is positive. Slight weakness is noted and resisted abduction abduction[sic]. Arthroscopy portal scars are seen and well healed sings [sic]
> […]
> PERMANENCY:
> Based on a reasonable degree of medical certainty, it is my opinion that the patient's traumatic injuries are permanent in nature.
> COMMENTS: Based on my experience with this condition. the patient will continue to experience daily left shoulder pain with dysfunction. The patient may develop arthritis in the left shoulder are and his condition may worsen, with the possibility that he may need future if symptoms warrant."

In opposition, plaintiff primary relies upon Dr. Dowd's affirmation which only opines and provides findings as to the plaintiff's left shoulder. Thus, in opposition plaintiff failed to submit any evidence raising triable issues of fact regarding the alleged injuries to plaintiff's cervical, thoracic, and lumbar spine.

Regarding the plaintiff's left shoulder, Dr. Dowd, affirmation states that plaintiff will "continue to experience daily left shoulder pain with dysfunction." (EF 26 ¶¶25). Notwithstanding the latter, the record reflects that during his deposition, the plaintiff testified at the EBT that he only experiences shoulder pain three times per week for half-hour periods. (EF 15 at 14). It is well settled that subjective complaints alone are insufficient (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d at 352, 746 N.Y.S.2d 865, 774 N.E.2d 1197; *see also Perl v. Meher*, 18 N.Y.3d 208, 216, 936 N.Y.S.2d 655, 960 N.E.2d 424). Plaintiff also submits and relies upon a left shoulder operative report. However, said report is unsworn and is not in admissible form.

Additionally, defendant Hilaire contends that plaintiff fails to submit any evidence explaining the gap in plaintiff's medical treatment of plaintiff's left shoulder.

It is established that the plaintiff must prove that his treatment has been continuous. (*see Mitchell v. Casa Redimix Concrete Corp*., 83 AD3d 1015, 921 N.Y.S.2d 543 [2d Dept 2011]; *Maffei*, 63 Ad3d 1011; *Pommells*, 4 NY3d at 830; *Ponciano v Schaefer*, 59 AD3d 605, 873 NYS2d 212 [2009]; *Garcia v Lopez*, 59 AD3d 593, 872 NYS2d 719 [2009]; *Pompey v Carney*, 59 AD3d 416, 872 NYS2d 541 [2009]; *Sapienza v Ruggiero*, 57 AD3d 643, 869 NYS2d 192 [2008]).

According to Dr. Dowd's affirmation, he only treated plaintiff on August 22, 2017, August 26, 2017, and August 29, 2017 and on April 22, 2021. Dr. Dowd's report does not provide an explanation for plaintiff's gap in medical treatment of plaintiff's left shoulder, nor does plaintiff submit any other evidence to explain the gap in medical treatment as to his left shoulder Consequently, Dr. Dowd's affirmation is insufficient to raise a triable issue of fact as plaintiff's left shoulder injury as Dr. Dowd's affirmation failed to adequately account for the gap of time between the conclusion of the plaintiff's medical treatments and their examination. (see *Barnes v Cisneros*, 15 AD3d 514 [2d Dept 2005]).

The Court finds that in response the plaintiff failed to raise a triable issue of fact to rebut defendant Hilaire's *prima facie* showing that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Accordingly, the branch of defendant Hilaire's motion seeking summary judgment dismissing plaintiff's claim of a serious injury under the Permanent Consequential Limitation, Significant Limitation of Use of a Body Function or System of NYIL § 5102(d) is granted as to plaintiff' left shoulder and cervical, thoracic, and lumbar spine is granted.

B. 90/180-Day

Defendant Hilaire argues that the plaintiff did not sustain a medically determined injury or impairment that prevented him from performing substantially all of the material acts constituting her customary daily activities during at least 90 of the first 180 days following the alleged accident.

To establish a serious injury under the 90/180 category of NYIL § 5102(d), a "plaintiff must establish that he or she 'has been curtailed from performing his [or her] usual activities to a great extent' rather than "some slight curtailment" (*Lanzarone v Goldman*, 80 AD3d 667, 669 [2d Dept 2011]; *DeFilippo v White*, 101 AD2d 801, 803 [2d Dept 1984]). Demonstrating that the plaintiff missed only one week of work due to the accident is a *prima face* showing that the plaintiff

did not suffer a serious injury within the meaning of § 5102(d) (*see Toure*, 98 NY2d 345, 774 N.E.2d 1197, 746; *Gaddy*, 591 N.E.2d 1176; *see also McNamee v GC Fire, Inc.*, 2013 NY Slip Op 32724[U], [Sup Ct, Queens County 2013] [holding that a plaintiff confined in bed on an intermittent basis did not qualify as serious injury under the 90/180 category]).

Defendant Hilaire argues plaintiff admitted that he was not confined nor lost a day of work during 90 days within the 180 days following the accident. During plaintiff's EBT, he testified that immediately after the accident he could not exercise, drive for long periods at a time, nor lift heavy weight, but was still able to go to work and perform his normal job duties. The activities the plaintiff described do not rise to the threshold of preventing him from performing substantially all his usual activities. (*Frisch v Harris*, 101 A.D.3d 941, 957 N.Y.S.2d 235 [2d Dept. 2012]).

Defendant Hilaire established *prima facie* showing that the plaintiff did not suffer a serious injury under the 90/180 category of NYIL § 5102(d), shifting the burden of proof to the plaintiff. (*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]).

In plaintiff's opposition, it argues that Dr. Golden failed to address whether the Plaintiff could engage in materially all of his normal activities during 90 of the 180 days following the accident. However, at plaintiff's EBT he testified that his employer, working hours, and work nature are the same as they were prior to the collision. (see *Hernandez v Cerda*, 271 AD2d 569, 570 [2d Dept 2000]). In addition, Plaintiff's expert did not address whether the plaintiff's claimed injuries substantially affected his customary activities during the statutory period. In opposition, plaintiff did not substantiate his claim that the injuries suffered during the accident substantially prevented him from performing his usual activities for at least 90 days within the 180 days following the accident (*see Lalli v Tamasi*, 266 AD2d 266 [2d Dept 1999]).

The Court finds that in response the plaintiff failed to raise a triable issue of fact to rebut defendant's prima facie showing that the plaintiff did not suffer a serious injury under the 90/180 of NYIL § 5102(d) (*see John v Linden*, 124 AD3d 598 [2d Dept 2015]; *Il Chung Lim v Chrabaszcz*, 95 AD3d 950 [2d Dept 2012]). Accordingly, the branch of defendant Hilaire's motion seeking summary judgment dismissing plaintiff's claim of a serious injury under the 90/180 of NYIL § 5102(d) is granted.

II. REGARDING DEFENDANT LAROSE CROSS-MOTION

It is well settled that a cross-motion is an improper vehicle for seeking affirmative relief from a nonmoving party. (See CPLR 2215; see also *Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843 [2d Dept 1986]).

This Court finds that defendant Larose's cross-motion is improper. Here, defendant Larose filed a cross- motion seeking an affirmative relief of summary judgment pursuant to CPLR 3212 against the plaintiff who is a non-moving party cross-moves against the plaintiff, who is a non-moving party in this sequence. Therefore, there is no need to consider its sufficiency nor the plaintiffs' opposition papers (*see, Ballard v Cunneen*, 76 AD3d 1037, 1038 [2d Dept 2010]).

Accordingly, the branch of defendant Larose's cross-motion motion seeking summary judgment dismissing plaintiff's claim under the following categories: permanent consequential limitation; significant limitation; and 90/180-day NYIL § 5102(d) is denied (*see, id.*).

CONCLUSION

Based on the foregoing, defendant Hilaire's motion for summary judgment is granted in its entirety, and the plaintiff's Complaint is dismissed as to all categories as against defendant Hilaire; and defendant Larose's cross-motion for summary judgment is denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

The foregoing constituted the decision and Order of this Court.

Dated: December 17, 2021

LOURDES M. VENTURA, J.S.C.