

Deans v Turner

2021 NY Slip Op 33204(U)

April 7, 2021

Supreme Court, Orange County

Docket Number: Index No. EF009058-2018

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X

SEAN DEANS,

Plaintiff,

-against-

JODY L. TURNER and NICOLE L. TURNER,

Defendants.

-----X

SCIORTINO, J.

DECISION AND ORDER

INDEX NO.: EF009058-2018

Motion Date: 1/29/2021

Sequence Nos. 4 - 5

The following papers numbered 1 to 31 were considered in connection with the defendants' motion (Sequence #4) for summary judgment on the issue of liability and plaintiff's motion (Sequence #5) for summary judgment on the issue of liability and serious personal injury in accordance with Insurance Law §5102:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion(Seq. #4)/Affirmation (Greisman)/ Exhibits A - G	1 - 9
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Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on June 25, 2018 on Route 300, in the City of Newburgh, Orange County, New York. Plaintiff commenced this action by filing a Summons and Complaint on April 9, 2019. Issue was joined by Verified Answer

filed on October 23, 2018. Plaintiff alleges he sustained serious injuries as defined in Insurance Law §5102(d). Plaintiff served a Bill of Particulars dated January 17, 2019.

Plaintiff claims the following injuries/conditions to establish a serious injury: partial articular-sided rotator cuff tear; superior labral tear; partial tear of coracohumeral ligament; 14/5 broad posterior subligamentous disc herniation; L2/3 and L3/4 primarily peripheral subligamentous disc bulging; left knee contusion with torn medial meniscus and chondral injury with synovitis; and lateral meniscal tear. Plaintiff underwent left knee arthroscopy on September 19, 2018, for partial medial and lateral meniscectomy; synovectomy; abrasion arthroplasty medial femoral condyle.

The Examination before Trial of plaintiff Sean Deans was held on September 19, 2019. The Examination before Trial of defendant Nicole Turner was held on October 14, 2019. The Examination before Trial of defendant Jody Turner was held on October 14, 2019. The Examination before Trial of non-party witness Robert Rindfleisch was held on October 8, 2020. Note of Issue was filed on December 17, 2019.

Deposition of plaintiff Sean Deans (Exhibit D)

On June 25, 2018, at approximately 5:00 p.m., plaintiff was exiting the Verizon parking lot and attempting to make a left turn and travel southbound on Route 300 in Newburgh. There are two northbound lanes that bottleneck into a single lane by the Verizon parking lot, one southbound lane, and a single two-way turning center lane. The weather on the day of the accident was sunny and clear.

Plaintiff pulled up to the stopped northbound traffic, waiting to make a left turn, and looked in both directions. Traffic in the northbound lane was standing still. The southbound lane was clear.

Plaintiff testified that, while the drivers in the northbound lane of Route 300 had the right of way, a stopped vehicle in the northbound lane left enough room for plaintiff to cross the northbound lanes and complete the left turn into the southbound lane. Plaintiff pulled into the northbound lane, stopped, and again looked in both directions. Both the southbound lane and two-way center turning lane were clear, and plaintiff proceeded. As plaintiff proceeded, defendant's vehicle, which was traveling in the center turning lane, struck plaintiff's vehicle in the driver's side front quarter panel. Plaintiff did not see defendant's vehicle or hear any sounds before the impact. Plaintiff described a single impact as feeling "like a Mack truck hit [him]."

Plaintiff's left knee struck the inside of his vehicle; his right arm was stuck between the armrest and his body, and he briefly lost consciousness. The impact pushed plaintiff's vehicle sideways through the center turning lane. Plaintiff exited the vehicle from the front passenger side. After the police arrived, plaintiff heard defendant telling the police officer that she was using the two-way center turning lane to catch up to the stop light at the next intersection. This statement was omitted from the original police report, but was included in the amended report.¹

Plaintiff was transferred by ambulance to St. Luke's hospital where he was examined and CT scans were taken of his neck and back. Plaintiff was discharged and driven home by his wife the same day. The following day, plaintiff sought treatment with Dr. Harvey, a chiropractor. Dr. Harvey recommended seeing Dr. Dynof, a pain management specialist. Plaintiff was then scheduled for MRIs of his neck, back, and knee.

Plaintiff also sought treatment with Dr. Palmeri, an orthopedic surgeon. Dr. Palmeri advised that he had a torn meniscus in his left knee and a torn rotator cuff in his right shoulder. As a result

¹ Neither police report is certified.

of the accident, plaintiff underwent two surgeries on his right shoulder: the first on October 8, 2018, the second on March 6, 2019. Plaintiff also underwent surgery on his left knee on September 19, 2018. Plaintiff subsequently received physical therapy three days per week, until he returned to work on June 10, 2019. At the time of deposition, plaintiff had pain in his neck, back, right shoulder, right hand, and left knee.

Prior to the accident, plaintiff worked at Verizon and United Foods. After the accident, plaintiff was out of work on disability leave from both jobs from the date of the accident until June 10, 2019. In June of 2019, plaintiff was at risk of losing his jobs, so he obtained a note from Dr. Palmeri advising his employers that he could return to work. With respect to his job with Verizon, plaintiff received full disability pay until March of 2019 (nine months); he then received half pay for approximately three months. He returned to the same position at the same hourly rate. With respect to his job at United Foods, he returned back to work in June of 2019, shortly after returning to Verizon.

Plaintiff testified that, as a result of the accident, he is no longer able to perform job duties, including kneeling down for long periods; carrying equipment on his right arm, and holding his right arm up. He also cannot take his shirt off without assistance and has difficult reaching and picking up his grandchildren.

Deposition of defendant Nicole Turner (Exhibit E)

Defendant Turner testified that she was traveling north on Route 300. There are two northbound lanes, which merge into a single lane at the Verizon building. There is also a two-way left turn-center lane, which proceeds until the next intersection; it then turns into a left turning lane to Route 52.

Prior to the accident, defendant was traveling in the northbound lane with at least twenty cars in front of her. The northbound lanes had merged, and traffic was “extremely heavy.”

Before she entered the two-way center turning lane, she could not see the traffic light, as there were “several cars in front of [her.]” Defendant entered the two-way center turning lane, which had fewer vehicles, and proceeded forward to the upcoming intersection.

She proceeded forward approximately two car lengths when she observed the plaintiff looking in the direction of the southbound lane as he attempted to make a left turn, crossing the northbound lane and two-way center turning lane. Defendant hit her brakes “extremely hard;” the brakes let out a screech. The plaintiff struck the front passenger side of defendant’s vehicle with the front driver’s side of plaintiff’s vehicle. Defendant observed the plaintiff fly out of the parking lot traveling approximately 40 miles per hour a “split second” before the impact. Although she had traveled only two car lengths after entering the two-way center turning lane, defendant testified she was traveling “around 25 miles an hour” at the time of impact.

Deposition of Robert Rindfleisch (Exhibit F)

At the time of the accident, non-party Robert Rindfleisch was in one of the northbound lanes, before the two northbound lanes merge. Defendant’s vehicle was traveling forward in the two-way center turning lane to his left, heading toward the next intersection approximately 500 to 600 yards away. Rindfleisch testified that the plaintiff was attempting to make a left turn across the northbound lane and center turning lane. The plaintiff was traveling between 5 and 7 miles per hour and the defendant was traveling between 15 and 20 miles per hour. Rindfleisch testified that, once the plaintiff cleared the northbound lane he never looked toward the northbound traffic again. The plaintiff tried to travel through the two-way center turning lane and was struck. Rindfleisch testified

that he had good visibility of the accident due to the elevated level of his truck.

Summary Judgment on Liability (Sequences #4 and #5)

Defendants' Motion

By Notice of Motion filed on December 22, 2020, defendants move for summary judgment on the issue of liability. Defendants claim entitlement to summary judgment on liability as the sole proximate cause of the accident was plaintiff's failure to yield the right of way when pulling out of a parking lot while making a left turn. Defendant's vehicle was within her lane of travel when plaintiff suddenly attempted a left turn across defendant's lane of travel. Plaintiff testified that vehicles traveling north on Route 300 had the right of way. As such, plaintiff's action violated Vehicle & Traffic Law §1143. (McKinney's Veh. & Traffic Law §1143) Such actions, defendants argue, constitutes negligence *per se*.

In opposition, plaintiff argues that defendants have failed to meet their burden on summary judgment on the issue of liability. Defendant Nicole Turner admits to using the two-way left turn-center lane as a passing lane at a rate of speed of approximately 25 miles per hour. Defendant's deposition testimony establishes that her use of the center turning lane, approximately 600 to 800 feet prior to her intended left turn in order to avoid rush hour traffic and excessive rate of speed, was improper and violated the applicable law. Defendant's deposition testimony establishes her violation of the Vehicle and Traffic Law, and her actions were the proximate cause of the underlying accident.

In reply, defendants argue that Ms. Turner's use of the left-turn lane was in complete accord with the terms of VTL 1126(c). Defendants argue there is no evidence to support suggesting that Ms. Turner was passing stationary vehicles, or that her actions violated applicable laws. Defendants argue Plaintiff's expert's opinions have no evidentiary basis in the record, ignores realities supported

by deposition testimony, and is speculative. Defendants have failed to raise a triable issue of fact precluding summary judgment on the issue of liability.

Plaintiff's Motion

By Notice of Motion filed on December 23, 2020, plaintiff moves for summary judgment on the issue of liability. Plaintiff argues that defendant Nicole Turner's deposition testimony demonstrates that she was using the two-way left turn-center lane as a passing lane at a rate of speed of approximately 25 miles per hour, approximately 600 to 800 feet prior to her intended left turn in order to avoid rush hour traffic and excessive rate of speed. Defendant testified that she had to slam on the brakes, heard the screeches of her brakes, but was unable to stop in time to avoid the collision. Plaintiff argues defendant's use of the two way turn center lane was improper and violated the applicable law. Plaintiff argues defendant Nicole Turner's actions were the proximate cause of the underlying accident.

Plaintiff submits the Affidavit of Gregory L. Witte, Accredited & Certified Accident Reconstructionist. Mr. Witte reviewed the accident report, and the parties' deposition transcripts. Witte conducted an independent investigation on February 20, 2020. Witte opines, to a reasonable degree of scientific certainty in the field of Traffic Crash Reconstruction including vehicular data and dynamics, facts, evidence, documentation and testing, that defendant Nicole Turner's improper and illegal use of the two-way-left-turn lane caused the collision to occur.

Plaintiff Deans' testimony indicates his compliance with the Vehicle Traffic Law rules and regulations. Plaintiff testified traffic was standing still in the northbound lanes, and the southbound lane was clear. Plaintiff argues he has established entitlement to judgment as a matter of law on the issue of liability.

In opposition, defendants argue that, as set forth in defendants motion for summary judgment, plaintiff's negligent actions were the sole proximate cause of the underlying accident.

Discussion on Liability (Sequences #4 and #5)

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996])

A plaintiff moving for summary judgment on a cause of action sounding in negligence has the burden of establishing: (1) a duty extending from defendant to plaintiff; (2) a breach of this duty; and (3) an injury to plaintiff as a result thereof. (*Poon v. Nisanov*, 162 AD3d 804 [2d Dept 2018]) However, a plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability. (*Maliakel v. Morio*, 185 AD3d 1018 [2d Dept. 2020]) Where facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility, summary judgment must not be granted. (*Bill Birds*, 2020 WL 1521903 at 7; *Jastrzebski*, 223 AD2d at 678)

A defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident. (*Leak v. Hybrid Cars, Ltd.*, 132 AD3d 958, 959 [2d Dept. 2015])

Vehicle and Traffic Law §1126(c) provides, "Where a two-way left turn lane or a paved and

clearly traversable dividing section separates the travel lanes for traffic proceeding in opposite directions, the foregoing limitation shall not apply to the driver of a vehicle traveling within such lane or section *for such distance as is required for safety in preparing to turn left* leaving such highway or in completing a left turn entering such highway. (Emphasis added) However, Vehicle and Traffic Law §1116(c) provides, “Traffic facing a steady white two-way left-turn arrow signal indication is permitted to use a lane over which the signal indication is located for a left turn, *but not for through travel*, with the understanding that common use of the lane by oncoming road users for left turns is also permitted.” (Emphasis added)

Here, the parties dispute whether plaintiff looked to see if traffic was coming from his left before attempting to make the turn. Plaintiff testified that he looked both ways before attempting the turn, and the lanes were clear. Defendant Nicole Turner and non-party Robert Reinfleisch testified that they observed the plaintiff speed out of the parking lot. Furthermore, Reinfleisch testified that he observed plaintiff only check traffic traveling in the southbound lane, and then attempted to make the left turn, colliding with defendant’s vehicle. Nicole Turner testified that her use of the center turning lane was essentially the norm during rush hour traffic, since traffic at the Route 52 left hand turning lane is often backed up to the center turning lane.

In the face of the conflicting testimony as to the facts, as contained in the appended deposition transcripts, the parties have failed to demonstrate entitlement to summary judgment on the issue of liability. (*Sperling v. Akesson*, 104 AD3d 840 [2d Dept. 2013]) This Court finds that there are triable of issues of fact with respect to whether plaintiff’s actions were a proximate cause of the accident, and whether defendant Nicole Turner was negligent in her use of the two-way center turning lane. (*Mercado v. Horn*, 156 AD3d 616, 617 [2d Dept. 2017]) As such, the instant motions

for summary judgment on the issue of liability are denied.

Plaintiff's Threshold Motion (Sequence #5)

Plaintiff argues he has suffered a serious injury within the meaning of the Insurance Law. Although plaintiff alleges specific injuries, no "serious injury" categories are specified in plaintiff's Bill of Particulars as defined by the Insurance Law.

In support of his motion, plaintiff offers certified copies of St. Luke's hospital emergency room records (Exhibit K). The records indicate that plaintiff presented with neck pain, right shoulder pain radiating down the arm, right thumb and right middle finger pain. A CT scan of cervical spine was performed, which revealed no acute fracture, but found multilevel degenerative changes. Plaintiff was given aspirin and was discharged.

Plaintiff appends the certified records of Dr. David Dynof, M.D., a physician certified in orthopedics and pain management. (Exhibit M) The records show an initial evaluation on June 27, 2018, two days after the accident, and multiple cervical trigger point injections from July 9, 2018 to September 19, 2018, and a right shoulder injection dated July 25, 2018.

At the June 27, 2018 evaluation, plaintiff complained of severe pain in the neck, right shoulder, and right hand. With respect to the cervical spine, Dr. Dynof notes there is severe tenderness to palpitation noted at cervical levels C3 to C6. Muscle spasm and tenderness are noted in the cervical paraspinal muscles to the left and right. The left and right trigger points were noted to be severely tender in the paracervical and trapezial regions. Pain was noted in the left and right rotation and flexion of the neck.

Dr. Dynof performed range of motion testing at the June 27, 2018 evaluation. Range of motion testing of the cervical spine showed flexion 0-30/0-50, extension 0-35/0-50, lateral rotation

to left 0-55/0-85 and right 0-65/0-85, left flexion (0-20/0-45), right flexion 0-30/0-45.

Lumbosacral range of motion testing showed flexion was 0-60/0-90, extension was 0-10/0-25, left rotation 0-20/0-45, right rotation 0-20/0-45, left flexion 0-10/0-25, right flexion 0-10/0-25. There was severe tenderness to palpitation noted at lumbosacral levels L3 through S1, and pain reported with restricted range of motion in left rotation, right rotation and extension.

Right shoulder range of motion was 0-140/0-180 forward, extension 0-25/0-50, abduction 0/100-0/130, internal rotation 0-75/-0/90, external rotation 0-70/0-90. Evidence for impingement was shown by a positive Hawkins and abduction test which was "strongly positive." Weakness of the supraspinatus muscle was demonstrated. Weakness of the Infraspinatus and Teres Minor was evidenced by a positive isometric external rotation test which was mildly positive.

Knee range of motion showed 0-120/0-120 degrees flexion for both knees. Healed arthroscopic scars were observed, along with a negative McMurray and negative Lachman bilaterally. These normal values represent full range of motion.

The right hand exhibits no wasting or rubor, no tenderness to palpation at the flexor or extensor tendons. The right hand shows limited range of motion with flexion at the 3 digit and extension at the 3 digit.

Dr. Dynof's impressions were, *inter alia*, cervical sprain/strain cervical myalgia; cervical trigger points; right cervical radiculopathy; thoracic sprain; thoracic myalgia; lumbosacral sprain/strain; left sacroiliac strain/sprain; right knee sprain; and right hand 3rd digit sprain. Dr. Dynof's report evaluation report makes no reference to any specific "serious injury" categories under the Insurance Law or causation of the injuries.

Plaintiff appends certified copies of Harvey Family Chiropractic records. (Exhibit L) These

records show plaintiff being treated with physical therapy by Dr. Harvey from 6/26/18 through 9/7/2018 for neck and back, during which plaintiff reports pain. The records also show physical therapy from 6/27/2018 to 9/7/2018 of the right hand and both knees, in which plaintiff reports pain. Appended to these records are the uncertified MRI reports from Dr. Steven Winter, M.D. Plaintiff also appends certified records from Peak Physical Therapy, where he sought treatment for right shoulder pain from 12/27/2018 to 6/26/2019 (over 30 visits).

Plaintiff also relies on the independent medical examination of Dr. Gabriel L. Dassa, D.O., F.A.A.O.S., which was performed on December 15, 2020. Plaintiff counsel's affirmation makes reference to the examination and Dr. Dassa's findings, but does not append the report. Plaintiff submits additional uncertified medical records which will not be considered.

Argument

With respect to the left knee, plaintiff underwent left knee arthroscopy; partial medial and lateral meniscectomy; synovectomy; abrasian arthroplasty medial femoral condyle performed by Dr. Palmeri.

With respect to the right shoulder, on October 8, 2018, plaintiff underwent right shoulder arthroscopy. Plaintiff underwent a second right shoulder arthroscopy on March 6, 2019. Plaintiff relies on the uncertified records of Dr. Michael Palmeri, M.D.

With respect to the cervical spine, plaintiff alleges injuries C5 through C7 disc herniations, and C2 through 3 posterior disc bulges. Plaintiff also alleges an L4/5 disc herniation, and an L2/3 and L3/4 disc bulging.

Plaintiff essentially argues the existence of these injuries demonstrates that plaintiff suffered a "serious injury" as defined by the Insurance Law.

Opposition (Sequence #5)

In opposition, defendants offer the independent medical examination report of certified orthopedic surgeon Paul G. Kleinman, M.D. Dr. Kleinman's report, dated January 8, 2020, is affirmed in compliance with Civil Practice Law & Rules §2106. Kleinman states that he reviewed the Bill of Particulars; MRI report of the right shoulder dated 8/6/2018; MRI report of the left knee dated 8/6/2018; MRI report of the cervical spine dated 8/7/2018; MRI report of the lumbar spine dated 8/7/2018; Dr. Dynof's notes dated 7/25/2018; Montefiore New Rochelle Hospital dated 9/19/2018 including operative report for left knee; Note from Dr. Islam dated 9/13/2018; Medical records from Montefiore New Rochelle Hospital dated 10/8/2018 including operative report for right shoulder surgery; Note from Dr. Palmeri from 3/6/2019 including operative report for second right shoulder surgery; notes from Dr. Palmeri; notes from Dr. Dynof; note from Harvey Family Chiropractic Office; and physical therapy notes.

Dr. Kleinman examined plaintiff on January 8, 2020. Dr. Kleinman performed range of motion testing of the back, neck, shoulders and knees. With respect to range of motion of the shoulder, Kleinman indicates "Shoulder range of motion showed 160 degrees forward elevation on the left with 90 degrees on the right. He had 60 degrees external rotation on the left and 20 degrees on the right... [plaintiff] had pain at the extremes of motion on the right with healed arthroscopic scars over the right shoulder."

Ranges of motion, measured by goniometer, were within normal limits² for cervical spine flexion (0-50/0-50), extension (0-30/0-60), lateral rotation to left (0-70/0-90) and right (0-70/0-90).

²Using the standards of the American Medical Association Guidelines for the Evaluation of Permanent Impairment

Lumbar spine flexion was 0-60/0-60, extension was 0-25/0-25, side bending was 0-25/0-25, with mild guarding at the extremes of motion. These normal values represent full range of motion of the lumbar spine.

Shoulder range of motion was 0-160/0-160 forward elevation on the left, 0-90/0-160 forward elevation on the right, external rotation 0-60/0-90 on the left, external rotation 0-20/0-90 on the right. A numerical value for internal rotation was not provided. He had pain at the extremes of motion on the right with healed arthroscopic scars over the right shoulder.

Knee range of motion showed 0-130/0-130 degrees flexion for both knees. Healed arthroscopic scars were observed, along with a negative McMurray and negative Lachman bilaterally. These normal values represent full range of motion.

Motor exam showed "some mild weakness of the external rotators on the right secondary to pain but they were normal on the left." Sensory exam showed decreased sensation to light touch in the left arm and the right second and third fingers. Straight leg raising exam was negative bilaterally.

Dr. Kleinman concludes "the claimant can do his regular activities of daily living and can work full duty as he is currently doing. His current medical status is that he is not currently in active treatment except for the medication he takes."

Defendants argue that plaintiff's deposition testimony establishes that he is not seeking any current medical treatment, nor has he provided a reason why there is no additional treatment. With respect to the shoulder, Dr. Klenman's IME report states that plaintiff suffers from "degenerative spurs." Plaintiff's doctor, Dr. Palmeri, also states the existence of degenerative disease.

With respect to the "permanent consequential limitation," defendants argue plaintiff's alleged disc bulge or herniation is insufficient to show that plaintiff's injuries were more than "slight, minor,

or mild,” as the records submitted by Dr. Palmeri shows only sprains and strains. (*Amato v. Fair Repair, Inc.*, 42 AD3d 477 [2d Dept. 2007])

Defendants argue that plaintiffs have failed to establish a “serious injury” as that term is defined in Insurance Law §5102(d).

Reply (Sequence #5)

Plaintiff argues that his extensive injuries demonstrate that he has established a 90/180 claim. Plaintiff argues defendant has failed to put forth an expert affirmation contradicting the findings of plaintiff’s medical records.

Discussion (Sequence #5)

As the proponent of the summary judgment motion, the movant has the threshold burden to establish, by competent medical evidence, whether a serious injury was suffered and whether it was causally related to the subject accident (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Peterson v Cellery*, 93 AD3d 911, 912 [3d Dept. 2012]). In support of their motion, plaintiff submits medical records and the parties’ deposition testimony. The medical records indicate that, following the accident, plaintiff was taken to the emergency room where a CT scan was taken of the cervical spine was performed which revealed no acute fracture, but found multilevel degenerative changes. Plaintiff was given aspirin and was discharged.

On June 27, 2018, plaintiff was evaluated by Dr. Dynorf, a pain management specialist. Range of motion testing was performed, which showed restricted range of motion of the cervical and lumbosacral spine, and right shoulder. Dr. Dynorf’s report evaluation report makes no reference to any specific “serious injury” categories under the insurance law, and makes no reference to causation of the injuries. The appended records show Dr. Dynorf also performed multiple cervical trigger point

injections from July 9, 2018 to September 19, 2018, and a right shoulder injection dated July 25, 2018. Plaintiff received physical therapy from June 26, 2018 through September 7, 2018 for the neck, back, right hand, and both knees. Plaintiff also received physical therapy for right shoulder pain from December 27, 2018 to June 26, 2019.

It is well-established that proof under the significant limitation of use category requires “comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence.” (*Toure*, 98 NY 2d at 350-351) “[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well.” (*Estrella v. GEICO Ins. Co.*, 102 AD3d 730 [2d Dept. 2013]) However, a “significant limitation” need not be permanent in order to constitute a serious injury. (*Toure*, 98 NY 2d at 351) A lack of recent examination is a relevant factor when considering a limitation. (*Vasquez v. Almanzar*, 107 AD3d 538, 539 [1st Dept 2013])

A “permanent consequential limitation” requires a greater degree of proof than a “significant limitation,” as only the former requires proof of permanency. (*Vasquez v. Almanzar*, 107 AD3d at 539]) To qualify as a serious injury, a “permanent loss of use” must be total. (*Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295, 298 [2001]) A diagnosis of a bulging or herniated disc, by itself, does not constitute a serious injury. (*Manzano v. O’Neil*, 285 AD2d 966 [4th Dept. 2001])

Section 4518 of the Civil Practice Law & Rules provides that a medical record is admissible provided that it bears a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee designated for that purpose or by a qualified physician. The opinions of treating physicians must be sworn to or

affirmed under penalty of perjury. (*McLoud v. Reyes*, 82 AD3d 848 [2d Dept. 2011]; *Rush v. Kwan Chiu*, 79 AD3d 1004 [2d Dept. 2010]; *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept. 1992]) Here, Plaintiff appends and relies upon numerous medical records. As many of the appended records lack certification or authentication, the uncertified records are hearsay and will not be considered with the instant motion. (*Irizarry v. Lindor*, 110 AD3d 846 [2d Dept. 2013]; *Rodriguez v. Cesar*, 40 AD3d 731, 732 [2d Dept. 2007]; *Shvartsman v. Vildman*, 47 AD3d 700 [2d Dept. 2008])

Permanent Loss of Use, Permanent Consequential Limitation, and Significant Limitation

To the extent that plaintiff claims a “serious injury” under the “permanent loss of use” and “permanent consequential limitation” categories, plaintiff relies on the medical records of Dr. Palmeri and Dr. Dynorf. The unsworn and unaffirmed records of Dr. Palmeri are inadmissible and may not properly be placed before the Court as a business record exception to the hearsay rule. (*Irizarry v. Lindor*, 110 AD3d 846)

The Court has examined the evaluation report of Dr. Dynorf, which contains range of motion testing which compares his findings, in each instance, to what is normal. (*Walker v. Public Adm’r of Suffolk County*, 60 AD3d 757 [2d Dept. 2009]) The report indicates that the plaintiff experienced restricted range of motion two days after the underlying accident. However, Dr. Dynorf’s evaluation report, which is over two years old, does not speak to causality. Plaintiff has also failed to provide a recent examination of plaintiff’s claimed injuries, which would be relevant to the instant application. (*Vasquez v. Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]). Plaintiff has not provided sufficient credible medical evidence attributing plaintiff’s claimed limitations to the medically determined injuries sustained in the accident. (*Monk v. Dupuis*, 287 AD2d 187 [3d Dept. 2001]) Considered in the light most favorable to defendant, plaintiff has failed to meet his initial burden.

(*Estrella*, 102 AD3d 730) In light of the foregoing, plaintiff's motion for summary judgment is denied with respect to the "permanent loss of use" and "permanent consequential limitation" categories.

To the extent that plaintiff claims a serious injury under the "significant limitation" category, plaintiff's argument relies on the Dr. Dynorf's evaluation report to establish plaintiff's limitation, and the physical therapy records to establish the duration of the claimed injuries. Although Dynorf's evaluation report, based on examination of the plaintiff two days after the underlying accident, describes the loss of range of motion, it does not describe "qualitative nature" of plaintiff's limitation "based on the normal function, purpose and use of the body part," nor does he establish a causal connection between the accident and the alleged injuries. (*Toure*, 98 NY2d 345, at 353) Considered in the light most favorable to defendant, plaintiff has failed to meet his initial burden. (*Estrella*, 102 AD3d 730) Therefore, defendant's motion for summary judgment is denied with respect to the "significant limitation" category.

90/180

The Court notes that plaintiff's claimed 90/180 claim was brought up for the first time in plaintiff's reply. To the extent that plaintiff claims a "serious injury" under the 90/180 category, none of medical records or reports relate any findings to a 90/180 claim, as required. (*Volpetti v. Yoon Kap*, 28 AD3d 750 [2d Dept. 2006]) Plaintiff testified that, after the accident, he was out of work on disability leave from June 25, 2018, to June of 2019. Plaintiff testified that as a result of the accident, he is no longer able to perform job duties, including kneeling down for long periods, carrying equipment on his right arm, and holding his right arm up. He also cannot take his shirt off without assistance, has difficult reaching up, and has difficulty picking up his grandchildren.

As mentioned above, plaintiff has provided no competent medical evidence to correlate plaintiff's alleged injuries with his inability to perform certain daily tasks. (*Toure*, 98 NY2d at 355) In light of the plaintiff's submission, this Court finds that plaintiff has failed to establish that he sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the last 180 days immediately following the accident. Inasmuch as plaintiff makes a 90/180 claim for his alleged injuries, plaintiff's application for summary judgment is denied with respect to this category.

Conclusion

On the basis of the foregoing, it is

ORDERED that defendants' application for partial summary judgment on liability is denied; and it is further

ORDERED that plaintiff's application for partial summary judgment on liability is denied; and it is further

ORDERED that plaintiff's application for summary judgment establishing that plaintiff suffered a "serious injury" is denied.

The parties shall appear for a virtual conference on May 6, 2021 at 12:00 noon. A Microsoft Teams link will be provided prior to the conference.

This decision shall constitute the order of the Court.

Dated: April 7, 2021
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*