SHORT FORM ORDER

ORIGINAL

INDEX No. 611112/2019
CAL. No. 202100010MV

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 3/26/21 (#003)
MOTION DATE 4/12/21 (#004)
MOTION DATE 4/15/21 (#005)
MOTION DATE 7/22/21 (#006)
ADJ. DATE 7/22/21
Mot. Seq. #003 MD
Mot. Seq. #004 MG; CASEDISP
Mot. Seq. #005 MD
Mot. Seq. #006 MD

JAMES SKELDON,

Plaintiff,

- against -

RONALD F. FAESSLER, JOSEPH TUMBARELLO and STACY TUMBARELLO,

Defendants.

THE BONGIORNO LAW FIRM, PLLC
Attorney for Plaintiff
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RONALD F. FAESSLER,

Third-Party Plaintiff,

- against -

JOSEPH TUMBARELLO and STACY TUMBARELLO,

Third-Party Defendants.

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Attorney for Defendants/Third-Party Defendants Joseph and Stacy Tumbarello
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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by Tumbarello defendants, filed February 25, 2021; by defendant Faessler, filed March 15, 2021; by Tumbarello defendants, filed April 1, 2021; by plaintiff, filed June 11, 2021 ; Notice of Motion/Order to Show Cause and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, filed June 10, 2021; by plaintiff, filed June 10, 2021; by defendant Faessler, filed July 15, 2021 ; Replying Affidavits and supporting papers by defendant Faessler, filed June 18, 2021; by Tumbarello defendants, filed July 21, 2021; by plaintiffs, filed July 20, 2021 ; Other _____; it is

ORDERED that the motions by Joseph Tumbarello and Stacy Tumbarello, the motion by Ronald Faessler, and the motion by James Skeldon are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Joseph Tumbarello and Stacy Tumbarello for summary judgment dismissing the complaint against them is denied, as moot; and it is further

ORDERED that the motion by defendant Ronald Faessler for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury pursuant to Insurance Law § 5102 (d) is granted; and it is further

ORDERED that the motion by defendants Joseph Tumbarello and Stacy Tumbarello for summary judgment dismissing the complaint against them on the ground that plaintiff did not suffer a serious injury pursuant to Insurance Law § 5102 (d) is denied, as moot; and it is further

ORDERED that the motion by plaintiff James Skeldon for summary judgment in his favor on the issue of Ronald Faessler's liability is denied, as moot.

This is an action to recover damages for injuries allegedly sustained by plaintiff James Skeldon as a result of a motor vehicle accident, which occurred on February 24, 2019, on Woodland Drive, at or near its intersection with Aspen Road, in the County of Suffolk, New York. Plaintiff alleges that he suffered various injuries as a result of the accident, including disc herniations and bulges in the cervical and lumbar regions of his spine, and sprains to his cervical and lumbar regions.

Defendant Faessler now moves for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). He submits, in support of the subject motion, copies of the pleadings, the bill of particulars, the transcript of plaintiff's deposition testimony, the unaffirmed medical reports of radiologist Marc Katzman, M.D., and the affirmed medical report of neurologist Mark Zuckerman, M.D. In opposition, plaintiff argues that triable issues of fact remain as to whether he sustained a serious injury. He submits, in opposition, the bills of particulars, the affirmations of Dr. Katzman, Matthew Kalter, M.D., and Aman Deep, M.D., and the affidavit of Jeffrey Block, D.C.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden

of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden to establish, prima facie, that the plaintiff did not sustain a "serious injury" (***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in . . . 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."

Findings of a defendant's own witnesses must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to summary judgment (***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], citing ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's treating medical providers (***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Pagano v Kingsbury***, *supra*). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***McLoud v Reyes***, *supra*; ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]). Further, an injury under the "90/180-days" category of "serious injury" must be "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). Specifically, plaintiff's usual activities must have been curtailed to a "great extent" to satisfy the 90/180-day category (***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Defendant Faessler's submissions established a prima facie case that plaintiff's alleged injuries do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A***

Car Sys., *supra*; ***Gaddy v Eyler***, *supra*; ***Maitre v Empire Paratransit Corp.***, 192 AD3d 786, 139 NYS3d 876 [2d Dept 2021]; ***Foy v Pieters***, 190 AD3d 700, 135 NYS3d 899 [2d Dept 2021]; ***Ramirez v L-T. & L. Enter., Inc.***, 189 AD3d 1636, 139 NYS3d 321 [2d Dept 2020]). The affirmed medical report of Dr. Zuckerman stated, in relevant part, that during a November 2020 neurological examination, plaintiff exhibited normal joint function in the cervical and lumbar regions of his spine, and that only minimal spasm was detected in his right mid-lumbar region. However, no muscle spasm or tenderness was detected in his cervical or thoracic regions. Dr. Zuckerman stated that plaintiff tested negative in the sitting straight leg raising test. He also stated that magnetic resonance imaging ("MRI") examination reports show pre-existing degenerative changes to plaintiff's cervical and lumbar regions. He diagnosed plaintiff as having suffered a "lumbar sprain superimposed underlying degenerative changes," and a cervical sprain superimposed with degenerative changes, and concluded that such cervical sprain was resolved (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Pagano v Kingsbury***, *supra*). Further, Dr. Zuckerman found no evidence of cervical or lumbosacral radiculopathy or central nervous system dysfunction, or neurologic of physical impairment.

In his affirmed medical report, Dr. Katzman opined that the MRI examination of plaintiff's cervical region conducted approximately one week after the accident showed disc bulging at C2-3, C4-5, and C6-7, and disc herniations at C3-4, C5-6, and C7-T1. He also stated that the examination revealed straightening of the normal lordosis and disc hydration loss. Dr. Katzman opined that the MRI examination of plaintiff's lumbar region conducted approximately one week after the accident showed disc bulging at L1-2, L2-3, and L3-4, and disc herniations at L3-4, L4-5, and L5-S1. He also stated that the examination revealed straightening of the normal lordosis and disc hydration loss at L4-5 and L5-S1.

Defendant Faessler having met his initial burden on the motion, the burden shifted to the non-moving parties to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*; ***Pagano v Kingsbury***, *supra*). Plaintiff failed to raise an issue of fact as to whether his injuries constitute "serious injuries." He argues that defendant Faessler failed to adequately address his claim that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d). Plaintiff submits a "second supplemental verified bill of particulars," dated June 10, 2021, alleging that plaintiff sustained a non-permanent injury that left him unable to perform substantially all of his normal daily activities for at least 90 of the 180 days immediately following the accident. However, the Court deems such bill of particulars as an amended bill of particulars, as it seeks to add new injuries (*see* ***Kirk v Nahon***, 160 AD3d 823, 75 NYS3d 237 [2d Dept 2018]; ***Fuentes v City of New York***, 3 AD3d 549, 771 NYS2d 178 [2d Dept 2004]; ***Danne v Otis Elevator Corp.***, 276 AD2d 581, 714 NYS2d 316 [2d Dept 2000]; ***Kyong Hi Wohn v County of Suffolk***, 237 AD2d 412, 654 NYS2d 826 [2d Dept 1997]). While leave to amend a bill of particulars is ordinarily freely granted in the absence of prejudice and surprise, unless on the eve of trial (*see* ***Lynch v Baker***, 138 AD3d 695, 30 NYS3d 126 [2d Dept 2016]; ***Rodgers v New York City Tr. Auth.***, 109 AD3d 535, 970 NYS2d 572 [2d Dept 2013]; ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]), plaintiff failed to move to amend his bill of particulars pursuant to CPLR 3025 (b). Thus, defendant was not required to address the newly alleged 90/180-day injury.

Dr. Katzman's affirmation and radiological reports are insufficient to raise a triable issue of fact, as they are substantively the same as the radiological reports submitted by defendant Faessler. In addition, the

radiological reports neither provide objective medical evidence showing that the accident resulted in significant limitations nor demonstrate the duration of the claimed range of motion limitations in plaintiff's spine and that such limitations are causally related to the subject accident (*see* ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Hayes v Vasilios***, *supra*; ***Scheker v Brown***, *supra*; ***Rovelo v Volcy***, *supra*).

The affirmations of Dr. Kalter and Dr. Deep, and the affidavit of Dr. Block are insufficient to raise a triable issue of fact, as they are based only on examinations performed in 2019 and early 2020. While Dr. Kalter, Dr. Deep, and Dr. Block provided quantitative findings of range of motion restrictions and concluded that plaintiff's injuries were directly related to the subject accident, they failed to demonstrate the duration of the claimed range of motion limitations, because they failed to provide findings based on contemporaneous and recent examinations (*see* ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Zuckerman v City of New York***, *supra*).

Accordingly, the motion by defendant Faessler for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102 (d) is granted. Therefore, the motions by the Tumbarello defendants and the motion by plaintiff are denied, as moot.

Dated: AUG 19 2021

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

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION