Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS PART 36
Justice

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ERIC SAEZ, **Index No. 707610/18**
Plaintiff, **Seq. No. 2**

-against-

PEMA DHUNDUP,
Defendant.

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The following papers numbered E21-E36, E43-E87 read on this motion by Defendant for an order granting him summary judgment pursuant to CPLR 3212, dismissing the Complaint on the grounds that there are no triable issues of fact, in that Plaintiff cannot meet the serious injury threshold requirement under Insurance Law 5104(a) and 5102(d); and the cross-motion by Plaintiff for an order pursuant to CPLR 3212(b) for summary judgment as to liability and for dismissal of the affirmative defenses.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibit…….....	E21-E36
Affirmation in Opposition-Memo of Law-Exhibits…….	E43-E63
Reply Affirmation…….	E82
Notice of Cross-Motion-Affirmation-Exhibits…….....	E64-E81
Affirmation in Opposition-Exhibit.....	E83-E84
Affirmation in Reply…….....…….	E85-E87

Upon the foregoing papers, it is ordered that Defendant's motion is granted and Plaintiff's cross motion is denied for the following reasons:

According to the Complaint, Plaintiff sustained serious personal injuries as a result of a motor vehicle accident that occurred on July 18, 2017. According to the Verified Bill of Particulars, Plaintiff sustained as a result of this accident, among other things, injuries to his lumbar spine, cervical spine, thoracic spine, as well as scattered traumatic ganglion cysts, tear supraspinatus tendon left shoulder with retraction and atrophy of the muscle, tear infraspinatus tendon left shoulder with retraction and atrophy of the muscle, and rupture of the scapholunate ligament left hand.

Defendant now moves for summary judgment dismissing the Complaint as against him on the ground that Plaintiff has not sustained a serious injury within the meaning of Sections 5102(d) and 5104(a) of the Insurance Law. Defendant has submitted, among other things, the following: "So Ordered" Stipulation, dated June 9, 2020; Verified Bill of Particulars; Plaintiff 's deposition transcript; an affirmed report from Dr. Dana A. Mannor, an orthopaedic surgeon; and an affirmed report from Dr. Audrey Eisenstadt, a radiologist. Initially, Defendant argues this motion is timely because it was filed pursuant to terms set forth in the "So Ordered" Stipulation ("Stipulation"), dated June 9, 2020, which provided in pertinent part the following:

> Defendant is to designate a new IME date, to be held within the next three months, assuming there are no complications from the COVID-19 situation. Plaintiff to submit to an IME within 30 days of designation, assuming there are no complications from the

COVID-19 situation. All parties time to file motion for Summary Judgment extended to 60 days following the exchange of the IME Report.

Plaintiff testified that on the day of the accident, following the collision, he went to Jamaica Hospital and one week later he began treating at Good Care PT. He treated at Good Care PT for five months and then stopped. He also testified that immediately following the accident, he missed work for one month and was confined to his bed for two weeks and his home for one month.

At Defendant's request, Dr. Mannor examined Plaintiff on September 9, 2020. She performed objective testing, including range of motion testing with a goniometer in accordance with AMA guidelines, on Plaintiff's cervical spine, lumbar spine, right and left shoulder, left and right elbow, right and left wrist/hand, right and left hip, right and left knee, and right and left foot/ankle and found no restricted range of motion in these body parts. She also performed a Scapular Winging and Kyphosis Present test, both of which were negative. Dr. Mannor found that the sprain/strain to Plaintiff's cervical spine, thoracic spine, lumbar spine, left shoulder/arm, bilateral hand and bilateral knee had resolved. Based upon her examination, she opined that Plaintiff has no orthopedic limitations in the body parts she examined and he capable of functional use of those body parts for normal activities of daily living as well as usual daily activities including work duties. She further opined that Plaintiff has no disability or permanency.

At Defendant's request, Dr. Eisenstadt reviewed Plaintiff's film examinations of his thoracic spine, cervical spine and lumbar spine. As to Plaintiff's thoracic spine, she found, among other things, disc degeneration which is not causally related to this accident. As to Plaintiff's cervical spine, she found, among other things, disc desiccation which is not causally related to this accident. As to Plaintiff's lumbar spine, she found, among other things, disc desiccation which predates this accident.

Based on the foregoing, Defendant argues that he is entitled to summary judgment dismissing the Complaint, because Plaintiff's alleged injuries were not caused in this accident, that no trauma was sustained, and/or the alleged injuries do not rise to the level of impairment sufficient to qualify under any category of the statute.

In opposition, Plaintiff argues the motion should be denied, because it was not timely filed pursuant to the terms set forth in the Stipulation. Plaintiff's IME was held on September 9, 2020. Thereafter, the within motion was filed on January 27, 2021. In response to Plaintiff's email on January 29, 2021 requesting a copy of the IME report, Defendant responded in an email notifying Plaintiff that the IME report was E-filed on January 26, 2021. Plaintiff claims that the IME report was not filed on January 26, 2021 on NYSCEF, rather it was filed as an Exhibit to the within motion. Thereby, Plaintiff did not obtain a copy of the IME report until after the within motion was filed. Consequently, Plaintiff argues the motion should be denied as untimely because he did not receive the IME report until after the motion was filed in violation of the terms of the Stipulation. If the Court finds the motion was timely filed, Plaintiff argues it should be denied, because Defendant has failed to establish his prima facie burden of demonstrating he has not sustained a serious injury as a result of this accident. In the alternative, Plaintiff argues he has submitted sufficient proof that raises issues of fact as to whether he sustained a significant limitation, permanent consequential, and a 90/180 injury as a result of the accident. Plaintiff has submitted, among other things, the following: a Supplemental Bill of Particulars, dated February 23, 2021; a report from Dr. Jerry A. Lubliner, an orthopaedic surgeon, dated March 3, 2021; emails regarding the IME report; and his affidavit.

Dr. Lubliner examined Plaintiff on March 3, 2021. He performed range of motion testing on Plaintiff's neck, right shoulder, wrists, lower back and left knee which revealed decreased range of

motion in these body parts. Based upon his examination and review of Plaintiff's medical records, he opined that as a result of this accident Plaintiff sustained the following injuries: as to his cervical spine he has and continue to have permanent impairments/conditions; as to his left shoulder he has and will continue to have permanent rotator cuff signs and by history a rotator cuff tear, permanent weakness, permanent recurrent pain, permanent limitation of his activities of daily living and permanent limitation of his ability to participate in sports; as to his left wrist, he has and will continue to have permanent loss of range of motion, permanent tenderness and permanent weakness; as to his lower back, he has and will continue to have permanent recurrent pain, permanent limitation of his activities of daily living, permanent recurrent radiculopathy down his left lower extremity and permanent loss of range of motion; and as to his the right knee, he has and will continue to have permanent weaknesses, permanent loss of range of motion, permanent recurrent pain and permanent signs of meniscal tears. Dr. Lubliner recommends Plaintiff have operative arthroscopy of his left shoulder with rotator cuff repair as needed and arthroscopy of his right knee and meniscal resection or repair.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

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 of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]; Beltran v Powow Limo, Inc., 98 AD3d 1070 [2d Dept. 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (see Brite v Miller, 82 AD3d 811 [2d Dept. 2011]; Damas v Valdes, 84 AD3d 87 [2d Dept. 2011], citing Pagano v Kingsbury, 182 AD2d 268 [2d Dept. 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony (see Beltran v Powow Limo, Inc., supra; Bamundo v Fiero, 88 AD3d 831 [2d Dept. 2011]; McIntosh v O'Brien, 69 AD3d 585 [2d Dept. 2010]). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which creates a material issue of fact (see Gaddy v Eyler, supra; Zuckerman v City of New York, supra; Beltran v Powow Limo, Inc., supra).

Initially, the Court finds that the within motion was timely filed. The Stipulation extended the time to file a motion for summary judgment 60 days following the exchange of the IME report. Here, the IME report was not mailed and/or emailed to Plaintiff, instead it was E-filed by Defendant as an Exhibit to the within motion. The Stipulation did not preclude Defendant from submitting the IME report in this manner. As such, Defendant did not violate the terms of the Stipulation by filing the within motion simultaneously with the filing of the IME report. Thereby, the Court finds the motion was timely filed.

The Court also finds that Defendant has met his prima facie burden of demonstrating that Plaintiff did not sustain a permanent consequential and a signification limitation injury within the meaning of Insurance Law §5102(d) as a result of the subject accident (see Toure v Avis Rent A Car

Sys., supra; Gaddy v Eyler, 79 NY2d 955 [1992]; Carballo v Pacheco, 85 AD3d 703 [2d Dept. 2011]; Ranford v Tim's Tree & Lawn Serv., Inc., 71 AD3d 973 [2d Dept. 2010]). Contrary to Plaintiff's claims, both Dr. Mannor's and Dr. Eisenstadt's reports are sufficient. Dr. Mannor's failure to review Plaintiff's medical records in preparing her report does not render her report insufficient, as she detailed the specific objective tests she used in her personal examination of Plaintiff (Malupa v Oppong, 106 AD3d 538 [1st Dept. 2013]). In addition, Plaintiff's claim that Dr. Eisenstadt's report is deficient, because it uses boilerplate language is without merit. Furthermore, the Court finds Plaintiff has failed to raise any triable issues of fact. Plaintiff testified, and stated in his affidavit, that after the accident he treated at Good Care PT for five months and then stopped. The only medical report Plaintiff submitted in opposition to this motion was from Dr. Lubliner, who first saw Plaintiff on March 3, 2021. Consequently, Plaintiff failed to explain the over three-year gap between the cessation of his treatment with Good Care PT (around January 2018) and the exam performed by Dr. Lubliner on March 3, 2021 (Uber v Heffron, 286 AD2d 729 [2d Dept. 2001]; Medina v Zalman Reis, 239 AD2d 394 [2d Dept. 1997]). As such, Plaintiff has failed to raise a triable issue of fact with respect to Defendant's claim that he did not sustain a significant limitation and/or a permanent consequential injury as a result of this accident. Furthermore, Plaintiff testified that after the accident he missed work for one month, and was confined to his bed for two weeks and his home for one month. Consequently, the Court finds that Plaintiff has failed to meet his burden of demonstrating that he sustained a 90 180 injury as a result of the subject accident (see Marin v Ieni, 108 AD3d 656 [2d Dept. 2013]). Accordingly, the motion is granted, and the Complaint is dismissed.

In light of the foregoing, Plaintiff's cross motion for summary judgment as to liability and for dismissal of the affirmative defenses is denied as academic.

Dated: October 1, 2021

ROBERT I. CALORAS, J.S.C.