SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17
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BRIAN J. DANIELS,

Plaintiff,

Index No.: 518981/2018
Motion Seq. Nos.: 01, 02, 03

-against-

KACPER PACHOWICZ and MONIKA ELAZBIET CWIKLA,

DECISION AND ORDER

Defendants.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions for summary judgment by the defendants, and plaintiff's motion to strike the defendants' answer.

The following e-filed documents, listed by NYSCEF document number (Motion 01) 11-26, 38-48, 50-55; (Motion 02) 28-37; and (Motion 03) 66-87 were read on these motions.

The defendant, Kacper Pachowicz, moves for summary judgment (Motion 01), pursuant to CPLR § 3212, and dismissal of the complaint, and any counterclaims and cross-claims. The plaintiff cross-moves (Motion 02) seeking to strike the answer of defendant, Kacper Pachowicz, pursuant to CPLR § 3126, for failure to comply with three court orders and discovery demands. The defendant, Monika Elazbiet Cwikla, moves for summary judgment (Motion 03), pursuant to CPLR § 3212, seeking dismissal of the complaint based on Insurance Law § 5102(d), arguing that the plaintiff did not sustain a serious injury as defined by the statute. After oral argument and upon careful consideration of the parties' submissions the motions are decided as set forth below.

This action arises from a motor vehicle accident that occurred on September 8, 2017, at Avenue of the Americas and West 56th Street, in the County of New York, City and State of New York. The plaintiff was a pedestrian, and alleges that the defendant, Kacper Pachowicz (Pachowicz) was operating a motor vehicle, owned by defendant Monika Elazbiet Cwikla (Cwikla), and ran over the plaintiff's right foot with his vehicle. The defendant, Pachowicz, argues that at the time of the accident he had no ownership interest in the vehicle; did not operate or control the vehicle; and had no knowledge or connection with any of the persons or facts and circumstances surrounding the motor vehicle accident. In support of the motion, Pachowicz submits the pleadings, an uncertified copy of the police report, his sworn affidavit, an unsworn letter from Progressive Insurance Company, a certified copy of an abstract of his New York State Department of Motor Vehicles' driving record, an unsworn statement purportedly by Pachowicz that on December 2, 2018 he attempted to file an identity theft police report, and was told by a police officer that he was unable to because there had been no financial fraud, an unsworn letter

dated December 18, 2018 allegedly written by Pachowicz's employer, stating that he was in the office building on the day of the accident, an unsworn chronology purported to be Pachowicz's itinerary on the date of the accident, and an unsworn, uncertified copy of a Google map satellite route of travel by Pachowicz on the date of the accident.

As of the filing of the instant motion no depositions had been held, and no discovery had been exchanged. In opposition, the plaintiff argues that Pachowicz has not submitted an affidavit of the owner of the vehicle, and has not shown that the owner did not give Pachowicz permissive use of the vehicle. The plaintiff submits his sworn affidavit which avers, inter alia, that at the time of the accident the defendant acknowledged that his name was Kacper Pachowicz, and that the police responding to the scene verified his identity by Pachowicz's driver's license. The plaintiff also argues that the motion is premature, as neither the owner of the vehicle, Cwikla, nor Pachowicz have been deposed, and discovery is needed. The defendant, Cwikla, also opposes the motion of Pachowicz, arguing that the defendant failed to submit admissible evidence, and that the affidavit of Pachowicz is self-serving and creates issues of fact.

It is well-settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact. *See Winegrad v New York Univer. Med. Ctr*., 64 NY2d 851 (1985). "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." *See Brea v Salvatore*, 130 AD3d 956, 956 (2d Dept 2015); *see also Village of Dobbs Ferry v Landing on the Water at Dobbs Ferry Homeowners Assn., Inc*., 198 AD3d 838 (2d Dept 2021). A party contending that a summary judgment motion is premature must demonstrate that "discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant." *See Rutherford v Brooklyn Navy Yard Dev. Corp*., 174 AD3d 932, 933 (2d Dept 2019), quoting *MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040 (2d Dept 2015) (internal quotation marks omitted). A party opposing summary judgment "is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated." *See Brea v Salvatore*, 130 AD3d at 956.

The police report submitted by the defendant constitutes inadmissible hearsay, as it is not certified. *See Yassin v Blackman*, 188 AD3d 62 (2d Dept 2020). With the exception of the sworn affidavit of Pachowicz, the remaining documents submitted by Pachowicz are unsworn, and therefore inadmissible. *See Municipal Testing Lab., Inc. v Brom*, 38 AD3d 862 (2d Dept 2007). The defendant's affidavit alone is self-serving, and in any event the plaintiff's affidavit raises material triable issues of fact as to whether Pachowicz was the operator of the vehicle at the time of the accident. Further, the plaintiff's motion is premature, as the plaintiff has demonstrated that the facts essential to justify opposition to the motion are exclusively within the knowledge and control of the plaintiff. *See Mogul v Baptiste*, 161 AD3d 847 (2d Dept 2018).

The plaintiff's motion (Motion 02), seeking to strike the answer of defendant Pachowicz is denied as moot, as discovery has been exchanged (NYSCEF Doc. Nos. 52 and 54), and the deposition of Pachowicz has taken place.

Turning to defendant Cwikla's motion for summary judgment based on threshold, the plaintiff alleges that he sustained injuries to his right foot as a result of the accident including, inter alia, a high-grade tear of the anterior talofibular ligament; moderate tibiotalar and posterior subtalar joint effusion; tenosynovitis of the posterior tibial tendon and flexor halluces tendon; and peroneal tenosynovitis. Defendant Cwikla argues that the plaintiff did not sustain a serious injury under Insurance Law § 5102(d), and in in support of the motion submits the pleadings, and the affirmed medical report of her medical expert, Dr. Dana A. Mannor, a board-certified orthopedic surgeon. Dr. Mannor conducted range of motion and other objective testing of the right and left ankle and foot, which were found to be normal. Dr. Mannor concluded that the plaintiff had sustained a right ankle/foot sprain/strain, which was resolved, and that the injury was causally related to the motor vehicle accident of September 8, 2017.

In compliance with 22 NYCRR § 202.8-g(a), the defendant, Cwikla, annexes a "Statement of Material Facts" with numbered paragraphs containing facts which the defendant contends do not raise genuine issues of fact. The plaintiff has failed to submit a counterstatement of material facts in opposition to the defendant's submission, as required by 22 NYCRR § 202.8-g(b). However, in the Court's discretion, it may decline to deem the facts admitted based on the plaintiff's non-compliance. *See* NY Ct. Rules, § 202.1(b), providing that "[f]or good cause shown, and in the interests of justice, the court in an action or proceeding may waive compliance with any of these rules other than sections 202.2 and 202.3 unless prohibited from doing so by statute or by a rule of the Chief Judge." *See Dusowitz v Natoli*, Sup Ct, Kings County, October 8, 2021, Toussaint, J., index No. 519465/2017; *Mackins v City of New York*, 2021 NY Slip Op 32440(U) (Sup Ct, NY County 2021). In any event, there was sufficient evidence in the record to raise triable issues of fact. *See Dowds v The City of New York*, 2021 NY Slip Op 32734(U) (Sup Ct, NY County 2021).

In opposition to defendant Cwikla's motion, the plaintiff submits the affirmed medical report of Dr. Ali E. Guy, dated November 8, 2021, who is board-certified in physical medicine and rehabilitation. Dr. Guy found limitation in range of motion of the plaintiff's right foot and ankle, diminished sensation to pinprick and touch of the right dorsal foot, as well as a gait disturbance. He also found that the plaintiff had a gait disturbance and dysfunction to the ankle that caused instability in the right lower extremity. Dr. Guy opined that as a result of the instability, the plaintiff must avoid certain activities to prevent further injuries.

According to Dr. Guy's affirmation of December 6, 2021, the plaintiff came under his care and treatment on September 8, 2017, for injuries sustained in the accident. Dr. Guy reviewed the MRI of the right foot taken on September 15, 2017, at Lenox Hill Radiology, which revealed injuries that included a high-grade tear of the anterior talofibular ligament; moderate tibiotalar and posterior subtalar joint effusion; tenosynovitis of the posterior tibial tendon and flexor hallucis tendon; peroneal tenosynovitis, and an old avulsion fracture of the medial malleolus. Dr. Guy also reviewed the Mount Sinai records and the medical reports of Dr. Richard L. Delaney. He avers that the plaintiff ceased treatment because he could no longer afford to continue treatment. The plaintiff continued a course of home treatment that included stretching exercises as recommended by his treating physicians.

Dr. Guy conducted an examination of the plaintiff's right ankle and foot on December 6, 2021, with the use of a goniometer, comparing the range of motion to the contralateral side and setting forth the normal range of motion. He found that the plaintiff was restricted in the right foot and ankle with a disability ranging from 34% to 40%, and that these restrictions, four years post-accident, indicate that the plaintiff is significantly limited, and has loss of use in the right foot and right ankle. He concluded that the plaintiff sustained a permanent partial disability, which is progressive in nature.

The plaintiff further submits the medical reports of Dr. Delaney, dated September 13, 2017, and September 26, 2017, that indicate that the plaintiff's injuries were causally related to the motor vehicle accident. Dr. Delaney noted that an MRI scan of the right ankle indicated that the plaintiff had sustained tenosynovitis of the posterior tibial tendon, flexor halluces longus, and peroneal tendons.

According to the plaintiff's deposition testimony of May 27, 2021, he experiences numbness and pain when doing certain activities, and that in the morning he wakes up with numbness in the foot for approximately three hours. He testified that he is limited in his activities, including running, lifting weights, walking up the stairs, and playing basketball.

As the proponent of the summary judgment motion based on Insurance Law § 5102(d), the defendant has the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his bill of particulars. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendants' examining physician, or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992). Once the defendants have made a prima facie showing that the plaintiff did not sustain a serious injury, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating that a triable issue of fact exists that the plaintiff sustained a serious injury. *See Gaddy v Eyler*, 79 NY2d 955 (1992).

The defendant's submissions demonstrate her prima facie entitlement to summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). S*ee Toure v Avis Rent A Car Sys.*, 98 NY2d 345; *Gaddy v Eyler*, 79 NY2d 955; *Fest v Agnew*, 68 AD3d 1051 (2d Dept 2009). The defendant has submitted competent medical evidence, including the affirmed report of her examining medical expert, establishing that the plaintiff's alleged injuries do not constitute a serious injury under the permanent loss of use, permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d). S*ee Hayes v Vasilios*, 96 AD3d 1010 (2d Dept 2012); *Staff v Yshua*, 59 AD3d 614 (2d Dept 2009).

In opposition, the plaintiff has raised a triable issue of fact that he sustained a serious injury under Insurance Law § 5102(d), resulting in a permanent partial disability of the right foot and ankle. Dr. Guy's affirmation establishes that based upon his examination, the plaintiff sustained a 34-40% restriction in range of motion of his right foot and ankle, diminished sensation to pinprick on the right dorsal of the foot, as well as a gait disturbance, all of which cause instability of the right lower extremity. Dr. Guy recommended periodic EMGs and MRIs

of the right foot and ankle, as well as physical therapy, and limitation of activities that will cause further injury. He opined that the plaintiff's injuries were causally related to the motor vehicle accident of September 8, 2017.

Contrary to the defendant's contentions, the plaintiff's reliance on the unsworn and uncertified medical records and x-ray and MRI reports relating to his injuries was proper since the defendant's examining doctor, Dr. Mannor, referred to the records in her affirmed report. *See Zarate v McDonald*, 31 AD3d 632 (2d Dept 2006); *Ayzen v Melendez*, 299 AD2d 381 (2d Dept 2002).

The plaintiff has submitted a sur-reply without leave of Court, and therefore it has not been considered in the determination of defendant Cwikla's motion for summary judgment.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the summary judgment motion (Motion 01) of defendant, Kacper Pachowicz, is **DENIED** in its entirety; and it is further

ORDERED, that the plaintiff's motion (Motion 02) seeking to strike the answer of defendant, Kacper Pachowicz, is **DENIED**; and it is further

ORDERED, that the summary judgment motion (Motion 03), of defendant Monika Elazbiet Cwikla, is **DENIED** in its entirety.

This constitutes the decision and order of the Court.

Dated: March 9, 2022

Lillian Wan

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.