SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C.
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ROBERT J. ANDERSON JR.,
Plaintiff,

-against

DUANE STEINHOFF and LAURA A. DATTORE,
Defendants.
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IAS Part 37

Index Number: 706326/2016

Motion Date: October 18, 2021

Motion Seq. No.: 7

The following electronically filed (EF) papers read on this motion by the defendants, Duane Steinhoff and Laura A. Dattore, for an Order: pursuant to CPLR Section 3212 granting the defendants, Duane Steinhoff and Laura A. Dattore, summary judgment and dismissing the plaintiff's Complaint on the grounds that plaintiff, Robert J. Anderson Jr., did not incur a "serious injury" as defined under NY Insurance Law section 5102(d), and as such, has no cause of action under NY Insurance Law Section 5104(a); and any further relief which this Court deems just and proper.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits…..…….....	EF 20-30
Affirmation in Opposition - Affirmation - Exhibits….....	EF 42-47
Affirmation in Reply……..……	EF 50

Upon the foregoing papers, it is Ordered that defendants' motion is 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 May 28, 2013 at or near the intersection of Westbound Sunrise Highway and Brookville Boulevard in the County of Queens, City and State of New York. Plaintiff alleges that as a result of the collision he sustained serious injuries as defined New York Insurance Law ("NYIL") § 5102.

Defendants 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 NYIL § 5102(d). In support of defendants' motion, they submit the following evidence: the summons and complaint, defendants' answer, verified bill of particulars, stipulation dated April 3, 2018, letter withdrawing motion, note of issue, plaintiff's examination before trial ("EBT") testimony, and medical report from Kumar S. Reddy, M.D. (hereinafter " Dr. Reddy").

Plaintiff opposes defendants' motion and avers that plaintiff did sustain serious injuries as defined pursuant to NYIL § 5102(d) warranting denial of defendant's motion. In support of plaintiff's opposition papers, it submits the following evidence: plaintiff's affidavit, affirmation and medical records from Jamil Abraham, M.D. (hereinafter "Dr. Abraham"), medical reports and records from Dov J. Berkowtiz, M.D. (hereinafter "Dr. Berkowtiz").

"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, 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 § 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 it sustained injuries to his right shoulder, left shoulder, cervical 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 consequential limitation of use of a body organ or member, and 90/180-day.

I. Permanent Consequential Limitation and Significant Limitation of Use of a Body Function or System

"Only a total loss of use is compensable under the 'permanent loss of use' exception to the no-fault remedy." (*Oberly v Bangs Ambulance, Inc.,* 96 NY2d 295 [2001]). Without any evidence within the record, this Court will only address the issue of a significant limitation of use of a body function or system.

Here, defendants argue that plaintiff's injuries do not qualify as a serious injury under the permanent consequential limitation category of NYIL § 5102(d).

On a motion for Summary Judgment alleging plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), the defendant bears the burden of establishing that plaintiff did not sustain a serious injury caused by the accident. (*Gardner v Spitz,* 2021 N.Y. Misc. LEXIS 4023, at *5-6 [Sup Ct, Queens County May 21, 2021, No. 715199/2018]). Defendant's burden may be satisfied by presenting affirmations by medical experts reciting that "the plaintiff has normal ranges of motion in the affected body parts, and identifies the objective tests performed to arrive at that conclusion." (*Id.*). Upon making this showing, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*Grossman v Wright,* 268 AD2d 79, 83–84 [2d Dept 2000]).

To determine whether an injury is a "serious injury" under NYIL § 5102(d), the movant must show the injury's duration and its extent, or the degree of limitations associated with it

(*Rovelo v Volcy*, 83 AD3d 1034, 1035 [2d Dept 2011]). Furthermore, "any subjective complaints of pain and limitation of motion must be substantiated by verified objective medical findings based on recent examination of the plaintiff" [citations omitted]. (*Id.*).

Here, defendants submit *inter alia* a medical report dated December 9, 2019, Dr. Reddy in relevant part, reads as follows:

> "DIAGNOSES:
> 1. Cervical spine sprain/strain - resolved.
> 2. Lumbar spine sprain/strain - resolved.
> 3. Bilateral shoulders sprain/strain - resolved.
>
> DIAGNOSIS AND TREATMENT: The diagnoses as stated above are properly stated, correct and are not supported by objective findings. There are no positive objective findings noted on today's examination to support subjective complaints of pain or decreased range of motion. Based on today's findings, further orthopedic care including physical therapy is not appropriate or medically necessary as the claimant's injuries have resolved without any objective evidence of orthopedic residuals. The length/frequency of the treatment was appropriate. The claimant responded well to the treatment received. There is no need for functionally oriented treatment.
>
> DISABILITY AND RETURN TO WORK: The claimant can work without restrictions. There is no indication for a functional capacity evaluation. The claimant has reached MMI. There is no permanency. I am not aware if the claimant was given an impairment rating. The claimant is not disabled.
>
> CAUSALITY: The diagnoses are causally related to the accident of record. Within reasonable medical probability, the proximate cause of the diagnosed injuries was as a result of the motor vehicle accident. The mechanism of injuries supports the diagnoses based on both subjective and objective complaints. The treatment was related to the injury or accident. There is no evidence of any contributing pre-existing conditions or prior injuries that impact on the current injuries. I am not aware of any comorbid medical conditions. Comments regarding psychological conditions are deferred to the appropriate specialist."

Defendants' evidence, specifically, Dr. Reddy's medical report affirmation, affirming that plaintiff's goniometer readings were normal and that plaintiff could work without restrictions is *prima facie* evidence that the 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). The burden now shifts 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]). The burden now shifts to plaintiff to rebut defendant's prima facie showing and raise a triable issue of fact.

In opposition, the plaintiff submits *inter alia* medical reports and an affirmation from Dr. Abraham, who examined the plaintiff on March 11, 2021. Dr. Abraham affirmation in relevant part reads, as follows:

Right Shoulder (10/5/20):

	Normal	Examination
Flexion	180 degrees	60 degrees
Extension	60 degrees	30 degrees
Abduction	180 degrees	80 degrees
Adduction	30 degrees	25 degrees
External Rotation	90 degrees	90 degrees
Internal Rotation	70 degrees	70 degrees

This examination represents a loss of Flexion of 67% , a loss of Extension of 50%, a loss of Abduction of 55%, and a loss of Adduction of 17%. The range of motion tests on Mr. Anderson's cervical spine revealed the following reductions in the range of motion (All range of motion testing performed using a goniometer. ROM normal values are in accordance with both the New York State WC guidelines and AMA guidelines).

(Cervical Spine: 10/5/20):

	Normal	Examination
Cervical Flexion	50 degrees	50 degrees
Cervical Extension	60 degrees	30 degrees
Cervical Lateral Left	45 degrees	30 degrees
Cervical Lateral Right	45 degrees	45 degrees
Cervical Rotation Left	80 degrees	50 degrees
Cervical Rotation Right	80 degrees	40 degrees

This examination represents a loss of Extension of 50%, a loss of Lateral Left of 33%, a loss of Rotation Left of 37% and a loss of Rotation Right of 50%. The range of motion tests on Mr. Anderson's lumbar spine revealed the following reductions in the range of motion (All range of motion testing performed using a goniometer. ROM normal values are in accordance with both the New York State WC guidelines and AMA guidelines).

(Lumbar Spine: 10/5/20):

Normal Examination Lumbar Flexion 60 degrees 30 degrees Lumbar Extension 25 degrees 10 degrees Lumbar Lateral Left 25 degrees 25 degrees Lumbar Lateral Right 25 degrees 25 degrees This examination represents a loss of Flexion of 50% and a loss of Extension 60%.

The history being correct it is my opinion to a degree of medical certainty that the injuries listed herein and within the attached medical records were causally related to the accident of May 28, 2013. Mr. Anderson's complaints are consistent with the injuries he sustained

in this accident. As a result of the accident of May 28. 2013, Mr. Anderson has suffered a significant limitation of use of his cervical spine, lumbar spine and right shoulder."

The Court finds that in opposition plaintiff raised triable issues of fact regarding plaintiff's cervical spine, lumbar spine and right shoulder injuries through the submission of the affirmation of Dr. Abraham who concluded that plaintiff suffered a significant limitation of use of his cervical spine, lumbar spine and right shoulder and directly related to the subject accident. (See *Himmelburger v Buchris*, 117 AD3d 801, 802 [2d Dept 2014]; *Khaimov v Armanious*, 85 AD3d 978, 979 [2d Dept 2011]; *Abdelaziz v Fazel*, 78 AD3d 1086, 1086 [2d Dept 2010]; *Smith v Matinale*, 58 AD3d 829 [2d Dept 2009]).

In addition, the conflicting medical reports submitted by the parties raises triable issues of fact as to whether plaintiff sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) (see *Wilcoxen v. Palladino*, 122 AD3d 727, 728 [2d Dept 2014][finding that "in light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the defendants' motion for 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) as a result of the subject accident"]; See also *Cariddi v. Hassan,* 45 A.D.3d 516 [2007]; *Gaviria v. Alvardo*, 65 A.D.3d 567 [2009]).

However, Plaintiff's moving papers failed to raise any issue of fact with respect plaintiff's alleged injury to his left shoulder.

Accordingly, as plaintiff has failed to provide competent medical evidence to rebut defendant's *prima facie* showing with respect to plaintiff's left shoulder injury, the branch of defendants' summary judgment motion dismissing plaintiff's claim of a permanent consequential limitation of use and substantial limitations of use of a body function or system to plaintiff's left shoulder under NYIL § 5102(d) is granted in part (*see, Deutsch v Tenempaguay*, 48 AD3d 614, 615 [2d Dept 2008]) and the remaining branches of defendants' motion summary judgment motion dismissing plaintiff's claim of a permanent consequential limitation of use and substantial limitations of use of a body function or system to plaintiff's spine, lumbar spine and right shoulder under NYIL § 5102(d) is denied.

II. 90/180

Defendants aver that plaintiff did not sustain a medically determined injury or impairment that prevented him from performing substantially all of the material acts constituting him 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]).

Here, defendants have failed to establish, *prima facie*, that plaintiff did not suffer a serious injury under the 90/180 category of NYIL § 5102(d). While defendants rely on plaintiff's

deposition testimony to establish their *prima facie* entitlement to judgment as a matter of law under the 90/180 category, plaintiff's testimony did not address his usual and customary daily activities "during the specific relevant time frame" and "did not compare . . . [her] pre-accident and post-accident activities during that relevant time frame" (*see, Hall v Stargot,* 187 AD3d 996, 996 [2d Dept 2020]; *Reid v Edwards-Grant,* 186 AD3d 1741, 1742 [2d Dept 2020]; Jong Cheol Yang v Grayline N.Y. Tours, 186 AD3d 1501, 1502 [2d Dept 2020]).

As defendants have failed to establish their *prima facie* entitlement to judgment as a matter of law as to plaintiff's claim of a serious injury under the 90/180 category, the Court "need not consider the sufficiency" of plaintiff's opposition papers (*see, Hall*, 187 AD3d at 996, *supra; Owens-Stephens v PTM Mgmt. Corp*., 191 AD3d 691 [2d Dept 2021]; *Ali v Williams*, 187 AD3d 1107 [2d Dept 2020]). Accordingly, the branch of defendants' motion seeking summary judgment dismissing plaintiff's claim of a serious injury under the 90/180 of NYIL § 5102(d) is denied *(see, id.).*

CONCLUSION

Based upon the foregoing, the branch of defendants' summary judgment motion dismissing plaintiff's claim of a permanent consequential limitation of use and substantial limitations of use of a body function or system to plaintiff's left shoulder under NYIL § 5102(d) is granted and the remaining portions of defendants' motion for summary judgment dismissing the complaint is denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Date: January 11, 2022

LOURDES M. VENTURA, J.S.C.