| **Balkaran v Polcarpio** |
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| 2022 NY Slip Op 32444(U) |
| January 7, 2022 |
| Supreme Court, Queens County |
| Docket Number: Index No. 708978/2019 |
| Judge: Maurice E. Muir |
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY



Present: HONORABLE MAURICE E. MUIR
Justice

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RYAN BALKARAN,

Plaintiff,

-against-

JOSEPH T. POLCARPIO and DERRICK R. TENN,

Defendants.

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IAS Part - 42

Index No.: 708978/2019

Motion Date: 9/16/21

Motion Cal. No.: 1

Motion Seq. No.: 2

The following electronically filed ("EF") documents read on this motion by Joseph T. Polcarpio ("Mr. Polcarpio" or "movant") for an order pursuant to CPLR § 3212 granting him summary judgment and dismissing Ryan Balkaran ("Mr. Balkaran" or "plaintiff") complaint together with any and all cross claims on the grounds that the plaintiff did not incur a "serious injury" as defined under NY Insurance Law § 5102(d) and as such has no cause of action under NY Insurance Law § 5104(a); and granting such further relief which this Court deems just and proper. Moreover, Mr. Balkaran cross-moves for an order pursuant to CPLR § 3212 granting him summary judgment on the issues of liability against the defendants and granting such other and further relief as to this Court deems just and proper.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits-Service..... | EF 23 -33 |
| Notice of Cross Motion-Affirmation-Exhibits-Service..... | EF 36 - 47 |
| Reply Affirmation-Exhibits ..... | EF 48 - 49 |

Upon the foregoing papers it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

***BACKGROUND***

This is an action to recover damages for personal injuries allegedly sustained by Mr. Balkaran in a motor vehicle collision. In particular, the plaintiff alleges that on January 13,

2018, a motor vehicle accident occurred when he was a passenger in a vehicle operated by Derrick R. Tenn ("Mr. Tenn"), which was struck by a vehicle operated by Mr. Policarpio, who made an illegal U-turn on Central Park West at or near its intersection with West 70th Street, in the county of New York, city and state of New York ("subject accident"). As a result, the plaintiff alleges that he sustained serious injuries to his cervical spine and lumbar spine. On May 15, 2019 the plaintiff commenced the instant action against the defendants; and on August 22, 2019, issue was joined, wherein Mr. Policarpio interposed an answer. Thereafter, on August 30, 2019, Mr. Tenn interposed answer. Now, Mr. Policarpio seeks summary judgment on the ground that Mr. Balkaran did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law as a result of the subject accident.

***APPLICABLE LAW***

It has long been established that the "legislative intent underlying the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (i.e., Insurance Law § 5101, *et seq.* – commonly known as New York's "No-Fault" Insurance Law) was to weed out frivolous claims and limit recovery to significant injuries (*Licari v. Elliot*, 57 NY2d 230 [1982]; *see also Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002] quoting *Duel v. Green*, 84 NY2d 795 [1995]). New York's No-Fault Insurance Law § 5102 (d) defines "serious injury" as follows:

> … 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 held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see Licari v. Elliott*, 57 NY2d 230 [1982]; *see also Charley v. Goss*, 54 AD3d 569 [1st Dept 2008] *aff'd* 12 NY3d 750 [2009]; *Porcano v. Lelzman*, 255 AD2d 430 [2d Dept 1998]; *Nolan v. Ford*, 100 AD2d 579 [2d Dept 1984], *aff'd* 64 NYS2d 681 [1984]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of New York's No-Fault Insurance

Law § 5102(d) (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Akhtar v. Santos*, 57 AD3d 593 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]; *Farozes v. Kamran*, 22 AD3d 458 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on 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 (*Pagano v. Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment by using medical reports and records prepared by the plaintiff's own physicians (*see Fragale v. Geiger*, 288 AD2d 431 [2d Dept 2001]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Vignola v. Varrichio*, 243 AD2d 464 [2d Dept 1997]; *Torres v. Micheletti*, 208 AD2d 519 [2d Dept 1994]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Xin Fang Xin v. Saft,* 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]; *Rich-Wing v. Baboolal*, 18 AD3d 726 [2d Dept 2005]).

Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Duel v. Green*, 84 NY2d 795 [1995]; *Pagano v. Kingsbury*,182 AD2d 268 [2d Dept 1992]). The mere parroting of language tailored to meet statutory requirements is insufficient (*see Grossman v. Wright*, 268 AD2d at 84). Further, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings, which shall be based on a recent examination of the plaintiff (*Kauderer v. Penta*, 261 AD2d 365 [2d Dept 1999]; *Tobiolo v. Friedman*, 283 AD2d 483 [2d Dept 2001]). Lastly, the 90/180 category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury (*see Licari*, 57 NY2d at 236; *Romero v. Brathwaite*, 154 AD3d 894 [2d Dept 2017]). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari*, 57 NY2d at 236).

## *DISCUSSION*

### A. *The Defendant's Motion to Dismiss Pursuant CPLR § 3212*

In support of the instant motion, the defendant provides the unsigned medical report of Edward Toriello, M.D. ("Dr. Toriello"), who is Board Certified Orthopedic Surgeon. On June 11, 2020, Dr. Toriello performed an independent orthopedic examnation, wherein he found normal ranges of motion in the plaintiff's lumbar spine and cervical spine. He also noted that "[r]ange of motion of the shoulders, elbows, wrists and digits was full and pain-free." All testing (e.g., straight leg raise) was negative and within normal limits. As a result, Dr. Toriello opined that

> The claimant reveals evidence of a resolved cervical strain and resolved low back strain. He reveals no objective evidence of continued disability. He is able to return to work and normal daily living activities without restriction. He does not require any further orthopedic care. He has no permanency. There is no orthopedic impairment."

In opposition, the plaintiff provides the affirmed medical report from Joyce Goldenberg, M.D. ("Dr. Goldenberg"), who is plaintiff's Treating Physician. On January 22, 2018, Dr. Goldenberg conducted an initial orthopedic examination, wherein she found that the plaintiff had limited range of motion to the cervical spine, thoracic spine and lumbar spine. Moreover, on May 26, 2021, Dr. Goldenberg conducted another orthopedic examination of plaintiff, who measured the plaintiff's range of motion of the cervical spine, left foot and lumbar spine utilizing the goniometer. Again, Dr. Goldenberg found that the plaintiff has limited range of motion in the relevant body parts. In fact, Dr. Goldenberg opined that ". . .Mr. Balkaran developed a limitation of use of his cervical and lumber spine which prevents him from performing his activities of daily living. The loss in mobility that he suffers is permanent. He will live the rest of his life with pain and reduced range of motion. Mr. Balkaran is disabled from his injuries and he still has limitation of motion and sufficient symptoms remaining, that indicates permanency." Additionally, the plaintiff provides the affirmed report from Thomas M. Kolb, M.D. ("Dr. Kolb"), who is a Board Certified a Radiologist. On February 26, 2018, Dr. Kolb reviewed the plaintiff's magnetic resonance imaging ("MRI"), which reveals disc herniations being present in both the cervical and lumbar spine.

Here the court finds that the defendant failed to meet his prima facie burden of establishing that the plaintiff did not sustained serious injury within the meaning of Insurance Law § 5102(d). (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Sook Houng v. Beers*, 151 AD3d 995 [2d Dept 2017]; *Nash v. MRC Recovery,*

*Inc.*, 172 AD3d 1213 [2d Dept 2019]). Here Dr. Toriello failed to execute his IME report. Moreover, Dr. Toriello failed to adequately address the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180–day category of Insurance Law § 5102(d). (*see Che Hong Kim v. Kossoff,* 90 AD3d 969 (2d Dept 2011]; *Rouach v. Betts*, 71 AD3d 977 [2d Dept 2010]). Additionally, Dr. Toriello failed to address all of the findings of injuries contained in plaintiff's MRIs and other medical records, which include disc herniation at L3-L4, L4-L5 and L5-S1 with central and foraminal narrowing, and impingement on the thecal right S1 nerve root and a disc herniation at C3-C4 & C5-C6 with central right foraminal narrowing; as well as Lumbar and cervical radiculopathy. Moreover, Dr. Toriello agrees that there is a causal relationship between the injuries and the subject accident. In light of the fact that the defendant failed to establish his prima facie entitlement to judgment as a matter of law in the first instance, it is unnecessary to reach the question of whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact (*see Che Hong Kim v. Kossoff,* 90 AD3d 969 [2d Dept 2011]).

Notwithstanding the same, the court has competent, admissible, but conflicting medical evidence and/or affirmations on the issue of serious injury, which warrant denial of the instant motion for summary judgment. (*Tinao v. City of New York*, 112 AD2d 363 [2d Dept 1985]; *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]). It is well settled that conflicting medical evidence on the issue of the permanency and significance of a plaintiff's injuries warrants denial of summary judgment. (*Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxen v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept 2013]; *Noble v. Mathew*, 252 AD2d 392 [1st Dept 1998]). Moreover, the plaintiff raises triable issues of fact, which must be resolved by a trier of fact.

***B. Plaintiff's Cross Motion for Summary Judgment Pursuant CPLR § 3212***

Furthermore, Mr. Balkaran cross-moves for summary judgment on the issue of liability against the defendants, pursuant to CPLR § 3212. In particular, the plaintiff argues that Mr. Policarpio has already been adjudged to be at fault for the accident, by a Court of concurrent jurisdiction. Here the court agrees with the plaintiff's contention. On June 4, 2019, Mr. Tenn commenced an action in the Supreme Court, New York County, entitled *Tenn v. Policarpio*, index number 155579/21 based upon the subject accident. Thereafter, on January 16, 2020, the Honorable Adam Silvera granted Mr. Tenn's motion for summary judgment wherein, he held that "it is undisputed that defendant [Joseph Policarpio] was making an illegal U-turn when he

crossed a double yellow line and collided with plaintiff's [Derrick Tenn] vehicle in the southbound lane." Furthermore, on December 16, 2021, this court granted Mr. Tenn's motion for summary judgment on the issue of liability, which was based upon the ground of res judicata. As such, this court has ruled that Mr. Policarpro is liable for the subject accident, which is law of the case.

It is well settled law that "[t]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Fishon v. Richm ond University Medical Center*, 171 AD3d 873 [2d Dept 2019]; *Kaygreen Realty Co., LLC v. IG Second Generation Partners, L.P.*, 116 AD3d 667 [2d Dept 2014]; *Ramanathan v. Aharon*, 109 AD3d 529 [2d Dept 2013]; *Erickson v. Cross Ready Mix, Inc.*, 98 AD3d 717 [2d Dept 2012]; *see also U.S. Bank National Association v. Oliver*, 180 AD3d 843 [2d Dept 2020]; *Aurora Loan Services, LLC v. Taylor*, 25 NY3d 355 [2015].) The doctrine forecloses reexamination of an issue previously determined by a court of coordinate jurisdiction "absent a showing of newly discovered evidence or a change in the law" (*Kaygreen Realty Co., LLC v. IG Second Generation Partners, L.P.*, 116 AD3d at 669; *see also Martin v. City of Cohoes*, 37 NY2d at 165, 371 N.Y.S.2d 687, 332 N.E.2d 867). Here, the court as already determined that Mr. Policarpro is liable for the subject accident, which is law of the case.

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment to dismiss the complaint, pursuant to CPLR § 3212, is denied in its entirety; and it is further,

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability as against defendant Joseph T. Policarpio is granted without opposition; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry, via NYSCEF, upon the defendants and the clerk of this court on or before February 10, 2022.

The foregoing constitutes the decision and order of the court.

Dated: January 7, 2022
Long Island City, NY

FILED
1/12/2022
COUNTY CLERK
QUEENS COUNTY

Maurice E. Muir

MAURICE E. MUIR, J.S.C.