Short Form Order

Index No. 609250/2020

SUPREME COURT – STATE OF NEW YORK
PART 55 – SUFFOLK COUNTY

PRESENT:
Hon. George Nolan
Justice Supreme Court

STEVEN JAIPAUL,

Plaintiff,

-against-

LUIS FURCAL-ISAAC and ANA ISAAC FURCAL,

Defendants.

Mot. Seq. No. 002 – MD
Orig. Return Date: 12/29/2021
Mot. Submit Date: 03/31/2022

PLAINTIFF'S ATTORNEY
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Upon the e-filed documents numbered 34 through 57, and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

ORDERED that the motion by defendants for summary judgment (motion sequence no. 002) dismissing the complaint on the ground that plaintiff Steven Jaipaul did not sustain a "serious injury" as defined in Insurance Law § 5102(d) is denied.

This is an action to recover damages for injuries sustained by plaintiff Steven Jaipaul when his vehicle was rear-ended by a vehicle owned by defendant Ana Isaac-Furcal and operated by defendant Luis Furcal-Isaac. The accident allegedly occurred on July 16, 2019, on Broadway in Babylon, New York. By the bill of particulars, plaintiff Steven Jaipaul alleges that, as a result of the accident, he sustained various serious injuries and conditions, including herniated discs in the thoracic, lumbar and cervical spines, pain, numbness and tingling in the cervical, thoracic and lumbar regions, and various related injections.

Defendants move for summary judgment dismissing the complaint on the ground that plaintiff Steven Jaipaul did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

Insurance Law § 5102 (d) defines "serious injury" as "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v. Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v. Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v. Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

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 Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [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 (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants made a *prima facie* showing that plaintiff Steven Jaipaul did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of defendant's examining physician (*see* ***Bailey v. Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v. Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v. Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On June 25, 2021, approximately two years after the subject accident, moving defendants' examining orthopedist, Dr. Dorothy Scarpinato, examined plaintiff Steven Jaipaul and performed certain orthopedic and neurological tests, including compression tests and the straight leg raising test. Dr. Scarpinato found that all the test results were negative or normal. Dr. Scarpinato also performed range of motion testing on the plaintiff's cervical, thoracic and lumbar regions using a goniometer to measure his joint movement. Dr. Scarpinato found that the plaintiff exhibited normal joint function in his cervical, lumbar and thoracic regions. Dr. Scarpinato opined that the plaintiff had no orthopedic disability, permanency or functional impairment at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at his deposition, plaintiff Steven Jaipaul testified that he worked as a print coordinator at Broaderick Financial, and that following the accident he missed only four days from

work and returned back to work with the same schedule. He also testified that gardening is the only activity that he is unable to perform because of the accident, although he has difficulty in driving, painting and doing chores. Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]). Thus, defendants met their initial burden of establishing that plaintiff Steven Jaipaul did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v. Eyler***, *supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v. DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v. Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v. Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v. Meher***, *supra*; ***Toure v. Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Rovelo v. Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v. Elliott***, *supra*; ***Cebron v. Tuncoglu***, *supra*). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v. Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Vasquez v. John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v. Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

Plaintiff opposes the motion, arguing defendants' expert's report is insufficient to meet their burden on the motion. Plaintiff also argues that the medical report prepared by his treating chiropractor, Dr. Walter F. Priestley, raises a triable issue as to whether he suffered injury within the "permanent consequential limitation of use" and "significant limitation of use" categories of Insurance Law §5102(d). In opposition to the motion plaintiffs submit, *inter alia*, the sworn report, dated January 21, 2022, of Dr. Priestly, the unsworn MRI reports, dated August 1, 2019, and August 5, 2019, and uncertified records from Dr. Sharma and Priestly Chiropractic.

Dr. Priestly sets forth plaintiff's complaints and the significant limitations in his cervical, lumbar and thoracic spinal functions due to the accident, measured during range of motion testing performed at his initial consultation on August 16, 2019, approximately one month after the subject accident. During his initial consultation, Dr. Priestly examined plaintiff and performed certain orthopedic and neurological tests, including Soto-Hall test, Valsalva test, straight leg raising test

and Braggard test, which were all positive. In addition, Dr. Priestly measured the plaintiff's cervical range of motion using an arthrodial protractor. That testing revealed significant loss of range of motion to the cervical spine. More recently, on January 3, 2022, Dr. Priestly examined plaintiff and found continued loss of range of motion in the cervical, lumbar and thoracic spines that he causally related to the motor vehicle accident of July 16, 2019. Based upon the foregoing, the Court finds that the plaintiff has sustained his burden of raising an issue of fact as to whether he suffered a significant limitation sufficient to defeat defendants' motion for summary judgment.

Thus, defendants' motion for summary judgment based on plaintiff's failure to meet the serious injury threshold is denied.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: June 13, 2022
Riverhead, NY

HON. GEORGE NOLAN, J.S.C.

___ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION