| **Qi Yong Wu v Olympos Trans Inc.** |
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| 2023 NY Slip Op 34322(U) |
| November 21, 2023 |
| Supreme Court, Kings County |
| Docket Number: Index No. 502905/2020 |
| Judge: Ingrid Joseph |
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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 21st day of November, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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Index No.: 502905/2020

QI YONG WU,

Plaintiff,

-against-

**DECISION AND ORDER**

OLYMPOS TRANS INC. and MOUSA EL SHERIF NAGAH,

Defendants.

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The following e-filed papers considered herein:

| | NYSCEF Doc. Nos. |
|---|---|
| Notice of Motion/Petition/Affirmation/Exhibits Annexed..... | 1-52 |
| Affirmation in Opposition..... | 55 |

Plaintiff Qi Yong Wu ("Plaintiff") moves to (1) vacate an order entered February 10, 2022 granting Defendants Olympus Trans Inc. and Mousa El Sherif Nagah's (collectively, "Defendants") motion for summary judgment on default with no opposition (Mot. Seq. No. 1; "Defendants' Motion"); (2) renew Defendants' Motion to allow Plaintiff's opposition to be heard and upon renewal, denying Defendants' Motion because there are triable issues of fact; and (3) set the matter down for a date certain for Defendants' examinations before trial (Mot. Seq. No. 3). Defendants oppose the motion on the grounds that law office failure alone does not constitute a reasonable excuse for the default and Plaintiff has not established a meritorious cause of action.

This action arises out of an accident that occurred on May 21, 2017, when Plaintiff, who was travelling on a bicycle, was allegedly struck by a vehicle operated by defendant Mousa El Sherif Nagah and owned by defendant Olympos Trans, Inc. As a result of the accident, Plaintiff claims he sustained injuries to his lower back, neck, right shoulder and right leg. Defendants later moved for summary judgment on the grounds that Plaintiff failed to meet the serious injury threshold under Insurance Law §§ 5104(a) and 5102(d). Defendants' motion was granted on default, after Plaintiff failed to submit any opposition.

Plaintiff now moves to vacate the default, alleging that Defendants' Motion went uncalendared and it was only after an associate assigned to the case left that the firm realized the motion went unopposed and was granted on default. As for his meritorious cause of action, Plaintiff contends that an initial physical examination after the accident revealed losses of range of motion in all planes. Plaintiff submits that Dr. Mark S. McMahon found that his injuries are serious and permanent and found losses of range of motion approximately four years after the accident. According to Plaintiff, evidence of disc pathology is enough to meet the serious injury threshold. Plaintiff further argues that Defendants' medical expert Dr. Dana Mannor evaluated Plaintiff more than four years after the accident, never reviewed Plaintiff's medical records or reports, and did not opine on a causal relationship. Plaintiff contends that the conflicting medical evidence warrants denial of Defendants' summary judgment motion.

In opposition, Defendants argue that Dr. Mannor demonstrated that Plaintiff did not sustain a serious injury. Dr. Mannor's report showed that the results of Plaintiff's independent medical examination were normal. Moreover, Defendants argue that Plaintiff's affidavit and attorney affirmation are inadmissible evidence on medical issues. Defendants further contend that Plaintiff's medical affirmations are conclusory, insufficient, and failed to account for possible alternatives to Plaintiff's alleged limitations. In addition, Defendants argue that Plaintiff's magnetic resonance imaging ("MRI") reports are not affirmed and fail to causally relate the findings to the subject accident. Finally, Defendants assert that a herniated or bulging disc alone do not constitute a serious injury. Thus, even if the court finds that Plaintiff proffered a reasonable excuse for his default, Defendants contend that Plaintiff has not established a meritorious cause of action.

Public policy favors the resolution of cases on the merits (*see Franco Belli Plumbing & Heating & Sons, Inc. v Imperial Dev. & Const. Corp.*, 45 AD3d 634, 637 [2d Dept 2007]). A party may move for an order vacating a prior judgment or order upon a showing of excusable default (CPLR 5015 [a] [1]). The court has discretion to excuse a default resulting from law office failure (CPLR 2005). Even if law office failure may constitute a valid excuse, the moving party must provide detailed support for their assertion as conclusory and unsubstantiated claims will not suffice (*see Trapani v Imlug & Seven Corp.*, 140 AD2d 690, 692 [2d Dept 1988]; *Piton v Cribb*, 38 AD3d 741, 742 [2d Dept 2007] [internal citations omitted]). This requirement also applies when, as here, a party attributes his default to a former attorney's failure to oppose motions (*New Penn Fin., LLC v Rubin*, 207 AD3d 730, 732 [2d Dept 2022] [internal citations omitted]). Where a default stems from repeated neglect, rather than an isolated, inadvertent mistake, the court may reject the proffered excuse (*Chery v Anthony*, 156 AD2d 414 [2d Dept 1989]; *Thomas v Avalon Gardens Rehab. & Health Care Ctr.*, 107 AD3d 694, 695

[2d Dept 2013]). In addition to demonstrating a reasonable excuse, the defaulting plaintiff must also establish a meritorious cause of action (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 141 [1986]; *Swensen v MV Transp., Inc.*, 89 AD3d 924, 925 [2d Dept 2011]).

The Court first addresses whether Plaintiff has proffered a reasonable excuse for his default. Here, Plaintiff's counsel alleges that Defendants' motion was filed on July 23, 2021 and granted on default on February 10, 2022. Counsel further alleges that the associate handling the case left the firm in March 2022 and it was only after his departure, that the firm discovered that no opposition had been filed. The Court finds that Plaintiff has established a reasonable excuse (*Smyth v Getty Petroleum Mktg., Inc.*, 103 AD3d 790, 790–91 [2d Dept 2013] [affirming trial court's exercise of discretion in vacating default due to prior attorney's neglect]) *Spyropoulos v Hirsh*, 21 AD3d 818, 818 [1st Dept 2005] [party "should not be prejudiced by his prior attorney's default, which was inadvertent, unintentional and an isolated incident devoid of any pattern of dilatory behavior"]; *Goldberg, Weprin & Ustin v Borg*, 271 AD2d 265, 265 [1st Dept 2000] [accepting reasonable excuse where firm became aware of case being marked off after former attorney left]).

The Court next turns to the issue of whether Plaintiff has demonstrated a meritorious cause of action with regard to sustaining a serious injury. "[T]he mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Kearse v New York City Transit Auth.*, 16 AD3d 45, 50 [2d Dept 2005]). Despite the existence of a herniated or bulging disc, a defendant may establish a prima facie case that a plaintiff did not sustain a serious injury by producing expert reports indicating full range of motion and lack of disability (*id.* at 51). According to Dr. Mannor, Plaintiff's physical examination revealed full range of motion and that all injuries had been resolved. Dr. Mannor concluded that there was "no evidence of orthopedic disability, permanency, or residuals." In addition to Dr. Mannor's report, Defendants provided an affirmed report from Dr. Audrey Eisenstadt, a radiologist, in support of their motion. Dr. Eisenstadt reviewed MRIs performed approximately two months after the accident and opined that (a) the scans of the cervical and lumbar spine were normal, (b) the scan of the right shoulder revealed a developmental variant, and (c) all scans showed no posttraumatic changes. Thus, the Court finds that through their experts' reports, Defendants have established a prima facie case and the burden shifts to Plaintiff to demonstrate a triable issue of fact.

In Plaintiff's proposed opposition to Defendants' motion for summary judgment, Plaintiff argues that (a) Defendants failed to submit competent evidence, (b) he sustained serious injuries and (c) there are conflicting assessments as to his range of motion. The Court first addresses the issue of

Defendants' evidence, and finds Plaintiff's contention as to the weight of Dr. Mannor's report unavailing since objective testing was performed (*see Hayes v Vasilios*, 96 AD3d 1010, 1011 [2d Dept 2012] [lack of medical record review is not fatal where objective tests revealed full range-of-motion]; *Henchy v VAS Exp. Corp.*, 115 AD3d 478, 479 [1st Dept 2014] [failure to review medical record does not render expert's report insufficient]). Further, Dr. Mannor was not required to opine whether the Plaintiff's injuries were not serious *and* not causally related (*Lee v Lippman*, 136 AD3d 411 [1st Dept 2016] [orthopedist not required to address causation]; *see also Boyle v Brennan*, 83 AD3d 983, 983–84 [2d Dept 2011]; *Esony v Benitez*, 2 AD3d 673 [2d Dept 2003]).

In support of his claim for serious injuries, Plaintiff cites to the results of (i) examinations performed soon after the accident and more than four years later, (ii) his physical therapist's examination and (iii) MRIs. Plaintiff relies on an initial examination by Dr. Hong. The Court notes that these records are partially illegible and though they appear to be signed, there is no indication they were affirmed [*Michael v New York City Hous. Auth.*, 64 Misc 3d 1210[A] [Sup Ct, Kings County 2019] [records are inadmissible if they are not affirmed, authenticated or certified]). The Court will not consider Plaintiff's physical therapy records as they are not in admissible form (*Frias v Yazidi*, 2016 NY Slip Op 31469[U] [Sup Ct, NY County 2016] [unsworn physical therapy records are inadmissible]). Though Dr. McMahon references the MRIs and incorporates their findings in his report, they are still inadmissible [*Cinelli v. Greyhound Lines, Inc.*, 211 AD3d 571, 572 [1st Dept 2022] [unsworn and unaffirmed MRI reports inadmissible where they were not relied upon by defendant's expert, who conducted independent film review, even if the findings were recited by plaintiff's expert]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661 [1st Dept 2010] [unsworn MRI reports inadmissible because defendants' experts did not submit the same or rely on them in reaching their conclusions]). As Plaintiff points out, Dr. Mannor did not review Plaintiff's medical records. Thus, there is no basis to deem these records admissible (*see Irizarry v Lindor*, 110 AD3d 846, 847 [2d Dept 2013] [unsworn reports reviewed by defendant' expert are admissible]). Except for Dr. McMahon's report, the Court finds the remaining medical evidence proffered by Plaintiff inadmissible.

The Court next addresses whether Dr. McMahon's report, which is based on his examination of Plaintiff on February 14, 2022, is sufficient to establish a serious injury causally related to the accident. Courts have found that where the only admissible evidence is an examination performed years after the subject accident, there is no evidence as to causation (*see Perl v Meher*, 18 NY3d 208, 217–18 [2011] ["an examination by a doctor years later cannot reliably connect the symptoms with the accident"]; *Shevardenidze v Vaiana*, 60 AD3d 660, 660–61 [2d Dept 2009] [range-of-motion limitations not contemporaneous with accident when examination was performed years later]; *Cinelli*,

211 AD3d at 572 [examination performed four years after the accident was insufficient to raise an issue of fact as to causation]; *Reyes-Mendez v City of New York*, 192 AD3d 464, 465 [1st Dept 2021] [affirmed report of physician who examined plaintiff four years after the accident was "too remote to raise an inference that the limitations were causally related to the accident"]; *Lekhraj v. Dhanraj*, 2013 NY Slip Op 30199[U] [Sup Ct, Queens County 2013] ["without admissible proof regarding the plaintiff's initial examination, plaintiff's medical proof does not provide evidence of an injury contemporaneous with this accident"]).

Plaintiff has not provided admissible evidence as to his suffering of a permanent consequential or significant limitation to raise an issue an issue of fact. With respect to Plaintiff's claim that he sustained an injury under the 90/180 category, the Court is unpersuaded. In his bill of particulars, Plaintiff alleged that he was confined to a bed for two or three days and confined to his home for seven days. During his deposition, Plaintiff testified that he missed two or three months of work. Nonetheless, there is no medical evidence indicating that he was unable to perform substantially all of his daily activities for not less than 90 out of 180 days following the accident (*Muzashvili v Vicente*, 16 Misc 3d 1140[A] [Sup Ct, Kings County 2007], *affd* 59 AD3d 413, [2d Dept 2009]).

Even though Plaintiff proffered a reasonable excuse for his default, he failed to demonstrate a potentially meritorious cause of action or opposition to Defendants' motion for summary judgment.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion (Mot. Seq. No. 3) is denied in its entirety.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.