SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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BRIAN LING,

Plaintiff,

-against-

MICHAEL W. MATHLESS and LEASE PLAN U.S.A., INC.,

Defendants.

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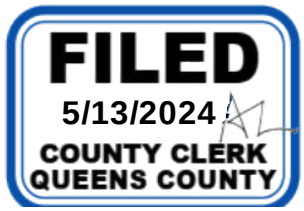
Index No.: 701510/2017
Motion Seq. No.: 3

DECISION and ORDER



Present: **HONORABLE ULYSSES B. LEVERETT**

	Papers Numbered
Notice of Motion -Affirmations-Statement of Material Facts-Exhibits	EF 49-67
Affirmation in Opposition -Memorandum-Exhibits	EF 70-80
Affirmation in Reply	EF 81

Upon the foregoing papers, it is ordered that defendant's Michael W. Mathless and Lease Plan U.S.A., Inc., motion for an order pursuant to CPLR §3212 granting defendant summary judgment and dismissing plaintiffs' complaint in that plaintiff did not sustain a serious injury as defined under Insurance Law §5102(d) is decided as follows:

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident on June 28, 2018 in the westbound lanes of the Long Island Expressway at or near exit 22A in the County of Queens, City and State of New York.

Plaintiff alleges that a vehicle operated by Defendant came into contact with a vehicle owned and operated by Plaintiff. Plaintiff states that as a result of the accident, he sustained injuries to his cervical spine.

Insurance Law §5102(d) defines a "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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

"[T]o 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... An expert's qualitative assessment of a plaintiff's condition may also 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" See *Toure v Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345, 350 (2002).

In support of the motion, defendant asserts that plaintiff did not sustain a serious injury as defined in Insurance Law §5102(d). Defendant submitted an orthopedic examination report and record review report from Jared F. Brandoff, M.D. dated August 1, 2020 based upon a June 19, 2020 visit. Plaintiff refused to answer questions regarding past medical history and any prior treatment regarding his neck and back. He did state in his deposition testimony that he was involved in a prior accident in 2010 where he collided with the back of a vehicle.

At the time of the examination plaintiff was wearing a soft cervical collar and had complaints that included neck pain which he rated as a 6 or 7 on a scale of 0 to 10. Examination of plaintiff's cervical spine revealed range of motion (as measured with a goniometer), flexion to 5 degrees (50 degrees normal), extension to 10 degrees (60 degrees normal), left and right lateral flexion at 10 degrees (50 degrees normal), and right and left rotation to 10 degrees (80 degrees normal). Dr. Brandoff reported the range of motion revealed supremely poor efforts and compromised ranges of motion which he believed were not indicative of the plaintiff's ability.

Range of motion testing of his lumbar spine revealed flexion to 50 degrees (normal is 60 degrees), extension to 25 degrees (normal is 30 degrees) and lateral bending of 25 degrees each way (normal is 25 degrees). Plaintiff reported that when he ranged his lumbar spine, it caused pain in his neck, which is significant as a positive Waddell's sign. Motor strength testing revealed 5/5 motor strength bilateral upper and lower extremities in all motor groups tested. He had no clonus, no Hoffmann's, negative Babinski, and a negative bilateral straight leg raise. Deep tendon reflexes were 2+ and symmetric bilateral upper and lower extremities. He had a well-healed right-sided anterior ACDF scar. His neck in general was held in a very stiff posture, but the posture was neutral. Overall, Dr. Brandoff stated that the physical examination appeared to be normal other than his intentionally compromise of cervical range of motion.

Ultimately, the report concluded with a diagnosis of a resolved cervical spine sprain. He stated considering the energy and the mechanism of injury, this was notably a very low energy mechanism accident. Initially, he felt no pain and did not feel the need to seek medical attention at the time of the accident. His neck pain began approximately 24 hours later, which is common among people who are involved in low energy accidents. This represents a myofascial pain syndrome, which is universally treated with appropriate conservative care including anti-inflammatory medications, physical therapy, and other pain management modalities, all of which this claimant received. Concurrently, the plaintiff received medical imaging studies, which revealed a history of moderate to severe degenerative disease in his neck. The claimant notably had arthritis on x-ray at C5-6 with varying degrees of spondylosis and osteophyte formation at C4-5, C5-6, and C6-7, which by report seemed to be indistinguishable from each other according to the radiologist reading the MRI. He stated there was no evidence to suggest that the surgery that was indicated was performed in order to treat any injury sustained, or any exacerbation of

previous degenerative disease sustained by the accident on June 28, 2016. He stated Dr. Brisson's physical examination was extremely ambiguous and made no suggestions of causality anywhere in his extensive notes. Notably, osteophytes and spondylosis as noted on the MRI report, were indicative of chronic degenerative disease and do not occur spontaneously as a result of acute trauma, nor would they develop in the timeframe between the accident and the time that the initial MRI was obtained. Therefore, those findings, which are the basis of the indications to perform spine surgery, predated the accident without question. At the time of the examination, Dr. Brandoff opined that his physical examination was essentially normal other than spasming of the cervical spine. He further noted he was able to work in some capacity throughout the period of time that he was treated for his neck pain. He concluded that he saw no need for any further treatment related to the accident on June 28, 2016 and any subsequent disability is mild and also not causally related to the accident.

Plaintiff in opposition to the motion states that defendant has not demonstrated that plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) and that plaintiff has raised triable issues that he did indeed sustain a serious injury. Plaintiff alleges that he sustained serious injuries as a result of the subject accident.

Plaintiff, in response to defendant's arguments that the alleged injuries were caused from a 2010 accident were disputed by plaintiff's arguments that plaintiff did not sustain any injuries in that accident, nor did he undergo any treatment then or leading up to this accident in 2016.

In support of the opposition, plaintiff provide records from Steven Ross, D.O. of Physical Medicine and Rehabilitation of New York, P.C. dated November 27, 2023.

Dr. Ross noted that the plaintiff reported the pain in his neck worsened since his last evaluation and worsens with activity and motion, turning, looking upwards or downwards, sitting, standing or remaining in one position for a long period of time. He reported he still had difficulty with household activities and stated his wife now helps him complete these tasks.

The physical examination revealed tenderness to palpation, painful range of motion and anterior surgical scar. All range of motion was obtained objectively through the use of a handheld goniometer. Range of motion revealed flexion to 30 degrees (50 degrees normal corresponding to a 40% loss of cervical flexion), extension to 25 degrees (60 degrees normal corresponding to a 58% loss of cervical extension), left rotation to 35 degrees (normal 80 corresponding to a 56% loss of cervical rotation) and right rotation at 40 degrees (80 degrees normal corresponding to a 50% loss of cervical rotation), and right side bending to 20 degrees (normal 50 corresponding to a 60% loss of cervical right side bending) and left side bending to 15 degrees (50 degrees normal corresponding to a 70% loss of cervical left side bending).

Ultimately, Dr. Ross stated that the plaintiff suffered from myofascial derangement, cervical disc herniations at C3-C4, C4-C5, and C6-C7 and left C5 radiculopathy. He concluded that plaintiff should follow up with a spine specialist in light of his pain and with his continued complaints, positive examination findings, positive diagnostic test results and significantly diminished range of motion, plaintiff sustained significant and permanent injuries to the cervical spine and subsequently the prognosis for a full and complete recovery is poor.

Defendants argues that plaintiff's injuries were preexisting and degenerative in nature. Dr. Ross's opinions conflicts with the opinions of defendants' experts. He stated "I have read the report of defendants' doctors, Dr. Jared Brandoff and Dr. Michael Carciente, and I disagree with their findings and conclusion. Specifically, I disagree with defendants' doctor's opinions that Mr. Ling is not suffering from any permanent impairment or injury, that any injuries he is suffering from are as a result of a degenerative and/or pre-existing condition in Mr. Ling's cervical spine, and that Mr. Ling's surgery was not indicated to treat injuries sustained in the subject motor vehicle accident." Plaintiff's expert is to specifically address, in nonconclusory terms, a defendant's expert's opinion that the plaintiff's condition was preexisting or degenerative. *Henry v. Hartley*, 119 A.D.3d 528 (2d Dep't 2014).

In most cases, serious injury arising from a herniated disc is established through a quantitative comparison with a normal range of motion, which was provided by Dr. Ross. *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002). His statement regarding the decrease range of motion in plaintiff's spine is sufficient as it specifies the extent and degree of the decrease. *Brehaut v. Laveck*, 266 A.D.2d 927 (4th Dep't 1999).

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here, the affirmed medical reports of the parties' doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

The Court finds triable issues of fact as to the existence of serious injury. Consequently, defendant's Michael W. Mathless and Lease Plan U.S.A., Inc., motion for an order pursuant to CPLR § 3212 granting defendant summary judgment and dismissing the complaint of plaintiff Brian Ling on the grounds that there are no triable issues of fact, in that plaintiff cannot meet the serious threshold requirement mandated by Insurance Law §5102 (d) is denied.

This is the decision and order of this Court.

Dated: May 10, 2024

Hon. Ulysses B. Leverett, J.S.C.

FILED
5/13/2024
COUNTY CLERK
QUEENS COUNTY

HON. ULYSSES B. LEVERETT