At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of August 2024.

P R E S E N T:
HON. WAVNY TOUSSAINT,
Justice.

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SHELDON FULTON,

Plaintiff,

- against –

GURTEG SINGH,

Defendant.

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Index No. 504220/2020

DECISION AND ORDER

The following papers numbered 1 to read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ and Affidavits (Affirmations) Annexed	45-52
Cross Motions and Affidavits (Affirmation) Annexed	
Answers/Opposing Affidavits (Affirmations)	56-61
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Gurteg Singh ("defendant") moves (Seq. 05) for an order, pursuant to CPLR § 3212 and New York Insurance Law § 5102(d), granting summary judgement dismissing the complaint. Plaintiff Sheldon Fulton ("plaintiff") opposes the application.

BACKGROUND

On November 15, 2017, plaintiff's vehicle was struck by a vehicle owned and operated by defendant at the intersection of Lafayette and Stuyvesant Avenues in Brooklyn, New York. In February 2020, plaintiff filed a summons and complaint alleging that he sustained serious injuries as a result of the accident. Defendant filed his answer on May 29, 2020. In a subsequent Bill of Particulars dated September 15, 2020, the plaintiff listed specific injuries including a right knee meniscus tear, cartilage tears, cervical and lumbar herniations and bulges; in addition to a right shoulder sprain/strain.

THE PARTIES' CONTENTIONS

Defendant's Motion

Defendant moves pursuant to CPLR § 3212 for summary judgement to dismiss the complaint on the basis that plaintiff did not sustain a serious injury as defined under New York Insurance Law § 5102(d). Defendant argues that the medical reports establish that plaintiff did not sustain a complete loss of use of a body organ or member, and that therefore he cannot satisfy the threshold requirement by New York Insurance Law § 5102(d). Defendant disputes the significance of plaintiff's alleged injuries, and further asserts that successful surgery without permanent loss or limitation does not qualify as a permanent serious injury.

In support of his motion, the defendant submits, *inter alia*, the medical report of Dr. Salvatore Corso and plaintiff's deposition. Independent medical examiner Dr. Salvatore Corso ("Dr. Corso"), who examined the plaintiff on May 24, 2022, states the plaintiff was a restrained driver at the time of the November 17, 2017 accident and reported that he had a prior work-related accident in 2005 that caused him to sustain injuries requiring surgeries on his right knee and right shoulder. As to the current accident, the plaintiff was referred for conservative treatment, including physical therapy, but did not report if he was continuing treatment. Dr Corso also states that the alleged injuries of the plaintiff's neck, back, right shoulder, and right knee, as stated in the Bill of Particulars, have all been resolved. Dr. Corso concluded that plaintiff's range of motion had returned to normal, and that plaintiff was not currently disabled nor prevented from participating in his daily activities.[1]

Defendant also asserts the plaintiff was unemployed, had a gap in treatment, and did not meet the criteria for being medically prevented from performing activities. Defendant notes that at his deposition, Plaintiff testified that he was retired, and that he initially refused and delayed seeking treatment until two months after the accident; and that treatment lasted only two to three months. The plaintiff further testified he

[1] NYSCEF Document No. 51.

did not have any surgeries for any of his injuries[2], and that he engages in his regular activities like going fishing sometimes, but not frequently.[3] Plaintiff confirms his prior 2005 workplace accident[4] and that he continued to receive treatment for the 2005 accident at the time of the 2017 auto accident and since then, in 2018.[5] After the 2005 accident, the plaintiff also testified that he did receive treatment in the form of injections and knee and shoulder surgeries, and confirmed that he did decline having the neck and back surgeries.[6]

Defendant also argues that plaintiff's deposition establishes that plaintiff's alleged injuries were not causally related to the 2017 accident, and that no trauma was sustained. Defendant points to the fact that the plaintiff suffered a subsequent auto accident in 2018 and purportedly sustained injuries very similar to those alleged in this matter. A claim was made and that matter was settled.[7] Accordingly, defendant argues that the plaintiff cannot prove that the injuries now claimed were caused by the subject 2017 accident, rather than the 2018 accident, and that in any event, the

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[2] NYSCEF Document No. 52, pg. 35, lines 13-15.

[3] NYSCEF Document No. 52, pg. 55, lines 12-13.

[4] NYSCEF Document No. 52, pg. 40, lines 9-25; pg. 41, lines 2-16.

[5] NYSCEF Document No. 52, pg. 46; lines 12-14.

[6] NYSCEF Document No. 52, pg. 39; lines 5-15; pg. 40, lines 13-23.

[7] NYSCEF Document No. 52, pg. 53; lines 7-11.

plaintiff cannot prove that any of his injuries rise to the level of impairment sufficient to qualify under the statute or meet the requirements under the 90/180-day test.

Plaintiff's Opposition

Plaintiff contends the defendant failed to prove, as a matter of law, that he did not suffer a serious injury. While plaintiff affirms in his affidavit that he stopped treatment for the 2017 accident, he states this was because he could no longer afford the treatment costs.[8] After the no-fault benefits were terminated, plaintiff asserts it was harder to find a treating physician in his resident state of Louisiana, given this is a New York motor vehicle accident case.[9] Plaintiff contends that he continues to experience pain in his neck, back and shoulders, and that he cannot walk long distances, lift or carry heavy objects, perform household chores or other personal activities.

Plaintiff also contends that he was unable to perform substantially all of his daily activities for at least 90 out of the first 180 days following the accident, as he experienced limitations in his movement and other difficulties with sleeping at night, sitting for long periods, climbing stairs, and engaging in activities he enjoyed, such

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[8] NYSCEF Document No. 58, par. 7.

[9] NYSCEF Document No. 58, par. 1.

as fishing.[10] Plaintiff further asserts that the medical reports prepared by radiologists Dr. Christopher F. Lawrence ("Dr. Lawrence"), and Dr. Narayan B. Paruchuri ("Dr. Paruchuri")[11], along with the medical reports prepared by orthopedic surgeons Dr. Hank Ross ("Dr. Ross") (including the review of the reports of SpineCare Chiropractic)[12], and Dr. Shahid Mian ("Dr. Mian")[13], establish the serious extent of his injuries and is causally connected to the 2017 accident.

All of the foregoing, plaintiff contends, is supported by, the diagnostic films[14] taken since the accident which reveal he sustained bulging discs, herniated discs, and a meniscal tear. Plaintiff further contends that at the very least, the question of the seriousness of his injuries raises material questions of fact which prevent a grant of summary judgement.

Finally, although the plaintiff acknowledges the conclusion of Dr. Corso's report of his injuries, plaintiff contends that Dr. Corso's own examination findings contradict his conclusion of resolved injuries, as he noted tenderness and limitations

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[10] NYSCEF Document No. 56.

[11] NYSCEF Document No. 59.

[12] NYSCEF Document No. 60.

[13] NYSCEF Document No. 61.

[14] NYSCEF Document No. 56, par. 15.

in the range of motion of the plaintiff's right knee.[15] Moreover, plaintiff contends Dr. Corso's report failed to address the plaintiff's testimony regarding pain complaints; failed to address the causation of positive findings stated in the MRI reports from Dr. Lawrence and Dr. Paruchuri; and moreover, did not assess plaintiff's ability to perform customary activities during 90 of the first 180 days following the accident. With respect to the gap in treatment highlighted by the defendant, plaintiff explains he halted treatment due to financial constraints following the exhaustion of the no-fault insurance coverage.

DISCUSSION

The Standard of Review

The drastic remedy of summary judgement should be granted only if there are no triable issues of fact present (*Murray v Community House Housing Development Fund,* 233 AD3d 675, 677 [2024]). The moving party must make a prima facie case showing of entitlement to judgment as a matter of law presenting sufficient evidence in admissible form (*Sheppard-Mobley v King*, 10 AD3d 70, 74 [2d Dept 2004]; see also (*Hecker v Liebgold*, 130 AD3d 572, 573 [2d Dept 2015]). Once the moving party has made a prima facie case, the burden shifts to the opposing party to provide evidence and proof in admissible form that sufficiently establishes the existence of

[15] NYSCEF Document No. 56, par. 11-16.

triable issues of fact (*Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]). The court's role in a motion for summary judgment is not to resolve factual disputes or assess credibility, but to determine whether issues of fact are present (*Piecraft Wantagh, LLC v Willow Wood Assocs, LP*, 216 AD3d 1010, 1013 [2d Dept 2023]).

Failure of the moving party to make a sufficient prima facie case without any indications of doubt requires denial of the motion (*Demshick v Community Hous. Mgmt. Corp.*, 34 AD3d 518, 520 [2d Dept 2006]). In instances where conflicting evidence is offered on the issue of whether a plaintiff's injuries are permanent or serious, and where varying inferences may be drawn, the question of fact is for the jury to decide (*Alexander v Eldred*, 63 NY2d 460, 468 [1984]).

New York Insurance Law § 5102(d)

This matter is governed by New York Insurance Law § 5102(d), which states:

> "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 (New York Insurance Law § 5102(d))."

Here, the defendant failed to establish a prima facie entitlement to summary judgement based on the proof submitted. The defendant, as the movant in this case, did not meet the burden to prove plaintiff did not sustain a serious injury causally related to this accident. Defendant did not provide sufficient medical evidence to prove his claim that plaintiff did not sustain a serious injury as a result of this matter. Though the Defendant mentions that a gap in treatment partially proves that a serious injury was not sustained, the cessation of medical treatment isn't necessarily the final word. The law doesn't mandate a record of continued medical treatment to contest summary judgment or to establish the seriousness of alleged injuries (*Pommells v Perez*, 4 NY3d 566, 574, 577 [2005]). A plaintiff alleging a "serious injury" however, must still offer a reasonable explanation for any extended gaps or cessation in treatment (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). Here, the plaintiff alleges he was unable to afford the on-going costs of treatment.

In any event, plaintiff's opposition raised triable issues of fact as to whether plaintiff sustained a serious injury. As demonstrated in Dr. Corso's, Dr. Lawrence's, Dr. Paruchuri's, Dr. Mian's, and Dr. Ross' medical reports, there are conflicting conclusions as to the range of motion of plaintiff's right knee, lumbar spine, cervical

spine, and right shoulder. The Court cannot say whether the plaintiff's alleged limitations concerning the nature and extent of his injuries are minor or slight to the point that they should be considered insignificant within the meaning of Insurance Law § 5102(d) (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 353 [2002]). Among the examining doctors, the nature and extent of plaintiff's injuries, including whether the injuries have been resolved, vary and are in dispute, thus summary judgement cannot be granted. (*Alexander v Eldred*, 63 NY2d 460 [1984] [internal quotations and citations omitted]; *Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]).

Dr Corso reports that all injuries have been resolved and have returned to normal. Dr. Lawrence reports fluid and arthritic changes in joints in the right shoulder. Dr. Paruchuri reports bulges, herniations, and impingements in the lumbar spine and tears in the right knee. Dr. Mian reports fluid and arthritic changes in the joints, and tears in the right shoulder and right knee. Lastly, Dr. Ross reports that the plaintiff has sustained injury to his rotator cuff and bicep tendon in his right shoulder along with cartilage tears in his knee. Dr. Ross further reports that he finds that all of the plaintiff's injuries were caused by the subject accident and cannot be healed or resolved on their own. These disputes are sufficient to raise triable issues of fact regarding whether the plaintiff sustained a serious injury. When the plaintiff's

evidence raises triable issues of fact in response to the defendant's evidence, the defendant's motion for summary judgement must be denied. (*Owens v Elrac LLC*, 213 AD3d 684, 685 [2d Dept 2023]; (*Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Walker v Esses*, 72 AD3d 938, 938-939 [2d Dept 2010]).

CONCLUSION

Accordingly, it is hereby,

ORDERED that defendant's motion (Seq. 05) for an order, pursuant to CPLR § 3212 and New York Insurance Law § 5102(d), granting summary judgement dismissing the complaint, is hereby denied in its entirety.

All other arguments of the parties have been considered by the Court and are denied.

This constitutes the decision and order of the Court.

KINGS COUNTY CLERK
FILED
2024 AUG -2 A 10:26

ENTER

JSC

Hon. Wavny Toussaint
J.S.C.

KINGS COUNTY CLERK
RECEIVED
2024 AUG -2 A 9:49