Pantelogous v Ze Shen
2024 NY Slip Op 35682(U)
January 7, 2025
Supreme Court, Nassau County
Docket Number: Index No. 613855/2021
Judge: Christopher T. McGrath

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. CHRISTOPHER T. McGRATH
Justice.

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GEORGE PANTELOGOUS and IONNA PANTELOGOUS,

Plaintiffs,

-against-

ZE SHEN,

Defendant.

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IAS/TRIAL PART 28
INDEX NO. 613855/2021
MOTION NOS.: 002 & 003
SUBMITTED: 10/09/2024

DECISION & ORDER

The e-filed documents for Motion Sequences 002 and 003, listed by NYSCEF document numbers "35," through "61," have been read and considered on these motions.

Defendant, Ze Shen, (hereinafter "Defendant") moves pursuant to CPLR §3212 to dismiss the Complaint against him on the basis that Plaintiff, Ionna Pantelogous (hereinafter "Ionna"), did not sustain a serious injury under Insurance Law §5102(d). (Motion Seq. No. 002). Defendant also moves pursuant to CPLR §3212 to dismiss the Complaint against him on the basis that Plaintiff, George Pantelogous (hereinafter "George"), did not sustain a serious injury under Insurance Law §5102(d). (Motion Seq. No. 003).

Plaintiffs, George and Ionna Pantelogous, commenced this action to recover for injuries allegedly sustained as a result of a motor vehicle accident on August 11, 2021, when Ionna was a passenger in her husband, George's motor vehicle. Plaintiffs' vehicle was allegedly rear ended by Defendant's vehicle when travelling southbound on the Cross Island Parkway at or near Hempstead Avenue. The Summons and Complaint are annexed to the moving papers as Exhibit A. Issue was joined via service of Defendant's Answer with Counterclaims, which is annexed to the moving papers as Exhibit B. The counterclaims have since been discontinued.

Relevant Law Pursuant to Article 51 of the New York State Insurance Law, "serious injury" is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ or member, function, or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of his/her usual and customary

daily activity for not less than 90 days during the 180 days immediately following the occurrence of the injury. (*See* McKinney's Consolidated Laws of New York, Insurance Law §5102[d]). When moving for summary judgment on the grounds that a plaintiff has not sustained a serious injury, a defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. The plaintiff in such a situation must present objective evidence of the injury. The mere parroting of language tailored to meet statutory requirements is insufficient. Further, [. . .] a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings. Moreover, these verified objective medical findings must be based on a recent examination of the plaintiff. (*See Grossman v. Wright*, 268 A.D.2d 79, 83-84 [2d Dept. 2000] [internal citations omitted]).

To meet the threshold for serious injury, the law requires that the claimed limitation be more than minor, mild, or slight and that the claim be supported by proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. (*See Licari v. Elliott*, 57 N.Y.2d 230 [1982]; *see also Gaddy v. Eyler*, 79 N.Y.2d 955 [1992]; *Scheer v. Koubeck*, 70 N.Y.2d 678 [1987]). A minor, mild or slight limitation will be deemed "insignificant" within the meaning of the statute. (*Licari*, 57 N.Y.2d at 230; *Grossman v. Wright*, 268 A.D.2d 79, 83 [2d Dept. 2000]).

When a claim is raised under the "permanent consequential limitation of use of a body organ or member, function, or system" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable. (*See Toure v. Avis Rent A Car Systems*, 98 N.Y.2d 345, 353 [2002]). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*See id.; see also Cho v. Demelo*, 175 A.D.3d 1235 [2d Dept. 2019] [holding that the defendant's *prima facie* burden for summary judgment in a personal injury case was not met without the orthopedic surgeon's

identification of the objective test utilized to measure the plaintiff's ranges of motion in the affirmed report]). Thus, whether a limitation of use or function is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose, and use of a body part. (*See Dufel v. Green*, 84 N.Y.2d 795, 798 [1995]).

To prevail on a claim under the ninth (90/180) statutory category, a plaintiff must demonstrate through competent, objective proof a "medically determined injury or impairment of a non-permanent nature which would have caused the alleged limitations on the plaintiff's daily activities." (*Monk v. Dupuis*, 287 AD2d 187 [3d Dept. 2001]). The curtailment to usual activities must be "to a great extent rather than some slight curtailment." (*Licari*, 57 N.Y.2d at 236).

Motion Sequence No. 002 — Ionna Pantelogous

This Court will first discuss Defendant's motion for summary judgment as it pertains to Ionna's claims. In the case at bar, Ionna's Bill of Particulars alleges, *inter alia*, the following injuries: a) loss of range of motion of the cervical spine; b) loss of range of motion of the lumbar spine; c) cervical radiculopathy; and d) lumbar radiculopathy. Ionna claims that her alleged injuries fall within the following categories of §5102(d): permanent loss of use of a body organ, member, function or system (category 6); permanent consequential limitation of use of a body organ or member (category 7); significant limitation of use of a body function or system (category 8); and/or a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitutes their usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (category 9).

Ionna is now 74 years old and at the time of the accident was 70 years old. According to Ionna's testimony at her Examination Before Trial, she refused to go to the hospital after the accident and was not bleeding, nor was she bruised. She testified that after the accident she went home. Ionna went to see her primary care doctor, Dr. Vlantis, and complained of pain from her neck, through her left shoulder, down her back into her left leg. In November of 2023, she visited Dr. Vlantis and still had the same complaints. There was a gap in treatment for at least ten months in 2022. Ionna testified that George had an unrelated medical issue with his stomach which required surgery. Due to Geroge's surgery, she stopped her physical therapy treatment and does

not have any future appointments. Ionna further testified that she was not confined to her bed or home following the accident, but that as a result of her alleged injuries, she cannot lift anything heavy with her left arm, and has difficulty with her house chores. Ionna claims that the pain causes her to wear a back brace and use a back board.

Defendant's Supporting Contentions

In support of Defendant's application for summary judgment, he submits, *inter alia*, the following documents annexed to the moving papers: 1) Bill of Particulars and Supplemental Bill of Particulars; 2) Ionna's Deposition Transcript; 3) Medical Examination Report of Dr. Howard Kiernan; and 4) MRI Film Review of Dr. Russel Weinstein.

On December 26, 2023, Dr. Howard A. Kiernan, a board-certified orthopedic surgeon, performed a medical examination of Ionna. Dr. Kiernan performed objective testing including range of motion testing measured with a goniometer in accordance with AMA guidelines. Upon physical examination, he found that Ionna exhibited full range of motion in her neck, back, bilateral shoulders, elbows, wrists, hands, hips, knees, ankles, and feet. All other objective tests were negative. He also found that Ionna entered the examination with normal gait and posture, and there was no limp or foot drop present. After examining Ionna and reviewing pertinent medical records, Dr. Kiernan concluded that Plaintiff's sprains and strains were all resolved. Dr. Kiernan did not find any objective, clinical findings to support any subjective complaints of pain. Lastly, he found evidence of contributing, preexisting arthritic conditions.

Furthermore, Dr. Russel Weinstein, a board-certified radiologist, reviewed Ionna's lumbar and cervical MRI films taken on December 07, 2021, four months post-accident. Dr. Weinstein found that the MRIs of the cervical and lumbar spine exhibited chronic and degenerative findings that did not indicate any traumatic pathology. Dr. Weinstein concluded that none of the results of the MRIs could be attributed to the subject accident as no injuries were traumatic in nature.

As to the 90-180 category, Defendant maintains that the evidence establishes that Ionna has not sustained a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Additionally, Defendant maintains that Ionna's preexisting arthritic conditions, as evidenced in the Defendant's medical examination, and her substantial gaps in treatment, caused

or contributed to her alleged injuries. Defendant highlights Ionna's gap in medical treatment and cites to *Pommells v. Perez*, 4 N.Y.3d 566 (2005), which held that a plaintiff who terminates treatment following an accident they claim causes a serious injury must offer some reasonable excuse for doing so. Defendant maintains that Ionna treated inconsistently for only a few months following the accident, has not treated since 2023, and has no future appointments scheduled. Additionally, Defendant concludes that she cannot establish permanency or offer any explanation for the cessation of treatment or other than the fact that their condition had improved and did not require further medical attention.

Defendant met their *prima facie* burden establishing that Ionna did not sustain a serious injury. Ionna must now come forward with evidence to overcome the Defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law.

Ionna's Opposing Contentions

In support of Ionna's opposition to Defendant's motion, Ionna submits the following: 1) the narrative report of Gus Katsigiorgis, DO; 2) MRI Review of Ronald Wagner, MD; 3) and a compilation of various "certified medical records".

In opposition, Ionna maintains that the Defendant's motion must be denied. In further support of her position, Ionna's counsel highlights portions of Ionna's deposition testimony. Ionna testified that she stopped working at her daughter's medical practice as an assistant due to the injuries she sustained as a result of this action. In fact, Ionna annexes disability notes indicating that she was unable to return to work. As it pertains to Ionna's gap in treatment, Ionna testified that her husband George had unrelated medical issues with his stomach that required surgery, which lead her to stop physical therapy because she was unable to drive to the appointments. As to her limitations, Ionna testified that she had trouble using her left arm and left leg, lifting objects, completing house chores, cleaning properly, and using a mop or vacuum.

In support of Ionna's position, she submits the medical report Gus Katsigiorgis, DO. (*See* Affirmation in Opposition, Exhibit "A"). At her last examination on July 1, 2024, Dr. Katsigiorgis found severe restrictions in range of motions of the cervical and lumbar spine, resulting in disabilities. Dr. Katsigiorgis concluded Plaintiff was a candidate for epidural steroid injections, possibly fusion surgery. In his conclusion Dr. Katsigiorgis causally related all of the injuries to the motor vehicle accident. Dr. Kastigiorgis states in his report as follows: "Examination of the

Cervical Spine: There is paraspinal muscle tenderness. Restricted range of motion, forward flexion limited to 30 (normal 60), extension 10 (normal 50). Rotation to the left 30 (normal 80). Rotation to the right is 40 (normal 80). Positive Spurling about the left and right with pain into the trapezial region. Examination of the Lumbar Spine: Patient walks with antalgic gait. Difficulty up/down examination table. There is paraspinal muscle tenderness. Restricted range of motion, forward flexion limited to 30, extension limited to 20. Positive SLR about the left."

Ionna also refers to "other medical records" which are annexed to the opposition papers as Exhibit "B." However, Ionna does not discuss the "other medical records" which appear to be: 1) MRI reports from Stand-Up MRI of Lynbrook, P.C., with an affirmation from Dr. Ronald Wagner who interpreted the MRI of the lumbar spine and cervical spine; 2) additional MRI reports from Lenox Hill Radiology; 3) physical therapy records from Motion SM Rockville Center; and 4) medical records from Island Musculoskeletal Care, M.D., P.C.

Defendant's Responsive Contentions

In reply, Defendant argues and maintains that Dr. Katsigiorgis failed to specify how he obtained his range of motion measurements. Defendant also maintains that the Dr. Katsigiorgis failed to cite the authoritative guidelines he used for what normal ranges should be. Additionally, Defendant contends that Ionna visited Dr. Katsigiorgis on July 1, 2024, solely for the purposes of preparing opposition to the subject motion. Defendant cites to *Tinyaoff v. Kuna*, 98 A.D.3d 501 (2d Dept. 2012), which held that failure to identify the authoritative guidelines for the standard of normal ranges comparted to makes the measurements lack objectivity and the measurement is wholly speculative. Additionally, Defendant cites to *Gill v. O.N.S. Trucking*, 239 A.D.2d 463 (2d Dept. 1997), which held that failure to state what objective means used to measure plaintiff's range of motion values, such as a goniometer, renders a doctors' claims insufficient and not probative. Defendant maintains that Dr. Katsigiorgis may have merely approximated and/or may also be comparing the measurements to his belief as to what range of motion is appropriate.

Additionally, Defendant maintains that Ionna failed to raise an issue of fact with the narrative report from Dr. Katsigiorgis despite the degenerative conditions in Ionna's cervical and lumbar spines. Defendant argues that Dr. Katsigiorgis failed to address those findings completely, thus supporting the conclusion that Ionna had a preexisting degenerative condition (citing to *Rivera v. Fernandez & Ulloa Auto Group*, 25 N.Y.3d 1222 [2015]; *Sylvain v. Maurer*, 165 A.D.3d 1203

[2d Dept. 2018]; *Cavitolo v. Broser*, 163 A.D.3d 913 [2d Dept. 2018]; *Batista v. Porro*, 110 A.D.3d 609 [1st Dept. 2013]).

Furthermore, Defendant maintains that Ionna also failed to rebut Defendant's *prima facie* showing of lack of causation because Dr. Katsigiorgis opines as to causation, but in a conclusory fashion, without commenting on the degenerative findings. Defendants cites to, *inter alia*, *Jules v. Calderon*, 62 A.D.3d 958 (2d Dept. 2009) which held that a plaintiff's physician's failure to address prior and subsequent accidents and injuries renders his conclusions that the injuries and limited he noted in the plaintiff's neck and back were caused by the subject accident as speculative and insufficient to defeat a motion for summary judgment.

Defendant reiterates in his reply, that Defendant's burden was met and that Ionna did not sustain a serious injury. Defendant maintains that the 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. (*See Smeja v. Fuentes*, 54 A.D.3d 326 [2d Dept. 2008]; *Piperis v. Wan*, 49 A.D.3d 840 [2d Dept. 2008]). Also, Defendant notes that the mere existence of radiculopathy does not constitute a "serious injury" within the meaning of the no-fault statute's provision governing the threshold for tort recovery; there must be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration. (*See Foley v. Karvelis*, 276 A.D.2d 666 [2d Dept. 2000]; *Furrs v. Griffith*, 43 A.D.3d 389 [2d Dept. 2007]).

As to the 90/180 claim, Defendant maintains that although the Defendant's doctor does not comment as to Plaintiff's condition within the 90/180 period, a Defendant can establish *prima facie* entitlement to summary judgment with regards to the 90/180 category absent medical evidence by citing Ionna's own testimony, demonstrating that she was not prevented from performing all of the substantial activities constituting her customary daily activities.

Discussion

On this record, Defendant established that Ionna did not sustain a serious injury. In response, Ionna's submissions failed to create a triable issue of fact. Ionna's evidentiary submissions in opposition in general, did not set forth competent medical evidence based on objective findings and diagnostic tests sufficient to overcome Defendant's proof and create a triable factual issue on her claim that she sustained a permanent loss of use of a body organ, member,

function or system (category 6); permanent consequential limitation of use of a body organ or member (category 7); significant limitation of use of a body function or system (category 8); "significant limitation of use of a body function or system" (Insurance Law § 5102[d]). *Blanchard v. Wilcox*, 283 AD2d 821, 823-24 [3d Dept 2001]). The mere existence of a herniated or bulging 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. (See *Casco v Cocchiola*, 62 AD3d 640, 641 [2d Dept 2009]).

While in his narrative report, Dr. Katsigiorgis noted decreased ranges of motions, Dr. Katsigiorgis failed to identify the method used to measure range of motion (*See Gonzalez v Cohn*, 224 AD3d 667 [2d Dept 2024]. Additionally, the report failed to identify the objective test which was utilized to measure range of motion and, thus, does not support the limitation conclusion. (*See Saunders v Mian*, 176 AD3d 994, 995 [2d Dept 2019]. Additionally, Dr. Katsigiorgis failed to address the degenerative conditions in Ionna's cervical and lumbar spines, thus supporting the conclusion that Ionna had a preexisting degenerative condition. (*See Cavitolo v. Broser*, 163 A.D.3d 913 [2d Dept. 2018]). Furthermore, although Dr. Katsigiorgis opined as to causation, he did so in a conclusory manner, without commenting on the degenerative findings. (*See Biascochea v. Boves*, 93 A.D.3d 548, 548-549 [1st Dept. 2012]).

As to Ionna's MRI findings, while a radiologist is not required to pair MRI findings with a physical examination, the radiologist performing the MRI in question must report an opinion as to the causality of the findings. Here, the MRI reports submitted with Ionna's opposition does not causally relate the findings to this accident. (*See Collins v Stone*, 8 AD3d 321, 322 [2d Dept 2004]).

Now turning to the gap in treatment, which in reality was a cessation of all treatment, Ionna failed to offer a reasonable explanation for terminating all therapeutic measures following the accident. "While a cessation of treatment is not dispositive- the law surely does not require a record of needless treatment in order to survive summary judgment-a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so." (*Pommells v. Perez*, 4 N.Y.3d 566, 574 [2005]) Neither Ionna nor her treating Doctor explained the essential cessation of Ionna's treatment after ten months of physical therapy. While Ionna did state that there was a gap in her treatment because her husband was unable to drive her to her physical therapy, Ionna only treated a few months following the

accident and failed to seek medical attention again until after the Defendant filed this motion. (*See Pommells v. Perez*, 4 N.Y.3d 566, 574 [2005])

Additionally, Ionna's counsel annexes approximately 400 pages of medical reports and records as an exhibit in support of her opposition to the instant motion. (*See* Exhibit B, Certified Records, Affirmation in Opposition). These records are incomplete and lack organization, making it challenging to review the information efficiently. Further, Ionna's counsel fails to discuss the records and fails to explain the relevance of the annexed records. Additionally, many of these "certified records" are accompanied only by a business record certification. "[A] physician's office records, supported by the statutory foundations set forth in CPLR 4518(a), are admissible in evidence as business records. However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion or expert proof." (*Fortunato v. Murray*, 72 A.D.3d 817, 818 [2d Dept. 2010]). Treatment entries require affirmation by a person with personal knowledge of the information within the report. The certification of the medical records and reports by the records custodian of the subject medical facility are not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury. (*See Irizarry v. Lindor*, 110 A.D.3d 846, 847 [2d Dept. 2013]).

As to the ninth category of serious injury, Ionna testified she stopped working at her daughter's medical practice as an assistant due directly to the injuries she sustained as result of the accident. However, there was no competent medical evidence in the record which would support a claim that Ionna was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days as a result of the subject accident. (*See Paykina v. Golden*, 21 A.D.3d 1021, 1022, 802 N.Y.S.2d 696, 697 [2005]). Thus, Ionna did not establish she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days as a result of the subject accident. (*See Paykina v. Golden*, 21 A.D.3d 1021, 1022, 802 N.Y.S.2d 696, 697 [2d Dept. 2005]).

Accordingly, it is hereby

ORDERED that Defendant, Ze Shen's motion pursuant to CPLR §3212, to dismiss the Complaint against him on the basis that Plaintiff Ionna Pantelogous did not sustain a serious injury under Insurance Law §5102(d), **is granted.**

Motion Seq. No.003 — George Pantelogous

Defendant maintains that George did not sustain a serious injury as defined by New York State Insurance Law §5102(d) as a result of the motor vehicle accident on August 11, 2021. In support of Defendant's application, he submits the following: 1) Plaintiffs' Summons and Complaint; 2) Defendant's Answer; 3) Plaintiff's Verified Bill of Particulars and Supplemental Bill of Particulars; 4) George's Deposition Transcript with Execution Letter; 5) Dr. Kieran's Medical Examination Report and Curriculum Vitae; and 6) Dr. Weinstein's Film Reviews and Curriculum Vitae.

In the case at bar, the Bill of Particulars alleges, *inter alia*, the following injuries: loss of range of motion of the neck, back, and right knee, along with right knee tears and radiculopathy in the neck and back. George maintains that he sustained serious and permanent injuries with significant range of motion deficits which caused permanent injury. Furthermore, through the Bill of Particulars, George claims the alleged injuries fall within the following categories of §5102(d): permanent loss of use of a body organ, member, function or system (category 6); permanent consequential limitation of use of a body organ or member (category 7); significant limitation of use of a body function or system (category 8); and/or a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Additionally, George alleges "pain/strain" as an injury in the Supplemental Bill of Particulars (category 9).

George is 85 years old and at the time of the accident was 81 years old. At his deposition, George testified that after the motor vehicle accident on August 11, 2021, he never treated at the hospital or urgent care in connection with his alleged injuries. He testified that he was able to drive his vehicle home from the scene of the accident, would not go in an ambulance, and told police at the scene of the accident that he wanted to make sure his grandson got home. He further testified that the day after the accident he experienced pain throughout his body, especially his left arm and right leg. He further testified that he began course of treatment as recommended by his doctor and his doctor told him he needed surgery on his right knee. However, due to issues with his stomach, he was unable to undergo said surgery. George claims that he still has problems with his right leg as it gets numb. At the time of his deposition, George testified that he did not have any appointments scheduled in connection with the subject accident. He testified that he is unable to

bend or lift things due to an unrelated stomach issue and subsequent surgery. At no point was he confined to his bed following the accident. He did testify that he was confined to his home for one month. He also testified that as a result of his alleged injuries, he can no longer tend to his garden.

Defendant's Contentions

In support of Defendant's motion, he submitted, *inter alia*, the following: 1) a copy of the Bill of Particulars and Supplemental Bill of Paritculars; 2) George's deposition transcript; 3) the Medical Report of Howard A. Kiernan, M.D.; and 3) the MRI film review – Affirmed Report of Dr. Russell Weinstein.

On December 26, 2023, Dr. Howard A. Kiernan, a board-certified orthopedic surgeon, performed a medical examination of George. Dr. Kiernan performed objective testing including range of motion testing measured with a goniometer in accordance with AMA guidelines. Upon physical examination, he found that George exhibited full range of motion in his neck, back, and right knee. All other objective tests were negative. He also found that George entered the examination with normal gait and posture; there was no limp or foot drop was present. After examining George and reviewing pertinent medical records, Dr. Kiernan concluded that George's sprains and strains were all resolved, and although the diagnoses were properly stated, Dr. Kiernan did not find any objective, clinical findings to support any subjective complaints of pain. Lastly, he found evidence of contributing, preexisting neck and lower back conditions.

In addition, Dr. Russell Weinstein, a board-certified radiologist, reviewed George's lumbar, cervical, and right knee MRI films taken on December 7, 2021, (four-months post-accident). In further support, Defendant submits the affirmation of Dr. Weinstein. Upon a review of the MRI films, Dr. Weinstein found that the MRIs of the cervical and lumbar spine exhibited chronic and degenerative findings that did not indicate any traumatic pathology. The right knee MRI revealed chronic degenerative findings with no evidence of meniscal tear. The doctor concluded that none of the result of the MRIs could be attributed to the subject-accident as no injuries were traumatic in nature.

On this record, Defendant established that George did not sustain a serious injury. The burden now shifts to George to come forward with evidence to overcome the Defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law.

George's Opposing Contentions

Based upon these facts, George submits that there are issues of fact as to whether he sustained the "serious injury" required by the Insurance Law. In support, George submits the following: 1) the report of Dr. Gus Katsigiorgis; 2) MRI Reports of the lumbar spine and cervical spine; and 3) "certified medical records." In support of his opposition to Defendant's motion, George refers to Dr. Katsigiorgis' examination report. Dr. Katsigiorgis last exanimated George on July 1, 2024, at which time Dr. Katsigiorgis found severe restrictions in the range of motions of the cervical and lumbar spine, resulting in disabilities as well as right knee pain with locking, related to the tear in the meniscus. Dr. Katsigiorgis concluded George was a candidate for surgery to the right knee, confirming he had during initial treatment after the accident also recommended the surgery to the right knee. Further, Dr. Katsigiorgis indicated possibility of a knee replacement, and concluded that George was a candidate for epidural steroid injections, and possibly fusion surgery. Dr. Katsigiorgis causally relates all of the injures to the motor vehicle accident.

Defendant's Responsive Contentions

In reply, Defendant argues, *inter alia*, that Dr. Katsigiorgis' medical report is speculative. Defendant contends that Dr. Katsigiorgis failed to state what objective means he used to measure George's range of motion values, such as a goniometer. Furthermore, Defendant also contends that Dr. Katsigiorgis failed to identify the authoritative guidelines for the standard of normal ranges, such as AMA Guidelines. As such, Defendant maintains that the measurements lack objectivity and the measurements are whole speculative, citing to *Tinyanoff v. Kuna*, 98 A.D.3d 501 (2nd Dept. 2012); *Sullivan v. Dawes*, 28 A.D.2d 472 (2d Dept. 2006); *Quintana v. Arena Transport, Inc.*, 89 A.D.3d 1002 (2d Dept. 2011); and *Harris v. Ariel Transp. Corp.*, 865 N.Y.S.2d 73 (1st Dept. 2008). Furthermore, Defendant maintains that without an objectively diagnosed injury, a plaintiff's subjective complaints are insufficient to support a finding of serious injury.

In addition, Defendant maintains that George's doctor failed to address degenerative findings. Dr. Weinstein, Defendant's expert, reviewed George's cervical and lumbar MRIs and right knee MRI and noted that the films showed only degenerative changes. Defendant argues that George failed to raise an issue of fact with the narrative report from Dr. Katsigiorgis because despite the degenerative conditions in George's cervical and lumbar spines and right knee, Dr. Katsigiorgis failed to address those findings completely, thus supporting the conclusion that

George had a preexisting degenerative condition, citing to *Rivera v. Fernandez & Ulloa Auto Group*, 25 N.Y.3d 1222 (2015); *Sylvain v. Maurer*, 165 A.D.3d 1203 (2d Dept. 2018); *Cavitolo v. Broser*, 163 A.D.3d 913 (2nd Dept. 2018); and *Batista v. Porro*, 110 A.D.3d 609 (1st Dept. 2013).

As to George's submission of his physical therapy records, Defendant contends that physical therapy findings are insufficient to raise an issue of fact because physical therapists cannot diagnose or make a prognosis. (*See Callahan v. Shekhman*, 149 A.D.3d 454, 52 N.Y.S.2d 41 [1st Dept. 2017]). Additionally, Defendant maintains that the medical records annexed to George's opposition are inadmissible and should not be considered as business record certifications cannot validate medical contents. In *Daniels v. Simon*, (99 A.D.3d 658 [2d Dept. 2012]), the Second Department held that although office records which contain a treating physician's day-to-day business entries qualify for admission as business records if the foundational requirements of CPLR §4518(a) are satisfied, a medical report is not admissible as a business record where, as here, it contains the physician's opinion or expert proof.

Discussion

Based upon this record, George failed to offer competent medical evidence to raise a triable issue of fact as to whether he sustained a serious injury. The same evidentiary issues which are present in Ionna's submissions are also present regarding George's submissions. While in his narrative report, Dr. Katsigiorgis noted decreased ranges of motions, Dr. Katsigiorgis failed to identify the method used to measure range of motion (*See Gonzalez v Cohn*, 224 AD3d 667 [2d Dept 2024]. Additionally, the report failed to identify the objective test which was utilized to measure range of motion and, thus, does not support the limitation conclusion. (*See Saunders v Mian*, 176 AD3d 994, 995 [2d Dept 2019]. As the Defendant contends, many of the medical reports and records submitted by George in opposition to the motion are unsworn and uncertified. George's counsel annexes close to 400 pages of medical reports and records as an exhibit in support of his opposition. (*See* Exhibit B, Certified Records, Affirmation in Opposition). These records lack coherence and, as such, fail to substantiate George's position. Additionally, many of these "certified records" are accompanied only by a business record certification. "[A] physician's office records, supported by the statutory foundations set forth in CPLR 4518(a), are admissible in evidence as business records. However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the

doctor's opinion or expert proof." (*Fortunato v. Murray*, 72 A.D.3d 817, 818 [2d Dept. 2010]). Treatment entries require affirmation by a person with personal knowledge of the information within the report. The certification of the medical records and reports by the records custodian of the subject medical facility are not sufficient to properly place the medical conclusions and opinions contained in those records and reports before the court, since those opinions must be sworn to or affirmed under the penalties for perjury. (*See Irizarry v. Lindor*, 110 A.D.3d 846, 847 [2d Dept. 2013]).

While George maintains that he suffered a serious injury, the mere existence of a herniated or bulging disc, and even a tear in a tendon, is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration. (*See Piperis v. Wan*, 49 A.D.3d 840, 841 [2d Dept. 2008]). The unexplained determination by George's examining physician, that the subject accident caused the injuries and limitations is speculative and conclusory, and therefore insufficient to raise a triable issue of fact. (See Piperis v. Wan, 49 A.D.3d 840, 841 [2d Dept. 2008])

Here, although George's medical submissions indicate, *inter alia*, a low to moderate grade medical collateral ligament tear at the femur and lateral meniscal tear, George fails to submit objective medical evidence of the extent of the alleged physical limitation resulting from the injury. Additionally, George failed to annex any medical records indicating that his injuries, including the tear, were a result of this accident. (*See Piperis v. Wan*, 49 A.D.3d 840, 841 [2d Dept. 2008]). Moreover, the MRI reports submitted with George's opposition do not give an opinion as to the causality of the findings. (*See Collins v Stone*, 8 AD3d 321, 322 [2d Dept 2004]). George failed to submit credible medical proof that the tear of the meniscus of the right knee was causally linked to the subject accident. Additionally, he did not provide proof indicating that before the accident his right knee was asymptomatic. (See Jaramillo v Lobo, 32 AD3d 417, 418 [2d Dept 2006]).

As to 90/180, there was no competent medical evidence in the record which would support a claim that George was unable to perform substantially all of his daily activities for not less than 90 of the first 180 days as a result of the subject accident. (*See Paykina v. Golden*, 21 A.D.3d 1021, 1022, 802 N.Y.S.2d 696, 697 [2005]).

Accordingly, it is hereby

ORDERED, that Defendant Ze Shen's motion pursuant to CPLR §3212, to dismiss the Complaint against him on the basis that Plaintiff George Pantelogous did not sustain a serious injury under Insurance Law §5102(d), is granted.

Dated: January 7, 2024
Mineola, New York

HON. CHRISTOPHER T. McGRATH
J.S.C.

ENTERED
Jan 16 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE