SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-5

----------X

MICHAEL WEST,

Plaintiff,

Index №.: 20831/2020E

-against-

Hon. Alison Y. Tuitt

Supreme Court Justice

FC EXECUTIVE INC. and "JOHN DOE", whose true name is unknown,

Defendants.

----------X

The following papers were read on this motion (**Seq. No. 1**) for **summary judgment** submitted on October 23, 2024.

Notice of Motion – Affirmation in Support and Exhibits	NYSCEF Doc. # 12 — 20
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 23 — 31

Defendant, FC Executive Inc. (defendant), moves pursuant to CPLR 3212 for summary judgment and dismissal of plaintiff's complaint on the ground that plaintiff has failed to satisfy the "serious injury" threshold as defined by New York Insurance Law § 5102 (d).

Background

Plaintiff's complaint seeks damages for the alleged personal injuries arising out of a motor vehicle accident which occurred on February 26, 2017. Plaintiff alleges that he sustained injuries to his cervical spine, thoracic spine, lumbar spine, right shoulder, right hip, and that he has experienced post-traumatic headaches because of this accident. Plaintiff claims that he sustained a "serious injury" under the "permanent loss of use", "permanent consequential limitation", "significant limitation", and/ or "90/180" categories of injury under New York Insurance Law § 5102 (d).

Discussion

Defendant seeks summary judgment, arguing that plaintiff did not sustain a "serious injury" under any of the alleged categories of injury, and that any injury to plaintiff's right shoulder, right hip, and lumbar spine were not caused by the subject accident. Defendant contends that plaintiff's deposition testimony defeats his "90/180-day" injury claim. Defendant also argues that plaintiff's cessation of treatment prevents him from claiming a "serious injury."

In opposition, plaintiff argues that defendant failed to meet its burden because defendant's expert did not review plaintiff's medical records. Plaintiff contends that, even if

defendant had met its initial burden on the motion, the reports of plaintiff's treating physician present issues of fact exist about whether he sustained a causally related "serious injury."

The Insurance Law defines a "serious injury" as follows:

> "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" (Insurance Law § 5102 [d]).

A defendant who moves for summary judgment on the ground that plaintiff did not sustain a "serious injury" under Insurance Law § 5102 (d) "bears the initial burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002] [quotations omitted]). Defendant's evidence can include "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiffs claim" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [quotations omitted]). A defendant's medical expert whose opinion is based on a physical examination is not required to review plaintiff's medical records if the expert details the specific tests used in the examination (*see Brand v Engelista*, 103 AD3d 539, 539 [1st Dept 2013]).

To determine "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 also may 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" (*Toure*, 98 NY2d at 350).

A defendant may also meet its burden with sufficient medical evidence demonstrating that plaintiff's injuries are not causally related to the accident (*Farrington v Go On Time Car Service*, 76 AD3d 818, 818 [1st Dept 2010], citing *Pommells v Perez*, 4 NY3d 556, 572 [2005]). Once defendant meets its initial burden, the burden shifts to plaintiff to raise a material issue of

fact using objective and admissible medical evidence demonstrating that plaintiff sustained a serious injury (*Toure*, 98 NY2d at 350).

Preliminary Issue

As an initial matter, with respect to plaintiff's alleged headache injury, the Court of Appeals and First Department have held that headaches do not qualify as a "serious injury" (*see Licari v Elliott*, 57 NY2d 230, 239 [1982] ["We do not believe the subjective quality of an ordinary headache falls within the objective verbal definition of serious injury"]; *Ceruti v Abernathy*, 285 AD2d 386, 386 [1st Dept 2001] ["headaches--do not constitute 'permanent loss of use of a body organ member, function or system' or 'significant limitation of use of a body function or system' under Insurance Law § 5102 [d]"]). Therefore, this court need not address this alleged injury.

Defendant's Burden

In support of its motion, defendant submits plaintiff's deposition transcript, the affirmed radiological reports of Audrey Eisenstadt, M.D., and the affirmed orthopedic report of Howard A. Kiernan, M.D.

Defendant establishes that plaintiff did not sustain a "serious injury" to his cervical spine, thoracic spine, lumbar spine, right shoulder, and right hip through submission of Dr. Kiernan's orthopedic report. Dr. Kiernan performed an orthopedic medical evaluation of plaintiff on August 17, 2022. The evaluation revealed normal range of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, right shoulder, and right hip, with negative orthopedic testing results. Dr. Kiernan concluded that plaintiff's alleged cervical spine, thoracic spine, lumbar spine, right shoulder and right hip injuries had fully resolved prior to the examination and that plaintiff demonstrated no evidence of an orthopedic disability (*see Velazquez v City of New York*, 200 AD3d 547, 548 [1st Dept 2021] [defendants established that "plaintiff did not sustain a serious injury involving a permanent consequential and significant limitation of use by submitting the opinions of their medical experts . . . who found no evidence of significant abnormalities on physical examinations and concluded that plaintiff's sprains and strains had resolved"]). Contrary to plaintiff's contention, Dr. Kiernan was not required to review plaintiff's medical records (*see Brand*, 103 AD3d at 539).

Defendant also establishes that any injury to plaintiff's lumbar spine, right shoulder, and right hip was not caused by the accident through its submission of Dr. Eisenstadt's radiological

reports. Dr. Eisenstadt reviewed an MRI of plaintiff's lumbar spine performed on April 14, 2017, and MRIs of plaintiff's right shoulder and right hip performed on December 4, 2017. According to Dr. Eisenstadt, plaintiff's MRIs revealed no evidence of traumatic injury and plaintiff's claimed lumbar spine, right shoulder, and right hip injuries are not causally related to the subject accident. Therefore, defendant demonstrates that plaintiff's claimed lumbar spine, right shoulder, and right hip injuries were not causally related to the subject accident (*see Brito v Bethlehem Haulage, LLC*, 232 AD3d 533, 534 [1st Dept 2024] [finding defendants established that plaintiff's injuries were not caused by accident by submitting expert radiologist opinion who opined that plaintiff's injuries "were degenerative, consistent with wear and tear, and not causally related" to accident]).

Defendant also establishes a cessation in plaintiff's treatment. Plaintiff testified that he was last treated three to four years before his deposition on September 8, 2022 (plaintiff deposition tr at 46). Thus, defendant shifts the burden to plaintiff to "offer some reasonable explanation" for plaintiff's cessation of treatment (*see Bianchi v Mason*, 179 AD3d 567, 567 [1st Dept 2020], quoting *Pommells*, 4 NY3d at 574).

Defendant also demonstrates entitlement to dismissal of plaintiff's "90/180-day" injury claim. Plaintiff's bill of particulars and deposition testimony establish that he was confined to his home for only one week after the accident (plaintiff deposition tr at 47), which does not meet the minimum duration necessary to maintain a 90/180-day injury claim (*see Newell v Javier*, 220 AD3d 487, 487 [1st Dept 2024] [finding that allegation that plaintiff was confined to home and bed for two months after accident and testimony that this period was "maybe a couple weeks" defeats 90/180-day claim]).

Plaintiff's Opposition

Plaintiff fails to raise a triable issue of fact regarding whether he sustained a "serious injury." Plaintiff's treating physician, Aric Hausknecht, M.D., initially evaluated plaintiff on June 21, 2017, less than four months after the accident. At that time, Dr. Hausknecht found significant range of motion loss of plaintiff's cervical spine, thoracic spine, and lumbar spine, which he found to be causally related to the subject accident. Plaintiff's only other medical evidence was Dr. Hausknecht's report based on an August 9, 2017, evaluation of plaintiff, during which no range of motion testing was performed. Plaintiff's evidence of documented limitations for approximately four months after the accident is insufficient to raise an issue of fact regarding

whether he sustained a "significant" or "permanent consequential limitation of use" (*compare Lamar-Vanterpool v Devora*, 2021 WL 2175971, at *2 [Sup Ct Bronx County 2021] [finding that three and a half months of documented range of motion restrictions was insufficient to constitute "significant limitation"], *affd* 200 AD3d 421 [1st Dept 2021]; *with Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013] [finding that documented limitations for one year and three months after accident sufficient to raise issues of fact as to "significant limitation" category of injury]). Plaintiff submits no evidence of limitations of his right shoulder and right hip (*see Morales v Cabral*, 177 AD3d 556, 557 [1st Dept 2019] [holding that plaintiff failed to raise issue of fact as to "serious injury" as plaintiff did not submit evidence to support claim that she suffered limitations in use]). Plaintiff also submits no evidence of limitations based on a recent examination, which defeats his claims that he sustained a "permanent consequential limitation" (*see Alston v Elliott*, 159 AD3d 575, 576 [1st Dept 2018] [finding that plaintiff could not demonstrate permanent consequential limitation of use as he failed to offer recent evidence of limitations]).

Plaintiff does not provide any explanation for his cessation of treatment, and therefore fails to raise a triable issue of fact regarding whether he sustained a serious, rather than minor, injury (*see Pommells*, 4 NY3d at 572-574; *Ortiz v Boamah*, 169 AD3d 486 [1st Dept 2019] ["a gap in treatment may be dispositive on a serious injury threshold motion, unless it is explained"]; *Auquilla v Singh*, 162 AD3d 463, 464 [1st Dept 2018]).

Plaintiff also fails to raise an issue of fact as to his "90/180-day" injury claim. Plaintiff's physician's finding that he was disabled after the accident, without offering any basis or providing any details regarding what aspects of his job he could not perform or addressing his ability to perform activities of daily living, is insufficient to raise an issue of fact as to his "90/180-day" injury claim (*see Abreu v Miller*, 181 AD3d 435, 435 [1st Dept 2020] [finding that plaintiff's physician's statement that she was "disabled" was insufficient to sustain 90/180-day claim, as physician "did not indicate why plaintiff was 'disabled' from her job, explain which aspects of the job she could not perform, or address her ability to perform activities of daily living"]; *Blake v Portexit Corp.*, 69 AD3d 426, 426-427 [1st Dept 2010] ["plaintiff's chiropractor's affidavit, which stated that plaintiff was 'totally disabled,' was too general to raise an issue of fact"]).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing plaintiff's complaint for failure to satisfy a "serious injury" threshold under Insurance Law § 5102 (d) is **GRANTED**, and the complaint is dismissed.

Dated: 5/30/25

Hon. A. Y. Tuitt
ALISON Y. TUITT, J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTIONS ARE.....	☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE