SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. George J. Silver, Justice PART 22

JORGE LUETTO and EGNUS GARCIA

vs.

ROSA ABREU

INDEX NO. 102646/2009

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for SUMMARY JUDGMENT

	Papers Numbered
Notice of Motion/Order to Show Cause — Affidavits— Exhibits	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits, Cross Motion	4, 5

Cross-Motion: ☐ Yes ■ No

Upon the foregoing papers, it is ordered that this motion

Defendant Rosa Abreu ("Defendant") moves pursuant to CPLR §3212 for an order granting summary judgment and dismissing Plaintiffs Jorge Luetto and Egnus Garcia's (collectively "Plaintiffs") Complaint on the grounds that Plaintiffs did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). Under New York Insurance Law §5102(d), a "serious injury" is defined 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

"[A] defendant can establish that [a] 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" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "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" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate:... MOTION IS ■ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Plaintiff Luetto

Plaintiff Luetto alleges in his Verified Bill of Particulars that, as a result of the accident, he sustained a serious injury including lateral meniscus tear, chondral lesion of patella and trochlea and synovitis of the right knee, right knee arthroscopy, debridement of the lateral meniscus, chondroplasty of patella and trochlea and synovectomy, oblique tear of the medial meniscus body, knee joint effusion, sprained wrist, cervical lordosis reversal and headaches. In support of this motion, Defendant submits the expert reports of Dr. Ravi Tikoo, Dr. Robert Orlandi and Dr. Audrey Eisenstadt. Dr. Tikoo conducted a neurological examination of Plaintiff on May 11, 2011. Dr. Tikoo conducted a physical examination including straight leg raising which was negative in the sitting position. He reported that straight leg raising was positive in the standing position, but stated that this was non-physiological and a voluntary limitation. Dr. Tikoo concluded that Plaintiff had a history of cervical and lumbosacral strain, soft tissue injuries of the right knee and right wrist and subjective complaints of headaches. Dr. Tikoo further stated that Plaintiff did not have significant clinical evidence of neuropathy, radiculpathy or disc herniation from the accident.

Dr. Robert Orlandi performed an orthopedic examination of Plaintiff on April 12, 2011. He conducted a physical examination including range of motion testing and found Plaintiff's range of motion to be normal in the cervical spine, shoulders and right knee. Dr. Orlandi found a limitation in Plaintiff's lumbar forward flexion. However, he stated that this was due to self restriction and was not compatible with straight leg raising results. Dr. Orlandi concluded that Plaintiff had an excellent prognosis with a resolved cervical and lumbar strain and no clinical residuals post right knee arthroscopy. Dr. Audrey Eisenstadt reviewed the MRI films of Plaintiff's right knee and lumbar spine. She stated that the lumbar MRI revealed dessication at L5-S1 level and no bulges or herniations were identified. Dr. Eisenstadt reported that the findings predated the accident and were indicative of degenerative conditions, not related to trauma. She also concluded that the right knee MRI revealed degenerative signal changes, no joint effusion or other abnormality. Dr. Eisenstadt stated that the knee findings were longstanding in origin and not related to trauma. Defendant also attaches a claims report, which indicates that Plaintiff had a prior accident on June 23, 2006 and two subsequent accidents on September 5, 2007 and January 7, 2008.

To warrant a finding of serious injury, a limitation must be "consequential" or "significant" (*see* Insurance Law § 5102 [d]; *Licari v Elliott*, 57 NY2d 230, 236 [1982]). As such, Defendants' submissions satisfy their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In opposition to Defendants' motion, Plaintiff submits his own affidavit and a letter from a witness to the accident, Tara Almante. However, the witness statement goes to the liability issue, which is not a part of the present motion. Plaintiff also submits Dr. Steven Struhl's expert report. Dr. Struhl states that MRI films revealed an oblique tear of the medial meniscus body with knee joint effusion. He performed surgery on October 11, 2007. Dr. Struhl's post operative diagnosis was "lateral meniscus tear, chondral lesion of patella and trochlea and synovectomy." Dr. Struhl concludes that Plaintiff's knee injury is permanent and was caused by the July 8, 2007 accident.

Plaintiff further submits uncertified reports interpreting his right knee MRI films taken on August 20, 2007. The report finds small to moderate knee joint effusion, an oblique tear of the body of the medial meniscus contacting the superior surface. Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*see Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Thus, the MRI report is not sufficient to defeat a motion for summary judgment (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

In order to rebut defendant's *prima facie* case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *Toure v Avis Rent A Car Sys.*, Inc., 98 NY2d 345, 350 [2002]). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

Plaintiff has not submitted any medical evidence contemporaneous with the accident. Dr. Struhl's report does not provide any indication of Plaintiff's condition immediately after the accident. Thus, Plaintiff failed to submit admissible contemporaneous evidence of the extent and duration of the alleged limitations in his right knee (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 905 NYS2d 31 [1st Dept 2010]; *Lopez v Abdul-Wahab*, 67 AD3d 598, 599, 889 NYS2d 178 [2009]). Further, Plaintiff simply did not address the affidavit of Defendant's expert, Dr. Eisenstadt stating that the spinal and right knee conditions revealed on MRI films were the result of a degenerative condition unrelated to the accident (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]). Plaintiff similarly fails to provide any medical opinion relating to the allegation of prior and subsequent accidents. These deficiencies render Plaintiff's submissions insufficient to rebut Defendant's *prima facie* case.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars indicates that Plaintiff was incapacitated from his employment from July 8, 2007 to August 6, 2007. Further, he does not provide any medical evidence to corroborate his alleged daily activity restrictions and as such, summary judgment is granted under the 90/180 category.

To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiff did not establish the existence of a cognizable claim for "permanent loss of use," since his medical evidence did not establish a total loss of use (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [2010]).

Plaintiff Egnys Garcia

Plaintiff alleges in her Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury including L4-L5 disc herniation impinging on the thecal sac, cervical multilateral disc bulges, C5-C6 fusion and posttraumatic headaches. In support of this motion, Defendant submits the expert reports of Dr. Ravi Tikoo, Dr. Robert Israel and Dr. Audrey Eisenstadt. Dr. Tikoo performed a neurological examination of Plaintiff on May 11, 2011. He noted mild tenderness in the lumbar spine, but no associated spasm. Dr. Tikoo also reported that straight leg raising was normal. He diagnosed Plaintiff with a history of lumbosacral strain and subjective complaints of headaches without any objective findings to substantiate the complaints. Dr. Tikoo concluded that Plaintiff had a normal neurological examination.

Dr. Israel conducted an orthopedic examination of Plaintiff on May 9, 2011. He conducted range of motion testing, using a goniometer, of Plaintiff's cervical spine, lumbar spine and right knee. Dr. Israel did not find any limitations in Plaintiff's range of motion. He concluded that Plaintiff had a resolved sprain of the cervical and lumbar spine and the right knee. Dr. Eisenstadt reviewed Plaintiff's cervical and lumbar

spine MRI films. She noted that Plaintiff had a congential cervical spine fusion at C5-C6, which was present at her birth. Dr. Eisenstadt also reported mild cervical straightening unrelated to possible trauma. She did not find any abnormalities on Plaintiff's lumbar spine MRI film.

To warrant a finding of serious injury, a limitation must be "consequential" or "significant" (*see* Insurance Law § 5102 [d]; *Licari v Elliott*, 57 NY2d 230, 236 [1982]). As such, Defendant's submissions satisfy their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In opposition to Defendant's motion, Plaintiff submits her own affidavit and the expert report of Dr. Bozena Augustyniak. Dr. Augustyniak states that Plaintiff's MRI films revealed L4-L5 herniation impinging upon the thecal sac, a posterior bulge of the C4-C5 and straightening of the cervical lordosis. Dr. Augustyniak concludes that Plaintiff's injuries are permanent and caused by the July 8, 2007 accident. Plaintiff additionally submits the uncertified copies of her MRI reports. The reports indicate findings of posterior herniation at L4-L5 impinging on the thecal sac and posterior bulge of the C4-C5 disc, fusion of C5-C6 and straightening of the cervical lordosis. Additionally, Plaintiff submits a Further Supplemental Affirmation in Opposition, attaching an uncertified copy of a "follow-up" data sheet from an examination of Plaintiff on September 8, 2011. Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*see Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Thus, the Supplemental Affirmation, even if properly served, is not sufficient to defeat a motion for summary judgment (*see Grasso v Angerami*, 79 NY2d 813, 580 NYS2d 178 [1991]).

In order to rebut defendant's *prima facie* case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *Toure v Avis Rent A Car Sys.*, Inc., 98 NY2d 345, 350 [2002]). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

Dr. Augustyniak does not opine as to the limitations in Plaintiff's range of motion, nor does she imply that she has even conducted range of motion testing. Dr. Augustyniak's report merely refers to the MRI films and does not state the findings of any objective testing that she herself conducted, either recently or contemporaneous with the accident. In any event, even if Plaintiff's alleged limitations were attributable to disc herniations that are not degenerative in nature, "bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*DeJesus v Paulino*, 61 AD3d 605, 608 [2009], *citing Pommells*, 4 NY3d at 574). Plaintiff has not submitted sufficient medical evidence to rebut Defendant's *prima facie* case.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Verified Bill of Particulars and affidavit indicate that Plaintiff was incapacitated from her employment from July 8, 2007 until August 6, 2007. However, Plaintiff has not provided any medical evidence to show that she was restricted in substantially all of her activities for a period greater than ninety

(90) days.

To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiff did not establish the existence of a cognizable claim for "permanent loss of use," since her medical evidence did not establish a total loss of use (*see Byong Yol Yi v Canela*, 70 AD3d 584, 585 [2010]).

Accordingly, it is hereby,

ORDERED that Defendant's motion for summary judgment is granted as to all Plaintiffs and Plaintiffs' complaint is dismissed in its entirety with costs and disbursements to Defendant as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendant is to serve a copy of this order upon Plaintiffs with Notice of Entry, within 30 days.

This constitutes the decision and order of the court.

FILED

APR 25 2012

COUNTY CLERK'S OFFICE
NEW YORK

APR 23 2012

Dated:

New York, New York

George J. Silver, J.S.C.

GEORGE J. SILVER