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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

HERMES BIDKAR SERPAS AND REINA DE LA PAZ VILLALOBOS,

Plaintiffs,

-against-

MOTION SEQ. NO.: 002
MOTION DATE: 7/6/12

ROBERT A. BELL AND BRANDI M. BELL,

INDEX NO.: 25083/09

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Motion by defendants for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint on the grounds that plaintiffs have failed to establish that they sustained a serious injury as defined by Insurance Law § 5102(d) is determined as hereinafter provided.

This is an action to recover damages for personal injuries allegedly sustained in a motor vehicle accident on August 15, 2009 at approximately 1:18 p.m., on Northern Boulevard, "15 feet west of Shelter Rock Road" in the Town of North Hempstead, County of Nassau.

In the bill of particulars, plaintiff Hermes Bidkar Serpas ("Serpas") alleges that he sustained the following injuries:

- Torticollis and straightening due to spasm of the cervical spine;
- Disc bulge at C3-4;
- Central disc herniation at C4-5, C5-6 and C6-7;
- Left paracentral C7-T1 disc herniation;
- Disc Bulges at L2-3 and L3-4;
- Central disc herniations at L1-2, L4-5 and L5-S1

Plaintiff, Reina De La Paz Villalobos (hereinafter "Villalobos") alleges that she sustained the following injuries:

- Joint effusion of the right shoulder;
- Possible encroachment of the right shoulder;
- Tears of the supraspinatus tendon of the right shoulder;
- Partial tear subscapulars tendon of the right shoulder;
- Joint effusion of the right knee;
- Tear, body of the lateral meniscus;
- Tear, body of medial meniscus;
- Grade II signal, posterior horn of the medial meniscus;
- Focal Central herniation at C6-7, creating impingement of the neural canal;
- Chest

Defendants now move for summary judgment dismissing the complaint as against them.

Serpas

As a proponent of the summary judgment motion, movants had the initial burden of establishing that plaintiff did not sustain a causally related serious injury under the permanent consequential limitation of use, significant limitation of use and 90/180-day categories. *(See Toure v Avis Rent a Car Sys.,* 98 NY2d 345, 352 [2002]). Defendants' medical expert must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. (*Browdame v. Candura*, 25 AD3d 747, 748 [2nd Dept 2006]).

Defendants, in order to establish *prima facie* entitlement to judgment submitted, the affirmed medical reports of Dr. Leon Sultan, an orthopedist, dated October 22, 2009; Dr. Arnold Illman, an orthopedist, dated August 10, 2011 and Dr. Erik J. Entin, a neurologist, dated December 27, 2011.

These doctors found no significant limitations in the ranges of motion with respect to any of plaintiff's claimed injuries, and no other serious injury within the meaning of Insurance Law § 5102(d) causally related to the collision (*see Toure v Avis Rent a Car Sys.,* 98 NY2d 345, 352 [2002]; *Gaddy v Eyler,* 79 NY2d 955, 956-957 [1992]). Upon

the foregoing Court finds that the defendant's have met their prima facie burden of proof.

The burden now shifts to plaintiff to demonstrate, by the submission of objective proof of the nature and degree of the injury, that he sustained a serious injury or there are questions of fact as to whether the purported injury, in fact, is serious. *Perl v Meher,* 18 NY3d 208 [2011].

In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as serious injury within the meaning of Insurance Law §5102(d). *See Toure v Avis Rent A Car Sys., Inc., supra; Scheer v Koubek*, 70 NY2d 678, 679 [1987]; *Munoz v Hollingsworth,* 18 AD3d 278, 279 [1st Dept 2005].

Plaintiff must come forth with objective evidence of the extent of alleged physical limitation resulting from injury and its duration. That objective evidence must be based upon a recent examination of the plaintiff (*Sham v B&P Chimney Cleaning*, 71 AD3d 978 [2nd Dept 2010]; *Cornelius v Cintas Corp.* 50 AD3d 1085 [2nd Dept 2008]; and upon medical proof contemporaneous with the subject accident. *(Perl v Meher, supra*; *Ferraro v Ridge Car Service*, 49 AD3d 498 [2nd Dept 2008].

Even when there is medical proof, when contributory factors interrupt the chain of causation between the accident and the claimed injury, summary dismissal of the complaint may be appropriate. *Pommells v Perez,* 4 NY3d 566, 572 [2005]. 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. *Dufel v Green*, 84 NY2d 795, 798 [1995].

Based on the record submitted, plaintiff Serpas has raised a triable issue of fact by submitting, among other things, an affirmation of Igor Cohen, M.D., dated May 4, 2012 describing a medical examination conducted contemporaneously (September 16, 2009) with the collision, and a re-evaluation conducted on March 20, 2012. Dr. Cohen's affirmation demonstrates that there is a triable issue of fact as to whether the collision caused injuries to the plaintiff that were serious injuries under the "permanent consequential limitation" or "significant limitation" of use categories of Insurance Law §5102(d) (*see Evans v Pitt*, 77 AD3d 611 [2nd Dept 2010], *lv to app dism.* 16 NY3d 736 [2011]. Specifically, Dr. Cohen stated, in pertinent part, as follows:

My current diagnosis, based on the in-office examinations,

MRI's and EMG/NCV results, is as follows: was post-concussion syndrome; post-traumatic migraine headaches; dizziness/vertigo; cervicobrachial syndrome; thoracic spine pain and lumbar myofascitis; disc bulging at C3-4; central disc herniations from C4 through T1, disc bulges from L2 through L4, disc herniations from L1-2 and L4 through S1; Frank Spinal Stenosis at C6-7 and C7-T1; and from L3 through S1; sub-acute left L5 radiculopathy; right shoulder derangement; right shoulder supraspinatus tendon impingement; and right subscapularis tendon tendonitis; a mild right sensorimotor and borderline left sensory demyelinating median nerve neuropathy at the wrist and left sensory Carpal Tunnel Syndrome.

It is my expert medical opinion that the injuries, as diagnosed, are directly and causally related to the motor vehicle accident of August 15, 2009. It is further my expert medical opinion that the disc pathology, as diagnosed via MRI's, is consistent with my clinical findings and that those injuries are permanent in nature. It is my expert medical opinion that the injuries as diagnosed have rendered the patient permanently disabled with regard to the functioning of his cervical, thoracic and lumbar spine and his right shoulder. It is further my expert medical opinion that the said injuries, as diagnosed, including the limitations of motion in the cervical, thoracic and lumbar spine and right shoulder as they are still present some two years post accident can only be considered permanent as they continue to inhibit the patient's ability to carry out normal activities of daily living involving sitting, standing, bending, walking and/or strenuous physical activities. It is further my expert medical opinion that limited ranges of motion and the injuries diagnosed are permanent and have resulted in a significant limitation of use of the right shoulder and cervical,

thoracic and lumbar spine.

Since plaintiff established that at least some of his injuries satisfy the "no-fault" threshold, "it is unnecessary to address whether [his] proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment." *Linton v Nawaz,* 14 NY3d 821, 822 [2010]; *McLelland v Estevez,* 77 AD3d 403 [2nd Dept 2010].

Finally, plaintiff has not sustained his burden under 90/180 day category which requires plaintiff to submit objective evidence of a "medically determined injury or enforcement of a non-permanent nature which prevents the injured person from performing substantially all of the natural 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." (Insurance Law §5102[d]).

"When construing the statutory definition of a 90/180 day claim, the words 'substantially all 'should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment." (*Thompson v Abbasi,* 15 AD3d 95 [1st Dept 2005]; *Gaddy v Eyler, supra*).

In his affidavit, plaintiff avers that "as a result of the accident I was out of work for approximately two weeks and when I returned to work I could no longer perform my duties as a landscaper and I lost my job. . . . Currently, I am a truck driver and work for CRM Express." (Par. 6 of Serpas' Affidavit).

Plaintiff's medical expert did not state that he was disabled, unable to work or unable to perform daily activities for the first 90 days out of 180 days. *See, Perl v Meher, supra; Judd Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010].

Villalobos

In support of their motion, defendants submit, *inter alia,* an affirmed medical report of Arnold Illman, M.D., dated August 10, 2011; and an affirmed medical report of Erik J. Entin, M.D., dated December 27, 2011.

In opposition to the motion, plaintiff Villalobos submits her affidavit dated May 31, 2012; an affirmation of Igor Cohen, M.D. dated May 4, 2012; and an affidavit of Robert Donadt, M.D., dated June 1, 2012.

As to Dr. Donadt's affidavit, defendants assert that the court should not consider same as plaintiffs have never disclosed Dr. Donadt as a treating healthcare provider, nor

have plaintiffs ever provided authorizations to obtain Dr. Donadt's records with respect to plaintiff Villalobos. Further, plaintiffs have offered no excuse for the late disclosure nor have plaintiffs supplemented their bill of particulars to claim that plaintiff Villalobos' right shoulder surgery was proximately caused by the subject accident. Indeed, defendants have only now learned of Dr. Donadt's involvement and plaintiff Villalobos' surgery, well after the note of issue and the instant motion were filed and more than a year after the alleged treatment occurred. Based upon this fact alone, defendants argue that it is well within this Court's discretion to disregard both Dr. Donadt's affidavit and plaintiff Villalobos' right shoulder surgery. (*See Kopeloff v Arctic Cat, Inc.*, 84 AD3d 890 [2nd Dept 2011].

In light of the fact that plaintiff Villalobos' bill of particulars alleges injury to her right shoulder, the claim that the accident required her to undergo shoulder surgery was not shown. Under these circumstances, plaintiff Villalobos is directed to supplement her bill of particulars, submit to a further deposition and a further physical examination, and defendants are granted leave to renew their motion as to plaintiff Villalobos upon the completion of the late discovery.

Defendants' argument that they are entitled to summary judgment on the grounds that the accident was the result of an "act of God" (*see Abish v Cetta*, 155 AD2d 495 [2nd Dept 1980]; has no bearing on whether plaintiffs sustained a serious injury as defined by Insurance Law § 5102(d). God's actions may affect healing but, under New York Law, not creation of the condition.

In view of the foregoing, defendants' motion for summary judgment dismissing the complaint as against Serpas is **denied.** As to Villalobos, defendants' motion is denied without prejudice to renewal upon completion of discovery.

This constitutes the Order ~~of the~~ Court.

Dated: November 9, 2012

J.S.C.