SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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GERALD COOPER, Index No.: 151997/2014

Plaintiff, Decision and Order

-against-

ELLIOT CAMPBELL,

Defendant.

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PAUL A. GOETZ, J.:

This action arises out of an accident that occurred on November 26, 2013, when plaintiff Gerald Cooper sustained injuries after he was struck by a car, owned and operated by defendant Elliot Campbell, while crossing the street. Defendant moves, pursuant to CPLR 3212, for an order granting summary judgment in favor of defendant on the issue of damages and for any possible claim of economic loss, and dismissing the complaint on the ground that the plaintiff has not sustained a "serious injury," as required by New York's No-Fault Law (Insurance Law § 5102 [d]). As set forth below, the motion is granted.

BACKGROUND AND FACTUAL ALLEGATIONS

On the date of the accident, plaintiff left his job as an electrician around 5:30 p.m. After he got off the subway, and as he was crossing Amsterdam Avenue, he was struck by defendant's car. Plaintiff was transported by ambulance to St. Luke's Hospital Emergency Department. Plaintiff testified that he received xrays and that he had no broken bones. He advised the hospital that he was experiencing pain in his back, both arms and right knee.

Plaintiff is 43 years old and maintains that he has never injured his back before. The hospital notes indicate that plaintiff was experiencing tenderness to his lower back and right knee. Plaintiff was discharged that same day and advised not to go back to work for one week. A week after the accident, plaintiff went back to the hospital for a follow-up and was instructed not to lift anything heavy and to see a doctor if he still experienced pain.

Plaintiff returned to work approximately two weeks after the accident. The second supplemental verified bill of particulars states that plaintiff was confined to bed

for approximately one week after the accident. Defendant's exhibit G at 1.

Plaintiff states that, prior to the accident, he "did heavy-duty and physically strenuous work as an electrician's helper and supervisor. My job duties required me to carry heavy materials, fish for wires, run wiring, install light fixtures and intercoms, and check others' work." Plaintiff's exhibit F, plaintiff's aff, ¶ 11. However, when he returned to work, he could no longer perform his job duties as a result of his injuries. He claims that, although he was provided with lighter-duty tasks, his back pain was excruciating and he could not perform the tasks, even with a back brace.

Prior to the accident, plaintiff claims that he regularly worked 100-hour weeks. After the accident, plaintiff contends that he was unable to sustain that many hours of work. Plaintiff alleges that, in March 2014, he was terminated because he was unable physically to perform the duties that he had been hired to do.

Plaintiff states that he saw Dr. Samuel Cho (Cho), an orthopedist, for lower back pain in February 2014. Although Cho suggested injections, plaintiff states that he did not feel comfortable with that. Cho further suggested naproxen and physical therapy. Plaintiff did not take the naproxen, as it upset his stomach. Plaintiff did not return to Cho until November 2014, and did not see a physical therapist until February 2015. He claims, "[a]fter the holidays, I found a physical therapy provider relatively close to home that would accept my No-Fault insurance coverage. I went to physical therapy appointments . . . for approximately three months." Plaintiff's aff, ¶ 26. Plaintiff explains that personal problems, as well as other unrelated and urgent medical conditions, took priority over physical therapy and back treatment.

Plaintiff states that he has been employed in various odd jobs since his accident, but that none of them paid as much as the jobs he could perform prior to his accident. As he can allegedly no longer lift anything heavy or perform strenuous activity, plaintiff can no longer gain employment as a "journeyman" electrician, electrician's helper, supervisor or construction worker. He alleges that he "can no longer play with my children and my nephew the same way I did before this accident . . . . I cannot even pick up my three-year-old nephew because of my back pain." *Id.*, ¶ 40.

In his bill of particulars, plaintiff is alleged to suffer from, among other things, "L5-S1 disc herniation. At L4-L5, Plaintiff has a mild diffuse disc bulge, mild posterior element spondylosis, mild aubarticular zone stenosis, and some inferior foraminal encroachment on the left." Defendant's exhibit E, first supplemental verified bill of particulars at 1. Plaintiff alleges that all injuries are permanent and will require further treatment, including a surgical repair of the herniation at L5-S1. Plaintiff further asserts a 90/180-day claim in his verified bill of particulars. After his initial complaint, plaintiff withdrew any potential claim for right leg or shoulder injury.

In support of his motion for summary judgment, defendant submits the report of Dr. Stuart Hershon (Hershon), among other medical reports. At defendant's request,

Hershon performed an orthopedic examination of plaintiff on September 3, 2015. Hershon's report indicates that plaintiff "currently complains of occasional low back pain and right knee pain." Defendant's exhibit H at 1. After examining plaintiff and reviewing plaintiff's medical records, Hershon concluded that plaintiff has no current disability. He noted, "It is my opinion that the claimant's complaints referable to his lumbar spine and right knee are subjective. There is no evidence of any accident related orthopaedic disability." Defendant's Exhibit H at 3. Hershon tested the range of motion in plaintiff's cervical spine, thoracic spine, lumbar spine, right knee and left knee, and found them all to be within normal range.

According to Hershon, although there was a causal connection between the accident and plaintiff's initial complaints, there is no causal connection between the accident and plaintiff's current complaints, which are subjective. Hershon concluded that plaintiff did not require any additional medical treatment at this time. Hershon's diagnosis was "S/P cervical sprain resolved, thoracic sprain resolved and lumbar sprain resolved; S/P contusion to right knee resolved." *Id.*

Defendant also submits Dr. Jonathan Lerner's (Lerner) review of an MRI taken of plaintiff's lumbar spine on March 8, 2015. Lerner concluded that the lumbar vertebrae were aligned normally and that there was no causal relationship between plaintiff's accident and the findings on the MRI. Lerner found the following:

> "1. At L4-L5, there is a mild diffuse bulge eccentric to the left with effacement of the thecal sac and mild left neural foraminal narrowing.
> 2. At L5-S1, there is a moderate size diffuse disc bulge with mild central stenosis. The neural foramina are patent bilaterally."

Defendant's exhibit I at 2.

Lerner noted that the findings at the L4-L5 and L5-S1 intervertebral discs were "consistent with degenerative disc disease and suggestive of chronic degenerative process as opposed to an acute traumatic event[,] . . . disc bulges in the lumbar spine will be seen in up to 64% of asymptomatic individuals, thus findings are frequently nonspecific." *Id.*

In opposition to defendant's motion, plaintiff provides the expert report of Dr. Edwin Richter, III (Richter), a physiatrist. Richter examined plaintiff on August 29, 2016, and states that he reviewed multiple medical records, including Cho's records, Lerner's report, plaintiff's March 8, 2015 MRI, Hershon's report and plaintiff's physical therapy records.

In his report, Richter contends that, post accident, plaintiff has "resultant lumbar disc herniation with associated chronic lower back pain and radiculopathy." Plaintiff's exhibit J at 2. Richter measured plaintiff's range of motion with a goniometer, and found that plaintiff demonstrated a decreased range of motion as a result of the accident. He wrote, "[l]umbar ranges of motion included flexion 35 degrees (normal 90

degrees), and extension 15 degrees (normal 25 degrees)." *Id.* Richter believes that plaintiff will need "continued medical care" as a result of the accident, and estimates how much the medical care could be expected to cost over the years.

Richter's report states that plaintiff's "Mount Sinai Radiology records were reviewed. These included 3/8/15 lumbar spine MRI report with impression of L5-S1 herniation with no evidence of cord progression." Plaintiff's exhibit J at 1. Richter further notes that Cho's records were reviewed, and that "[l]umbar examination was notable for flexion to about 40 degrees and extension to 20 degrees with pain at the end of the range of motion. Conservative care was prescribed." *Id.*

Richter concludes that the "findings described above" are the result of plaintiff's accident. *Id.* at 3. He states the following, in relevant part:

> "Notably [plaintiff] had no prior history of lower back pain and had been able to perform physically heavy work in the past. His x-ray in the emergency department on the day of the accident did not show any degenerative changes. It is therefore reasonable to attribute his symptoms to the accident rather than to a degenerative process which would typically be associated with a gradual onset of symptoms over a prolonged period of time rather than acutely developing as they did for [plaintiff]."

Id. at 3.

DISCUSSION

I. Serious Injury

> "To recover damages for noneconomic loss related to personal injury allegedly sustained in a motor vehicle accident, 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 Insurance Law § 5102 (d), but also that the injury was causally related to the accident."

Valentin v Pomilla, 59 AD3d 184, 186 (1st Dept 2009) (internal quotation marks and citation omitted).

In pertinent part, a "serious injury" has been defined as permanent loss of use of a body organ, a significant limitation of use of a body function, or an "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).

II. Summary Judgment

"To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a serious injury." *Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 (1st Dept 2011) (internal quotation marks and citations omitted). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that the plaintiff's injury was caused by a pre existing condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818, 818 (1st Dept 2010).

Once defendant meets his initial burden, plaintiff must then demonstrate a triable issue of fact as to whether he sustained a serious injury within the meaning of Insurance Law § 5102 (d). *Shinn v Catanzaro*, 1 AD3d 195, 197 (1st Dept 2003). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion. *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 (2002). Further, where defendant has alleged that the injuries are due to a preexisting degenerative condition, plaintiff has "the burden of coming forward with evidence addressing the defendant['s] claimed lack of causation." *Valentin v Pomilla*, 59 AD3d at 186.

Significant Limitation Category:

Here, the record indicates that defendant made a prima facie showing that plaintiff did not sustain a serious injury under the significant limitation category. As noted above, defendant provided an affirmed report from Hershon, an orthopedist. Hershon concluded that, although plaintiff's initial symptoms were caused by the accident, plaintiff did not suffer any permanent injuries. Plaintiff was diagnosed as having resolved sprains, with no accident-related orthopedic disability. Hershon found plaintiff to have normal ranges of motion in the affected areas of the body. The court notes that "defendant['s] orthopedic expert properly provided objective bases for his conclusions that plaintiff['s] ranges of motion were normal . . . [by listing] the tests he performed and recorded ranges of motion expressed in numerical degrees and the corresponding normal values." *Spencer v Golden Eagle, Inc.*, 82 AD3d at 591.

Lerner stated that plaintiff's MRI revealed no causal relationship between the accident and the findings, which were consistent with degenerative disc disease. Plaintiff argues that Lerner did not take into account that plaintiff did not suffer from any back pain prior to the accident. However, citing to a medical journal, Lerner does state that disc bulges in the lumbar spine will be seen in up to 63% of asymptomatic individuals.

In opposition, as set forth below, plaintiff does not raise a triable issue of fact that he sustained a serious injury. Richter does not sufficiently address causation, and

instead, selectively quotes from the records of the other physicians in the course of crafting his report. For example, Richter reviewed the March 8, 2015 MRI report, that was written by Dr. Lawrence Tanenbaum (Tanenbaum) and sent to Cho. Richter quotes from Tanenbaum's report that there was a L5-S1 herniation. However, he does not quote from the other portion of the report that states, in pertinent part: "The conus appears at the L1 position. There is no visualized cord compression. There is loss of disc signal at L5-S1 compatible with degenerative change." Plaintiff's exhibit M at 1. Richter alleges that he relied on this report in making his determination about plaintiff's injury. However, Richter selectively quotes from Tanenbaum's report, and does not address either Tanenbaum's or Lerner's finding of degeneration.

Richter surmises that, as plaintiff did not experience back pain prior to the accident, the accident must be the cause. He further bases his conclusion on the xray taken right after plaintiff's accident. However, Richter's report is speculative, as Richter cherry-picks portions of the doctors' reports that align with his opinion, and does not address plaintiff's doctors' opinions with respect to degeneration. "Consequently, there is no objective basis for concluding that the present physical limitations and continuing pain are attributable to the subject accident rather than to the degenerative condition." *Valentin v Pomilla*, 59 AD3d at 186; *see also Stevens v Bolton*, 135 AD3d 647, 648 (1st Dept 2016) ("Plaintiff failed to raise a triable issue of fact as to her claimed cervical and lumbar spine injuries, since her physicians did not address defendant's proof of preexisting degeneration, which was shown in her own MRI reports"); *see also Malupa v Oppong*, 106 AD3d 538, 539 (1st Dept 2013) ("Plaintiff's claims of persisting pain and limitations in her left hand are unsupported by any objective evidence of injury").

Similarly, Richter cites to a portion of Cho's notes from February 2014, where Cho opines that plaintiff exhibited a limited range of motion. However, Richter does not include or address Cho's subsequent report dated November 2014, where Cho concludes that plaintiff has a "full range of motion." Plaintiff's exhibit K at 1. Richter also does not mention or explain the discrepancy in both Cho's and Hershon's conclusion that plaintiff had a full range of motion. Courts have found that, "[a]bsent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's conclusion that plaintiff's condition is causally related to the subject accident is mere speculation, insufficient to support a finding that such a causal link exists." *Valentin v Pomilla*, 59 AD3d at 186 (internal quotation marks and citation omitted).

In addition, to assist in his evaluation, Richter claims that he reviewed the records produced during plaintiff's physical therapy treatment, which note that plaintiff had a reduced range of motion. However, plaintiff's physical therapy records cannot be used to raise an issue of fact, as "uncertified and unaffirmed medical records [are] inadmissible." *Green v Domino's Pizza, LLC*, 140 AD3d 546, 546 (1st Dept 2016) (citation omitted).

In any event, records alleging the existence of a disc bulge or herniation are "not evidence of serious injury in the absence of objective proof of the extent of the alleged

physical limitations resulting from the injury, and its duration." *Luetto v Abreu*, 105 AD3d 558, 559 (1st Dept 2013) (internal quotation marks and citation omitted).

Permanent Injury

Plaintiff has further failed to raise a triable issue of fact that he suffered a serious injury, in the form of a permanent injury, pursuant to Insurance Law § 5102 (d). Although plaintiff argues that he set forth a claim of permanent loss of use, plaintiff and his experts only allege that plaintiff "sustained limitations." Plaintiff does not claim that he suffers from a "total loss of use" of his back. *See Byong Yol Yi v Canela*, (70 AD3d 584, 585 [1st Dept 2010]) (Plaintiff "failed to raise a triable issue of fact as to his claim that he sustained a permanent loss of use of a body organ, member, function or system. Such loss must be total . . .").
90/180-day claim

"[A] defendant can establish prima facie entitlement to summary judgment on [the 90/180-day] category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that [plaintiff] was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period." *Elias v Mahlah*, 58 AD3d 434, 435 (1st Dept 2009).

Defendant has established prima facie, through plaintiff's own testimony, that plaintiff did not sustain a 90/180-day injury, which prevented him from performing "substantially all of his usual and customary daily activities during the requisite period." *Merrick v Lopez-Garcia*, 100 AD3d 456, 457 (1st Dept 2012) (internal quotation marks and citation omitted).

Plaintiff's testimony indicates that he was confined to bed for one week and that he returned to work two weeks after the accident. In addition, when plaintiff did return to work, he alleges that he was provided with "lighter-duty" tasks. *See e.g. Byong Yol Yi v Canela,* 70 AD3d at 584 (Defendant's prima facie showing is made, where plaintiff testified that "he was not confined to bed and home and returned to work within the first 90 days following his accident"); *see also Pakeman v Karekezia*, 98 AD3d 840, 841 (1st Dept 2012) (internal quotation marks and citations omitted) ("Working light duty is fatal to a 90/180-day claim").

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff states, in his affidavit, that he experiences daily back pain and that he cannot pick up his nephew or participate in recreational sports. However, this affidavit does not raise a triable issue of fact, "because plaintiff's statement is unsupported by medical evidence and because the activities listed therein do not constitute substantially all of his activities." *Blake v Portexit Corp.*, 69 AD3d 426, 427 (1st Dept 2010) (internal citation omitted); *see also Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 (1st Dept 2008) ("Although he testified that he was advised by his physicians to refrain from landscaping and heavy lifting, and that he was somewhat restricted in the activities of his daily living, such evidence is insufficient to raise a triable issue of fact").

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing this complaint, on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5012 (d), is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: APR 13 2017

ENTER:

PAUL A. GOETZ, J.S.C.