NEW YORK SUPREME COURT - COUNTY OF BRONX

Mot. Seq. 02
Mot. Seq. 03

AUG 29 2011

PART 19

Case Disposed	☒
Settle Order	☐
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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ROACH, ROBERT

Index Nº. **0306230/2009**

- against -

Hon. **LUCINDO SUAREZ**,
Justice.

CITYWIDE MOBILE RESPONSE CORP.

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The following papers numbered 1 to **17** read on this motion, **SUMMARY JUDGMENT LIABILITY** Noticed on **March 28, 2011** and duly submitted as No. **53** on the Motion Calendar of **August 19, 2011** and the following papers numbered **18** to **22** read on this motion, **REARGUE/RENEW/RESETTLE/RECONS** Noticed on **April 21, 2011** and duly submitted as No. **54** on the Motion Calendar of **August 19, 2011**

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed **(Motion Sequence # 2)**	1, 2, 3	
Answering Affidavit and Exhibits	4	
Replying Affidavit and Exhibits	5, 6	
Notice of Cross-Motion - Order to Show Cause - Exhibits and Affidavits Annexed	7, 8, 9, 10, 11	
Answering Affidavit and Exhibits	12, 13, 14, 15, 16	
Replying Affidavit and Exhibits	17	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed **(Motion Sequence # 3)**	18, 19, 20	
Answering Affidavit and Exhibits	21	
Replying Affidavit and Exhibits	22	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, plaintiff's motion for partial summary judgment on liability (Motion Sequence # 2), defendants' cross-motion for summary judgment dismissing plaintiff's complaint, and defendant's motion seeking renewal (Motion Sequence # 3) are consolidated for decision herein and disposed of in accordance with the annexed decision and order.

Dated: **08/25/2011**

Hon. _____
LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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ROBERT ROACH,

Plaintiff,

- against -

CITYWIDE MOBILE RESPONSE CORP., JENNIFER RICH, and BRIAN CALDWELL,

Defendants.

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DECISION AND ORDER

Index No. 306230/2009

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated March 4, 2011 and the affirmation and exhibits submitted in support thereof (Motion Sequence # 2); the affirmation in opposition dated April 5, 2011 of defendants Citywide Mobile Response Corp. and Jennifer Rich; plaintiff's reply affirmation dated August 3, 2011 and the exhibit annexed thereto; the amended notice of cross-motion dated May 24, 2011 of defendants Citywide Mobile Response Corp. and Jennifer Rich and the affirmation, physicians' affirmed reports (2) and exhibits submitted in support thereof; the affirmation in support of defendant Brian Caldwell dated April 11, 2011; the affirmation in support of defendant Brian Caldwell dated May 25, 2011; plaintiff's affirmation in opposition dated July 29, 2011 and the physician's affirmation and exhibits annexed thereto; the reply affirmation dated August 18, 2011 of defendants Citywide Mobile Response Corp. and Jennifer Rich; and the notice of motion dated March 29, 2011 of defendant Brian Caldwell and the affirmation and exhibits submitted in support thereof (Motion Sequence # 3); the affirmation in opposition dated April 11, 2011 of defendants Citywide Mobile Response Corp. and Jennifer Rich; the reply affirmation dated April 11, 2011 of defendant Brian Caldwell; and due deliberation; the court finds:

This action stems from a motor vehicle accident that occurred on March 22, 2009 at the

intersection of Second Avenue and East Twenty-Third Street, New York, New York. Plaintiff was a passenger in a vehicle owned and operated by defendant Brian Caldwell ("Caldwell") when it was involved in a collision with an ambulance owned by defendant Citywide Mobile Response Corp. ("Citywide") and operated by defendant Jennifer Rich ("Rich") (collectively "Citywide").

Plaintiff now moves pursuant to CPLR 3212 for partial summary judgment against defendants Citywide and Rich on their liability for causing the accident (Motion Sequence # 2). Citywide and Rich cross-move for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury," as defined in Insurance Law § 5102(d). Caldwell moves pursuant to CPLR 2221 for leave to renew on the basis that a change in law affects the court's prior determination that denied Caldwell's motion for summary judgment (Motion Sequence # 3). The motions and the cross-motion are consolidated for decision herein as they involve common questions of law and fact.

Plaintiff alleges in his verified bill of particulars to have sustained injuries including a torn medial and lateral meniscus of the left knee with chondromalacia and synovitis; disc herniations at L3-L4 through L5-S1; disc bulges at L1-L2 and L2-L3; disc herniations at C3-C4 and C5-C6; a disc bulge at C6-C7; and sprains and pain. Plaintiff underwent arthroscopic surgery on his left knee, a left knee intrarticular injection, and epidural steroid injections to his spine. Plaintiff also admits he was confined to his bed and his home for one week after the accident. He claims to have sustained injuries in the categories of 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; and a medically determined injury or impairment of a non-permanent nature that prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety (90) of the first one hundred eighty (180) days after the accident ("90/180 claim").

In support of the motion, Citywide submits copies of plaintiff's deposition transcript and medical records and affirmed reports from orthopedic surgeon Robert Israel, M.D. and neurologist Maria Audrie De Jesus, M.D. The opinion of radiologist Lewis M. Rothman, M.D., who reviewed plaintiff's MRI films taken five weeks after the accident, is unsworn and unaffirmed and is therefore inadmissible. *See* CPLR 2106; *Offman v. Singh*, 27 A.D.3d 284, 813 N.Y.S.2d 56 (1st Dep't 2006).

Dr. Israel performed an orthopedic evaluation of plaintiff on June 11, 2010. His examination revealed normal ranges of motion without tenderness or spasm to palpation in the cervical, thoracic and lumbar spine. Tests such as cervical compression, Spurling's, and straight leg raising were all negative. Examination of the left knee after surgery revealed two well-healed portals with no tenderness or effusion and range of motion within normal limits. He determined that plaintiff's spine sprains had resolved and that the status of his left knee was post-arthroscopic surgery. Dr. Israel opined that plaintiff had no disability as a result of the accident and medical treatment was unnecessary. There was no permanency or residuals related to the accident, and Dr. Israel concluded plaintiff was capable of performing his work and daily living activities without restriction.

Dr. De Jesus performed a neurological examination of plaintiff on June 28, 2010. She found plaintiff's motor, reflex, sensory and gait and coordination skills were normal. Examination of the neck, thoracic and lumbar spine revealed normal ranges of motion with no tenderness or muscle spasm. Dr. De Jesus opined that plaintiff's cervical, thoracic and lumbar sprains/strains had resolved and there was no need for treatment. She found no evidence of a neurological permanency or disability after an otherwise normal neurological examination and concluded plaintiff could perform his usual occupation and daily living activities without restriction.

Although plaintiff's medical records are not certified, "a defendant may rely upon unsworn medical reports and uncertified records of an injured plaintiff's treating medical care providers in order

to demonstrate the lack of serious injury." *Elshaarawy v. U-Haul Co. of Miss.*, 72 A.D.3d 878, 881, 900 N.Y.S.2d 321, 324 (2d Dep't 2010). Plaintiff's lumbar spine MRI confirmed disc herniations at L3-L4 and L5-S1 and disc bulges at L1-L2 and L2-L3. The scan also revealed mild degenerative endplate changes, marginal osteophytes at multiple levels, and degeneration of lumbar intervertebral discs. The cervical spine MRI showed multilevel disc dessication and facet degenerative changes causing mild spinal stenosis and neural foraminal narrowing. Disc herniations were confirmed at C3-C4 and C5-C6 and a disc bulge was found at C6-C7. The left knee MRI showed degenerative tears of the posterior horn of the medial and lateral meniscus and sprains of the medial collateral ligament, distral suprapatellar tendon, and anterior cruciate ligament. The findings were suggestive of early arthritic disease. Plaintiff's other medical records reveal complaints of back and knee pain prior to the accident.

Plaintiff testified at his deposition that he was unemployed when the accident occurred. He admitted he was diagnosed with psoriatic arthritis several years before the accident. The condition has caused pain in his back and left knee, and he treated the condition with prescription painkillers and anti-inflammatory medicine. Plaintiff testified he was confined to his home for only two days after the accident.

Citywide has met its burden of establishing that plaintiff did not sustain a serious injury through the affirmed reports of his medical experts. *See Porter v. Bajana*, 82 A.D.3d 488, 918 N.Y.S.2d 414 (1st Dep't 2011); *La Rosa v. Gomez*, 84 A.D.3d 665, 924 N.Y.S.2d 59 (1st Dep't 2011). Citywide has also demonstrated entitlement to summary judgment on plaintiff's 90/180 claim based on his deposition testimony and verified bill of particulars. *See Dennis v. New York City Tr. Auth.*, 84 A.D.3d 579, 923 N.Y.S.2d 473 (1st Dep't 2011); *Lopez v. Eades*, 84 A.D.3d 523, 921 N.Y.S.2d 858 (1st Dep't 2011).

The burden now shifts to plaintiffs to demonstrate, through objective proof, the nature and

degree of the injury sustained or that there are questions of fact the purported injury was "serious." *See Charley v. Goss*, 54 A.D.3d 569, 863 N.Y.S.2d 205 (1st Dep't 2008), *affirmed*, 12 N.Y.3d 750, 904 N.E.2d 837, 876 N.Y.S.2d 700 (2009). In opposition, plaintiff submits an affirmation from Howard Levy, M.D. and an unsigned report from neurologist Douglas Schottenstein, M.D. dated October 15, 2009.

Plaintiff fails to raise a triable issue of fact that he sustained a permanent consequential or significant limitation of use of a body function or system. "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 A.D.3d 605, 608, 878 N.Y.S.2d 29, 32 (1st Dep't 2009); *Arjona v. Calcano*, 7 A.D.3d 279, 776 N.Y.S.2d 49 (1st Dep't 2004). Similarly, a torn meniscus, standing alone, is not evidence of a serious injury. *See Gibbs v. Hee Hong*, 63 A.D.3d 559, 881 N.Y.S.2d 415 (1st Dep't 2009).

The report of Dr. Schottenstein is unsigned and inadmissible. *See* CPLR 2106; *Burgos v. Vargas*, 33 A.D.3d 579, 822 N.Y.S.2d 297 (2d Dep't 2006). There is no indication that Drs. Israel and De Jesus expressly relied on it in forming their opinions nor did they submit the report with their own reports. *See Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660, 905 N.Y.S.2d 31(1st Dep't 2010). Even if the report were considered, Dr. Schottenstein's examination of plaintiff seven months after the accident is insufficient to establish a limitation of range of motion contemporaneous with the accident. *See Soho v. Konate*, 85 A.D.3d 522, 925 N.Y.S.2d 456 (1st Dep't 2011); *Rossi v. Alhassan*, 48 A.D.3d 270, 851 N.Y.S.2d 193 (1st Dep't 2008); *Thompson v. Abbasi*, 15 A.D.3d 95, 788 N.Y.S.2d 48 (1st Dep't 2005). Although plaintiff testified he received treatment from numerous physicians immediately after the accident, none of those records were submitted. Dr. Schottenstein also failed to identify the objective methods he used to measure the range of motion. *See Gibbs v. Hee Hong*, *supra*; *Lloyd v. Green*, 45

A.D.3d 373, 846 N.Y.S.2d 29 (1st Dep't 2007). Dr. Schottenstein did not account for or acknowledge plaintiff's arthritis as a possible contributing factor. He offered no opinion as to the permanency of the injuries to plaintiff's cervical and lumbar spine, and plaintiff has not submitted the results of a more recent medical examination to rebut Citywide's expert findings of a full range of motion in the spine. *See Shu Chi Lam v. Dong*, 84 A.D.3d 515, 922 N.Y.S.2d 381 (1st Dep't 2011); *Townes v. Harlem Group, Inc.*, 82 A.D.3d 583, 920 N.Y.S.2d 21 (1st Dep't 2011); *Thompson v. Abbasi, supra.*

Dr. Levy's examination of plaintiff's left knee seven months after the accident is also insufficient to constitute objective proof contemporaneous with the accident of a limitation or restriction, which is a prerequisite even where plaintiff has undergone surgery. *See Soho v. Konate, supra.* His more recent examination of plaintiff revealed pain and weakness in the left knee, but Dr. Levy did not identify what objective tests or methods, if any, he used in making those findings. *See Lloyd v. Green, supra.* Similarly, Dr. Levy did not perform any range of motion tests to refute Citywide's expert findings of a full range of motion in the left knee. *See Shu Chi Lam v. Dong, supra.* While Dr. Levy concluded that plaintiff would suffer permanent limitations in walking or performing high-impact activities, he did not "explain the significance of his findings, or provide a sufficient description of the qualitative nature of the limitations based on the normal function and use of the knee." *See Colon v. Vincent Plumbing & Mech., Co.*, 85 A.D.3d 541, 542, 925 N.Y.S.2d 458, 459 (1st Dep't 2011). Furthermore, Dr. Levy failed to exclude plaintiff's psoriatic arthritis as a possible cause of his more recent complaints. Neither plaintiff nor Dr. Levy offered an explanation as to the lack of medical treatment after surgery, *see Zhijian Yang v. Alston,* 73 A.D.3d 562, 903 N.Y.S.2d 4 (1st Dep't 2010), and plaintiff testified at his deposition that he felt "zero" pain after surgery.

Plaintiff also fails to raise an issue of fact in the category of permanent loss of a body organ, member, function or system. To establish a claim for the permanent loss of use, only a total loss of use

is compensable. *See Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001). Here, Dr. Levy's opinion that plaintiff was permanently partially disabled is insufficient to establish he sustained a total loss of use of the left knee.

As to his 90/180 claim, both Dr. Schottenstein and Dr. Levy examined plaintiff beyond the statutory period. Plaintiff offers no other objective medical proof sufficiently contemporaneous with the accident to establish he was unable to perform substantially all his daily living activities. *See Taylor v. Am. Radio Dispatcher*, 63 A.D.3d 407, 880 N.Y.S.2d 54 (1st Dep't 2009); *Rossi v. Alhassan*, *supra*.

Since plaintiff is unable to meet the threshold for serious injury, summary judgment is granted to Caldwell as well. *See Ikeda v. Hussain*, 81 A.D.3d 496, 916 N.Y.S.2d 109 (1st Dep't 2011); *Taylor v. Vasquez*, 58 A.D.3d 406, 871 N.Y.S.2d 89 (1st Dep't 2009).

In light of the foregoing, plaintiff's motion for partial summary judgment on the issue of Citywide's liability for causing the accident and Caldwell's motion for renewal are denied as moot.

Accordingly, it is

ORDERED, that the cross-motion of defendants Citywide Mobile Response Corp. and Jennifer Rich for summary judgment dismissing plaintiff's complaint is granted (Motion Sequence # 2); and it is further

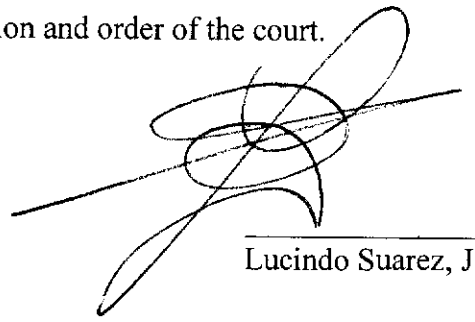
ORDERED, that the motion of plaintiff Robert Roach for partial summary judgment on the issue of the liability of defendants Citywide Mobile Response Corp. and Jennifer Rich for causing the accident is denied as moot ("Motion Sequence # 2); and it is further

ORDERED, that the motion of defendant Brian Caldwell for leave to renew the decision and order of the undersigned dated September 7, 2010 is denied as moot; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendants Citywide Mobile Response Corp. , Jennifer Rich, and Brian Caldwell dismissing plaintiff's complaint.

This constitutes the decision and order of the court.

Dated: August 25, 2011



Lucindo Suarez, J.S.C.