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SHORT FORM ORDER

INDEX No. 11-11679
CAL No. 14-00230MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-7-14
ADJ. DATE 10-16-14
Mot. Seq. # 002 - MD

EDELMIRO MEDINA and DAVID PAFUNDI,

Plaintiffs,

- against -

LEONARD PETRELLA and ISLAND READY MIX, INC.,

Defendants.

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Mineola, New York 11501

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Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-16; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 17-32; Replying Affidavits and supporting papers 33-34; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendants Leonard Petrella and Island Ready Mix, Inc. for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint on the basis that plaintiffs, Edelmiro Medina and David Pafundi, have not sustained serious injuries as defined by Insurance Law § 5102 (d), is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs, Edelmiro Medina and David Pafundi, in a motor vehicle accident that occurred on March 28, 2011, on County Road 46 at or near its intersection with Victory Avenue in Brookhaven, New York, when plaintiff Medina's vehicle was struck in the rear by the vehicle owned by defendant Island Ready Mix, Inc., and operated by defendant Leonard Petrella.

The defendants now seek summary judgment on the basis that the plaintiffs' claimed injuries fail to meet the threshold imposed by Insurance Law § 5102 (d). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such proof has been offered, the burden then shifts

to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, and lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102 (d), " '[s]erious injury' means 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 90 days during the 180 days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

On a motion for summary judgment to dismiss a complaint for failure to set forth a *prima facie* case of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In support of this motion, the defendants submitted, *inter alia*, an attorney's affirmation; copies of the pleadings and plaintiffs' bill of particulars; the sworn reports of Peter Chiu, M.D. dated July 25, 2011 concerning his independent physical medicine and rehabilitation examination of Edelmiro Medina, Isaac Cohen, M.D. concerning his independent orthopedic examination of Edelmiro Medina, Sumeer Sathi, M.D. concerning his independent neurologic examination of Edelmiro Medina, Peter Keuskamp, M.D. dated September 28, 2011concerning his independent neurologic examination of David Pafundi, Isaac Cohen, M.D. dated January 23, 2014 concerning his independent orthopedic examination of David Pafundi, and Sumeer Sathi, M.D. dated December 4, 2013 concerning his independent neurologic examination of David

Pafundi; and unsigned but certified transcripts of the examination before trial of Edelmiro Medina dated February 7, 2013, and David Pafundi dated February 7, 2013, which are not objected to by plaintiff.

Based upon a careful review of the evidentiary submissions, it is determined that defendants have not demonstrated *prima facie* entitlement to summary judgment as to either category of injury as defined by Insurance Law § 5102 (d) as to either plaintiff.

It is noted that Dr. Peter Chiu has not submitted a copy of his curriculum vitae or otherwise qualified as an expert in this matter. Although defendants submitted certain sworn reports in which the defendants' physicians indicate that there were various medical records and MRI studies and EMG reports which were reviewed in reaching their opinions, in part, as to both plaintiffs, none of those records, reports, or studies have been provided with the moving papers. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which are not in evidence, and that the expert testimony is limited to facts in evidence (*see* ***Allen v Uh***, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom***, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts, Inc.***, 194 Misc 2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2005]). Said records, reports, and studies are not in evidence, leaving this Court to speculate as to their contents, precluding summary judgment as to either plaintiff.

It is further noted that as to plaintiff Medina, Dr. Chiu and Dr. Cohen set forth differing normal range of motion values for lumbar flexion raising factual issues concerning which normal value is accurate and whether or deficits were then present, based upon application of the findings. Dr. Sathi set forth different cervical range of motion values for left and right rotation from those set forth by Dr. Chiu and Dr. Cohen, raising further factual issues which preclude summary judgment. As to plaintiff Pafundi, Dr. Keuskamp set forth a normal lumbar flexion range of motion value which differed from those values set forth by Dr. Chiu and Dr. Cohen.

DAVID PAFUNDI

By way of the verified bill of particulars, plaintiff David Pafundi alleges that as a result of the subject accident, he sustained injuries consisting of: posterior disc bulge at C2-3 encroaching upon the ventral aspect of the thecal sac and lateral recess; straightening and loss of normal cervical lordosis; disc herniation at C4-5 encroaching upon the ventral aspect of the thecal sac and lateral recesses bilaterally; disc herniation at C5-6 encroaching upon the thecal sac and impinging upon the left ventral aspect of the cord and mildly deforming its ventral margin; herniation at C6-7 encroaching upon the ventral aspect of the thecal sac and abutting the ventral aspect of the cord; pain in the bilateral trapezius, pain radiating into the right upper extremity with weakness; myofascitis; nerve root injury; right C7 nerve irritation; pain discomfort and tenderness; significant decrease in range of motion; traumatic aggravation of prior asymptomatic condition; T10-11 posterolateral disc herniation encroaching upon the right ventral aspect of the thecal sac; T5-6 disc herniation deforming the thecal sac; T6-7 to T12 disc herniations, with pain, discomfort and significantly decreased range of motion; T11-12 disc herniation encroaching upon the ventral aspect of the thecal sac; L1-2 through L4-5 disc bulges encroaching upon the thecal sac and lateral

recesses bilaterally; L5-S1 disc herniation encroaching upon the medial margin of the right S1 nerve root; pain radiating down the lower extremities; myofascitis; nerve root injury; pain, discomfort, tenderness and spasms; significantly decreased range of motion; straightening and loss of normal lordosis; headaches; difficulty walking; right wrist pain; abnormal and antalgic gait secondary to pain; right median sensory neuropathy; right carpal tunnel syndrome; right knee joint effusion; grade 2 signal in the right knee with posterior horns of both medial and lateral menisci; and significant decreased right knee range of motion.

Dr. Keuskamp on September 24, 2011 conducted an independent neurologic examination on David Pafundi approximately six months after the subject accident. He indicated in his report that the plaintiff was a 34-year-old male who was a passenger in a stopped pick up truck when it was struck in the rear. He was seen at Brookhaven Memorial Hospital emergency room for back pain and stiffness, and suffered increased neck, mid, and lower back pain the following morning when he woke up. He was seen at Eastern Island Medical Care and started on a regimen of physical therapy, acupuncture, and chiropractic treatments. MRIs revealed evidence of right lateral herniation at T10, T11, and T12 through L5, with disc bulges and central disc herniation at L5-S1. A cervical spine MRI report revealed disc bulges at C2-3, bulges and ridges at C4-5, and C5-6, with ridge and disc herniation at C6-7. Dr. Keuskamp, in obtaining range of motion measurements of plaintiff's cervical and lumbar spine, reported significant restrictions in the cervical spine in all directions, and in the lumbar spine on flexion. No thoracic spine range of motion measurements were reported by Dr. Keuskamp. While Dr. Keuskamp stated that the plaintiff has a prior history of neck injury, he also stated that plaintiff's residual neck pain and stiffness is nonspecific and more likely related to his pre-existing disc disease than from his cervical spine sprain as a result of the March 28, 2011 accident. The opinion is conclusory, and Dr. Keuskamp does not indicate the basis for such opinion or that he reviewed prior cervical spine studies to substantiate the extent of any pre-existing disc disease. Dr. Keuskamp did not comment upon Mr. Pafundi's alleged radicular injuries. It is additionally noted that although Dr. Keuskamp opined that there is no evidence of clinically significant disc disease and residual low back discomfort due to residual effects of a back sprain, he opined that the plaintiff would benefit from about two more months of physical therapy of the cervical spine and two more cervical epidural injections over a two month period. Dr. Keuskamp also stated that with regard to Mr. Pafundi's thoracic spine, he could make no further statements without a personal review of the thoracic spine MRI with and without contrast. Therefore, it is not known whether Dr. Keuskamp's medical opinion would change should he conduct such review. Such factual issues preclude summary judgment.

Dr. Cohen conducted an orthopedic examination of Mr. Pafundi. Dr. Cohen stated that the records reviewed indicate that the plaintiff was involved in an accident on October 22, 1990, a second accident on July 31, 1999 involving a right upper extremity; and a third accident on July 7, 2002. Dr. Cohen did not set forth the nature of plaintiff's injuries, if any, relating to the first and third accidents. Dr. Cohen made reference to prior injuries purportedly sustained by the plaintiff contained in the records available for review, but he did not review the actual records of plaintiff's treating physician and diagnostic tests and studies, leaving this Court to speculate as to the nature and extent of those purported previous injuries, precluding summary judgment. While Dr. Cohen stated that all changes documented on the cervical spine MRI of April 7, 2012 were present on the MRI of February 12, 2007, none of those reports have been provided. He continued that a repeat MRI of plaintiff's thoracic spine on May 4, 2011 demonstrated similar findings, but he does not set forth those findings, indicate what he meant by "similar," and whether or not there were additional findings or levels involved, or change in the size of the herniations or bulging of those

involved discs. Thus, there are factual issues concerning whether or not the subject accident caused additional injury or an aggravation of any prior or pre-existing conditions, as alleged by the plaintiff.

Dr. Sathi conducted an independent neurologic exam of Mr. Pafundi and noted that on October 22, 1990, the plaintiff was treated for syncope, a right hand injury on July 31, 1999, neck pain following a motor vehicle accident on July 7, 2002, and neck and back pain following the subject motor vehicle accident on March 28, 2011. He stated that at the time of the subject accident, Mr. Pafundi was being treated with pain medication prescribed by Dr. Elfiky, a neurologist, and with intermittent chiropractic care for chronic neck pain related to the accident in 2002. Since the subject accident, the plaintiff has been under the care of neurologist Dr. Telang and pain management physician, Dr. Kechejian, and has received numerous trigger point injections and epidural injections to the cervical and lumbar spine. Dr. Sathi stated the plaintiff denied any previous mid or low back pain of significant degree, although he thinks he may have had some treatment. Dr. Sathi reported that Mr. Pafundi's cervical MRI of April 9, 2012 revealed left foramina narrowing, C3-4 and C5-6 paracentral disc herniation, right C6-7 disc herniation, and felt there was no change compared to a prior MRI performed February 12, 2007. However, he further reported that the MRI of Mr. Pafundi's cervical spine on April 29, 2011, following the accident, revealed disc bulge at C2-3, left posterolateral disc herniation at C4-5, posterior disc herniation at C5-6 with a left parasagittal component, and central and right C6-7 disc herniation. Thus, there are discrepancies between the cervical MRI reports of April 9, 2012 and April 29, 2011 involving levels C2-3 and C3-4, raising factual issues which preclude summary judgment.

Upon examination, Dr. Sathi reported straight leg raising was positive on the right at 45 degrees. He did not report any findings for cervical or lumbar lateral bending. He reported significant range of motion deficits for thoracolumbar spine extension and bilateral rotation, evidencing objective findings. Dr. Sathi reported that Mr. Pafundi suffered an exacerbation of his chronic neck and back pain resulting from the subject accident, and that his prognosis is guarded for ongoing neck and back pain based upon history, need for medication, and review of his imaging studies. Dr. Sathi has not addressed plaintiff's claims of C7 nerve root injury and irritation, and S1 nerve root pain. Such factual issues also preclude summary judgment.

Defendants' examining physician Keuskamp examined Mr. Pafundi on day 176 of the statutory period of 180 days following the accident. Thus, there are factual issues as to whether his report is sufficient on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted the usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). David Pafundi testified to the extent that immediately following the accident, he experienced pain in his neck and mid back, for which he was seen at Brookhaven Hospital. Thereafter, he followed up with Eastern Island Medical for physical therapy three to five days a week for about fourteen months for pain in his neck, lower back, right wrist, and right knee, and for pain management and chiropractic treatment. He received acupuncture one to two times a week. He also was administered trigger point injections, about four epidurals to his neck and back, and underwent various MRI studies. Mr. Pafundi testified that the pain in his neck and back affects his everyday life. He cannot do any type of yard work, rake leaves, shovel snow, vacuum the pool, sit on the floor to play board games with the

children, and it interferes with his intimacy with his wife. He has constant pain. He indicated that he had prior injuries to his neck and back for which he treated for about five years.

EDELMIRO MEDINA

By way of the verified bill of particulars, Edelmiro Medina alleges that as a result of the accident, he suffered injuries consisting of: C5-6 and C6-7 disc herniations indenting the thecal sac; myofascitis; hypoesthesia in the left C8 dermatone; bilateral trapezius pain; weakness in the left upper extremity; loss of normal lordosis; pain, discomfort, tenderness, and spasms; significantly decreased range of motion; tingling sensation down the left arm; disc bulge at L5-S1 with ventral canal and bilateral foramina encroachment; myofascitis; hypoesthesia and right L4 dermatone; weakness in the left lower extremity; disc bulges at L2-3, L3-4, and L4-5 with bilateral L5 nerve root impingement within the lateral recesses; disc bulge at L5-S1 with ventral canal and bilateral foramina encroachment; left L5 nerve root irritation; headaches, bilateral carpal tunnel syndrome; and post concussive syndrome headaches.

Dr. Chiu examined the plaintiff on July 25, 2011, approximately four months after the subject accident. Pursuant to his examination, Dr. Chiu reported deficits in range of motion for plaintiff's cervical spine flexion, extension, right and left rotation, and lateral bending; and for lumbar flexion, extension, right and left lateral bending. Then, in a conclusory and inconsistent statement, Dr. Chiu set forth that there was a lack of objective findings to support Mr. Medina's subjective complaints. While Dr. Chiu noted that plaintiff's cervical and lumbar MRI studies revealed multiple bulging and herniated discs, he does not rule out that these injuries are causally related to the subject accident, and set forth his diagnosis of cervical and lumbar spine sprains/strains, resolved.

Dr. Cohen conducted an orthopedic examination on plaintiff Medina, obtained range of motion values relating to plaintiff's cervical and lumbar spine, and reported no deficits, although the normal values are at issue in this matter. Dr. Cohen stated that plaintiff demonstrated no evidence of radiculopathy, however, he does not set forth the basis for this conclusory opinion and has not commented upon the EMG studies which he reviewed, raising further factual issues. Dr. Cohen stated that he evaluated the MRI examinations of Mr. Medina's cervical and lumbar spine, and that the findings were consistent with preexistent degenerative disc disease. He did not set forth the duration of such findings, and stated in a conclusory manner that such findings are consistent with age-appropriate changes, precluding summary judgment (***Estella v Geico Insurance Company***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]).

Dr Sathi provided a report relating to his neurologic examination of Mr. Medina, and set forth that the plaintiff is a 58-year-old Hispanic male whose vehicle was rear ended by a cement truck. He was treated by a physiatrist, and obtained chiropractic treatment, physical therapy, and acupuncture for over one year, with only temporary relief. Dr. Sathi indicated in his report that the EMG nerve studies of plaintiff's upper extremities revealed bilateral median sensory motor neuropathy consistent with carpal tunnel syndrome with no evidence of radiculopathy. However, the report has not been provided with the moving papers. Dr. Sathi also stated that the EMG study involving the lumbar spine revealed left L5 nerve root irritation. He also noted results of the various MRI studies, including the multiple bulging and herniated cervical and lumbar discs. Dr. Sathi indicated that Mr. Medina was involved in a motor vehicle accident

ten years prior with two to three treatments for significant relief of back pain. While Dr. Lathi obtained cervical range of motion values without deficits when compared to the normal range of motion values, which he set forth, he reported a deficit of 20 degrees in plaintiff's thoracolumbar spine flexion, indicating objective findings and raising factual issues. While Dr. Sathi reported that the plaintiff suffered cervical and lumbar myofascial sprains, he also indicated that they were causally related to the accident. He did not comment upon the multiple bulging and herniated cervical/lumbar discs, and whether or not they are causally related to the subject accident, but set forth that Mr. Medina's prognosis is guarded for neck and back pain given his imaging findings which reveal disc pathology, multiple levels on a degenerative basis which may progress over time. Dr. Lathi did not indicate when such degenerative changes began, the cause of the changes, and whether or not they are related to or aggravated by the subject accident.

Defendants' examining physician, Dr. Chiu, examined plaintiff Medina during the statutory period of 180 days following the subject accident, but his affidavit is insufficient to demonstrate entitlement to summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted the usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]). Dr. Chiu did not comment upon the plaintiff's activities with regard to any limitations, except to state he is not disabled. He stated that, at the time of the examination, the plaintiff returned to work as a truck driver, working full-time without restrictions.

The plaintiff testified to the extent that he is employed as a delivery representative for AmeriGas, and has a route where he makes deliveries over an eight hour period. In making his delivery, he has to pull a heavy hose about fifty to seventy-five feet. He stated that it is difficult to do, and takes about three to five minutes to pull the hose from the trucks to the delivery point. The hose retracts automatically. He makes between fifteen and twenty-four deliveries a day. He normally worked five to six days a week, but after the accident, he worked mostly five days a week. Following the accident, he lost seven days from work. Immediately after the accident, he felt dizzy and his head hurt. Later, he went to Brookhaven Hospital because his pain was becoming more severe in his neck, head, and back. He followed up two to three times a week with Eastern Island Medical for physical therapy, electrical stimulation, and weekly acupuncture for his neck and back for about one year. Prior to this accident, he played softball with his friends. His son had a league, but he had to stop playing on the league. He cannot go to Puerto Rico as he cannot sit for three and a half hours. He can no longer mow his lawn, and has a friend do it for him. He previously went to the park with his granddaughters almost every weekend, and had to stop because it hurts to run around with them. At work he has to take it easy and does not do as much as he did before the accident. Prior to this accident, he never injured his neck, but in 2000, was in a car accident and had pain in his lower back for which he treated with pain management for a few months.

Based upon the foregoing, defendants have not established prima facie entitlement to dismissal of the complaint of Edelmiro Medina and David Pfundi as to either category of injury, due to the multiple factual issues contained in defendants' moving papers.

These factual issues raised in defendants' moving papers preclude summary judgment. The defendants failed to satisfy the burden of establishing, *prima facie*, that either plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d

345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties have failed to establish their *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, this motion by defendants for dismissal of the complaint for failure of the plaintiffs to meet the serious injury threshold is denied.

Dated: December 3, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**