

**Nash v MRC Recovery Inc.**

2016 NY Slip Op 30087(U)

January 12, 2016

Supreme Court, Suffolk County

Docket Number: 24017/11

Judge: Paul J. Baisley

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

City

PRESENT:  
HON. PAUL J. BAISLEY, JR., J.S.C.  
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INDEX NO.: 24017/11  
MOTION DATE: 5/28/15  
MOTION NO.: 002 MG

LAWRENCE NASH,  
Plaintiff,

PLAINTIFF'S ATTORNEY:  
DE BROSSE & STUDLEY, LLP  
182-38 Hillside Ave., Suite 103  
Jamaica Estates, New York 11432

-against-

MRC RECOVERY INC., MICHAEL MASSIAN and  
SANTANDER CONSUMER USA,  
Defendants.

DEFENDANTS' ATTORNEY:  
CATALANO, GALLARDO  
& PETROPOULOS, LLP  
100 Jericho Quad., Suite 326  
Jericho, New York 11753

Upon the following papers numbered 1 to 77 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-28 ; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 29-57 ; Replying Affidavits and supporting papers 58-75; 76-77 ; Other     ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (motion sequence no. 002) of defendants MRC Recovery, Inc. and Michael Massian for an order pursuant to CPLR R. 3212 granting summary judgment on the issue of liability in favor of such defendants and dismissing the complaint in this action against them; granting summary judgment and dismissing the action in its entirety on the grounds that plaintiff fails to satisfy the "serious injury" threshold requirement of §5102(d) of the Insurance Law, thus barring, under §5104(a) of the statute, his claim for non-economic loss; and pursuant to CPLR §3126 striking plaintiff's complaint based on his failure to respond to the Court order (BAISLEY, J.) dated October 8, 2014 by providing unrestricted authorizations for records of plaintiff's medical treatment, or alternatively, precluding plaintiff from opposing the instant motion and from presenting evidence at trial supporting or opposing claims or defenses, is determined as follows.

This personal injury action arises out of an incident that occurred at 3:00 a.m. on May 16, 2011, at plaintiff's mother's residence in Riverhead, New York. Defendant Michael Massian, the principal and sole employee of defendant MRC Recovery, Inc., and a friend, Kevin Gordon, were in the process of repossessing a 2001 Lexus belonging to plaintiff Lawrence Nash pursuant to a job assignment from defendant Santander Consumer USA. Plaintiff alleges that he was seriously injured when his feet and legs were run over by defendants' tow truck and/or by his own vehicle which was being towed by the tow truck (first cause of action). Plaintiff further alleges that defendants converted various items of personal property that were in his vehicle when it was repossessed (second cause of action).

Defendants now move for summary judgment dismissing plaintiff's complaint on the grounds that defendants are not liable for plaintiff's injuries, which were caused by his own illegal



conduct; plaintiff failed to sustain a “serious injury” as a result of the incident; and plaintiff failed to comply with a court order directing him to provide unrestricted authorizations for medical records. The motion is supported by the affirmation of defendants’ attorney, Melissa A. Danowski, Esq. dated February 26, 2015 to which various exhibits are annexed, including a copy of the pleadings, plaintiff’s verified bill of particulars, a certified copy of the incident report and investigation file of the Riverhead Police Department, copies of the deposition transcripts of plaintiff Lawrence Nash and defendant Michael Massian, the reports of defendants’ orthopedic and podiatric experts, certain employee disciplinary records of plaintiff, the October 9, 2014 order of this Court (BAISLEY, J.) directing plaintiff to provide unrestricted authorizations “for all treating medical providers, collateral sources, employers, and workers compensation/social security disability within 30 days,” and a supplemental demand for authorizations dated October 13, 2014.

Defendants’ motion is opposed by plaintiff, who has submitted his affidavit sworn to on May 13, 2015 and the affirmation of his attorney, Richard A. De Brosse, Esq., dated May 14, 2015, together with numerous exhibits, including a supplemental bill of particulars dated October 9, 2014, the deposition transcript of non-party witness Takisha Holland, the affirmation of plaintiff’s orthopedic surgeon dated May 13, 2015, plaintiff’s unsworn medical records from various providers in New York and Tennessee, plaintiff’s response to discovery demands dated January 5, 2015 including numerous authorizations, together with additional exhibits duplicative of those provided by defendants (*e.g.*, pleadings, bill of particulars, Riverhead Police incident report). The Court notes that the transcript of the deposition of Takisha Holland is unsigned, unsworn and does not contain a proper certification as required by CPLR R. 3116(b). Moreover, there is no showing that the transcript was forwarded to the witness for review pursuant to CPLR R. 3116(a). Accordingly the transcript is inadmissible and was not considered by the Court (*Marks v Robb*, 90 AD3d 863 [2d Dept 2008]).

The certified records of the Riverhead Town Police Department investigation of the incident reflect that Michael Massian and Kevin Gordon gave sworn statements in which they alleged in substance that Mr. Nash attempted to stop the repossession of his vehicle by jumping into the tow truck and driving it away as Mr. Massian stood on the running board, hanging onto the side of the truck. They stated that Mr. Nash drove the vehicle towards Mr. Gordon, and then suddenly swerved hard to the right, causing both Mr. Massian and Mr. Nash to fall from the tow truck. Mr. Gordon stated that the truck or Mr. Nash’s vehicle may have run over Mr. Nash’s legs. The police report reflects that plaintiff initially gave a statement at the scene that he ran out in front of the tow truck to stop the repossession of his vehicle and that the tow truck driver ran him over. The police report further reflects that when subsequently interviewed at the police station (where he appeared voluntarily after being treated at the hospital), Mr. Nash changed his story and stated that he was hanging on the side of the tow truck and that he fell off the truck when the driver drove away and was run over by his car on the back of the tow truck. The Riverhead Town Police Department, which investigated the incident as a possible grand larceny, concluded that Mr. Nash’s version of the accident was false, but never arrested Mr. Nash or charged him in connection with the incident, apparently because Mr. Massian never returned to police headquarters to sign the charge prepared by the detective conducting the investigation.



Defendant Michael Massian testified at his deposition that the accident happened when plaintiff jumped into the driver's seat of defendants' tow truck with the driver's side door open and drove the truck towards Mr. Gordon who was standing across the street. Mr. Massian testified that he was standing on the running board and hanging onto the side of the truck as Mr. Nash was driving the truck away, and that Mr. Nash suddenly swerved the vehicle to the right, causing both Mr. Nash and Mr. Massian to fall out of/off of the truck onto the roadway.

Plaintiff testified at his deposition that the accident occurred when he tried to stop defendants from taking his car. He testified that he climbed up onto the running board of the tow truck and that the driver took off with the driver's side door still open. Plaintiff testified that he fell off the tow truck and that the rear wheels of the tow truck and his own vehicle ran over his feet and legs.

In his affidavit submitted in opposition to the instant motion, plaintiff stated that at the time of the accident he was standing next to the tow truck with the front passenger<sup>1</sup> door open and that the tow truck driver suddenly pulled off. He stated that he hung on to the open door and was dragged a few hundred yards before falling to the ground and being run over by the tow truck.

It is well established that the function of the Court in determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). It is not for the Court to determine the credibility of witnesses (*S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]), and “[a]ny conflict in the testimony or evidence presented merely raise[s] an issue of fact” (*6243 Jericho Realty Corp. v AutoZone, Inc.*, 27 AD3d 447, 449 [2d Dept 2006]). Here, the parties' deposition testimony, their affidavits, and their statements and witness statements to the police officers who investigated the incident reflect markedly different accounts of how plaintiff's injuries occurred. The differing versions, including the discrepancy as to who was operating defendants' tow truck at the time, raise questions of fact that cannot properly be determined by the Court on a motion for summary judgment. These questions of fact preclude a determination as a matter of law that defendants were not negligent in connection with their attempt to repossess plaintiff's car.

Similarly, the same questions of fact preclude a determination that, as argued by defendants, plaintiff's action is barred under the “Barker/Manning” rule (*Barker v Kallash*, 63 NY2d 19 [1984]; *Manning v Brown*, 91 NY2d 116 [1997]). The *Barker* and *Manning* cases relied on by defendants hold that a plaintiff whose injuries are the direct result of his commission of serious criminal or illegal conduct is not entitled to recover for his injuries (*id.*). Notably, the personal-injury plaintiffs in *Barker* and *Manning* had admitted to committing the acts that constituted the crimes of pipe-bomb making and “joyriding,” respectively. Here, plaintiff has denied that he ever entered defendants' tow truck or drove it, and it is undisputed that he was never charged with a crime in connection with the incident. Accordingly, the Court is unable to

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<sup>1</sup> In his supplemental affirmation in opposition, not otherwise considered by the Court on the ground that it was untimely and unauthorized, plaintiff's attorney states that his office erroneously typed “passenger” when plaintiff stated that he was at the driver's side door.



conclude as a matter of law that, as alleged by defendants, plaintiff's injuries were the product of his own illegal conduct in attempting to steal the tow truck in order to prevent his vehicle from being repossessed.

In light of the foregoing, defendants' motion for summary judgment on the issue of liability is denied.

Defendants also allege that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102(d) as a result of the accident. Insurance Law §5102(d) defines "serious injury" 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."

Plaintiff's verified bill of particulars alleges that, *inter alia*, he sustained abrasions to his knees and elbows with pain, swelling and restricted use as well as various injuries to his lower extremities, including bilateral crush injuries, midfoot sprains, lacerations, ecchymosis, degloving injury to the right foot, bruising and soft tissue damage, significant swelling and stiffness of both feet and ankles, infection hematoma of the right foot requiring plaintiff to undergo surgical debridement and evacuation of the hematoma and necessitating the use of crutches to ambulate, all with attendant pain, limitation of use, diminished range of motion and difficulty walking. Plaintiff also alleges that he sustained sprain/strain injuries and abrasions to the lower back, anxiety and depression with impact upon sexual function.

Plaintiff's bill of particulars does not specify which of the nine categories of "serious injury" set forth in §5102(d) are implicated by his claimed injuries, but alleges generally that he has been "totally disabled" as well as "incapacitated from employment" from May 16, 2011 to the present and that all of his claimed injuries are permanent in nature. A supplemental bill of particulars dated October 9, 2014 alleges, *inter alia*, that plaintiff sustained additional injuries including medial and lateral tears of the meniscus of the left knee requiring surgery, and significant scarring to the left ankle and left knee as well as deformity and disfigurement.<sup>2</sup>

Plaintiff was examined by defendants' orthopedic and podiatric experts on April 16, 2014 and April 22, 2014, respectively. The Court notes that the purported affirmation of defendants' podiatric expert, Robert J. Landry, D.P.M., is inadmissible and accordingly was not considered by the Court (CPLR R. 2106(a)). The provisions of the CPLR authorizing certain professionals who are not parties to an action to submit affirmations in lieu of affidavits are applicable only to attorneys admitted to practice in the courts of the state, or physicians, osteopaths or dentists authorized by law to practice in the state (*id.*). Chiropractors, podiatrists and other providers of

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<sup>2</sup> In her reply affirmation dated May 27, 2015, defendants' attorney denies ever having received plaintiff's supplemental bill of particulars; however, the affirmation of service annexed to plaintiff's affirmation in opposition reflects that plaintiff's attorney served a copy of the supplemental bill of particulars on defendants' counsel by regular mail on October 9, 2014.



medical treatment not specifically listed in the statute may not avail themselves of the affirmation privilege of CPLR R. 2106 (*Doumanis v Conzo*, 265 AD2d 296 [2d Dept 1999]). It is well established that a defendant moving for summary judgment dismissing a plaintiff's complaint for failure to establish "serious injury" and relying on medical evidence from defendant's own doctors must provide such evidence in admissible form, *i.e.*, affidavits or affirmations, and not unsworn reports (*Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Dr. Landry's report is unsworn and accordingly inadmissible.

The affirmed report of defendants' orthopedic expert John C. Killian, M.D. dated July 7, 2014 reflects that in connection with his examination of plaintiff on April 16, 2014 he conducted an extensive review of plaintiff's unsworn medical records, including records and x-ray reports from the hospital emergency department where plaintiff was evaluated and treated immediately after the accident, records of plaintiff's various treating orthopedists in New York and Tennessee, hospital records documenting plaintiff's admission for wound care and follow-up notes, a report of an MRI of plaintiff's lumbar spine, records of plaintiff's neurosurgical evaluation, a report of a venous Doppler sonogram of plaintiff's left leg, diagnostic imaging studies including chest x-rays and CT scan of plaintiff's chest, and copies of unidentified photographs of a left lower leg and foot. Dr. Killian also reviewed plaintiff's bill of particulars as to plaintiff's alleged injuries. (The Court notes that plaintiff's supplemental bill of particulars was not served until October 9, 2014 and accordingly was not reviewed by Dr. Killian.)

Dr. Killian also obtained a medical history from plaintiff which reflected, *inter alia*, a diagnosis of a herniated disc in his back and his current complaints of pain in the bottom of both feet which is aggravated by walking and standing, pain in his left knee on kneeling or bending, low back pain, and pain in his right shoulder with numbness in his fingers. Plaintiff also reported that he underwent surgery for left knee pain the year prior to the examination. Dr. Killian's report reflects that plaintiff stated that at the time of the accident he worked as an electrician and that he has not returned to work in any capacity since the date of the accident.

Dr. Killian conducted a physical examination of plaintiff, whom he described in his report as a "well developed, obese male, who was in no acute distress." In addition to performing a neurological examination Dr. Killian examined plaintiff's right shoulder, lumbar spine, and lower legs. Dr. Killian noted that he used visual testing and a goniometer when possible to measure plaintiff's ranges of motion.

Dr. Killian found normal range of motion of plaintiff's right shoulder and of plaintiff's lumbar spine. Dr. Killian found reduced but symmetrical range of motion upon flexion of plaintiff's knees (130 degrees, normal 150 degrees) which he attributed to the bulk of plaintiff's calves and thighs meeting. Dr. Killian also found mildly limited range of motion of plaintiff's left ankle compared to the right: dorsiflexion was 15 degrees (20 degrees normal) and plantar flexion was 40 degrees (60 degrees normal).

In addition to the findings noted upon his physical examination of plaintiff, Dr. Killian's report contains an extensive recitation of the contents and findings of the medical reports and records of plaintiff's medical providers that he reviewed and on which he relied in arriving at his opinion. Dr. Killian concluded based on the foregoing that plaintiff had sustained extensive soft



tissue abrasions and contusions over the lower legs but had sustained no fractures or significant structural injuries. He noted that plaintiff developed an eschar of the left lower leg which required wound care and left a healed scar measuring 2"x1-1/2" on his left ankle, but all of the other soft tissue problems resolved. Dr. Killian notes that x-rays of plaintiff's feet were negative for traumatic abnormalities but showed mild degenerative changes. Dr. Killian further noted that plaintiff had been evaluated for complaints of low back pain at the time of the accident but an MRI showed congenital spinal stenosis with disc bulges at several levels. Plaintiff also admitted he had a prior disc herniation and Dr. Killian concluded that the changes seen on the lumbar MRI were not caused by injuries from the May 16, 2011 incident. Dr. Killian noted that plaintiff's subjective complaints of pain associated with the lumbar examination were not supported by objective findings of restricted motion or muscle spasm. Similarly, Dr. Killian found plaintiff's subjective complaints of lumbar pain on supine straight leg raising were inconsistent with the sciatic nerve tension signs and contradicted by negative straight leg raising in the sitting position and by complaints of comparable pain with simultaneous hip and knee flexion which causes no spinal stress.

Dr. Killian also concluded that plaintiff's current complaints of problems with his right shoulder and left knee are clearly unrelated to the accident given that none of the records reviewed mention such complaints. In any event Dr. Killian found no restriction of motion of either plaintiff's right shoulder or left knee.

As to plaintiff's ankles, Dr. Killian noted the examination was remarkable for the healed scar from the wound care of the left ankle and mildly restricted motion of the left ankle compared to the right, which was normal (dorsiflexion 15 degrees, 20 degrees normal; plantar flexion 40 degrees, 60 degrees normal). Dr. Killian noted, however, that there was a functional range of motion and no asymmetry in plaintiff's gait, and that there was no atrophy of his calf to suggest disuse.

Dr. Killian concluded that plaintiff has minor residual stiffness of his left ankle from the soft tissue problems for which he was treated after the accident but that the minor loss of motion is of no functional significance. He found no evidence of impairment of plaintiff's left knee, low back or right shoulder, and concluded that plaintiff is able to work at his normal capacity and perform all of his usual activities of daily living without restrictions.

Dr. Killian's report thus reflects that plaintiff sustained only soft-tissue injuries as a result of the accident, with no permanent disabling injury and no functionally significant limitation of motion. Plaintiff's contemporaneous medical reports and records that Dr. Killian reviewed reflected preexisting degenerative changes to plaintiff's ankles and feet as well as a herniated disc and degenerative changes to plaintiff's lumbar spine. Dr. Killian did not note any objective findings in plaintiff's medical records that supported plaintiff's claim that he was disabled from employment or that restricted plaintiff's activities in any manner from the time of the accident to the time of the examination.

For the foregoing reasons, the Court finds that defendants' submissions are sufficient to establish, *prima facie*, that plaintiff did not sustain a serious injury as defined in Insurance Law §5102(d) as a result of the accident on May 16, 2011.



In his affirmation in opposition to defendants' motion, plaintiff's attorney identifies for the first time what he considers the "relevant" portions of Insurance Law §5102(d) as those pertaining to the "significant disfigurement," "permanent loss of use," "significant limitation of use," and "90 out of 180 days" categories. Counsel argues that defendants have failed to meet their burden of proof that plaintiff did not sustain a "serious injury." In particular counsel alleges that defendants failed to adequately demonstrate that plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment, and further that defendant did not demonstrate that plaintiff did not sustain a "significant disfigurement" to his left knee and left ankle. Plaintiff's attorney argues that since plaintiff's bill of particulars and his deposition testimony reflects that he was incapacitated from employment from May 16, 2011 to the present, it was incumbent on defendants' physician to rule out his disability during the 180-day period following the accident. In addition, counsel alleges that Dr. Killian acknowledged the existence of plaintiff's 2"x1-1/2" surgical scar on his left knee, which counsel appears to be arguing raises an issue of fact as to whether the scar is a "significant disfigurement."

The Court notes in the first instance that neither plaintiff's complaint nor his bill of particulars specifies which categories of "serious injury" he is claiming under Insurance Law §5102(d). Plaintiff did not explicitly allege in his bill of particulars that he sustained a 90/180-day claim or a significant disfigurement. It is well established that where the plaintiff's complaint or bill of particulars fails to allege a particular injury or category of injury, the claim may be disregarded (*Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]; *Ifrach v Neiman*, 306 AD2d 380 [2d Dept 2003]).

The Court further notes that at the time of Dr. Killian's physical examination of plaintiff and his resulting report, plaintiff had not made a claim of a causally related injury to his left knee, a fact which was explicitly noted by Dr. Killian in his report. Notwithstanding the foregoing, Dr. Killian found no restriction of motion of plaintiff's left knee except that attributable to plaintiff's obesity, which was sufficient to establish, *prima facie*, that it was not a serious injury.

Similarly, neither plaintiff's complaint nor his bill of particulars gives notice that plaintiff is making a claim under the "significant disfigurement" category of serious injury. Plaintiff's supplemental bill of particulars employs for the first time the terms "significant scarring," "deformity" and "disfigurement" but is dated October 9, 2014, which is after the date of Dr. Killian's examination of plaintiff and accordingly could not have been addressed by Dr. Killian (to the extent it may fairly be read to set forth a "significant disfigurement" claim under the Insurance Law and in light of its failure to identify the location of the area(s) alleged to be scarred, deformed or disfigured).

Finally, the Court finds that plaintiff's conclusory and self-serving allegations that he was totally disabled from the date of the accident were implicitly addressed by Dr. Killian in his determination that plaintiff sustained only soft-tissue injuries as a result of the accident, and in his recitation of the contemporaneous medical findings by plaintiff's providers on which he based that conclusion. Nothing in Dr. Killian's report of those findings reflects plaintiff's inability to



perform his usual and customary activities within the first six months after the accident. The Court thus concludes that the failure of defendants' expert to explicitly address the 90/180-day or significant disfigurement categories of serious injury does not preclude defendants from making out a *prima facie* case (*Perez v Vasquez*, 71 AD3d 531 [1st Dept 2010]).

Accordingly, the burden has shifted to plaintiff to submit proof in admissible form that he did sustain a serious injury as contemplated by the Insurance Law. Plaintiff's submissions fail to meet that burden.

Plaintiff relies on the affirmation of his treating orthopedist, Fred Carter, II, M.D., dated May 13, 2015, to establish that plaintiff did sustain a serious injury as a result of the May 16, 2011 accident. Dr. Carter's affirmation states only the following:

I, Fred Carter II, M.D., a physician duly licensed to practice medicine in the State of New York, affirms [*sic*] the truth of the following under the penalty of perjury and pursuant to CPLR 2106:

1. I maintain an office located at 7555 Main Rd., Mattituck, NY.
2. I examined Laurence Nash on several occasions, and accordingly, I prepared the annexed report(s).
3. I certify and attest that: these records are an accurate and complete copy of the original records; the original records were kept in the regular course of business for the purpose of diagnosing and treating Laurence Nash's condition, and made at the time of the event described or within a reasonable time thereafter. These records/reports and films are an integral part of my office records, and were obtained and maintained by my office in the regular course of business for the purpose of diagnosing and treating the patient, Ms. [*sic*] Nash's condition.
4. All opinions I express in this affirmation are held and expressed with a reasonable degree of medical probability and that if called upon to testify as a witness in the above matter, I would testify to all matters relating to the annexed reports.
5. Moreover, the injuries that I diagnosed are causally related to the accident of May 16, 2011 whereby he was run over and dragged by a tow truck.

Dr. Carter's affirmation, which is annexed as part of plaintiff's Exhibit 18, contains no medical, diagnostic or treatment information regarding plaintiff, does not identify the "records" to which he refers therein, and does not specify the injuries that he diagnosed or identify how those unspecified injuries were causally related to the accident. Accordingly, the affirmation on its face is insufficient to establish that plaintiff sustained a serious injury as a result of the accident.

The affirmation appears, however, to purport to incorporate by reference the unsworn/unaffirmed records generated by Dr. Carter in connection with his several examinations of plaintiff, in particular on October 11, 2011, October 24, 2011, November 3, 2011, February 15, 2013, February 27, 2013, March 12, 2013, April 24, 2013, July 28, 2014, and September 16, 2014, copies of which are included as part of Exhibit 18 (and interspersed with the unsworn records of other medical providers, which are addressed separately below).

Dr. Carter's records reflect that plaintiff initially consulted Dr. Carter on October 11, 2011 – five months after the accident – for complaints of lower back pain and intermittent paresthetic type pain that goes down both legs on both sides. Dr. Carter's examination of plaintiff's upper



extremities revealed full and painless range of motion of all joints of the upper extremities, with 5/5 motor strength in all motor groups and intact sensory and motor function. Examination of the lumbar spine revealed mild spasm in the lumbar-sacral region, with reported pain into the buttocks and down in to the back of patient's legs with forward flexion. Dr. Carter reported, however, that plaintiff has no limitation, right side versus left side on range of motion. Dr. Carter further reported that examination of the lower extremities showed pain-free motion of the hips and knees. Dr. Carter noted that pertinent findings are limited to plaintiff's feet. His report reflected that plaintiff had tenderness on the right side over the posterior tibialis tendon and pain with resisted inversion consistent with posterior tibial tendinopathy. He noted that plaintiff's ankle open wound is smaller than the size of a dime and is reported to have been healing well with local wound care. Dr. Carter recommended that plaintiff continue with wound care and get an MRI of the lumbar spine and start physical therapy.

Dr. Carter saw plaintiff again on October 24, 2011. He noted that plaintiff had pain across the low back with prolonged sitting and getting from a seated to a standing position, with some symptoms of radiation into the lower extremities. He noted that plaintiff stated that his ankles and feet were improving, with intermittent pain and swelling. Plaintiff returned for a follow-up visit on November 3, 2011 after having undergone a lumbar MRI. Dr. Carter's notes reflect that the MRI demonstrated diffuse mild to moderate disc bulges in the area of L4/5 and L5/S1. He reported that plaintiff is still having pain consistent with the MRI findings, but does not causally attribute those findings to the May 16, 2011 accident.

The Court notes that all of Dr. Carter's examinations of plaintiff to this point had taken place within the first 180 days after plaintiff's accident. None of Dr. Carter's notes, however, reflect the existence of any documented medical condition that prevented plaintiff from performing substantially all of his usual and customary activities for 90 out of the first 180 days following plaintiff's accident. It appeared that plaintiff's ankle wound was substantially healed, his intermittent ankle pain and swelling was improving, and plaintiff's only substantive complaint was low back pain. It is well established however, that pain and discomfort are insufficient to establish the existence of a serious injury (*Licari v Elliot*, 57 NY2d 230 [1982]).

It appears that Dr. Carter did not see plaintiff again until February 15, 2013, at which time plaintiff complained for the first time of left knee and right shoulder pain. Dr. Carter thereafter performed arthroscopic surgery to repair a medial meniscus tear of plaintiff's left knee. The Court notes that Dr. Carter's office records do not indicate that plaintiff's knee injury is causally related to the accident. Dr. Carter's vague, nonspecific and factually deficient affirmation is insufficient to establish that plaintiff's knee injury is causally related to the accident. Moreover, any such conclusion would be speculative in light of the fact that plaintiff had not previously complained of or been diagnosed with or treated for a left knee injury contemporaneous to the accident (*Arrowood v Lowinger*, 294 AD2d 315 [1st Dept 2002]). Dr. Carter's records similarly do not reflect that either plaintiff's knee surgery or the ankle injury resulted in a significantly disfiguring scar.

In sum, Dr. Carter's records do not reflect that plaintiff sustained a serious injury under any of the categories belatedly identified by plaintiff's attorney as "relevant."

Also annexed as part of plaintiff's Exhibit 18 are copies of numerous unsworn records of other medical providers of plaintiff, some but not all of which were referred to by Dr. Killian in his affirmation in support of defendant's motion. It is well established that a defendant can



establish the lack of serious injury by using the unsworn medical records of plaintiff's treating providers (*Pagano v Kingsbury, supra*, 182 AD2d at 271; *Fragale v. Geiger*, 288 AD2d 431 [2d Dept 2001]). To the extent those reports and records are relied on by defendant's expert in rendering his opinion, they may be used by plaintiff's expert even though they are unsworn (*Zarate v McDonald*, 31 AD3d 632 [2d Dept 2006]). The affirmation of Dr. Killian makes it clear that he did in fact rely on those records identified as items one through ten in his affirmation, and accordingly those records are admissible in opposition to defendant's motion. Dr. Carter's bare-bones affirmation, however, does not reflect that he reviewed or relied on any of the records referenced in Dr. Killian's affirmation and accordingly they are not admissible to establish any of the conditions or findings contained therein (*id.*).

In any event, none of those records, or Dr. Carter's office records, contain information that would suggest that plaintiff sustained a "serious injury" as a result of the accident on May 16, 2011. In particular, there is no reference to any medical condition that prevented plaintiff from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. Plaintiff has not shown that any of his medical providers advised him not to engage in work or other activities as a result of his injuries and plaintiff's conclusory allegation that he was unable to work is unsupported by competent medical evidence (*Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]).

Moreover, the photographs annexed to plaintiff's Exhibit 18 are not authenticated, are undated, and accordingly are insufficient to depict plaintiff's allegedly disfiguring scars. Accordingly, plaintiff's submissions fail to overcome defendant's *prima facie* showing that plaintiff did not sustain a serious injury as a result of the accident.

In light of the foregoing, defendant's motion for summary judgment is granted and plaintiff's first cause of complaint is dismissed.

With respect to plaintiff's claim that defendants converted his personal property, the un rebutted deposition testimony of both defendant Michael Massian and plaintiff establishes that plaintiff failed to avail himself of the opportunity offered by defendants to retrieve his personal belongings from his vehicle at the time of the repossession. Defendants' submissions further establish that plaintiff thereafter made no further efforts to retrieve his belongings. In light of the foregoing, defendants cause of action for conversion of plaintiff's personal property cannot be maintained (*see, Elias v Ferri*, 46 AD3d 743 [2d Dept 2007]). Accordingly, defendants are also granted summary judgment dismissing plaintiff's second cause of action.

As a final matter, the Court notes that plaintiff's response to defendant's discovery demands is untimely as it was concededly not provided by the date set forth in the order of this Court dated October 9, 2014. In addition, the authorizations provided therein are not compliant with the order as they are date-restricted and the order specifically directed plaintiff to provide unrestricted authorizations. The Court finds that plaintiff's failure to timely and substantively comply with the order provides a further basis for dismissal of plaintiff's complaint, which, however, is rendered moot in light of the foregoing determination.



The compliance conference presently scheduled to be held before the undersigned on January 14, 2016 is cancelled.

Submit judgment.

Dated: January 12, 2016

**PAUL J. BAISLEY, JR.**

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J.S.C.

