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SHORT FORM ORDER

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INDEX No. 10-27260
CAL No. 14-00587MV

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-4-15
ADJ. DATE 12-3-15
Mot. Seq. # 008 - MG; CASEDISP
009 - XMD

BOBBY RIDDICK,

Plaintiff,

- against -

SUFFOLK COUNTY PUBLIC ADMINISTRATOR AS ADMINISTRATOR OF THE ESTATE OF LEON PERLSTEIN, DECEASED, MICHAEL G. TUTHILL, COUNTY OF SUFFOLK and SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS TRANSPORTATION DIVISION,

Defendants.

EWALL & EWALL, ESQ.
Attorney for Plaintiff
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Huntington, New York 11743

ZAKLUKIEWICZ, PUZO & MORRISSEY, LLP
Attorney for Defendants Tuthill & Suffolk County
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FRANKLYN A. FARRIS, ESQ.
Suffolk County Public Administrator
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Riverhead, NY 11901

RICHARD T. LAU & ASSOCIATES
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Jericho, New York 11753

Upon the following papers numbered 1 to 54 read on this motion and cross motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers 13 - 24 ; Answering Affidavits and supporting papers 25 - 41; 42 - 47 ; Replying Affidavits and supporting papers 48 - 51; 52 - 54 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Michael Tuthill and the County of Suffolk for an Order, pursuant to CPLR 3212, granting summary judgment in their favor is granted; and it is further

ORDERED that the cross motion by defendant Suffolk County Public Administrator, as Administrator of the Estate of Leon Perlstein, deceased, for summary judgment dismissing the complaint as

asserted against it on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied, as moot.

In July 2010, plaintiff Bobby Riddick commenced this action to recover damages for personal injuries he allegedly sustained as the result of a motor vehicle accident that occurred on County Road 39 in the Town of Southampton on November 10, 2009. The accident allegedly happened when a vehicle driven by Leon Perlstein collided with the rear of a public bus owned by defendant County of Suffolk and driven by defendant Michael Tuthill. At the time of the collision, plaintiff was riding as a passenger in the bus. By his bill of particulars, plaintiff alleges he suffered various injuries due to the accident, included a partial patella tendon tear in his right knee, multiple disc bulges in his cervical and lumbar regions, lumbar radiculopathy, and bilateral ulnar neuropathy. He also alleges that the accident exacerbated preexisting neck, back, knee and wrist conditions, and that he was totally disabled for 10 months due to his injuries.

By Order dated March 23, 2012, this Court granted a motion by Leon Perlstein for an order joining for trial this action with a personal injury action pending in this Court, assigned Index Number 43019/2010, brought against him by Mathew Patrick, another passenger on the bus. Months later, on August 9, 2012, Leon Perlstein passed away. Subsequently, counsel for plaintiff, the Suffolk County defendants, the Suffolk County Public Administrator, Franklyn Farris, and the law firm of Richard T. Lau & Associates, which had been representing Leon Perlstein prior to his death, executed a stipulation that provides, in part, that the Suffolk County Public Administrator, in its capacity as administrator of Perlstein's estate, is substituted as a defendant in place of Perlstein. The stipulation was so-ordered by the Court on June 21, 2013, *nunc pro tunc* to May 16, 2013.

By Order dated June 1, 2015, the Court denied a motion by the Suffolk County Public Administrator for summary judgment on the issue of serious injury on the ground that there was no evidence that the Public Administrator had retained the law firm of Richard T. Lau & Associates to represent the estate of Leon Perlstein in this action. Further, the Court also denied a motion by defendants Tuthill and County of Suffolk for summary judgment on the issue of liability on the ground that the affidavit of service failed to indicate that such motion was served on the Public Administrator. However, the denial of the motions was without prejudice to renewal within thirty (30) days of the entry of the June 1, 2015 Order upon proof that Richard T. Lau & Associates is authorized to act in this action on behalf of the Public Administrator.

Defendants Tuthill and County of Suffolk now move for an order granting summary judgment dismissing the complaint against them on the ground that Leon Perlstein's negligence was the sole proximate cause of the subject accident. Alternatively, the Suffolk County defendants argue plaintiff's alleged injuries do not meet the No-Fault Law's "serious injury" threshold set forth in Insurance Law § 5102 (d).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, the Suffolk County defendants made a *prima facie* showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of moving defendants' examining physician (*see* ***Bailey v Islam***, 99 AD3d 633, 953 NYS2d 39 [1st Dept 2012]; ***Sierra v Gonzalez First Limo***, 71 AD3d 864, 895 NYS2d 863 [2d Dept 2010]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). On September 9, 2013, approximately three years and ten months after the subject accident, moving defendants' examining orthopedist, Dr. Jay Nathan, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test, Lachman's test, McMurray's test, Finkelstein's test, Tinel's test, and Phalen's test. Dr. Nathan found that all the test results were negative or normal, except for positive Tinel's test for the median nerve of plaintiff's both wrists. Dr. Nathan found that there was no spasm in plaintiff's cervical and lumbar regions, although there was minimal tenderness therein. Dr. Nathan also performed range of motion testing on plaintiff's cervical and thoracolumbar spin, elbows, wrists, hands and knees, using a goniometer to measure his joint movement. Dr. Nathan found that plaintiff exhibited normal joint function in his cervical and thoracolumbar spin, elbows, wrists, hands and knees. Dr. Nathan opined that plaintiff had no disability at the time of the examination (*see* ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]).

Further, at his deposition, plaintiff testified that he was unemployed at the time of the accident, and that he was not confined to bed or home following the accident. Plaintiff testified that after the subject accident, he was taken by ambulance to an emergency room and was discharged on the same day. Within a

week after the accident, he went to Eastern Island Medical Care where he received physical therapy and chiropractic treatments for almost two years. Plaintiff testified that there is no activity that he is unable to perform and he had difficulty playing basketball, running and lifting over fifty pounds. Plaintiff's deposition testimony established that his injuries did not prevent him from performing "substantially all" of the material acts constituting his customary daily activities during at least 90 out of the first 180 days following the accident (*see* ***Burns v McCabe***, 17 AD3d 1111, 794 NYS2d 267 [4th Dept 2005]; ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [2d Dept 1997]).

Thus, the Suffolk County defendants met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system, and that he was not prevented from performing substantially all of his usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see* ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]).

The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*). A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination of the plaintiff or 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 (*see* ***Perl v Meher***, *supra*; ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). Furthermore, a plaintiff claiming serious injury who ceases treatment after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]).

In opposition, plaintiff contends that the motion by the Suffolk County defendants for summary judgment must be denied on the ground that they failed to submit proof that Richard T. Lau & Associates is authorized to act in this action on behalf of the Public Administrator. However, plaintiff's such contention is without merit since such proof was submitted with the cross motion by the Public Administrator. Plaintiff also argues the Suffolk County defendants' expert report is insufficient to meet their burden on the motion. Plaintiff contends that the positive Tinel's test results for his wrists raise a triable issue as to whether he sustained a "serious injury" as defined in Insurance Law §5102 (d). However, the mere existence of carpal tunnel syndrome is not evidence of a serious injury in the absence of objective testing of the extent and duration of the alleged physical limitations resulting from the injury (*see* ***Jacobs v Slaght***, 47 AD3d 679, 850 NYS2d 166 [2d Dept 2008]; ***Patterson v N. Y. Alarm Response Corp.***, 45 AD3d 656, 850 NYS2d 114 [2d Dept 2007]). Plaintiff further argues that the medical reports prepared by his treating physicians raise a

triable issue as to whether he suffered injury within the "significant limitation of use" category of Insurance Law § 5102 (d). In opposition, plaintiff submits his own affidavit and the sworn medical reports and affirmations of Dr. Richard Sears, Jr., Dr. Daniel Korman, Dr. Stephen Fromm, Dr. Elliot Eisenberger, Dr. Andrew Hwang, Dr. Richard Siegmann, Dr. Thomas Dowling, Dr. Arjang Abbasi, Dr. Daniel Brandenstein, and Dr. Sondra Pfeffer.

The sworn report of Dr. Sears is insufficient to defeat summary judgment. Dr. Sears' report, dated November 13, 2009, set forth plaintiff's complaints and the findings, including the limitations in his cervical and lumbar joint function, measured during range of motion testing. Dr. Sears, however, failed to state how he measured the joint function in plaintiff's cervical and lumbar spines in his report. The Court can only assume that Dr. Sears' tests were visually observed with the input of plaintiff. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Harney v Tombstone Pizza Corp***, 279 AD2d 609, 719 NYS2d 704 [2d Dept 2001]; ***Herman v Church***, 276 AD2d 471, 714 NYS2d 87 [2d Dept 2000]).

The sworn reports of Dr. Korman are insufficient to defeat summary judgment. Dr. Korman's reports, dated January 6, 2010, February 16, 2011, October 31, 2014, and November 24, 2014, indicate that he performed range of motion testing on plaintiff's cervical and lumbar regions and knees on November 17, 2009, December 21, 2009, January 13, 2011, and September 8, 2014. Dr. Korman found that plaintiff had range of motion restrictions in his cervical and lumbar regions and knees. However, like Dr. Sears, Dr. Korman failed to state how he measured the joint function in plaintiff's cervical and lumbar spines in his reports (*see* ***Harney v Tombstone Pizza Corp***, *supra*; ***Herman v Church***, *supra*).

The sworn reports of Dr. Fromm are insufficient to defeat summary judgment. Dr. Fromm's reports, dated December 9, 2009 and January 6, 2010, set forth plaintiff's complaints and the findings, including the limitations in his cervical and lumbar joint function, measured during range of motion testing. Dr. Fromm failed to state how he measured the joint function in plaintiff's cervical and lumbar spines in his reports (*see* ***Harney v Tombstone Pizza Corp***, *supra*; ***Herman v Church***, *supra*).

The sworn affirmation, dated November 10, 2014, of Dr. Eisenberger is insufficient to defeat summary judgment. Dr. Eisenberger's affirmation indicates that according to the MRI examination of plaintiff's lumbar spine, performed on November 30, 2009, he had bulging discs at L3-L4, L4-L5, and L5-S1. However, Dr. Eisenberger failed to proffer an opinion as to the cause of the lumbar injury noted in his report (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]).

The sworn affirmation, dated November 18, 2014, of Dr. Hwang is insufficient to defeat summary judgment. Dr. Hwang's affirmation indicates that according to the MRI examination of plaintiff's right knee, performed on November 23, 2009, he had full thickness tear in his right knee. However, Dr. Hwang failed to proffer an opinion as to the cause of the right knee injury noted in his report (*see* ***Scheker v Brown***, *supra*; ***Sorto v Morales***, *supra*; ***Collins v Stone***, *supra*).

The sworn affirmation, dated November 13, 2014, of Dr. Siegmann is insufficient to defeat summary judgment. Dr. Siegmann's affirmation indicates that according to the MRI examination of plaintiff's cervical

spine, performed on February 16, 2010, he had bulging discs at C3-C4 through C6-C7. However, Dr. Siegmann failed to proffer an opinion as to the cause of the cervical injury noted in his report (*see* ***Scheker v Brown***, *supra*; ***Sorto v Morales***, *supra*; ***Collins v Stone***, *supra*).

The sworn affirmation, dated November 17, 2014, of Dr. Dowling is insufficient to defeat summary judgment. According to the affirmation, Dr. Dowling saw plaintiff and performed range of motion testing on his cervical region on March 1, 2010. Dr. Dowling found that plaintiff had range of motion restrictions in his cervical region. However, Dr. Dowling failed to state how he measured the joint function in plaintiff's cervical spine in his affirmation (*see* ***Harney v Tombstone Pizza Corp***, *supra*; ***Herman v Church***, *supra*).

The sworn report of Dr. Abbasi is insufficient to defeat summary judgment. Dr. Abbasi's report, dated March 16, 2010, set forth plaintiff's initial complaints and the findings, including the limitations in his cervical joint function, measured during range of motion testing. Dr. Abbasi failed to provide the normal range of motion measurements for the cervical joint (*see* ***Quintana v Arena Transport, Inc.***, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]; ***Johnson v Tranquille***, 70 AD3d 645, 892 NYS2d 896 [2d Dept 2010]). Moreover, Dr. Abbasi failed to state how he measured the joint function in plaintiff's cervical spine. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Harney v Tombstone Pizza Corp***, *supra*; ***Herman v Church***, *supra*). Dr. Abbasi provided neither evidence of range of motion limitations nor a qualitative assessment of plaintiff's lumbar spine.

The sworn report of Dr. Brandenstein is insufficient to defeat summary judgment. According to Dr. Brandenstein's report, dated November 11, 2014, he did not examine plaintiff's cervical and lumbar regions until October 12, 2010, almost 11 months after the accident, and submitted no objective medical evidence contemporaneous with the accident (*see* ***Henchy v VAS Express Corp.***, 115 AD3d 478, 981 NYS2d 418 [1st Dept 2014]; ***Soho v Konate***, 85 AD3d 522, 925 NYS2d 456 [1st Dept 2011]; ***Toulson v Young Han Pae***, 13 AD3d 317, 788 NYS2d 334 [1st Dept 2004]).

The sworn reports of Dr. Pfeffer are insufficient to defeat summary judgment. Here, Dr. Pfeffer's MRI report, dated August 17, 2013, indicates that according to the MRI examination of plaintiff's lumbar spine, performed twenty days after the subject accident occurred, he had herniated discs at L3-L4 and L4-L5. However, Dr. Pfeffer failed to proffer an opinion as to the cause of the lumbar injury noted in her report (*see* ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Sorto v Morales***, 55 AD3d 718, 868 NYS2d 67 [2d Dept 2008]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]). Moreover, as to plaintiff's right knee, Dr. Pfeffer's report, dated August 17, 2013, indicates that she reviewed the x-ray report of plaintiff's right knee, performed on the day of the accident, which indicates that there was no evidence of acute fracture, there was patellofemoral degenerative joint disease, and the possibility of a small joint effusion was raised on the lateral projection. Dr. Pfeffer also reviewed the MRI report of plaintiff's right knee, performed 13 days following the accident, which indicates that there was "pre-existing osteodegenerative disease with pre-existing intrameniscal intrasubstance degeneration" and that there was "no conclusive evidence for meniscal tearing, pathologic joint effusion, subcutaneous soft tissue contusion, bone bruising, recent (i.e. trauma-related) fracture, or dislocation." Dr. Pfeffer further indicates that the partial-thickness tendon tearing in the patella "may (in part) be attributable to the subject accident." The mere existence of a tear in tendons, as well as a tear in a ligament, is not evidence of a serious injury in the

absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*see* ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; ***Little v Locoh***, 71 AD3d 837, 897 NYS2d 183 [2d Dept 2010]; ***Ciancio v Nolan***, 65 AD3d 1273, 885 NYS2d 767 [2d Dept 2009]; ***Niles v Lam Pakie Ho***, 61 AD3d 657, 877 NYS2d 139 [2d Dept 2009]). Dr. Pfeffer provided neither evidence of range of motion limitations nor a qualitative assessment of plaintiff's right knee. Moreover, the unaffirmed medical reports of Southampton Hospital, Eastern Island Medical Care, Dr. Korman, Dr. Michael Benanti, Dr. Eisenberger, Dr. Hwang, and Dr. Justin Zack, submitted by plaintiff, are insufficient to raise a triable issue of fact, as they are not in admissible form.

Finally, plaintiff failed to offer competent evidence that he sustained nonpermanent injuries that left him unable to perform his normal daily activities for at least 90 of the 180 days immediately following the accident (*see* ***John v Linden***, 124 AD3d 598, 1 NYS3d 274 [2d Dept 2015]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 944 NYS2d 236 [2d Dept 2012]; ***Rivera v Bushwick Ridgewood Props., Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]). Thus, the Suffolk County defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Accordingly, the cross motion by the Public Administrator for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d) is denied, as moot.

Dated: September 9, 2016

GRANTED
SEP - 9 2016
JUDITH A. PASCALE
Clerk of Suffolk County

Hon. Joseph Farneti
Acting Justice Supreme Court

X FINAL DISPOSITION ____ NON-FINAL DISPOSITION