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SHORT FORM ORDER

COPY

INDEX No. 15-15676
CAL. No. 17-00344MV

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-19-17
ADJ. DATE 11-2-17
Mot. Seq. # ~~001~~ 002 - MG; CASEDISP

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GERALD S. BERKEMEYER,

Plaintiff,

- against -

SHANNON M. MULLIGAN,

Defendant.

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Upon the following papers numbered 1 to 45 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 33; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 34 - 43; Replying Affidavits and supporting papers 44 - 45; Other ___; it is,

ORDERED that the motion by defendant Shannon Mulligan for summary judgment dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Gerald Berkemeyer, as a result of a motor vehicle accident, which occurred on September 7, 2012. The accident allegedly happened when defendant's vehicle struck plaintiff's vehicle, as plaintiff was reversing into a parking spot in a parking lot. Plaintiff alleges that, as a result of the accident, he suffered various injuries including a shoulder rotator cuff tear, disc bulges and herniations in his cervical and lumbar spine, and a medial meniscal tear.

Defendant seeks an Order granting summary judgment dismissing plaintiff's complaint on the grounds that plaintiff's negligence caused the collision and that Insurance Law § 5104 precludes plaintiff from pursuing a personal injury claim because he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant submits, in support of the motion, copies of the pleadings, the bill of particulars, the note of issue, an uncertified copy of the police report, photographs, the transcripts of the parties' deposition testimony, and the report of orthopedic surgeon David Weissberg, M.D. In

opposition, plaintiff argues that issues of fact remain as to the parties' negligence and whether he sustained serious injuries. Plaintiff submits, in opposition, his affidavit, a portion his deposition testimony transcript, the affirmation of physician Ahmed Elfiky, M.D., and the affidavit of Adam Cohen, D.C.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing, *prima facie*, that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's treating medical providers (*see* ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective

medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). 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 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***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***McLoud v Reyes***, *supra*; ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; ***Simanovskiy v Barbaro***, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; ***Little v Locoh***, 71 AD3d 837, 897 NYS2d 183 [2d Dept 2010]; ***Larson v Delgado***, 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]). Further, a plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a "great extent rather than some slight curtailment" (*see* ***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]). Moreover, a plaintiff who terminates therapeutic measures following an accident, while claiming "serious injury," must offer some reasonable explanation for having done so to prevail on his or her claim (*see* ***Ramkumar v Grand Style Transp. Enters. Inc.***, 22 NY3d 905, 976 NYS2d 1 [2013]; ***Pommells v Perez***, *supra*; ***David v Caceres***, 96 AD3d 990, 947 NYS2d 159 [2d Dept 2012]).

Defendant's submissions established a *prima facie* case that the alleged injuries to plaintiff's spine do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Plaintiff did not suffer a serious injury under the 90/180-day category, as his bill of particulars alleges that he was confined to home for only one week and to bed for "2 days per week" (*see* ***Pryce v Nelson***, *supra*; ***Strenk v Rodas***, *supra*; ***Colon v Torres***, 106 AD3d 458, 965 NYS2d 90 [1st Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*; ***Rosa v Mejia***, 95 AD3d 402, 943 NYS2d 470 [1st Dept 2012]; ***Hospedales v***

Doe, 79 AD3d 536, 913 NYS2d 195 [1st Dept 2010]; ***Williams v Baldor Specialty Foods, Inc.***, 70 AD3d 522, 895 NYS2d 394 [1st Dept 2010]). Defendant has also presented competent evidence that none of plaintiff's alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*).

In his affirmed medical report, Dr. Weissberg stated, in relevant part, that during his examination, plaintiff exhibited normal joint function in his cervical and thoracolumbar spine. Dr. Weissberg also stated that no spasm or tenderness was detected upon palpation of plaintiff's spine. Plaintiff's motor and sensory examination of his upper extremities was normal and he tested negative in the straight leg raising test bilaterally. Dr. Weissberg also stated that plaintiff exhibited some limitation in joint function in his left shoulder, but he tested negative in the impingement sign, O'Brien's, Speed's, and apprehension sign tests. Plaintiff also exhibited some limitation in joint function in his right knee, but tested negative in the joint line tenderness, McMurray's, and Lachman's tests. Dr. Weissberg diagnosed plaintiff as having suffered sprains to his cervical spine, lumbar spine, left shoulder, and right knee, and concluded that such injuries have resolved and that there are no signs of an ongoing disability related to the accident (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Pagano v Kingsbury***, *supra*).

Defendant having met her initial burden on the motion, the burden shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*; ***Pagano v Kingsbury***, *supra*). Plaintiff failed to submit evidence sufficient to raise a triable issue of fact. Plaintiff's submissions are insufficient to raise a triable issue of fact as to whether he sustained non-permanent injuries that left him unable to perform substantially all 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]).

In his affirmation, Dr. Elfiky stated that he examined plaintiff five days after the subject accident and observed severe pain in plaintiff's lower back, weakness in his upper extremities, hips, legs, and feet, and muscle spasm throughout his cervical and lumbar spine. In addition, plaintiff tested positive in the straight leg raising test and had moderate limited range of motion of in his cervical spine. In December 2012, January 2013, and March 2013, Dr. Elfisky noted nearly identical findings as the initial examination. However, Dr. Elfiky's affirmation did not adequately quantify plaintiff's loss of range of motion in his spine, shoulder, and knee as a result of these injuries and, therefore, his affirmation is insufficient to raise a triable issue of fact (*see* ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*; ***McLoud v Reyes***, *supra*; ***Bennett v Genas***, 27 AD3d 601, 813 NYS2d 446 [2d Dept 2006]). Dr. Elfiky's affirmation also failed to set forth the objective tests utilized to measure the joint function, such as through the use of a goniometer or inclinometer (*see* ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]; ***Gamberg v Romeo***, 289 AD2d 525, 736 NYS2d 64 [2d Dept 2001]; ***Junco v Ranzi***, 288 AD2d 440, 733 NYS2d 897 [2d Dept 2001]; *see also* ***Bayk v Martini***, 142 AD3d 484, 35 NYS3d 923 [2d Dept 2016]; ***Schilling v Labrador***, *supra*; ***Durand v Urick***, 131 AD3d 920, 15 NYS3d 475 [2d Dept 2015]). In addition, Dr. Elfiky's findings are not based on contemporaneous and recent

examinations (*see* Insurance Law § 5102 [d]; ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Zuckerman v City of New York***, *supra*).

In his sworn affidavit, Adam Cohen, a chiropractor, stated that when examined eight days after the accident, plaintiff exhibited significant limitations in joint function and muscle spasms in his cervical and lumbar regions. In March 2013, Cohen again found significant limitations in joint function in plaintiff's cervical, thoracic, and lumbar spine. Cohen last examined plaintiff in June 2013 and noted that plaintiff continued to have radiating neck pain and spasms in his spine. Cohen diagnosed plaintiff as suffering from disc bulges and herniations in his cervical, thoracic, and lumbar spine, and determined that such injuries were causally related to the subject accident. As Cohen's findings are not based on contemporaneous and recent examinations, they fail to rebut defendant's *prima facie* showing that plaintiff did not suffer a "serious injury" within the meaning of the statute (*see* Insurance Law § 5102 [d]; ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Zuckerman v City of New York***, *supra*). In addition, Cohen's range of motion measurements for plaintiff's shoulder and knee were improper, as a chiropractor may only treat the spine (*see* Education Law § 6551).

Accordingly the motion by defendant Shannon Mulligan for summary judgment dismissing the complaint is granted.

Dated: May 25, 2018

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION