To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
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JOSEPH J. SIMONETTI,

Plaintiff,

-against-

MARY E. EVANS,

Defendant.

DECISION AND ORDER

INDEX NO.: EF001211-2019
Motion Date: 9/3/2020
Sequence No.: 1

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VAZQUEZ-DOLES, J.

The following documents numbered 1 to 21 were read on this motion by defendant Mary E. Evans, for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a serious injury as defined in Insurance Law §5102(d).

PAPERS	NUMBERED
Notice of Motion/Affirmation in Support (DiMaggio)/Exhibits A-H	1-10
Affirmation in Opposition (Szarka)/Exhibits A-H/Memorandum of Law in Opposition	11-20
Affirmation in Reply (DiMaggio)	21

Background and Procedural History

This is an action for personal injuries allegedly sustained by plaintiff in a two-car motor vehicle accident that occurred on North Airmont Road, intersecting at the New York State Thruway, southbound exit, County of Rockland, New York, on April 19, 2016. As a result of the accident, plaintiff alleges that he sustained serious injuries as defined under Insurance Law §5102(d).

This action was commenced by plaintiff with the service and filing of a Summons and Verified Complaint on or about September 20, 2017. Issue was joined by service of defendant's Verified Answer on March 14, 2016. Note of Issue was filed on February 6, 2020. Pursuant to this Court's Part Rules, a motion for summary judgment was to be filed within 60 days, i.e. on or before April 6, 2020. However, as a result of the COVID public health emergency and the Executive Orders in place at the time, the time to file such motion was tolled; and as such, the present motion is timely.

Defendant now moves for summary judgment on the grounds that plaintiff has not sustained a serious injury within the meaning of the Insurance Law. In support of her motion, in addition to plaintiff's deposition transcript, defendant submits the affirmed report of Dr. Robert C. Hendler, an orthopedist. Dr. Hendler examined plaintiff on November 12, 2019. Dr. Hendler's physical examination of plaintiff's range of motion in his cervical spine was within normal limits. There was no indication of muscle spasm or atrophy, and no pain on palpation along the entire cervical spine. X-ray of plaintiff's cervical spine performed by Dr. Hendler showed normal cervical lordosis. There was marked degenerative joint disease and degenerative disc disease throughout cervical spine, with marked narrowing of the disc interspaces from C4 o C7. Dr. Hendler reviewed plaintiff's medical records, including an x-ray report from April 19, 2016, which showed degenerative joint disease and degenerative disc disease at C5-C6. He also reviewed an MRI of the cervical spine taken on December 23, 2016, which showed multiple disc abnormalities and degenerative change consistent with degenerative joint disease and degenerative disc disease. His interpretation of the MRI study concurred with the reported findings of the attending radiologist. Based upon his physical examination and review of plaintiff's medical records, Dr. Hendler opined that plaintiff may have sustained a cervical

sprain, with temporary exacerbation of pre-existing degenerative joint disease and degenerative disc disease. He opined that plaintiff showed no present disability and will have no permanent findings in his cervical spine that would be causally related to the subject accident.

The examination of plaintiff's shoulders showed full range of motion bilaterally; no atrophy of either shoulder girdle musculature; and no palpable trigger zones or crepitus on range of motion of either shoulder. Dr. Hendler opined that the left shoulder did not appear to have been injured in the subject accident; and further opined that there is no present disability and no permanent findings causally related to the subject accident.

Examination of plaintiff's knees showed full range of motion in both knees; there was no musculature atrophy and plaintiff walked with a normal gait. Dr. Hendler opined that plaintiff possibly sustained a mild contusion to the right knee, with temporary exacerbation of a significant prior right knee problem, which has resolved. He opined that there was no present disability and no permanent finding in either knee that were causally related to the subject accident.

Dr. Hendler further opined that plaintiff did not sustain a medically determined injury or impairment of a non-permanent nature, which prevented him 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 accident.

Defendant further contends that plaintiff has not demonstrated that he sustained economic loss in excess of "basic loss" pursuant to Insurance Law §5201(a); as the medical expenses alleged in the Bill of Particulars add up to $17,933.74 and no further documentation of expenses in excess of $50,000 have been disclosed.

In opposition, plaintiff limits his contentions to their being an issue of fact as to whether he sustained a "permanent consequential limitation" or a "significant limitation of use" of his cervical spine. In support of his contentions, plaintiff submits an affidavit, various medical records, and the affidavit and report of Dr. Steven C. Weinstein, a physiatrist. In his affidavit, plaintiff outlines his medical treatment history and his current complaints of pain and limitations.

Dr. Weinstein examined plaintiff on July 29, 2020. Dr. Weinstein opined that plaintiff's right knee injury was resolved. Dr. Weinstein's physical examination of plaintiff's cervical spine showed:

- Range of motion at 30 degrees (80 degrees normal) with left neck tightness
- Left lateral bending at 10 degrees (45 degrees normal)
- Right rotation at 35 degrees (80 degrees normal)
- Right lateral bending 15 with neck cracking (45 degrees normal)
- Extension at 30 degrees (60 degrees normal)

Dr. Weinstein's impression was "cervical strain/sprain, superimposed upon pre-exiting [*sic*] multilevel cervical degenerative disc disease and multilevel cervical central canal and foraminal stenosis." He opined that plaintiff's significant cervical limitations were caused by plaintiff's April 19, 2016 accident, and that plaintiff's injuries were permanent. Dr. Weinstein further opined that plaintiff's prognosis is negatively impacted by his pre-existing conditions. He further opined that plaintiff's permanent restriction of cervical range of motion caused plaintiff to have restrictions for lifting and overhead activity that were not present prior to the motor vehicle accident.

In reply, defendant contends that plaintiff's affidavit is self-serving and contains conclusory assertions about his subjective complaints, which are insufficient to raise a triable issue of fact. Defendant further contends that the Dr. Weinstein's examination was performed after the filing of defendant's motion for summary judgment and was not extended until well

after the filing of the note of issue and is therefore untimely and of no probative value. Defendant further contends that even if the Court were to consider Dr. Weinstein's report, plaintiff has failed to raise a triable issue of fact. Defendant argues that Dr. Weinstein failed to address the possibility that plaintiff's injury to his cervical spine may be attributed to plaintiff's prior motor vehicle accident in which he sustained injury to his neck, or to his pre-existing degenerative conditions.

Discussion

The proponent of a motion for summary judgment must establish that the cause of action or defense has no merit sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (*see Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). The movant is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form to eliminate any material issues of fact from the case. Failure to make this showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Medical Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy only granted where this burden is met and then only if the opposition to the motion fails to establish the existence of a material issue of fact requiring a trial (*see Vega v Restani Construction. Corp.*, 18 NY3d 499 [2012], *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require the trial of a material question of fact on which she rests her claim or must demonstrate an acceptable excuse for her failure to meet the requirement (*see Zuckerman v New York*, 49 NY2d at 562). In deciding a motion for summary judgment, a Court's function is to identify material triable issues of fact, not to make credibility determinations or findings of fact. Issue-finding,

rather than issue-determination is required (*see Vega v Restani Construction. Corp.*, 18 NY3d at 505). Summary judgment should be granted where only one conclusion may be drawn from the established facts (*see Kriz v Schum*, 75 NY2d 25 [1989]). If there is any doubt as to the existence of a triable issue, then the motion for summary judgment should be denied (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]).

Defendant moves for summary judgment, claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102 because he did not provide proof that he sustained a serious injury as a result of the April 19th accident.

It is well established that proof under the permanent consequential limitation of use or the significant limitation of use categories requires a comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *Dufel v Green*, 84 NY2d 795, 798 [1995]).). "[S]ubjective complaints alone are not sufficient" to meet the threshold (*Toure,* 98 NY2d at 350). Defendant bears the initial burden of establishing a prima facie case that plaintiff did not sustain a serious injury (*see id.*).

Defendant has satisfied her prima facie burden establishing that plaintiff has not sustained a serious injury through the submission of Dr. Hendler's affirmed report; thus the burden shifts to plaintiff to offer proof in admissible form sufficient to create a material issue of fact necessitating a trial (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]).

Contrary to defendant's contentions, "a party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment" (*Rivers v Birnbaum*, 102

AD3d 26, 31 [2d Dept 2012]; *accord Cobham v 330 West 34th SPE, LLC*, 164 AD3d 644, 645 [2d Dept 2018]). As such, the Court is within its discretion to consider Dr. Weinstein's affirmation (*Cobham v 330 West 34th SPE, LLC*, 164 AD3d at 645). The Court finds that plaintiff's submission is sufficient to raise a triable issue of fact as to whether he sustained a significant limitation of use or permanent consequential limitation of his cervical spine as a result of the subject accident (*see Lim v Tiburzi*, 36 AD3d 671, 672 [2d Dept 2007]).

However, the Court notes that plaintiff failed to oppose that portion of defendant's motion which established that plaintiff has not sustained an economic loss greater than basic economic loss; as such, that claim is dismissed (*see Watford v Boolukos*, 5 AD3d 475 [2d Dept 2004]).. Similarly, defendant established that plaintiff did not sustain an injury that prevented him from performing his usual and customary activities for not less than 90 days of the 180 days after his accident; and plaintiff failed to raise a triable issue of fact is this regard (*see Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664, 665 [2d Dept 2008]; *Sainte-Aime v Ho*, 274 AD2d 569, 570 [2d Dept 2000]).

Conclusion

Based upon the foregoing, it is hereby

ORDERED that defendant's motion is granted, in part, with respect to plaintiff's claims of a medically determined injury which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for ninety days during the one hundred eighty days immediately following the accident and plaintiff's claim for economic loss in excess of basic economic loss, and it is further

ORDERED that defendant's motion is denied, in part, with respect to plaintiff's claim of a permanent consequential limitation of use of a body organ or member and plaintiff's claim of a significant limitation of use of body function or system.

The parties are directed to appear for a mandatory settlement conference on January 20, 2021 at 3:30 P.M.. A Microsoft teams link will be provided prior to the conference.

Any matters not specifically addressed have been considered and denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 4th, 2020
Goshen, New York

E N T E R:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: *Counsel of Record via NYSCEF*