SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES **PART** 22M

Justice

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ALEXYS CASANOVA ROSADO,

Plaintiff,

- v -

M KESSLER HARDWARE, JOHN DOE

Defendant.

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INDEX NO. 157742/2019

MOTION DATE 10/10/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion by Defendant M Kessler Hardware for summary judgment on the basis that Plaintiff failed to satisfy the threshold set forth in Insurance Law 5102 (d) is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a January 14, 2019 motor vehicle accident. Plaintiff's Bill of Particulars alleges injuries to Plaintiff's cervical spine, lumbar spine, right shoulder, and right knee that fall within the serious injury categories of Insurance Law 5102 (d).

Movant bears the initial burden to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]). In instances where a defendant asserts that the evidence reveals a preexisting injury or a degenerative condition, the plaintiff must present evidence to the contrary (*Brewster v FTM Servo, Corp.*, 44 AD3d 351 [1st Dept 2007]).

Defendants have established a prima facie showing of entitlement to summary judgment. Defendants rely on the affirmed reports of Dr. Andrew N. Bazos, orthopedic surgeon, Dr. Nicholas Post, neurosurgery specialist, and Dr. Carl Jewell, Biomechanist.

Dr. Bazos examined Plaintiff on September 10, 2021, and reviewed relevant medical records and reports, including MRIs of Plaintiff's right knee taken on May 25, 2019, which shows a horizontal tear of the posterior horn of the medial meniscus, and an interstitial tear of the ACL. An MRI of Plaintiff's right shoulder taken on June 25, 2019 showed a supraspinatus tendon tear. Dr. Bazos also reviewed the January 3, 2018 MRI of Plaintiff's right shoulder, which showed a tear of the supraspinatus tendon and a tear of the anterosuperior labrum.

Dr. Bazos measured Plaintiff's range of motion using a goniometer and compared the measurements to normal values as described in AMA Guidelines and found normal range of motion as to Plaintiff's cervical spine, thoracolumbar spine, right and left shoulders, and right and left knees.[1] Dr. Bazos concluded that Plaintiff sustained "at most minor, self-limited, soft tissue strain injuries to the right shoulder" as a result of the subject accident, that Plaintiff made a full and complete recovery from those injuries, and that Plaintiff is left with no accident-related disability or limitations in performing her normal daily activities. Dr. Bazos further concluded that all ongoing care Plaintiff received addressed issues unrelated to the subject accident. Specifically, with regard to Plaintiff's right shoulder and right knee, Dr. Bazos noted that the tearing in Plaintiff's right shoulder was the result of a long-standing impingement; had Plaintiff sustained acute traumatic rotator cuff tears, labral tears and meniscus tears at the time of the subject accident, she would have had the immediate onset of pain and swelling "which would require emergent medical attention at the scene and most certainly would have caused her to seek medical attention immediately after the accident." Consequently, according to Dr. Bazos, the findings on the MRIs of Plaintiff's right shoulder and right knee predated the subject accident by "some time" given their level of development and represent the normal aging process.

Dr. Bazos further concluded that the surgeries performed to Plaintiff's right shoulder and right knee were not medically necessary as a result of the subject accident. Despite the fact that Dr. Bazos did not have the operative reports for his review, he found that the delay in the onset of

[1] Dr. Bazos also examined Plaintiff's elbows, wrists, hands, hip, ankles, and foot and found normal range of motion, but those areas are not pleaded in Plaintiff's Bill of Particulars.

Plaintiff's symptoms and lack of physical examination findings did not support surgical intervention as it relates to the subject accident. Therefore, he determined that the surgical procedures that were performed were in no way attributable to the incident in question.

Dr. Post also performed an independent medical examination of Plaintiff on September 14, 2021 and reviewed relevant medical records and reports. Dr. Post measured Plaintiff's range of motion using a goniometer and compared the measurements to normal values as described in AMA Guidelines and found limitation in range of motion as to Plaintiff's cervical spine and lumbar spine, which he attributed to suboptimal effort and complaints of discomfort at the end points of movement. Dr. Post also performed motor strength testing, reflex testing, and sensory testing, which were normal with the exception of difficulty performing heel walking exercises and toe walking exercises due to subjective complaints of low back pain, as well as a relative decrease in sensitivity to light touch and pinprick in the lower right extremity. Dr. Post categorized the limitations on the physical examination as "out of proportion" to Plaintiff's mild degenerative spinal condition documented on diagnostic testing, and thus are not an accurate reflection of Plaintiff's functional status. Dr. Post concluded that Plaintiff's subjective pain complaints do not correspond with a traumatic spinal injury. Plaintiff's diagnostic testing performed after the subject accident describe mild degenerative changes affecting the cervical lumbar spinal column, and the June 13, 2020 and July 24, 2020 percutaneous discectomy procedures targeted this mild pre-existing degenerative condition.[2] Dr. Post found no evidence of ongoing neurological impairment based upon available information, and concluded that Plaintiff is capable of working and performing her activities of daily living without restriction.

Dr. Jewell reviewed relevant materials, conducted a biomechanical injury causation analysis and concluded that the subject accident did not create the required injury mechanisms and did not induce force magnitudes that exceeded tolerable levels specific to Plaintiff, and as such, a causal link between the subject incident and the claimed injuries cannot be established.

[2] Dr. Post also noted that the clinical utility of these percutaneous discectomy procedures is uncertain.

Dr. Jewell's analysis demonstrated that the impact involved a shallow collision angle with vehicular damage consistent with a sideswipe incident. Dr. Jewell reported that Plaintiff would not be expected to experience any significant movement relative to the vehicle's interior, due to the low accelerations in this case, Plaintiff's body would have been well supported by the seat structures and any resulting motion would have been limited. With regard to Plaintiff's cervical spine, lumbar spine, and right shoulder, Dr. Jewell's biomechanical injury causation analysis demonstrated that the forces and accelerations that Plaintiff experienced were within tolerable levels for a person in her physical condition and were comparable to, or less than, those associated with typical activities of daily living. Dr. Jewell concluded that the subject accident did not create the required injury mechanisms and did not induce force magnitudes that exceeded tolerable levels specific to Plaintiff, and thus a causal link between the subject incident and the claimed cervical spine, lumbar spine, and right shoulder injuries cannot be established. Dr. Jewell cited scientific literature supporting his methodology (*De La Rosa v Nelson Ave. Holdings*, 199 AD3d 513 [1st Dept 2021]).

As to the 90/180 days category of Insurance Law 5102 (d), Plaintiff's Bill of Particulars states that Plaintiff was confined to her bed and home for one week. Defendant also relied on Plaintiff's testimony that she has continued working since the subject accident, but she works less since the accident. Plaintiff also testified that she used to go on walks in the park for exercise but does not do that as often as a result of her injuries. She also testified, that she is affected when she cooks, cleans, showers, lays down to sleep, and shops for groceries.

Defendant has met his initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]). The burden therefore shifts to Plaintiff to produce prima facie evidence to support her claim of serious injury.

In opposition, Plaintiff relies on the affirmation and attached medical records of Dr. Howard L. Baum, orthopedist, the affirmation of Dr. Tamer Elbaz, a specialist in pain management, certified medical records including radiology records from CitiMed Diagnostic,

acupuncture records from Ye's Acupuncture P.C., and physical therapy records from Smart Inspire Physical Therapy, P.C. and AHM Physical Therapy, P.C., and chiropractic records from Rose Chiropractic Health & Wellness PC and Dean Chiropractic PC.

In reply, Defendant contends that Plaintiff's medical records fail to contain objective and qualitative findings and measurements required to raise an issue of fact. Defendant further contends that Dr. Baum's affirmation fails to evidence any recent evaluation, while Dr. Elbaz's affirmation fails to compare Plaintiff's degrees of range of motion with normal range of motion values, and the remaining medical records provided fail to establish Plaintiff's current condition and thus summary judgment must be granted.

Dr. Baum examined Plaintiff on June 25, 2019 and concluded that Plaintiff's right shoulder and right knee injuries were not degenerative in nature because they were traumatically induced (not chronic), that Plaintiff's right shoulder injury was exacerbated by the subject accident, and that the injuries to Plaintiff's right knee were caused by the subject accident. Dr. Baum found positive O'Brien, Neer, and Hawkins tests as to her right shoulder, and restricted range of motion as to Plaintiff's right knee. Dr. Baum reviewed MRI films of Plaintiff's right shoulder taken on May 25, 2019, that revealed tears in her labrum and supraspinatus tendon, and of her right knee, also taken on May 25, 2019, that revealed meniscal and ACL tears and joint effusion. Dr. Baum reported that since conservative treatments on Plaintiff's right knee failed, he performed arthroscopic surgery on Plaintiff's right knee on August 30, 2019, and his post-operative diagnoses included meniscal tearing and post-traumatic chondral fracture. At an examination on August 13, 2019, Dr. Baum reported a restricted range of motion and decreased strength as to Plaintiff's right shoulder. However, Dr. Baum failed to compare any range-of-motion measurements that he took in those body parts to normal. Specifically, Dr. Baum recorded that Plaintiff is "moving about 140 degrees actively" does not disclose any specific range-of-motion measurements performed in reaching that conclusion (*Green v Jones*, 133 AD3d 472 [1st Dept 2015]). He performed no tests on Plaintiff's cervical spine and lumbar spine, nor did he give a qualitative assessment of injuries to those areas (*Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]).

Dr. Elbaz's affirmation and medical records, on the other hand, demonstrates sufficiently recent range-of-motion deficits and qualitative limitations in use of Plaintiff's cervical spine, lumbar spine, right knee, and right shoulder. Dr. Elbaz first examined Plaintiff on March 10, 2020. He measured Plaintiff's range of motion using a goniometer and compared the measurements to normal values as described in AMA Guidelines and NYS Division of Disability Determination. Dr. Elbaz found limitation in Plaintiff's range of motion as to her cervical spine, lumbar spine, right shoulder, and right knee. Dr. Elbaz also noted positive spurling sign, as to Plaintiff's cervical spine, positive impingement sign as to Plaintiff's right shoulder, and positive media/lateral stress and petallar grind test as to Plaintiff's right knee. Dr. Elbaz also performed a lumbar spine discectomy at the L5-S1 level with a post-operative diagnosis of a L5-S1 disc herniation, and a cervical spine discectomy at C5-C6, with a post-operative diagnosis as a C5-C6 disc herniation. Based on Dr. Elbaz's examination, review of Plaintiff's MRIs, and the nature of her symptoms as well as her medical history, Dr. Elbaz concluded that Plaintiff's cervical spine and lumbar spine injuries were traumatically induced and not degenerative in nature and were caused by the subject accident. Plaintiff has raised a sufficient issue of fact as to her cervical spine and lumbar spine injuries to warrant denial of summary judgment. If a claimant can satisfy at least one of the serious injury thresholds, then the claimant is permitted to recover for all damages proximately caused by the accident, even those that are not considered "serious." (*Jiang Chung v State of NY*, 70 Misc3d 775, 786 [Ct Cl 2020]). As such, the Court need not determine whether Plaintiff's other injuries fall into one of the serious injury categories under Insurance Law 5102 (d).

With respect to the 90/180 days category of serious injury, there is no competent medical evidence demonstrating that Plaintiff was unable to perform substantially all of her normal activities for at least 90 of the first 180 days as a result of the accident (***Elias v Mahlah***, 58 AD3d 434, 435 [1st Dept 2009]). Plaintiff's examination before trial testimony that she did not go out of her room at any point on the night of the accident and that she worked less hours than prior to the subject accident, as well as the fact that Plaintiff's Bill of Particulars alleges that Plaintiff was confined to bed and home for one week immediately following the subject accident undermine her

chance of establishing a 90/180-days claim (*Nguyen v Abdel-Hamed*, 61 AD3d 429, 430 [1st Dept 2009]; *Lopez v Abdul-Wahab*, 67 AD3d 598, 599-600 [1st Dept 2009]). This defeats her claim under this category (*Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013] ["Plaintiff's deposition testimony that he was confined to bed and home for about one week after the accident, and that his workday was shortened by an hour, defeats his 90/180 day claim"]). Plaintiff's subjective complaints of pain and limitation, without more, do not rise to the level of a "serious injury" within this category of Insurance Law 5102 (d). Accordingly, it is

ORDERED that the motion by Defendant M Kessler Hardware for summary judgment based upon the grounds that Plaintiff's alleged injuries fail to satisfy the serious injury threshold under Insurance Law 5102 (d) are denied, except as to the 90/180 days category; and it is further

ORDERED that any requested relief not specifically addressed herein has nonetheless been considered: and it is further

ORDERED that within 30 days of entry, Defendant shall serve a copy of this Decision and Order with Notice of Entry upon Plaintiff.

This constitutes the Decision and Order of the Court.

8/29/2023
DATE

James G. Clynes
JAMES G. CLYNES, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE