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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver Justice PART 22

DE LOS SANTOS, DIGNA

- v -

DE LOS SANTOS, MANUEL

INDEX NO. 100217-2009

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion for

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits	No(s). 1, 2
Answering Affirmation(s) — Affidavit(s) — Exhibits	No(s). 3
Replying Affirmation — Affidavit(s) — Exhibits	No(s). 4

Upon the foregoing papers, the motion is decided as follows:

Defendant Manuel De Los Santos ("Defendant") moves pursuant to CPLR §3212 for an order granting summary judgment and dismissing Plaintiffs Digna De Los Santos, John De Los Santos and Franklin Guzman's (collectively "Plaintiffs") complaint on the ground that Plaintiffs did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). Under New York Insurance Law §5102(d), a "serious injury" is defined 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 can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Plaintiff Digna De Los Santos

Plaintiff alleges in her Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury including posterior horn tear of the medial meniscus of the right knee, loss of range of motion of the right knee and cervical spine, strain and sprain of the cervical and lumbar spine and right shoulder traumatic injury. In support of this motion, Defendant submits the expert reports of Dr. Maurice C. Carter and Dr. Jacob Lichy. Dr. Carter examined Plaintiff on June 10, 2010. He reviewed the MRI film of Plaintiff's right knee taken on October 21, 2008 and concluded that there was no evidence of a tear. Dr. Carter further determined that Plaintiff's range of motion was "bilaterally excellent." However, an expert's qualitative assessment of a plaintiff's condition must be supported with an objective basis and compares the plaintiff's limitations to the normal function (*see Toure v Avis Rent A Car Sys., Inc.*, 98 N.Y.2d 345, 350-51, 746 N.Y.S.2d [2002]). Dr. Carter fails to specify what mechanism or objective test he used to evaluate Plaintiff's range of motion, nor does he compare it to normal. Additionally, Dr. Lichy's report states that he reviewed Plaintiff's October 21, 2008 right knee MRI film. He reported that the film was a normal MRI of the right knee. Dr. Lichy's report is not affirmed under the penalties of perjury. Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*see Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Defendant has failed to present evidence sufficient to meet their initial burden of establishing a *prima facie* case for summary judgment as to whether Plaintiff's alleged injuries constituted a permanent consequential limitation of use a body organ or member and/or a significant limitation of a body function or system.

Nonetheless, in opposition, Plaintiff successfully raises a question of fact as to her injuries. Plaintiff submits the expert affirmation of Dr. Steven Brownstein and Dr. Mark McMahon. Dr. Brownstein reviewed Plaintiff's cervical spine and right knee MRI films. He found that the cervical spine MRI revealed straightening of the normal curvature and that the right knee MRI film showed a tear of the posterior horn of the medial meniscus. Dr. McMahon recently examined Plaintiff and found limitations in range of motion of her right knee, right shoulder and cervical spine. He concluded that she sustained a right knee torn medial meniscus, cervical spine sprain and a right shoulder sprain.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v.* Rodriguez, *63 A.D.3d 520 [1st Dept 2009]).* The Bill of Particulars does not list any periods of confinement to bed and/or home. Plaintiff testified that she was not confined to bed, but was confined to her home for approximately one week. She further stated that she missed six hours from work. Plaintiff has not sufficiently shown that her curtailment of activities was medically determined (see *Antonio v Gear Trans Corp.*, 2009 NY Slip Op 6370 [treating physician's statements that they were "medically disabled," and were to refrain from any work or activities that caused pain were too general to raise the inference that plaintiff's confinement to bed and home was medically required]; *see Gorden v Tibulcio*, 50 AD3d 460, 463, 855 N.Y.S.2d 515 [2008]). Accordingly, Defendant's summary judgment motion as to Plaintiff's 90/180 claim under New York Insurance Law §5102(d) is granted.

Plaintiff John De Los Santos

Plaintiff alleges in his Verified Bill of Particulars that, as a result of the accident, he sustained a serious injury including fracture of the right shoulder humeral head and cervical and lumbar spine strain/sprain. In support of this motion, Defendant submits the expert reports of Dr. Maurice C. Carter

and Dr. Jacob Lichy. Dr. Carter examined Plaintiff on June 10, 2010. He stated that Plaintiff was able to laterally rotate his shoulders about 35 to 40 degrees and abduct his shoulders to about 160 degrees (with complaint of discomfort). Dr. Carter further stated that straight leg raising was negative when seated and positive at about 50 to 55 degrees bilaterally. Dr. Carter also reviewed Plaintiff's MRI of his right shoulder taken on October 21, 2008. He states that the film is a normal study. Dr. Carter further reasons that St. Luke's Hospital saw a line on the shoulder x-ray, which represented the growth plate. Dr. Carter's conclusion is that Plaintiff bruised his shoulder in the accident and has no residual problems aside from a weakness of the scapula motos, which can be attended by therapy or home exercise. Dr. Lichy reviewed Plaintiff's right shoulder MRI film taken on October 21, 2008. He concluded that there was no evidence of any tears and that it was a normal MRI.

In opposition, Plaintiff contends that he sustained a fracture of the proximal humerus. Plaintiff submits the St, Luke's Roosevelt emergency department records from the night of the accident. The records indicate that the right clavicle x-ray revealed a linear lucency in the acromion, suspicious for a non-displaced fracture and a linear lucency at the level of the humeral head which may also represent a non-displaced fracture. Dr. McMahon also examined the October 5, 2008 x-ray and stated that the x-ray shows a fracture of the proximal humerus, which he states was caused by the motor vehicle accident. In order to raise a question of fact, Plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]). Plaintiff has sufficiently raised a question of fact as to whether he sustained a fracture as a result of the car accident.

With respect to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d), Plaintiff's injuries must restrict him from performing "substantially all" of his daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v.* Rodriguez, *63 A.D.3d 520 [1st Dept 2009])*. The Bill of Particulars does not list any periods of confinement to bed and/or home. Plaintiff testified that he was not confined to bed or home, nor did he lose anytime from school. Accordingly, Defendant's summary judgment motion as to Plaintiff's 90/180 claim under New York Insurance Law §5102(d) is granted.

Plaintiff Franklin Guzman

Plaintiff alleges in his Verified Bill of Particulars that, as a result of the accident, he sustained a serious injury including posterior disc herniations at C5-C6 and C6-C7, annular bulging at L4-L5, Grade II signal of the posterior horn of the medial meniscus of the right knee and lumbar and cervical strains/sprains. In support of this motion, Defendants submit the expert reports of Dr. Maurice C. Carter and Dr. Jacob Lichy. Dr. Carter examined Plaintiff on June 3, 2010. Upon physical examination, he stated that Plaintiff could perform neck extension at least 40 degrees beyond neutral and rotated 65 degrees left and right, within the normal range. Further, Dr. Carter stated that manual motor testing from the knees was excellent with motion from 0 to 145 degrees, within the normal range. He additionally conducted straight leg raising in both the seated and recumbent positions and found the signs to be negative. Dr. Carter concluded that Plaintiff had a sprain of his back with no cervical or lumbar

radiculopathy. He also stated that there is no knee injury.

Dr. Lichy reviewed Plaintiff's right knee MRI film dated October 22, 2008 and concluded that it was a normal MRI. He also reviewed Plaintiff's cervical spine MRI film and noted a minute concentric disc bulge at C6-C7. Dr. Lichy's report is not affirmed under the penalties of perjury. Medical records and reports by examining and treating doctors that are not sworn to or affirmed under penalties of perjury are not evidentiary proof in admissible form, and are therefore not competent and inadmissible (*see Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]).

Defendants also raise a gap in treatment argument. Plaintiff testified that he treated for three to four months from October 2008 to January 2009 and has not treated since that time. While a cessation of treatment is not dispositive, a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so (*DeLeon v Ross*, 2007 NY Slip Op 8001 [1st Dept]; *Pommells v Perez*, 4 NY3d 566, 574, 830 N.E.2d 278, 797 NYS2d 380 [2005]). Plaintiff contends that it is "simply impossible to have a legally insurmountable gap in treatment given such a short overall time span," referring to the fact that the accident occurred in 2008. Further, Plaintiff argues that the "law is clear that any gap in treatment goes to the weight, not the admissibility of the plaintiff's evidence." Nonetheless, all the case law cited by Plaintiff pertains to situations where plaintiff sufficiently addressed gap in treatment either through an affidavit stating that plaintiff was unable to treat due to lack of monetary funds or through an expert affirmation stating that maximum medical improvement had reached or that further treatment would be palliative. Plaintiff did not submit any evidence to adequately address Defendant's gap in treatment argument. He does not submit an affidavit explaining why he stopped treatment in 2009, nor do any of his experts address this issue. Accordingly, Plaintiff failed to raise any triable issue of fact as to his sustaining a serious injury causally connected to the accident.

Accordingly, it is hereby,

ORDERED that Defendant's motion for summary judgment is granted as to Plaintiff Franklin Guzman and Plaintiff Guzman's complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendant's motion for summary judgment as to Plaintiffs Digna De Los Santos and John De Los Santos is denied as to their claims under the permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendant's motion for summary judgment as to Plaintiffs Digna De Los Santos and John De Los Santos is granted as to their claims under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendant is to serve a copy of this order upon Plaintiffs, with Notice of Entry, within 30 days.

George J. Silver

George J. Silver, J.S.C.

Dated: February 6, 2013
New York County

GEORGE J. SILVER