SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT Justice PART 5

Index Number : 104937/2010
TRICARICO, WILLIAM
vs.
CAMARA, MAMADOU C.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT CPLR #7

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 8-13-13
AUG 13 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

WILLIAM TRICARICO,

Plaintiff,

-against-

MAMADOU C. CAMARA, W. SARS TRANS CORP., THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT and THE NEW YORK CITY OF TRANSPORTATION

Defendants.

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DECISION/ORDER
Index No. 104937/2010
Seq. No. 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2..(Exhibits D &E)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....4.. (Exhibits D, E &F)
REPLYING AFFIDAVITS.....	.....5.....
EXHIBITS.....	.....
OTHER.....(Cross-Motion).....	..... 3.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants Mamadou C. Camara and W. Sars Trans Corp., move for an Order pursuant to CPLR§3212 granting summary judgment and dismissing plaintiff's Complaint for failure to sustain a "serious injury" within the meaning of Insurance Law§ 5102(d). Defendants The City of New York, The New York City Police Department and The New York City Department of Transportation (" collectively, the City"), cross-move for an Order pursuant to CPLR§3212, granting them summary judgment dismissing plaintiff's Complaint. Plaintiff opposes.

It should be noted that for the sake of judicial economy and brevity, the City adopts and incorporates by reference the arguments set forth in their co-defendants' motion for summary judgment. After a review of the papers presented, all relevant statutes and case law, the Court **denies** the instant motion and cross-motion.

Factual and procedural background:

Plaintiff commenced the instant action to recover monetary damages for personal injuries he allegedly sustained as a result of a motor vehicle accident occurring on November 11, 2009, at the intersection of East 58th Street and First Avenue, in New York County. According to plaintiff, the vehicle he was driving was struck by defendant W. Sar's Trans Corp.'s taxi cab, which was driven by defendant Mamadou Camara. Following the accident, EMTs were called to the scene and immobilized plaintiff with a cervical collar and back board. They then transported him to New York Presbyterian Hospital. At the hospital, plaintiff complained of head pain, neck pain and dizziness. He was examined and eventually diagnosed with "whiplash." He was prescribed Ibuprofen, Percocet, Naproxen and Flexoril for pain, and was discharged. Hospital personnel suggested that he refrain from working for at least two days and referred him to an orthopedic clinic for further treatment. However, in lieu of going to the clinic, plaintiff opted to see Dr. Andrew C. Susi, a chiropractor, on November 23, 2009. Dr. Susi's office is close in proximity to plaintiff's home.

On or about February 5, 2010, plaintiff served a Notice of Claim on the City. On or about March 30, 2010, he also served a Summons and Complaint on the City. The City joined issue via service of its Answer on or about May 13, 2010. On October 4, 2011, plaintiff filed a Note of Issue which was subsequently vacated. Then, on November 13, 2012, he filed a second Note of Issue. In his Bill of Particulars dated May 19, 2010, plaintiff alleges that he sustained, *inter alia*, a disc herniation at C2-C-3; C3-C4; C4-C5 and C5-C6; posterior disc bulge at L1-L2 through L5-SI; T8-T9

left sided focal extruded disc herniation; anterior disc extension at T5-T6-T9-T10; left shoulder derangement; left shoulder strain and left shoulder rotator cuff syndrome. It also alleges that as a result of these injuries, plaintiff was confined to his home for three days, and also missed three days of work.

Positions of the parties:

Plaintiff argues that his proffered medical evidence clearly indicates that he sustained both cervical and lumbar disc herniations and bulges as well as diminished range of motion, which are a direct result of his car accident. Thus, he asserts that defendants have not met their burden of proof that his injuries were not serious in nature, thereby necessitating the denial of the instant motion.

The following is a recitation of plaintiff's various examinations and test results. Plaintiff saw Andrew C. Susi, D.C., on November 23, 2009, complaining of neck, upper and lower back pain as a result of his accident. He informed Dr. Susi that this persistent pain substantially interfered with the performance of his everyday activities and seemed to be worsening over time. Plaintiff alleges that the range of motion tests conducted by Dr. Susi revealed limitations to his cervical and lumbar spine. Following this initial evaluation, plaintiff began a course of treatment with Dr. Susi, continuing over a period of almost two years.

On November 24, 2009, the day after Dr. Susi's initial evaluation, plaintiff was examined by John McGee, who is Board Certified in Physical Medicine and Rehabilitation. Plaintiff presented with the same complaints of extreme pain in the neck, back and left shoulder. He informed Dr. McGee that he was also experiencing difficulty in rising after sitting, in walking and in bending. Consequently, Dr. McGee performed various range of motion tests. He also conducted follow up examinations of plaintiff on January 1, 2010, February 25, 2010, March 25, 2010, May 6, 2010, June 10, 2010, July 22, 2010, September 16, 2010, March 3, 2011 and October 20, 2011.

In his annexed report, Dr. McGee states that with regard to plaintiff's cervical spine, the tests he performed indicated "deep/superficial muscle spasm, tenderness, L/R bilateral cervical paraspinals." (Bongiorno Aff., Ex. D). Additionally, the Spurling's test indicated that plaintiff was suffering from cervical root impingement due to discogenic pathology. Said report also indicates that NCV/EMG studies of the upper and lower extremities may be performed in order to rule out radiculopathy and provide a more accurate diagnosis..." *(Id.)*. Following the results of these various tests, Dr. McGee recommended a comprehensive treatment plan for patient.

On the last page of his report, Dr. McGee states "I feel that there is a direct causal relationship between the accident described and the patient's current injuries to the described areas. His symptoms and clinic findings are consistent with musculoskeletal injuries to the described areas. At this point, the patient remains impaired with regard to some functional capabilities, as such, I would like to recommend that the patient receive physical therapy program *[sic]* to increase muscle strength and range of motion to the areas injured..... All damages are very close to the nerve roots where they exist from the spine and may develop risk of chronic arthritis, scar formation and lead to impairment and disability." (*Id.)*

An MRI was subsequently performed on November 30, 2009, by Steven Winter, M.D., who is Board Certified in Radiology. Said MRI revealed a straightening of the cervical curvature in addition to herniations with impingement at the C2-3, C3-4, C4-5 levels, as well as a bulging disc with impingement at the C5-6 level. The MRI also revealed herniated discs with impingement and posterior disc bulges. Finally, an MRI of the thoracic spine performed on December 1, 2009, revealed an additional herniated disc with impingement at the T9-9 level. (*Id.*)

Thereafter, Dr. McGee referred plaintiff to Andrew Davy, M.D., a specialist in pain management. Dr. Davy examined plaintiff on October 11, 2010. Dr. Davy's report is annexed as

Exhibit "E." Plaintiff complained that he was still experiencing neck and lower back pain and described it as "throbbing, burning, tingling, sharp, with a pin and needle sensation." Dr. Davy's diagnosis was "low back pain secondary to lumbar post-traumatic disc pathology, lumbar radiculopathy, multiple myofascial trigger points, cannot rule out facet syndrome." (*Id.*) His examination revealed positive straight leg test results and a positive Spurling's test. Additionally, he noted tenderness existing throughout plaintiff's facet joints and multiple myofascial trigger points in the neck and shoulder areas.

In response to these test results, Dr. Davy recommended that plaintiff undergo a series of thoracic, lumbar and cervical epidural injections. Plaintiff also contends that he was compelled to seek extensive palliative care in the form of acupuncture and massage therapy. More importantly, Dr. Davy states that "all [patients] pain, suffering and current temporary total disability is a result of this accident." (*Id.*)

It should also be noted that plaintiff also sought out the services of Jay Tanoy, a Physical Therapist on November 23, 2009, and Roberto Chiemi, a licensed massage therapist. In his report, Mr. Chiemi states that patient came to see him after being diagnosed with "concussion syndrome, tension headaches, brachial neuropathy/radiculopathy, cervical disc displacement, lumber radiculitis, lumbar disc herniations, lumbar sprain/strain and left shoulder strain as a result of a motor vehicle accident." (Bongiorno Aff. Ex. F).

On September 6, 2011, Dr. S.W. Bleifer, an Board Certified Orthopedist, examined plaintiff at the request of defendants W. Sars Trans Corp. and Mamadou C. Camara. In Dr. Bleifer's medical report, annexed to the instant motion as Exhibit "D," he notes that plaintiff denied losing consciousness after the accident. Nor, did he sustain any fractures. Said report also notes that plaintiff was continuing his usual work as a porter. Using a goniometer, Dr. Bleifer performed a

series of range of motion testing on plaintiff's cervical spine, right and left shoulders, right and left elbows, thoracic spine, lumbar spine, muscle strength and right and left hips.

He ultimately diagnosed plaintiff with resolved post-concussion syndrome, resolved cervical and lumbosacral sprains, resolved left shoulder contusion and strain and resolved contusion of the left elbow and chest wall. Based upon the results of his examination, plaintiff's history, a review of the Bill of Particulars and various medical records, Dr. Bleifer concluded that plaintiff "did not sustain any permanent injuries as a result of the November 11, 2009 accident." (*Id.*)

On September 15, 2011, plaintiff, again at the request of the aforementioned defendants, ws also examined by Dr. Elizabeth Ortof, a Board Certified Neurologist. In her affirmed medical report annexed as Exhibit "E, in defendants' Notice of Motion" she states that at the time she examined him, plaintiff had already returned to work, and was working at full capacity as a porter. He also informed Dr. Ortof that he missed about two weeks of work as a result of accident. Dr. Ortof also performed a series of range of motion tests on plaintiff's cervical spine and lumbar spine. The result are as follows: 1) Post-concussion syndrome resolved; 2) Cervical sprain resolved; 3) Left shoulder strain resolved; 4) Contusion of the left elbow resolved; 5) Contusion of the chest wall resolved; 6) Lumbosacral sprain resolved; and 7) Normal examination of left hip.

Dr. Ortof's examination further indicated that plaintiff's motor examination revealed 5/5 strength everywhere; that his reflexes were normal and his sensory examination was intact to pin, touch, position and vibration. His coordination revealed intact finger to nose bilaterally. His gait was normal, his Romberg's test was negative and he was able to walk on his heels and tandem without any apparent difficulty. Dr. Ortof stated "[t]he claimant did not sustain any permanent injuries as a result of the November 11, 2009 accident." *(Id.)*

Defendants argue that the results of the aforementioned independent examinations reveal that plaintiff unequivocally did not sustain a serious injury under any of the categories promulgated by Insurance Law§5102(d). They also argue that the aforementioned medical reports constitute competent medical evidence in admissible form to satisfy their burden of establishing that plaintiff did not suffer a serious injury as a matter of law. They argue that plaintiff is unable to sufficiently satisfy the category of "permanent loss of use of a body organ, member, function or system," because his loss of use, even if permanent, is not "total." Defendants further argue that plaintiff's injuries are merely soft tissue in nature, and as such, do not satisfy the categories of "permanent consequential limitation of use of a body organ or member," or a "significant limitation of use of a body system or function." Lastly, defendants argue that the soft tissue injuries fail to satisfy the 90/180 disability category in that said injuries do not prevent plaintiff from performing "substantially all" of the material acts which constitute his usual and customary daily activities during the statutory period.

Plaintiff argues that defendants have failed to meet their initial burden of demonstrating the absence of material triable issues of fact. He argues that it is "well settled law that a movant seeking summary judgment in soft tissue cases can establish prima facie entitlement to summary judgment by submitting medical reports which contain quantified findings that demonstrate that a victim has full range of motion in her lumbar and cervical spine." (See Aff. in Opp. ¶ 10). Plaintiff also argues that a loss of range of motion quantified at 30% of normal has explicitly been held by the First Department to be significant.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson*

v. Waisman, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D. 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

Pursuant to Article 51 of the New York State Insurance Law, "serious injury" is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, or member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute his ususal and customary daily activity for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury (see McKinney's Consolidated Laws of New York, Insurance Law§ 5102(d)). Categories 6 through 9 are clearly applicable to the instant case.

Serious injury is a threshold issue, and therefore, is a necessary factor of plaintiff's prima facie case (see *Licari v. Elliot*, 57 N.Y.2d 230 [1982]; *Toure v. Harrison*, 6 A.D.3d 270 [1st Dept. 2004]; Insurance Law§ 5104[a]). In order to satisfy the statutory threshold, a plaintiff must submit competent objective medical evidence of his/her injuries, based on the performance of objective tests

paired with the doctor's observations during plaintiff's physical examination (see *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002; *Lopez v. Senatore*, 65 N.Y.2d 1017 [1985]). Subjective complaints alone are deemed insufficient to establish a prima facie case of serious injury (*Gaddy v. Eyler*, 79 N.Y.2d 955, 957 [1992]; *Scheer v. Koubek*, 70 N.Y.2d 678, 679 [1987]). However, on a defendant's motion for summary judgment, the motion papers must establish a prima facie case through evidence in admissible form that plaintiff's injuries are not that serious within the meaning of Insurance Law§ 5102[d] (see *Baez v. Rahamatali*, 6 N.Y.3d 868 [2006]).

To meet the threshold regarding the significant limitation of use of a body function or system or permanent consequential limitation category, it is required that the limitation be more than minor, or slight, and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (see *Gaddy v. Eyler*, *supra*, *Licari v. Elliot*, *supra*, *Scheer v. Koubeck*, 70 N.Y.2d 678 [1987]). "A significant limitation [of use of a body function or system] need not be permanent in order to constitute "serious injury" (*Vasquez v. Almanzar,* 107 A.D.3d 538 [1st Dept. 2012];*Estrella v. Geico Ins. Co.*, 102 A.D.3d 730, 731 [2d Dept. 2013]; see also *Partlow v. Meehan*, 155 A.D.2d 647, 647 [2d Dept. 1989]).

A " 'permanent consequential limitation, requires a greater degree of proof than a 'significant limitation,' as only the former requires proof of permanence" (*Altman v. Gassman*, 202 A.D.2d 265, 265 [1st Dept. 1994]). When a claim is raised pursuant to the "permanent consequential limitation of a body organ or member" or "significant limitation of use of a body function or system" categories, in order to prove the extent or degree of the physical limitation, an expert's numeric percentage of the plaintiff's loss of range of motion is considered acceptable (see *Toure v. Avis Rent A Car Sys, Inc.*, 98 N.Y.2d at 349).

In the case at bar, the Court is faced with conflicting reports regarding plaintiff's condition rendered by Board Certified physicians. At this juncture in the proceedings, there is no way to determine with any semblance of certainty, which physician's finding accurately reflects whether or not plaintiff has suffered a serious injury as contemplated by the statute, and whether said injury has prevented him from substantially performing all his usual activities for not less than 90 during the 189 days following his accident. Indeed, these determinations would be more appropriately addressed and resolved by a jury.

While it is also important to note that the Court agrees with defendants that since the New York Presbyterian Hospital record (see Bongiorno Aff., Ex. "B"), as well as the MRI reports of Dr. Winter (Bongiorno Aff., Ex. "D"), are not signed, sworn to or affirmed, the conclusions set forth therein would not ne probative to this Court's consideration. Indeed, courts have unanimously held that a party may not use an unsworn medical report prepared by a party's own physician on a motion for summary judgment (see *Grasso v. Angerami*, 79 N.Y.2d 813 [1991]; *Offman v. Singh*, 27 A.D.3d 284 [1st Dept. 2006]; *Quinones v. Ksieniewicz*, 80 A.D.3d 506 [1st Dept. 2011]). Furthermore, the opinions and conclusions of other physicians, (i.e. Dr. Wilen), formulated in reliance upon these unsworn reports would fail in themselves, to raise a triable issue of fact (see *Clemmer v. Drah Cab Corp.*, 74 A.D.3d 660, 661 [1st Dept. 2010]).

While Dr. Wilen relied, *inter alia,* on Dr. Winter's MRI results, so did Dr. Davy. However, Dr. Davy also conducted his own physical examination of plaintiff. Thus, the fact that he may have reviewed, considered and/or relied on said unsworn MRI results, does not undermine the validity of his medical opinion regarding plaintiff's condition.

Lastly, defendants argue that "plaintiff's complaint must be dismissed because he has failed to explain his complete cessation of treatment in October 2011." (Torto Reply Aff. p. 7,¶ 16). "A

cessation of treatment is not dispositive" on a summary judgment motion, although "a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so" (*Pommells v. Perez*, 41 N.Y.3d 566,574 [2005]). In the instant case, the Court, not having viewed any evidence that plaintiff in fact did cease treatment in October 2011, is not inclined to strike plaintiff's complaint solely on an unsupported allegation.

Therefore, the Court finds that plaintiff has established a prima facie case that defendants have failed to sufficiently rebut.

In accordance with the foregoing, it is hereby

ORDERED that the summary judgment motion of defendants' Mamadou C. Camara and W. Sars Trans Corp. are denied; and it is further

ORDERED that the City's cross-motion for summary judgment is also denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

FILED

AUG 16 2013

COUNTY CLERK'S OFFICE
NEW YORK

DATED: August 13, 2013

AUG 13 2013

ENTER:

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT