Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr. IAS PART 32
Justice

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WILLIAM BAKER and JOANNA ROMANOWSKA,

Plaintiff,

-against-

VERIZON NEW YORK INC and KERRY D. WILLIAMS,

Defendants.

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Index. No.:12482/2013

Motion Dated: August 7, 2015
Seq. No. 1
Cal. No. 10

The following papers numbered 1 to 13 read on defendants' motion and plaintiff William Baker's cross-motion against co-plaintiff for summary judgment pursuant to CPLR §3212 dismissing plaintiffs' complaint on the basis that plaintiffs' alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

	Papers Numbered
Notice of Motion, Affirmation, Exhibits.....	1-4
Notice of Cross-Motion, Affirmation.....	5-7
Opposition, Exhibits.....	8-10
Reply, Exhibits.....	11-13

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined as follows:

The Court initially notes that this matter has been settled and discontinued as to plaintiff Joanna Romanowska. As such, those portions of defendants' motion seeking summary judgment against such plaintiff, as well as William Baker's ("Baker") cross-motion are denied as moot.

This action involves a motor vehicle accident that occurred on April 16, 2013 on the Grand Central Parkway at or near its intersection with 66th Avenue, Queens County. Plaintiff Baker was operating the vehicle involved in the occurrence. In his verified bill of particulars Baker alleges a multitude of injuries including but not limited to right shoulder partial rotator cuff tear, left knee meniscus tear, both requiring surgery, bulges, herniations and impingement of various spinal discs, decreased range of motion in various areas of his body, various strains and sprains, along with exacerbation thereof, and headaches and pain syndrome. He also testified on February 25, 2014 in connection with the underlying accident. He stated that an ambulance came to the scene, he was examined, but not taken to the hospital, and that he was able to drive his

vehicle from the scene to Multi Speciality Pain Management ("Multi Speciality") where he had been receiving treatment for injuries sustained in prior events. Specifically, Baker acknowledged that he was involved in two prior automobile accidents, the first in 1993 and the second in 2004/2005, as well as an assault in 2010.

The Court was provided with plaintiff's deposition transcript from August 21, 2012 relative to the 2010 assault. A comparison of his testimony with that most recently taken (2014) reveals that plaintiff complains of much the same injuries, including injuries to his back, shoulders, neck and legs. He likewise claimed much of the same restrictions in his daily activities, such as walking, standing and sitting for long periods of time, lifting heavy objects, performing household chores, engaging in relations with his fiancé and performing self grooming, among other tasks. The Court also notes that some injuries have been complained of since the 2004/2005 accident in which Baker was struck as a pedestrian[1]. Baker also indicated that he never returned to work following the 2010 assault, and that he had been continuously treating with a pain management physician at Multi Speciality on a monthly basis for the 2010 incident through 2013. Baker stated that he saw such physician in March 2013 and then again on April 18, 2013, two days following the accident underlying this action although, he could not recall if he told him about such accident[2]. He also admitted that he was still taking pain medications for the injuries sustained in the 2010 assault, as recently as the evening before the 2013 accident, and importantly, that some of the complaints he previously made as a result of the assault worsened.

Given the above, defendants argue that the alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff Baker's complaint is warranted.

APPLICABLE LAW

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact, (*see* CPLR §3212[b]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986], Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 852 [1985], Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment, (*see* Licari v Elliot, 57 NY2d 230, 237-38 [1982]), and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those enumerated in such statute, (*see* Gaddy v Eyler, 79 NY2d 955, 956-57 [1992]). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of

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[1]Baker commenced an action regarding this accident that it seems was settled prior to trial. The assault action, bearing Supreme Court, Queens County index number 5639/2011 appears to have gone to trial where a verdict for defendants was awarded.

[2]The doctor's progress notes of such date do not indicate knowledge of the April 16, 2013 accident, and notes of dates later in time indicate Baker denied any new injuries or accidents. Multiple and various doctors', hospital, physical therapy and other treatment records are provided as exhibits to the moving papers.

support the plaintiff's claim, (*see* Grossman v Wright, 268 AD2d 79, 84 [2nd Dept. 2000]; *see also* Toure v Avis Rent A Car Sys., 98 NY2d 345, 352 [2002], Gaddy at 956, Batista v Olivia, 17 AD3d 494 [2nd Dept. 2005]).

With this established, the burden shifts to the plaintiff to come forward with evidence demonstrating a material issue of fact with respect to their injuries being serious within the meaning of section 5102(d), (*see* Gaddy at 957). What is required of plaintiff in this endeavor is evidence of the injury by quantitative objective findings (*see* Toure at 350, Grossman at 84), free of mere conclusory assertions tailored to meet the statutory requirements, (*see* Lopez v Senatore, 65 NY2d 1017, 1020-21 [1985]; *see also* Powell v Hurdle, 214 AD2d 720 [2nd Dept. 1995]), and based on a recent examination, (*see* Murray v Hartford, 23 AD3d 629 [2nd Dept. 2005], Mohamed v Dhanasar, 273 AD2d 451 [2nd Dept. 2000], Kauderer v Penta, 261 AD2d 365 [2nd Dept. 1999]). Subjective complaints of pain and limitation are insufficient (*see* Gaddy at 957-58, Scheer v Koubek, 70 NY2d 678, 679 [1987], Licari at 239).

As to the categories of injuries, there are nine in total, generally those in dispute are subsections six through nine; more specifically, "6) permanent loss of use of a body organ, 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; and 9) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment", (Insurance Law §5102[d]). As to subsection six, the injury must be a total loss (*see* Oberly v Bangs Ambulance, Inc., 96 NY2d 295, 299 [2001]), and continue for the duration of the injured person's life. As to subsections seven and eight, there is much overlap in that the words consequential and significant have been held to mean something more than minor, mild or slight (*see* Gaddy at 957, Scheer at 679, Licari at 236). As opposed to a loss, these sections deal with a limitation, the extent and degree of which must be quantified by objective testing (*see* Barrett v Howland, 202 AD2d 383 [2nd Dept. 1994]; *see also* Micelson v Padang, 237 AD2d 495, 496 [2nd Dept. 1997]), that must be noted within the report, (*see* Mobley v Riportella, 241 AD2d 443, 444 [2nd Dept. 1997], Lincoln v Johnson, 225 AD2d 593, 593-94 [2nd Dept. 1996]). In the latter there is an element of duration (*see* Partlow v Meehan, 155 AD2d 647, 648 [2nd Dept. 1997]), while the former requires permanency. Mere repetition of the word "permanent" in a report is insufficient to meet this requirement, (*see* Lopez at 1019). Finally, with respect to these two subsections the objective findings must be the result of a recent examination and any lapse in time between the cessation of medical treatment after the accident and the physical examination conducted by plaintiff's expert must be adequately explained, (*see* Grossman at 84; *see also* Smith v Askew, 264 AD2d 834 [2nd Dept. 1999]). With respect to the final category commonly referred to as 90/180, it must be shown by more than self-serving testimony, (*see* Phillips v Costa, 160 AD2d 855, 856 [2nd Dept. 1990]), that substantially all of the plaintiff's activities were curtailed to a great extent rather than slightly, (*see* Licari at 236) by a medically determined injury or impairment of a non-permanent nature, (*see* Toure at 357).

ANALYSIS

Moving defendants present admissible proof by way of the sworn reports of Monette G. Basson, M.D., a neurologist who examined Baker on April 10, 2014 in relation to this matter's accident, as well as on November 1, 2012 in relation to the 2010 assault; Edward A. Toriello, M.D., an orthopedic surgeon who examined Baker on May 13, 2014; and Sheldon Feit, M.D. a radiologist who performed a review of Baker's diagnostic films, along with an MRI report of plaintiff's left knee dated May 15, 2013. Dr. Basson and Dr. Toriello both indicate the medical records they reviewed and the means by which certain tests were performed including objective quantified range of motion testing by use of a baseline bubble inclinometer and/or a goniometer. The results of such testing as compared to normal are documented. Dr. Basson indicates that there was no evidence of a neurological injury and positive findings were due to hysterical conversion reaction, not objective findings. Dr. Toriello opined that the claimants subjective complaints are unsupported by objective findings and the injuries sustained in 2013 were an exacerbation of a pre-existing condition. He further clarifies in an addendum that it is clear the injuries involving Baker's neck, shoulder and knee antedate the 2013 accident. Finally, Dr. Feit indicated that the findings appear chronic and degenerative in nature, and there are no abnormalities causally related to the 2013 accident. As to the 90/180 category, defendants presented plaintiff's deposition testimony in which he testified as outlined above. Inasmuch as the alleged restrictions and daily activities are identical for the prior occurrence, Baker cannot causally relate such limitations to the subject 2013 accident.

This showing is sufficient to meet defendants' *prima facie* burden. In light thereof, plaintiff must come forward to show that his injuries are serious under the law or that there is at least a material issue of fact with respect thereto, (*see* Grossman at 84; *see also* Toure at 352, Gaddy at 956).

In an attempt to do so, plaintiff presents the reports of Stephen Wilson, M.D. and Mehran Manouel, M.D. These reports are insufficient for their attempted purpose in, *inter alia*, the latter is not based upon a recent examination; the last examination for which plaintiff appeared was on August 1, 2013, over 2 years ago, (*see* Murray at 629, Brown v Tairi Hacking Corp., 23 AD3d 325, 326 [2nd Dept. 2005], Kauderer at 365, Thomas v. Roach, 246 A.D.2d 591 [2d Dept. 1998]); and as to both, they fail to address that at the time of the subject accident plaintiff had ongoing and continuous treatment to the same body parts due to prior accidents and events, (*see* Gentilella v Bd. of Ed.of Wantagh Union Free, 60 AD3d 629, 630 [2nd Dept. 2009], Contave v Gelle, 60 AD3d 988, 989 [2nd Dept. 2009], Penaloza v Chavez, 48 AD3d 654, 655 [2nd Dept. 2008]). Accordingly, any findings of causality are speculative at best, (*see* Vidor v Davila, 37 AD3d 826, 826-27 [2nd Dept. 2007], Moore v Sarwar, 29 AD3d 752, 753 [2nd Dept. 2006]), and an issue of fact cannot be created by simply declaring a causal relation, (*see* Varveris v Franco, 71 AD3d 1128, 1129 [2nd Dept. 2010], Contave v Gelle *and* Moore v Sarwar *supra*).

CONCLUSION

In light of the above, defendants' motion for summary judgment and to dismiss plaintiff Baker's complaint on the ground that his alleged injuries fail to meet the serious injury threshold requirement is granted.

Dated: November 25, 2015

Rudolph E. Greco, Jr.
J.S.C.