

SCAW

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**

**Justice.**

TRIAL/IAS PART 2  
NASSAU COUNTY

THOMAS BOLAND,

Plaintiff,

-against-

MARK BLUMLEIN,

Defendant.

ORIGINAL RETURN DATE: 08/17/11

SUBMISSION DATE: 10/17/11

Index No. 1386/10

MOTION SEQUENCE #001

The following papers read on this motion:

Notice of Motion.....	1
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Defendant’s motion for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a “serious injury” under New York Insurance Law § 5102(d) is denied.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of material fact, and the moving party is, therefore, entitled to judgment as a matter of law ( *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court’s task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to

demonstrate the absence of any material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). The burden rests on defendant to establish that plaintiff has not suffered a serious injury within the meaning of the statute. If defendant establishes that he is entitled to judgment as a matter of law, the burden shifts to the plaintiff to provide admissible evidence in support of his serious injury claim ( *Quadrozzi v. Salako*, 697 N.Y.S.2d 671 [1999]).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident, which occurred on September 16, 2009. Plaintiff injured his lower back in a prior motor vehicle accident about ten years ago (Ex. D, p74, 75). About three years ago he injured his left shoulder lifting weights (Id., p.72).

In support of his position that plaintiff did not suffer a permanent or significant limitation of use of a body organ, function or system, defendant submits the report of Isaac Cohen, M.D., a board certified orthopedic surgeon, dated January 5, 2011. Dr. Cohen's examinations of plaintiff on that date revealed "cervical and lumbosacral strains, resolved" (Def's Ex. E). Range of motion testing of cervical and lumbar spine and left shoulder, measured with a goniometer, was within normal range.

Dr. Cohen opined that "the claimant has significant preexistent degenerative disc disease in the cervical and lumbosacral spine areas. The MRIs of the cervical and lumbar spine revealed no evidence of acute, accident related changes. The EMG was unremarkable with no radiculopathy present" (Id.) He further opined that "Mr. Boland is able to perform his normal activities in an unrestricted fashion and has no evidence of an active disability" (Id.) Moreover, the "MRI examination of the left shoulder demonstrated the presence of AC joint arthritis, a condition that also preexisted the accident of 9/16/09" (Id.). Defendant contends that this affirmed report establishes that plaintiff did not suffer a serious injury.

Defendant submits that plaintiff did not sustain a serious injury that prevented him from performing substantially all of his activities for at least 90 out of the 180 days immediately following the accident. "[T]here was no competent medical evidence which would support a claim that the plaintiff was unable to perform substantially all of h[is] daily activities for not less than 90 of the first 180 days as a result of the subject accident (citation omitted)" (*Boyle v. Gundogan*, 19 AD3d 351 [2d Dept. 2005]).

Defendant has, therefore, satisfied his initial burden of demonstrating that plaintiff did not suffer a serious injury. The burden now shifts to plaintiff “to come forward with sufficient evidence to overcome defendant’s motion by demonstrating that [he] sustained a serious injury within the meaning of the No-Fault Insurance Law (citation omitted)” (*Gaddy v. Eyler*, 79 NY2d 955, 957 [1992]).

In opposition, plaintiff submits the affirmations of Engracia Lazatin, M.D., Harry G. Fisher, M.D., Sebastian Lattuga, M.D. and Robert Donadt, M.D., as well as the unaffirmed MRI reports of Richard J. Rizzuit, M.D. and the affidavit of plaintiff. Defendant submits that the unsworn MRI reports are not competent evidence. Defendant’s arguments that the MRI reports are insufficient are unavailing as his expert referenced these very same reports (*see, McFarland v. Irizarry*, 26 Misc.3d 1224(A) (Civ. Ct., Bronx Co., 2010)).

Plaintiffs’ expert, Dr. Lazatin, initially examined plaintiff on September 16, 2009, when he presented with complaints of back, neck, right knee and left shoulder pain. Range of motion studies revealed limitations. Dr. Lazatin recommended a course of physical therapy which continued until August 12, 2010, at which time he reached maximum improvement (Pl’s Ex. B, ¶7). At the time of her initial evaluation of plaintiff, Dr. Lazatin’s diagnosis was “lumbar spine sprain/strain, thoracic sprain, cervical spine sprain/strain; post accident headaches; left shoulder sprain/strain; right knee sprain/strain, R/O cervical/lumbar spine HNP, R/O cervical/lumbar radiculopathy, R/O left shoulder torn ligament” (Id., ¶8). Dr. Lazatin opined that, consistent with the clinical presentation in her office, these injuries were causally related to the motor vehicle accident of September 16, 2009, and would inhibit plaintiff’s ability to carry out his normal course of daily activities.

A year later, on August 17, 2011, Dr. Lazatin re-examined plaintiff. Her current diagnosis is: “lumbar spine sprain/strain; cervical spine strain/sprain; left shoulder sprain/strain; right knee sprain/strain; disc herniations from C3 through C7; disc herniations at L2 through S1; left shoulder AC joint supraspinatus impingement with tendinopathy” (Id., ¶20). Dr. Lazatin opined that the limitations in motion of plaintiff’s lumbar spine, cervical spine, right knee and left shoulder are permanent and will continue to inhibit plaintiff’s ability to carry out his normal activities of daily living.

On March 23, 2010, plaintiff presented to Dr. Fisher with complaints of pain to his back, neck, right knee and left shoulder. Plaintiff continues to treat with Dr. Fisher who recommended that plaintiff refrain from his normal course of employment. Dr. Fisher opines that the arthroscopy surgery performed on November 5, 2010, to plaintiff's left shoulder to repair an impingement was necessitated as a result of the subject accident. Plaintiff was reevaluated by Dr. Fisher on September 8, 2011, at which time his diagnosis was "cervical spine pain; left shoulder pain; lumbar spine derangement; disc herniations from C3 through C7; disc herniations at L2 through S1; left shoulder AC joint supraspinatus impingement with tendinopathy" (Pl's Ex. C, ¶16). Dr. Fisher further opines that the injuries were causally related to the motor vehicle accident of September 16, 2009, and that the injuries are permanent in nature and will continue to inhibit plaintiff's ability to carry out his normal activities of daily living.

Plaintiff first presented to Dr. Lattuga, a board certified orthopedist, on March 8, 2010, with complaints of back, neck and left shoulder pain, as well as lower extremity radiation with numbness, tingling and dysesthesias. Dr. Lattuga's range of motion studies of the cervical and thoracolumbar spine, conducted by using a goniometer, revealed limitations. Dr. Lattuga's diagnosis subsequent to his examination and review of MRIs was "cervical radiculopathy; disc herniations from C3 through C7 and disc herniations at L2 through S1" (Pl's Ex. D., ¶8). Dr. Lattuga stated that plaintiff elected to proceed with physical therapy and lumbar spine epidural injections. He recommended that plaintiff "refrain from his normal course of employment and the patient has not returned to work the entire time while under my care" (Id., ¶9).

Dr. Lattuga opined that "the injuries as diagnosed are causally related to the motor vehicle accident of September 16, 2009 and the limitations in the ranges of motion as they are still present can only be considered permanent . . . and that the disc pathology diagnosed via MRIs were causally related to the subject motor vehicle accident" (Id., ¶10). Dr. Giovanni Angelino, M.D. of Dr. Lattuga's office administered lumbar epidural steroid injections to plaintiff on October 27, 2010, November 17, 2010, and December 1, 2010 (Id., ¶¶11, 12).

Plaintiff was re-evaluated by Dr. Lattuga on August 29, 2011, at which time he presented with complaints of back, neck and left shoulder pain. Range of motion studies using a goniometer revealed limitations. Dr. Lattuga opined that "the need

for epidural steroid injections was as a result of the injuries sustained in the motor vehicle accident of September 16, 2009. Further, it is my expert medical opinion that Mr. Boland is potentially a candidate for surgery to the lumbar spine due to the injuries he sustained in this accident” (Id., ¶19).

Plaintiff treated with Dr. Donadt from August 3, 2011, until the present time (Pl’s Ex. E, ¶9). Dr. Donadt’s diagnosis after re-evaluation of plaintiff on October 4, 2011, was “chronic cervical spine sprain; chronic lumbar spine sprain; disc herniations from C3 through C7 and disc herniations at L3 through S1” (Id., ¶13). Dr. Donadt opined that the injuries as diagnosed were casually related to the motor vehicle accident of September 16, 2009, and that “as the patient is still exhibiting limitation of motion in his lumbar spine and cervical spine some two years post accident said injuries can only be considered permanent and significant as the injuries diagnosed will continue to inhibit the patient’s ability to carry out his normal activities of daily living” (Id., ¶15)

Counsel for plaintiff submits that the conflicting opinions between defendant’s examining physician and plaintiff’s doctors raise issues of fact and issues of credibility for a jury to decide. The court agrees. The Court of Appeals recently held that even where plaintiff’s evidence is “hardly powerful,” issues of credibility are not for the court to decide but for the jury (*Perl v. Meher*, \_\_\_\_\_ NY3d \_\_\_\_ [2011]).

Accordingly, defendant’s motion for summary judgment is denied.

This decision constitutes the order of the court.

Dated: 12-21-11

HON THOMAS P. PHELAN  
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THOMAS P. PHELAN, J.S.C.

**ENTERED**

DEC 23 2011

NASSAU COUNTY  
COUNTY CLERK’S OFFICE

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