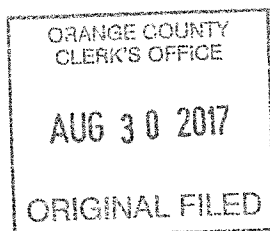


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To commence the statutory time
for appeals as of right (CPLR 5513 [a]),
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
TERRANCE WEST and AUDREY WILLIAMS,
Plaintiff,

DECISION AND ORDER

Index No.: 4999/2015

-against-

Motion Date: 6/26/2017

Sequence No. 2

JAMIE MACAS and NELSON
NAULA-CHIMBOLEMA

Defendants.

-----X
SCIORTINO, J.

ORIGINAL

The following papers numbered 1 to 25 were considered in defendants' application for dismissal of the complaint on the grounds of failure to establish that plaintiff has sustained a serious injury:

PAPERS

NUMBERED

Notice of Motion/Affidavit (Shuter)/Exhibits A-P	1 - 17
Affirmation in Opposition (Shuttleworth)/Affirmation (Dr. Dassa)	
Exhibits A-E	18 - 24
Reply Affirmation	25

This personal injury action arises out of a motor vehicle accident that took place on November 6, 2014. Plaintiff West was a passenger in one of the involved vehicles. Plaintiff commenced this action by filing a Summons and Complaint on or about July 2, 2015. West alleges that he sustained serious injuries as defined within Insurance Law §5102(d). Specifically, plaintiff claims cervical and lumbar sprain and/or strain; left shoulder sprain; internal derangement of his right knee, and aggravations and exacerbations of preexisting conditions. West also claims right knee surgery, related to the accident, was performed on March 12, 2015.

By Notice of Motion filed March 17, 2017, defendants seek summary judgment dismissing the complaint against West, on the ground that he did not suffer a serious injury in accordance with the definitions under Insurance Law §5102(d).

In support of their application, defendants submit evidence that West was involved in an automobile accident two and one half years prior to the subject accident. (*See, Hightower v Ghio*, 82 AD3d 934 [2d Dept 2011]) Defendants offered, among other things, a report from their examining physician, Bradley D. Wiener, M.D., who examined the plaintiff on January 9, 2017. As to the lumbar spine, Dr. Wiener opined that West may have sustained, at most, a lumbosacral strain injury which was a pre-existing condition as a result of a prior motor vehicle accident which occurred on March 30, 2013. Dr. Wiener found no current limitation of motion. An MRI performed on May 4, 2013 indicates a bulging disc with central focal bulge L4-5 without disc herniation. A subsequent MRI performed on June 28, 2016 was not considered as it was subsequent to another motor vehicle accident that occurred on August 9, 2015. As a result of that accident, West claimed injury to his right elbow and lumbar spine. He also sustained a work related injury to his lumbar spine on June 18, 2016.

With respect to the cervical spine, Dr. Wiener indicated that West offered no complaints and did not indicate that he was injured in this region as a result of the subject accident. An MRI performed on December 8, 2014 was compared to an MRI performed on May 3, 2013, and indicated no changes, and a narrowing of the disc space height at C5-6 and spondylosis.

Prior medical records clearly document that the plaintiff had a pre-existing history of trauma, injury and symptoms to the right knee. Specifically, the Progress Note of Ronald Krinick, M.D. from Seaport Orthopedics dated March 18, 2014 (one year after the first accident and eight months

before the subject accident) indicates that the defendant complained of right knee pain. West was diagnosed with a right knee medial meniscus tear and Dr. Krinick recommended arthroscopic surgery.

The Patient Note of Jean A. Bachar, M.D. of Seaport Orthopedics dated October 14, 2014, one month prior to the subject accident, indicates that plaintiff presented for a follow-up evaluation of his low back and bilateral knee pain with an onset of instability, clicking sensation and stiffness in his right knee. Dr. Bachar ordered an MRI which was conducted January 2, 2015, approximately two months after the subject accident. The MRI indicated no change, compared to a prior MRI of August 26, 2013.

It is further noted that the plaintiff presented at St. Luke's Cornwall Hospital on the day of the subject accident, and did not complain of right knee pain. The emergency room note indicates that he complained only of left shoulder and low back pain. Defendant was evaluated, treated and released.

As to the left shoulder, Dr. Weiner concludes that there is no plausible mechanism whereby the left shoulder would have sustained anything other than a minor contusion. The MRI performed January 17, 2015 is unremarkable except for mild degenerative change and a deltoid contusion consistent with a contusion injury. Also, Dr. Bachar indicated in her October 14, 2014 patient note, that plaintiff's left shoulder lacked 10 degrees flexion and abduction.

Based upon the report of their expert, Dr. Wiener, and the records of plaintiff's treating physicians, defendants' initial moving papers constituted a *prima facie* showing that West did not sustain a serious injury as a result of the November 6, 2014 accident, and that his injuries to his spine and right knee were not causally related to the subject accident.

The burden thus shifted to plaintiff West to raise a triable issue of fact as to whether his injuries are casually related to the subject accident and constitute serious injuries as defined in Insurance Law §5102(d). (*See, Stukas v Streiter* 83 AD3d 18 [2d Dept 2011]) West, provided two reports of Dr. Gabriel Dassa, dated February 7, 2017 and June 2, 2017 respectively, in which she indicates specific losses of range of motion in plaintiff's spine, left shoulder and right knee and that plaintiff suffers from persistent orthopedic impairment to his neck, back, right knee and left shoulder which are causally related to this accident. (*Lopez v. Senatore*, 65 N.Y.2d 1017, 1020 [1985]) However, plaintiff does not refute defendant's evidence of a preexisting injuries, nor does Dr. Dassa mention the injuries sustained by plaintiff in 2015.

Dr. Dassa's reports do not address the fact that the MRI performed after the subject accident showed no changes from those performed previously. While he does mention the 2013 accident, Dr. Dassa did not review all treatment records from that accident nor does he mention the well-documented injury to plaintiff's back and right knee for which plaintiff was still treating with pain medication at the time of the accident. Dr. Dassa also does not consider either of plaintiff's subsequent accidents in 2015 for which plaintiff claimed lumbar spine injury. Dr. Dassa's finding of a 10 degree loss of range of motion in plaintiff's left shoulder is the same as Dr. Bachar's findings prior to the subject accident.

Although Dr. Wiener did not specifically address the plaintiff's 90/180 claim, that claim is belied by the plaintiff's bill of particulars and deposition testimony which reveal that plaintiff was not employed at the time of the accident. Further, although his bill of particulars indicates that he was confined to bed for approximately two months and thereafter to home for approximately eight months, West testified that he was able to take himself to physical therapy commencing just days

after the accident. He began working construction in June 2015 and, prior to start of that employment, he attended classes for such employment. When asked at his deposition what activities he is unable to do because of the accident, plaintiff answered "sports" but admits that he had not attempted to play any sports since well before the subject accident due to work obligations. He also testified that he has had no problems performing his usual and customary activities of daily living. In addition, plaintiff submits the report of Dr. Amy M. Weiss-Citrome, dated January 8, 2015, just two months after the subject accident, in which she opined that plaintiff is not disabled and can carry on his regular daily activities.

In light of the above, it is hereby:

ORDERED that the defendant's motion is granted in its entirety; and it is further

ORDERED that the complaint of plaintiff, Terrance West, is dismissed.

This matter is hereby scheduled for a further status conference on October 6, 2017, at 9:00 a.m. at the Orange County Courthouse, 285 Main Street, Goshen, New York.

This decision constitutes the order of the Court.

Dated: August 24, 2017
Goshen, New York

ENTER

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