To commence the statutory time period 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 WESTCHESTER

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JOSE CAPELLAN,

Plaintiff,

-against-

DECISION & ORDER
Index No.: 61183/2012
Sequence Nos. 1&2

EASTERN CONCRETE MATERIALS, INC. and ERIC RICCIO,

Defendants.

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WOOD, J.

The following documents numbered 1-35 were read in connection with the summary judgment motions made by each party:

Defendant's Notice of Motion, Dr.Taffet Affidavit, Dr. Bove Affidavit, Counsel's Affirmation, Exhibits.	1-14
Defendants' Memo of Law.	15
Plaintiff's Counsel's Affirmation in Opposition, Exhibits.	16-22
Defendants' Reply Affirmation.	23
Plaintiff's Notice of Motion, Counsel's Affirmation, Plaintiff's Affidavit, Exhibits.	24-30
Plaintiff's Counsel's Affirmation in Opposition, Exhibits.	31-35

Plaintiff commenced this action by filing the summons and verified complaint on July 20, 2012, seeking damages for injuries allegedly sustained on February 7, 2012, from a rear end collision with impact to his vehicle from defendant's cement mixing truck on Yonkers Avenue, in Yonkers. On August 22, 2012, defendants filed and served their verified answer denying

negligence, proximate cause and causal damage, and asserting the defense that plaintiff sustained a serious injury within the requirements of Section 5102(d) and 5104 of the Insurance Law. Defendants move pursuant to CPLR § 3212, for summary judgment on the ground that the plaintiff did not sustain a "serious injury" as required by Insurance Law § 5102 (d). Plaintiff opposes defendants' motion and cross moves for summary judgment on the basis that defendant was negligent by causing the motor vehicle accident. Upon the foregoing papers, the motions are decided as follows:

By way of background, plaintiff, 53 years of age, claims that on February 7, 2012, he was going to pick up his daughter from school, and was on Yonkers Avenue waiting for on-coming traffic to pass to make a left turn into St. Johns Avenue, when his 1999 Jeep Grand Cherokee was rear ended by defendant Riccio's cement mixing truck. In contrast, Riccio's version of the subject accident was that plaintiff, without a rear directional signal, stopped short in the middle of the intersection causing defendant to brake, and when barely moving at maybe one mile an hour there was a very light contact to plaintiff's rear bumper. After the accident, plaintiff refused to go to the hospital, and did not seek medical attention until the next day.

It is well settled that a 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; see also Menzel v

Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

New York Insurance Law § 5104 (a) provides: "notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state there shall be no right of recovery for non-economic loss, except in the case of serious injury." Pursuant to Insurance Law § 5102 (d), serious injury means: 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.

In order to recover under the permanent loss of use category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295, [2001]). To prove the extent or degree of physical limitation with respect to the permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the qualitative nature of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345, [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, 57 NY2d 230 [1982]). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (Toure v. Avis Rent A Car Systems, Inc. 98 N.Y.2d 345 [2002]). Whether a plaintiff has sustained a serious injury within the meaning of the statute is a threshold legal question within the sole province of the court (Hambsch v New York City Transit Authority, 101 AD2d 807 [2d Dept 1987]). Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (Toure v. Avis Rent–A–Car Systems, Inc., 98 N.Y.2d 345, 350).

As the moving party, it is the defendant's initial burden to establish that the plaintiff has not sustained a "serious injury" (see Gaddy v Eyler, 79 NY2d 955, 956 [1992]). This is accomplished by submitting objective proof, generally in the form of "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, 84 [2d Dept 2000]). Such proof can even include "unsworn medical reports and uncertified records of an injured plaintiff's treating medical care providers" (Elshaarway v U-Haul Company of Mississippi, 72 AD3d 878 [2d Dept 2010]; see Itkin v Devlin, 286 AD2d 477[2d Dept 2001]). If defendants establishes their prima facie entitlement to judgment as a matter of law, the burden shifts to the plaintiff to produce evidence sufficient to demonstrate a triable issue of fact on the existence of a "serious injury" as defined by the statute (see Sanevich v Lyubomir, 66 AD3d 665 [2d Dept 2009]; Azor v Torado, 59 AD3d 367, 368 [2d Dept 2009]).

Defendants' Motion for Summary Judgment

To support their motion, defendants raise the undisputed fact that plaintiff was involved in a prior motor vehicle accident in New York on June 14, 2004, wherein he was in an Acura and was rear ended by a garbage truck while stopped at a red light.[1] As a result of this prior accident, plaintiff did not return to his former occupation as a manager of a bar and restaurant. He assumed the role of primary care provider of his children, and doing household chores.

Defendants point to plaintiff's 2005 medical treatment records and reports that indicate that the injuries alleged in the 2004 action involved plaintiff's cervical spine at C6-7 with radiculopathy by EMG testing and the lumbar spine at L5-S1 for herniated disc. Plaintiff's medical records and plaintiff's own testimony evidence that since his prior accident, he has had ongoing neck and back pain resulting in neck and back injuries for herniated discs at C6-7 and L5-S1 that caused him daily radiating pain into both arms and legs. Defendants argue that plaintiff's medical reports, and the fact that plaintiff has been awarded and collecting social

[1]Plaintiff brought an action for damages in Bronx County under Index No. 23111/2004.

security disability benefits for being disabled from working since 2005 or 2006, confirm that plaintiff has ongoing medical issues resulting from the prior accident. For instance, the Manhattan Medical Imaging P.C. Report on June 25, 2004, shows plaintiff having a protruded disc herniation at C6/C/7 with partial obliteration of the epidural space, and on July 16, 2004, a thin broad based protruded disc herniation at L5/S1 posteriouly. Plaintiff had laser decompression surgery on his low back and neck in 2005 at Cabrini Medical Center. Since 2008 or 2009, plaintiff was prescribed with medications of Seroquel, Zoloft for depression, Neurontin for nerve pain and spasm, and Ambien for sleep that were taken regularly before and up to the subject accident. Defendants rely on plaintiff's prior medical records by Drs. Kaisman and Hausknecht in 2005, which noted plaintiff's reduced ranges of motion, his positive EMG result for a C6-7 radiculpathy and both cervical C6-7 and lumbar L5-S1 laser disc decompression procedures, which they claim is competent proof in support in favor of their summary judgment motion.

Defendants further recount that the damage to plaintiff's Jeep resulting from the subject accident merely involved an indentation without any breakage or cracking of the bumper cover.

Defendants recognize that on February 8, 2012 (after the subject accident) plaintiff went to the Emergency Room of Montefiore Medical Center where he was evaluated and provided with medication for his pain. He was diagnosed with cervical and lumbar strains. The same diagnosis was made by Dr. Faierman on March 1, 2012 with the additional diagnosis of status post surgery. On February 28, 2012, All County LLC Diagnostic Radiology report indicates (among other things) disc bulges at C3/C4 and C5/C6 and disc herniation at C4/C5 and C6/C7. On August 28, 2012, at Franklin Hospital, plaintiff had a C6-C7 disc removal surgery with a

bone graft inserted.

In support of their motion, defendants offer the affidavit and report of Dr. Robert T. Bove, Jr., Ph.D, who is a member of the society of automotive engineers, holds doctorate and masters degrees in bioengineering from the University of Pennsylvania, and is employed by Exponent in its Biomechanics practice in Philadelphia. He also is an Adjunct Professor in the Department of Mechanical Engineering at Temple University in Philadelphia. Dr. Bove conducted a biomechanical analysis of the loading applied to plaintiff's body and the effects of that loading in the low speed collision of February 7, 2012, to determine whether the subject accident could have caused or exacerbated the thoracolumbosacral spine pathologies documents in plaintiff's medical records. Dr. Bove found that based on the biomechanical analysis presented above, the subject incident provided no mechanism to cause any thoracolumbosacral spinal disc injuries to plaintiff, and provided no more potential for exacerbation of his pre-exiting thoracolumbosacral spine pathologies than he would have experience during activities of daily living.

Defendants also offer the affidavit and report of Dr. Robert Taffet, a graduate of Albert Einstein College of Medicine, 1988, an orthopedic surgeon certified by the American Board of Orthopaedic Surgery, with 18 years of clinical practice. Over a year after the accident, Dr.Taffet performed a medical examination of plaintiff, having reviewed his medical records and charts. Dr. Taffet opines that there is nothing in the radiologic studies obtained after plaintiff's February 7, 2012 accident to suggest anything other than pre-existent cervical and lumbar degenerative disc disease. The soft tissue injury component of plaintiff's alleged injuries from the 2012 accident do not appear to have been significant. Plaintiff only sustained temporary cervical and

lumbar sprains, that are non-permanent, as a result of the 2012 accident. Dr. Taffet opines that plaintiff had minor non-serious soft tissue injuries to the cervical and lumbar spine. Plaintiff's lumbar degenerative disc disease was present in 2004 and appears to have gotten worse over time, which is the natural progression of the disease process. Dr. Taffet does not believe that lumbar decompression and possibly fusion surgery would be of benefit to plaintiff, and does not believe that the accident of February 7, 2012, materially aggravated his preexistent cervical or lumbar degenerative disc disease. Dr Taffet notes that the August 28, 2012, cervical decompression and fusion surgery performed by Dr. Lattuga was not necessary as it relates to the subject accident. It is also Dr. Taffet's opinion that he sees no reason why plaintiff is unable to be gainfully employed in a light/sedentary duty job.

Based upon the foregoing, defendants met their prima facie burden by the submission of competent medical evidence establishing that the alleged injury to the plaintiff's lumbosacral and cervical regions of his spine did not constitute a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d), as a result of the subject accident.

However, with respect to the 90/180 day serious injury category, defendants have not met their initial burden of proof. Plaintiff claims that to this day, he has been prevented from performing substantially all of his daily activities since the accident. Defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident (in fact he examined plaintiff over a year following the accident), and did not adequately address this issue in their submissions, thus rendering the physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to

substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident. Thus, summary judgment is precluded with regard to this category.

In opposition to defendants' motion, plaintiff submits competent medical evidence raising a triable issue of fact as to whether the alleged injuries to the lumbosacral and cervical regions of his spine constituted serious injuries under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102(d) (Dixon v. Fuller, 79 A.D.3d 1094, 1094–1095,[2d Dept 2010]).

Upon examination of the papers and exhibits submitted, this court finds that plaintiff raised triable factual issue as to whether the plaintiff has "permanent consequential" and "significant limitation" categories. The medical records submitted by plaintiff noted "decreased" range of motion in the cervical spine, and the objective medical testing done to arrive at that conclusion was discussed (Knopf v Sinetar, 69 AD3d 809 [2d Dept 2010].

Plaintiff argues that the evidence offered in support of defendants' motion creates, at most, nothing more than a conflict of medical opinion as to both the nature and cause of plaintiff's injuries. The court agrees.

In support of his motion, plaintiff offers the Diagnostic Radiology Report from Dr. Chandy, dated February 28, 2012, noting that plaintiff had a history of previous surgery herniated disc, and currently has a posterior disc bulges and herniation. It is Dr. Chandy's medical opinion that plaintiff's injuries to his cervical and lumbar spines and the need for epidural steroid injections and nerve blocks in his cervical and lumbar spines as well as surgery to his cervical spine are causally related to the subject accident.

Moreover, after the accident, on February 13, 2012, physical therapist Eliogio Leyva, performed range of motion tests on plaintiff's cervical and lumbar spines finding variable losses to his cervical and lumbar spines. Ranges of motion were measured using a goniometer and the results were analyzed in comparison with the normal ranges of motion published by the American Medical Association and NYS Disability Determination Guidelines. Plaintiff claims that he has difficulty sitting for long periods of time, bending, lifting, playing sports, playing with his child, shopping, driving and helping his wife around the house.

Plaintiff also offers the report of Dr. Lattuga, a board certified orthopaedic spine surgeon, and plaintiff's treating physician, who notes plaintiff's injuries from the prior accident, and represents that he has treated plaintiff from May 29, 2012. Dr. Lattuga states that plaintiff's symptomatology and limited range of motion of his neck and back are causally related to the subject accident. Further, Dr. Lattuga states that plaintiff's condition is permanent and constitutes significant qualitative limitation, restriction of use, and activity of the injures areas of his person. Dr. Lattuga's report based on his own examinations and test results of plaintiff, in conjunction with MRI films confirming the existence of his injuries, and his description of the effect that his injuries have had on his activities, provides adequate proof of the extent or degree of plaintiff's physical limitations to substantiate his claim of serious injury.

Plaintiff having shown how he suffers from physical limitations due to the injuries he sustained as a result of the accident, provided objective evidence of his injuries, and provided his treating physician's affirmation confirming the extent or degree of the physical limitation resulting from the alleged injuries, plaintiff has thus, come forward with sufficient evidence to

defeat defendant's motion for summary judgment.[2]

It is well settled that the mere existence of a herniated disc, a bulging disc, or radiculopathy is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (Casimir v Bailey, 70 AD3d 994 [2d Dept 2010]. Plaintiff submitted competent medical evidence addressing the conclusions of the defendants' expert, that these injuries were in fact longstanding and not degenerative, and were causally related to the subject accident (Singh v City of New York, 71 AD3d 1121, [2d Dept 2010]).

Dr.Lattuga's opinion is supported by objective medical evidence, including MRI, and tests and reports, paired with his observations during his physical examination of plaintiff. It cannot be said that the alleged limitations of plaintiff's back are so minor, mild or slight as to be considered insignificant within the meaning of Insurance Law §5102(d). In conclusion, considered in the light most favorable to plaintiff, this evidence is sufficient to defeat defendants' motion for summary judgment.

Plaintiff's Motion for Summary Judgment

Proof of a rear-end collision establishes a prima facie case of negligence on the part of the driver of the vehicle that strikes the forward vehicle and imposes a duty upon the offending

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[2]Moreover, plaintiff explained that the medical bills for the treatment plaintiff received were paid by no fault benefits. Once payment for his medical care was terminated by no-fault, he had to stop treating with his doctors and therapists because he could not afford for their care and treatment out of his own pockets. When his no fault benefits terminated, he did have private health insurance, but could not afford the co-payments needed to continue treatment by using is private health insurance. He was receiving $1,560 a month in disability benefits. He claims that his mortgage was $672 a month, and with his other expenses including support of two children he could not afford to pay for his medical care out of his own pocket.

vehicle to come forward with admissible proof to establish an adequate, non negligent explanation for a rear- end collision, he will be deemed negligent as a matter of law (Parise v. Meltzer, 204 AD2d 295 [2d Dept 1994]; Moran v. Singh, 10 A.D.3d 707, 708). The sudden stop of a lead car is one of the non-negligent explanations of a rear-end collision, because the operator of that car has a duty to avoid stopping suddenly without properly signaling to avoid a collision "when there is opportunity to give such signal" (Vehicle and Traffic Law § 1163; *see id.; Colonna v. Suarez,* 278 A.D.2d 355, 718 N.Y.S.2d 618) Taveras v Amir, 24 AD3d 655, 656 [2d Dept 2005]

Plaintiff argues that the subject accident was solely caused by defendant, Eric Riccio. Based upon plaintiff's version of the events, plaintiff made out a prima facie case. However, in opposition, defendant claims that he did not see any directional signals illuminated on the plaintiff's vehicle while stopped waiting behind plaintiff at the red traffic light. Defendant points to the statutory duty under Vehicle and Traffic Law Section 1163(a)(b)(d) to turn on the signal when making a left turn, and the failure to do so has been found to be sufficient to preclude the granting of summary judgment to a plaintiff on an argument that a rear ending collision is negligence against the rearward operator (Klochpin v. Masri, 45 AD3d 737 [2d Dept 2006]). As in this case, one of the several nonnegligent explanations for a rear end collision is a sudden stop of the lead vehicle (Chepel v. Meyers, 306 AD2d 235, 237 [2d Dept 2003]).

For the reasons stated above, plaintiff's summary judgment motion is also denied, as defendant has raised a triable issue of fact. The issue of the timeliness of the summary judgment motion is therefore moot. This matter comes down to the battle of the medical experts and the credibility of the parties and witnesses as to the cause of the accident, thus summary judgment is

inappropriate in these circumstances.

Based on the foregoing, the motion by the defendants for summary judgment dismissing the complaint is DENIED, and Plaintiff's motion for summary judgment is also DENIED.

All matters not herein decided are denied. This constitutes the decision and order of the court.

ORDERED, that the parties are directed to appear on June 25th **, 2014, at** 930 **a.m, in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.**

Dated: **May 8, 2014**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

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