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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ALJER GARCIA,

Plaintiff,

-against-

DECISION & ORDER
Index No. 63334/2015
Sequence No. 2

MCMAHON'S FARM, INC. and PEOPLES WILLIS, JR.,

Defendants.

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WOOD, J.

The following papers were read and considered in connection with Defendants' motion:

Defendants' Notice of Motion, Counsel's Affirmation, Exhibits.
Plaintiff's Counsel's Affidavit in Opposition, Exhibit.
Defendants' Counsel's Reply Affirmation.

This is an action for serious personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on April 23, 2015, on the Major Deegan Expressway near East 230th street in the Bronx, where a vehicle operated by defendant struck plaintiff's vehicle in the rear while plaintiff was slowly moving in traffic. On May 18, 2016, this court issued a decision granting summary judgment on liability to plaintiff, however said order does not preclude a finding that plaintiff has not sustained a serious injury under New York Insurance Law 5102(d). Defendants now brings this motion for summary judgment on the issue of serious injury, claiming that there is no triable issue of fact. Plaintiff opposes the motion.

Upon the foregoing papers, the motion is decided as follows:

Summary Judgment

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]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 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 "sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court must 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]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Issue finding, as opposed to issue determination, is the key to summary judgment (Krupp v Aetna Life & Cas. Co., 103 AD2d 252, 261 [2d Dept 1984]). 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]).

Serious Injury

A plaintiff claiming personal injury as a result of a motor vehicle accident must first demonstrate a prima facie case that he or she sustained serious injury within the meaning of Insurance Law §5104(a) (Licari v Elliott, 57 NY2d 230 [1982]). 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.

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 [2002]).

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]). For the permanent consequential limitation category of use of a body organ or member or significant limitation of use of a body function or system, 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 (98 NY2d 345). The consequential limitation of use category also requires that the limitation be permanent (Lopez v Senatore, 65 NY2d 1017 [1995]).

A plaintiff claiming a significant limitation of use of a body function must substantiate his or her complaints with competent medical evidence of any range-of-motion limitations that were contemporaneous with the subject accident (Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept 2008]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, 57 NY2d 230). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (Perl v Meher, 18 NY3d 208, 218 [2011]). The Court of Appeals noted that "in our view, any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well". Although Insurance Law § 5102(d) does not expressly set forth any temporal requirement for a "significant limitation," there can be no doubt that if a bodily limitation is substantial in degree yet only fleeting in duration, it should not qualify as a "serious injury" under the state (Thrall v City of Syracuse, 60 NY2d 950, *revg* 96 AD2d 715; Partlow v Meehan, 155 AD2d 647, 648 [2d Dept 1989]).

To prove the 90/180 day category, an injury must be (1) medically-determined injury or

impairment of a nonpermanent nature (2) 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...and (3) there must be curtailment of usual activities to a great extent, rather than some slight curtailment (Damas v Valdes, 84 AD3d 87, 91 [2d Dept 2011]). 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 (98 N.Y.2d 345). In order to establish serious injury under this prong of the statute, the plaintiff must establish that he or she "has been curtailed from performing his [or her] usual activities to a great extent" (57 NY2d at 236; Lanzarone v Goldman, 80 AD3d 667, 669 [2d Dept 2011]).

As the moving party, the defendant bears the initial burden to establish that the plaintiff has not sustained a "serious injury" (Gaddy v Eyler, 79 NY2d 955, 956 [1992]). This is accomplished through 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]). A defendant may rely on the sworn statements of the defendant's examining physician or unsworn reports of plaintiff's examining physician (Pagano v Kingsbury, 182 AD2d 268 [2d Dept 1992]).

If defendants establish 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]).

Further, it is well-settled that "in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law §5102(d), the plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury" (Grossman v Wright, 268 AD2d at 84). Thus, an affidavit or affirmation simply setting forth the observations of the affiant are not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination. (Grossman v Wright, 268 AD2d at 84). Moreover, to meet its burden of proof, a plaintiff is required to submit medical evidence based on an initial examination close to the date of the accident (Griffiths v Munoz, 98 AD3d 997 [2d Dept 2012]). Additionally, and equally important, plaintiff must establish, through admissible medical evidence, that the injuries sustained are causally related to the accident claimed (Pommells v Perez, 4 NY3d 566 [2005]). A plaintiff's submission must be in the form of a competent statement under oath (or affirmation, when permitted) and must demonstrate that plaintiff sustained at least one of the categories of serious injury as enumerated in Insurance Law §5102(d). Where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation of treatment (Neugebauer v Gill, 19 AD3d 567 [2d Dept 2005]). While it is true that plaintiff is not required to submit contemporaneous range of motion testing, he is required to submit competent medical evidence demonstrating that he sustained range of motion limitations contemporaneously with the accident (Perl v Meher, 18 NY3d 208, 218 [2011]). The absence of a contemporaneous medical report invites speculation

as to causation (Griffiths v Munoz, 98 AD3d at 999). Even if plaintiff's doctor does not specifically address the findings in the reports submitted by the defendants that the abnormalities in the tested areas were degenerative rather than traumatic, the findings of the plaintiff's doctor that plaintiff's injuries were indeed traumatic and were causally related to the collision, is sufficient as it implicitly addressed the defendants' contention that the injuries were degenerative (Fraser-Baptiste v New York City Transit Authority, 81 AD3d 878 [2d Dept 2011]). Subjective complaints of pain, without more, do not suffice to establish a serious injury (Scheer v Koubek, 70 NY2d 678 [1987]).

Here, plaintiff alleges a serious injury claiming a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and/or medically determined injury through the 90/180 category.

At the outset, there are no allegations that plaintiff's injuries consist of death, dismemberment significant disfigurement fracture or loss of fetus. Thus, these categories under the statute are inapplicable. Remaining are the categories of 6 through 9.

In support of their motion for summary judgment, defendants offer that on December 8, 2016, plaintiff submitted to a physical examination with their medical expert, Gregory Galano, MD., an orthopedic surgeon. At that examination, plaintiff declined to comment regarding his past medical history, surgical history, prior or subsequent accidents or injuries or medications. Following a physical examination of plaintiff and review of plaintiff's medical records, Dr. Galano concluded that no there were no objective orthopedic residual or permanency related to the subject accident, and that plaintiff's injuries had resolved.

Dr. Galano examined plaintiff's cervical spine, lumbar spine, thoracic spine, both

shoulders and both knees. He tested for range of motion using a goniometer and his December 27, 2016 report, recited that his examination of plaintiff's cervical spine revealed a full range of motion, no evidence of parasinal tenderness or trapezil tenderness to palpitation, and no spasms; the foraminal compression test was negative and plaintiff's sensory responses were intact throughout the upper extremities; Spurling's test was also negative; no atrophy of the intrinsic muscles.

Dr. Galano's examination of plaintiff's thoracic spine revealed a full range of motion; no paraspinal spasms or paraspinal tenderness; Plaintiff's lumbar spine revealed a full range of motion, no parapsinal spasms or paraspinal tenderness. Straight leg rasing test was negative and plaintiff was able to arise on his heels and toes.

Dr. Galano's examination of plaintiff's right and left shoulder revealed a full range of motion, Dr. Galano's examination of plaintiff's right knee revealed a full range of motion; no tenderness to palpation, no effusion and no atrophy of the quadriceps. McMurray's test and Lachmann's test were negative. The anterior drawer sign and posterior drawer sign were negative, as well as other tests that were performed. The same holds true for the left knee except that a healed arthrosporic portals were noted.

In light of these medical tests, and medical reports, Dr. Galano diagnosed plaintiff with a resolved cervical spine strain, resolved thoracic spine strain, resolved lumbar spine strain, resolved left shoulder sprain, resolved right shoulder sprain, resolved left knee sprain, post arthroscipic surgery and resolved right knee sprain. He concludes that plaintiff's injuries have resolved and there are no objective orthopedic residual or permanency related to the subject accident. He further notes that the MRI report of plaintiff's left knee revealed no evidence of a meniscal tear.

Plaintiff's left knee MRI films of August 7, 2015 were also reviewed by David A. Fisher, MD a Board Certified Radiologist. Dr. Fisher opined that the MRI of plaintiff left knee performed a few months post accident was an unremarkable study with the exception of mild prepatellar edema, which is consistent with a soft tissue contusion. Dr. Fisher found no internal derangement and no evidence of a fracture, meniscal or ligament tear.

In light of the foregoing, sufficient evidence was presented that satisfied defendants' initial burden of demonstrating that plaintiff did not sustain a serious injury. The burden now shifts to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (Gaddy v Eyler, 79 NY2d 955 [1992]).

At the outset, plaintiff asserts procedural objections (among other things) that certain defendants exhibits are not admissible including Exhibit L, the MRI Report is unavailing as plaintiff's unsworn medical records can be used by defendant on summary judgment. Plaintiff's other arguments regarding admissibility of the reports fail as well.

On the merits, plaintiff offers the same report as referred hereinabove from Dr. Peyser, who performed the MRI of plaintiff's left knee on August 7, 2015. That report recited that plaintiff's left knee showed no evidence of a fracture, and showed the medial and lateral collateral ligaments were intact. The anterior and posterior cruciate ligaments were also intact. The medical and lateral menisci were normal without evidence of a tear. Except for a small joint effusion, the MRI of plaintiff's left knee was found to be unremarkable.

Plaintiff also offers a very recent medical report of Kevin H. Weiner, M.D., of All Boro Medical Rehabilitation PLLC, dated April 16, 2017, who reviewed plaintiff's own examining physician, Dr. Peyser report, as well as his own observations. Dr. Weiner attests that plaintiff's cervical range of motion was limited. Based upon plaintiff's history and physical, Dr. Weiner

finds that there is a causal relationship between the current symptoms of plaintiff's cervical disk herniations, thoracic disk herniations, lumbar disk herniations, and his surgical intervention to his car accident. He claims that his cervical thorzic and lumbar condition is permanent in nature.

On the merits of the motion, plaintiff failed to raise a triable issue of fact as to whether he sustained a serious injury to his left knee, cervical spine, or lumbar spine, and other injuries under the "permanent consequential limitation of use" and/or the "significant limitation of use" categories of Insurance Law §5102(d). The affirmed medical report of Dr. Kevin H. Weiner, MD, dated April 16, 2017, did not raise a triable issue of fact as to whether plaintiff sustained serious injuries to her left knee, and the other denoted injuries as a result of the subject accident. His conclusions appear to be conclusory, no significant limitations were found as the court can tell, as the normal ranges were not clearly denoted.

Moreover, there is no 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 (Niles v. Lam Pakie Ho, 61 AD3d 657, 658–59 [2d Dept 2009]). Approximately 12% limitation in range of motion in plaintiff's left knee does not qualify as "serious injury," (McLoud v Reyes, 82 AD3d 848, [2d Dept 2011]). In any event, a finding of reduced range of motion, alone is insufficient to support a finding of serious injury. Dr. Weiner submitted his findings of loss of range of motion in plaintiff's cervical and lumbar spine, and left shoulder a finding of reduced range of motion alone is insufficient to support a finding of serious injury where, as here, there is no evidence of a medically determined injury to plaintiff's cervical or lumbar spine or shoulder to account for the his subjective complaints of pain. Based upon the limited reports submitted, the first report appearing to be three and a half months after the subject car accident,

no sufficient evidence exists to demonstrate a causation of plaintiff's injuries to the subject car accident.

Accordingly, the court finds that defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d), as a result of the subject accident, and plaintiff has not raised issues of fact to preclude summary judgment.

90/180 Day Category

Plaintiff also alleged that he sustained a serious injury under the 90/180-day category of Insurance Law §5102(d). Defendant claims that during the 180-day period immediately following the subject accident, plaintiff did not have an injury or impairment which, for more than 90 days, that prevented him from performing substantially all of the acts that constituted his usual and customary daily activities (Karpinos v Cora, 89 AD3d 994 [2d Dept 2011]).

On this record, no credible evidence has been set forth to indicate that plaintiff was unable to perform substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (Rouach v Betts, 71 AD3d 977 [2d Dept 2010]). Plaintiff also failed to set forth any competent medical evidence to raise a triable issue of fact as to whether he sustained a medically-determined injury of a nonpermanent nature which prevented him from performing his usual and customary daily activities for 90 of the 180 days following the subject accident (Mora v Riddick, 69 AD3d 591, 592 [2d Dept 2010]).

Accordingly, considering this evidence in the light most favorable to the non-moving party, and affording plaintiff the benefit of every favorable inference that can be drawn from

the evidence, defendants' motion for summary judgment is granted in its entirety and the plaintiff's Complaint is dismissed as to all categories under the Insurance Law, and in its entirety. The Clerk is directed to enter judgment accordingly.

All matters not herein decided are denied.

This constitutes the Decision and Order of the court.

Dated: August 15, 2017
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF