Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Frankie J. Lynch,

Plaintiff,

-against-

Martha Hershkowitz, Jay Hershkowitz, Antonella Davi, Giuseppe Davi and Vita Davi,

Defendants.

Index No.: 26286/2011

Motion Sequence No.: 005; MD ✓
Motion Date: 10/24/18
Submitted: 2/27/19

Motion Sequence No.: 006; MD ✓
Motion Date: 10/24/18
Submitted: 2/27/19

Motion Sequence No.: 008; MD ✓
Motion Date: 12/19/18
Submitted: 2/17/19

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Clerk of the Court

Upon the following papers read on this motion by defendants Antonella Davi, Giuseppe Davi, and Vita Davi and the motion by defendants Martha Hershkowitz and Jay Hershkowitz for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury under Insurance Law §5102 [d] and the motion by defendants Martha Hershkowitz and Jay Hershkowitz for an order precluding plaintiff from offering any evidence at the time to trial pursuant to CPLR 3126: Notice of Motion and Affirmation in Support dated September 18, 2018, together with Exhibits A through K annexed thereto; Notice of Cross-Motion and Affirmation dated October 3, 2018, together with Exhibit A annexed thereto; Affirmations in Opposition dated February 6, 2019, together with Exhibits A through H annexed thereto; Reply Affirmation dated February 7, 2019 and Exhibit A annexed thereto; Reply

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Affirmation dated February 14, 2019 and on the motion by defendants Martha Hershkowitz and Jay Hershkowitz for an order enforcing the court order dated January 24, 2018 and precluding plaintiff from offering evidence at the time of trial: Notice of Motion and Affirmations in Support dated November 20, 2018 together with Exhibits A through D annexed thereto; Affirmation in Opposition dated February 26, 2019 and Exhibit A annexed thereto; Reply Affirmation dated March 7, 2019 and Exhibits A though E annexed thereto; it is

ORDERED that the motions by defendants (Motion Sequences 005, 006, and 008) are consolidated for purposes of a determination herein; and it is further

ORDERED that the motions by defendants for summary judgment pursuant to Insurance Law §5102 [d] are denied; and it is further

ORDERED that the motion by defendants Martha Hershkowitz and Jay Hershkowitz to preclude plaintiff from offering any evidence at the time of trial regarding a recommendation for surgery is denied.

This is a personal injury action seeking damages allegedly resulting from a three car motor vehicle accident on February 5, 2009 on Deer Park Avenue at or near its intersection with August Road, Town of Babylon, County of Suffolk, State of New York. The action was commenced by the filing of a summons and complaint on August 23, 2011. It is alleged that a motor vehicle owned and operated by defendant Martha Hershkowitz was rear-ended by a vehicle owned by defendant Giuseppe Davi and operated by defendant Antonella Davi, resulting in the Hershkowitz vehicle coming into contact with the rear of the vehicle operated by plaintiff Frankie J. Lynch. Issue was joined by defendants Martha Hershkowitz and Jay Hershkowitz (the "Hershkowitz defendants") on September 28, 2011. Issue was joined by defendants Antonella Davi, Giuseppe Davi, and Vita Davi (the "Davi defendants") on December 7, 2011. Plaintiff served a verified bill of particulars on January 19, 2012 and an amended verified bill of particulars on April 16, 2014 claiming he suffered, among other things, left shoulder internal derangement and bursitis with rotator cuff tendinitis, L5-S1 disc bulge, C2-C3 and C4-5 disc bulges, C5-C6 disc herniations, T2-T3, T3-T4, T4-T5, T7-T8 and T9-T10 disc herniations, left knee and lateral meniscal tears, and left knee patellofemiral syndrome with patellar tendinitis as a result of the accident. Defendants Antonella Davi, Giuseppe Davi, and Vita Davi now move and defendants Martha Hershkowitz and Jay Hershkowitz cross-move for summary judgment dismissing the complaint against them pursuant to Insurance Law §5104 on the grounds that plaintiff did not sustain a serious injury as defined by N.Y. Insurance Law §5102 [d]. In support of their motions, defendants submit copies of the pleadings, the transcript of plaintiff's deposition testimony, and the affirmed reports of Teresa Habacker, M.D.("Dr. Habacker"), and Jonathan Lerner, M.D.("Dr Lerner").

Plaintiff testified that he was taken to the hospital via ambulance after the accident, had an x-ray taken of his back and after an hour, he was discharged. He further testified that he presented to his primary care physician one day after the accident and thereafter began physical therapy three to four times a week, which was decreased to one day per week after three to four months of treatment. Plaintiff's treatment consisted of acupuncture, massage, chiropractic care, stretching, low weights, heat and electric stimulation. Plaintiff further testified that he saw his chiropractor for six months. According to his testimony, MRIs of his back, neck, arms and knees were performed and

he received three to five cortisone shots. Plaintiff testified that two months after the accident he presented once to an orthopaedist for his knees who recommended surgery. Plaintiff did not undergo knee surgery. Plaintiff further testified that he missed one to two days of work immediately following the accident and then an additional two months of work, he was confined to bed for one day, and confined to his home for one to two months. Plaintiff testified that as a result of the accident he can no longer play golf, lay in bed, or do construction work. Plaintiff was involved in another motor vehicle accident in May 2010 and injured his left arm.

Plaintiff was examined by Dr. Habacker, a board certified orthopedic surgeon on July 31, 2015. According to the affirmed report of Dr. Habacker, plaintiff was diagnosed with resolved lumbosacral sprain/strain. While Dr. Habacker found that plaintiff had full range of motion of his cervical and lumbar spines and knees, there were significant range of motion limitations of plaintiff's left shoulder, those being, forward flexion 120 degrees (180 degrees normal), left shoulder abduction 90 degrees (180 degrees normal), left shoulder internal rotation 80 degrees (90 degrees normal) and left shoulder external rotation 70 degrees (90 degrees normal). According to Dr. Habacker's affirmed report, the range of motions were measured using a goniometer and she opined that plaintiff had full passive range of motion. Dr. Lerner reviewed plaintiff's MRI of his cervical spine and according to a report dated May 19, 2012, the disc herniations and bulges were confirmed, however, Dr. Lerner opined that they were consistent with degenerative disc disease and chronic degenerative process as opposed to the subject accident and in that regard, he opined there was no causal relationship between the accident and the MRI findings. Dr. Lerner also reviewed the MRI of plaintiff's left knee and noted a small meniscal tear. Dr. Lerner opined that his overall findings based upon the evidence was suggestive of a chronic degenerative process resulting from normal walking and other routine activities and opined there is no causal relationship between the plaintiff's accident and the MRI findings. Dr. Lerner further reviewed the MRI of plaintiff's lumbar spine and confirmed the existence of bulging discs at L5-S1, which he opined were consistent with degenerative disc disease. Dr. Lerner opined there was no causal relationship between plaintiff's accident and the MRI findings. Plaintiff's thoracic spine MRI also was reviewed by Dr. Lerner, who acknowledged the existence of bulging discs. Dr. Lerner noted there was dessication of the T2-T3 through T0-T10 disc space levels which is consistent with degenerative disc disease. Dr. Lerner concluded that there is no causal relationship between plaintiff's accident and the MRI findings.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v. Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v. Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v. Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v. Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 [d] defines "serious injury" as "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, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). 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 a "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 (*see* ***Perl v. Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v. Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v. Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 [d] (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v. Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v. Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). A defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) "by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (***Nunez v. Teel,*** 162 AD3d 1058, 75 NYS3d 541 [2d Dept. 2018]; *see also* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]; ***Moore v. Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v. Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). A defendant may also establish entitlement to summary judgment using the plaintiff's own sworn deposition testimony and unsworn medical reports and records prepared by the plaintiff's own physicians (*see* ***Uribe v. Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v. U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v. Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v. Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v. Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v. Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v. New York Univ. Med. Ctr.***, *supra*; ***Burns v. Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept. 2006]; ***Rich-Wing v. Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2 Dept. 2005];***Boone v. New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v. Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Gaddy v. Eyler***, 79

NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v. Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]; ***Tornabene v. Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2d Dept. 2003]; ***Pagano v. Kingsbury***,182 AD2d 268, 587 NYS2d 692 [2d Dept. 1992]).

Here, defendants failed to show, prima facie, that plaintiff did not sustain serious injuries to his left knee and left shoulder under the limitations of use categories of Insurance Law § 5102 [d] (*see* ***Garbutt v. United Parcel Serv.***, 131 AD3d 444, 13 NYS3d 897 [2d Dept 2015]; ***McDonough v. Mulligan***, 125 AD3d 616, 3 NYS3d 92 [2d Dept 2015]; ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). In particular, the examination of plaintiff conducted by defendant's independent expert, Dr. Habacker, which occurred over six years after the accident, found a significant limitation in range of motion in plaintiff's left shoulder (*see* ***Nunez v. Teel,*** 162 AD3d 1058, 75 NYS3d 541 [2d Dept. 2018]; ***Ramos v. Baig***, 145 AD3d 695, 41 NYS3d 902 [2d Dept 2016]; ***Cockburn v. Neal***, 145 AD3d 660, 44 NYS3d 59 [2d Dept 2016]; ***Dean v. Coffee-Dean***, 144 AD3d 1080, 41 NYS3d 750 [2d Dept 2016]; ***Mercado v. Mendoza***, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]; ***Akhtar v. Santos,*** 57 AD3d 593, 869 NYS2d 220 [2d Dept. 2008]). Although Dr. Habacker states that plaintiff has "full passive range of motion," Dr. Habacker does not provide any objective basis for this opinion. In addition, the evidence of a meniscus tear to plaintiff's left knee raises an issue of fact as to the existence of a serious injury (*see* ***Pollas v. Jackson,*** 2 AD3d 700, 769 NYS2d 796 [2d Dept. 2003]; ***Medley v. Lopez,*** 7 AD3d 470, 777 NYS2d 473 [1st Dept. 2004]). Although Dr. Lerner opines that plaintiff's injuries are degenerative in nature and were unrelated to the accident, Dr. Lerner does not address the claimed left shoulder injury. Moreover, Dr. Habacker's affirmed report provides that the accident caused plaintiff's lumbar spine injuries, which conflicts with the opinion of Dr. Lerner that there is no causal relationship between the accident and lumbar spine injuries. Thus, the conflicting medical opinions of defendants' experts as to causation creates a question of fact (*see* ***Romano v Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Qurashi v. Hittin,*** 51 AD3d 652, 858 NYS2d 675 [2d Dept. 2008]; ***Kalpakis v County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). While Dr. Habacker found no causal relationship between the accident and plaintiff's left shoulder injury, no objective medical evidence is offered to explain how Dr. Habacker arrived at this opinion (*see* ***Mercado v. Mendoza***, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]).

Based upon the above, defendant failed to satisfy the burden of establishing *prima facie* that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 [d)](*see* ***Agathe v. Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Reitz v. Seagate Trucking, Inc.,*** 71 AD3d 975, 898 NYS2d 173 [2d Dept. 2010]; ***Walters v. Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]) and thus there are triable issues as to plaintiff suffered a serious injury (*see* ***Greenidge v. United Parcel Serv., Inc.***, 153 AD3d 905, 60 NYS3d 421 [2d Dept 2017]). Inasmuch as defendant failed to establish *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Reynolds v Wai Sang Leng***, 78 AD3d 919, 911 NYS2d 431 [2d Dept 2010]; ***McMillan v. Naparano,*** 61AD3d 943, 879 NYS2d 152 [2d Dept. 2009]; ***Yong Deok Lee v. Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v. Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v. Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]). Nevertheless, even if this Court were to find that defendant's burden had been met, plaintiff presented objective medical evidence regarding plaintiff's limitations in range of motion to his lumbar spine, left shoulder and left knee, sufficient to raise an issue of fact to be resolved at trial (*see* ***Romano v. Persky***, 117 AD3d

814, 985 NYS2d 633 [2d Dept 2014]; ***Kalpakis v. County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]).

Accordingly, the motion by defendant for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied.

In regards to the motion by the Hershkowitz defendants to preclude plaintiff from offering any evidence at the time of trial concerning a recommendation for surgery, the court order dated January 24, 2018 provided that plaintiff "shall be precluded from offering evidence upon the trial of this action about a recommendation for surgery unless the physician who made such recommendation is identified and duly executed, current, HIPAA-compliant authorizations to obtain his/her relevant records are provided within fifteen (15) days from the date of service of a copy of this order with notice of entry." As the Second Department has held, a plaintiff can avoid the adverse impact of a conditional order of preclusion by demonstrating a reasonable excuse for his failure to comply with the order and a meritorious cause of action (***Lee v. Barnett,*** 134 AD3d 908, 22 NYS3d 122 [2d Dept. 2015]). The "determination of what constitutes a reasonable excuse for failing to comply with a conditional order of dismissal lies within a trial court's discretion" (***Burro v. Kang,*** 167 AD3d 694, 698, 90 NYS3d 298, 303 [2d Dept. 2018]). The court notes that plaintiff's counsel indicated they were only substituted in this action on April 6, 2018, which was after the date for compliance with this Court's January 24, 2018 order. It is further noted that plaintiff indeed complied with the information requested in the January 24, 2018 order prior to the adjourned return date of the within motion. The court further notes that authorizations for the records of Dr. Armand Abulencia and Dr. Ahmed Eleman, the doctors who plaintiff claims recommended surgery, were provided in January 19, 2012 and June 19, 2015, which is not refuted by defendants in their reply papers. Here, the court finds that plaintiff has demonstrated a reasonable excuse for the failure to timely comply with the January 24, 2018 conditional preclusion order. Moreover, the meritorious nature of the action was established previously, inasmuch as the motion by the Hershkowitz defendants for summary judgment on liability was denied by order of this Court dated June 14, 2018.

Accordingly, the respective motions by the defendants are denied.

Dated: 5/15/2019

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**