At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2th day of DECEMBER, 2019.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

----------X

J.G., by his m/n/g, JOAN GEORGE, and JOAN GEORGE, Individually and K.N., by her m/n/g, SONIA NOEL and SONIA NOEL, Individually,

Plaintiff,

Index No.: 512195/2016

-against-

Decision and Order

TYONA MARRIMON, FRANTZDY PRINTEMPS, SINCLAIR SAMUELS, COLLETTE A. GIBBSON, And GLENROY M. GEORGGE,

Defendants.

----------X

KINGS COUNTY CLERK FILED 2019 DEC 24 AM 9:34

The following *papers* numbered 53 to 70 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	157-169;170-183
Opposing Affidavits (Affirmations)	184-214
Reply Affidavit	215-216

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant TYONA MARRIMON moves this court pursuant to C.P.L.R. §3212, for an Order granting Defendant summary judgment and dismissing the Complaint of the Plaintiff, upon the ground that Plaintiff has failed to meet the "serious injury" threshold

MS #11, 12

requirement mandated by Insurance Law §5102(d); and granting such other further relief as this Court deems just and proper. Defendant, FRANTZDY PRINTEMPS and defendant, SINCLAIR SAMUELS also move pursuant to C.P.L.R. §3212, for an Order granting Defendant summary judgment and dismissing the Complaint of the Plaintiff, upon the ground that Plaintiff has failed to meet the "serious injury" threshold requirement mandated by Insurance Law §5102(d); and granting such other further relief as this Court deems just and proper. Plaintiff opposes the same contending there are material issues of fact.

ARGUMENTS

All Defendants argue Plaintiff's injuries do not meet the threshold requirements of a "serious injury" as defined by Insurance Law § 5102(d) and thus that plaintiffs' claims for non-economic loss are barred by Section 5104(a) of this statute. Defendant contends the plaintiffs own doctor fails to make any measurements with regard to range of motion. Defendants go on to contend the one measurement made by plaintiff doctor does not specify what tool was used to make said measurement, and moreover the alleged loss of range of motion was for an injury to the knee which is not contained or claimed in the bill of particulars. Additionally, defendants contend all reports submitted by the plaintiff are not sworn medical reports and have no probative value. Defendant's further argue that Plaintiff's fail to adequately explain the gap in treatment.

Plaintiff argues Defendants' moving papers fail to shift the burden to the plaintiff. Additionally, plaintiff contends that the defendants fail to establish no serious injury as a matter of law, because the medical records submitted by the plaintiff raise triable issues of fact.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". C.P.L.R. §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

In a soft tissue injury case, a plaintiff alleging a "serious injury", must provide objective medical evidence of a "serious injury" within the meaning of the Insurance Law § 5102(d). "Both the defendant who seeks to make a prima facie showing, and the plaintiff who attempts to raise a triable issue of fact, must provide quantitative, numerical, range of motion findings and compare those findings to "normal"." *Knokhinv v. Murray*, 27 Misc.3d 1211(A), 2010 WL 1542529 (N.Y.Sup.). A defendant seeking summary judgment on the grounds that plaintiff's injury does not meet the threshold, the defendant must show that there is no question of fact that there is no loss of range of motion.

In the present motion defendants established that there is no "serious injury" as a matter of law because the evaluating doctors find no loss in ranges of motion. In opposition the plaintiffs fail to raise a triable issue of fact as to serious injury threshold. The reports annexed by the plaintiff do not state what means were used to take any alleged measurements where abnormal ranges of motion were found. Regardless, the only report submitted by the plaintiff that contains ranges of motion are ranges of motion measured for the knees of K.N., such alleged injuries are not claimed in the present case. It is important to note, none of the medical reports submitted by the plaintiff are sworn medical reports, nor do any of the reports contain range of motion measurements other than the previously mentioned report. "The unsworn medical reports which are submitted in opposition to the motions are inadmissible (*see, Grasso v Angerami*, 79 NY2d 813, 814; *Mobley v Riportella*, 241 AD2d 443, 444). "Without admissible evidence to support their claims of injuries, the plaintiffs' respective affidavits, consisting merely of self-serving, subjective complaints of pain, are without probative value (*see, Rum v Pam Transp.*, 250 AD2d 751; *Lincoln v Johnson*, 225 AD2d 593; *Barrett v Howland*, 202 AD2d 383; *LeBrun v Joyner*, 195 AD2d 502); quoting, *Young v. Ryan*, 265 A.D.2d 547, 548, 697 N.Y.S.2d 150 (1999). Additionally, there is nothing in the records that establish either plaintiff satisfies the 90/180 category of the New York Insurance Law.

In the Court of Appeals cases regarding serious injury threshold, *Pommells,* 4 NY3d 566, (2005), and *Brown, id.*, defendant's submissions shifted to plaintiff the burden of coming forward with evidence indicating a serious injury causally related to the accident. In *Brown*, just like in the present case, both Plaintiffs sought no further medical treatment or review of their alleged accident-related injury for more than three years,

when, on March 24, 2019, they consulted with the physician who furnished a report in this case. *id.* In Brown, just like in the present case the plaintiff's have also failed to offer any reason for the gap in treatment. "While a cessation of treatment is not dispositive the law surely does not require a record of needless treatment in order to survive summary judgment a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so." *Id.* In the present case, plaintiffs provided no explanation whatever as to why they failed to pursue any treatment for their injuries after the initial period, nor did their doctors (*see Franchini v Palmieri*, 1 NY3d 536 [2003]); *id.*

Accordingly, defendant's TYONA MARRIMON, motion Seq. #11, and Defendants, FRANTZDY PRINTEMPS and defendant, SINCLAIR SAMUELS, motion sequence #12, Motions for Summary Judgment dismissing the complaint of Plaintiff J.G. and Plaintiff, K.N. is hereby granted as the plaintiffs J.G. and K.N. failed to establish serious injury pursuant to New York State Insurance Law Section 5102(d) as well as the 90/180 category of the New York Insurance Law, for the reasons stated above.

This constitutes the Decision/Order of the Court.
Date: December 2, 2019

RICHARD VELASQUEZ, J.S.C.

KINGS COUNTY CLERK FILED DEC 24 AM 9:34

So Ordered
DEC 02 2019 Hon. Richard Velasquez