

Stati v Kreps

2019 NY Slip Op 34479(U)

July 26, 2019

Supreme Court, Westchester County

Docket Number: Index No. 63824/2017

Judge: John P. Colangelo

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This opinion is uncorrected and not selected for official publication.

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

-----X
MARINA STATI and HUGO REYES,

Plaintiffs,

-against-

CHRISTIAN I. KREPS and JOSEPH F. KREPS, JR.,

Defendants.
-----X

COLANGELO, J.

DECISION AND ORDER

Index No. 63824/2017
Motion Sequences #1 & 2

The following papers were read on Plaintiffs' Motion for Summary Judgment on the issue of liability (Motion Sequence #1) and Defendants' Cross-Motion for Summary Judgment (Motion Sequence #2) :

<u>Motion Sequence #1</u>	<u>NYSCEF</u>
Notice of Motion-Affirmation-Exhibits A-I	20-30
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Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

Motion Sequence #1

This is an action for personal injuries allegedly sustained by Plaintiffs Marina Stati and

Hugo Reyes ("Plaintiffs") on April 16, 2017 at approximately 9:00 pm when, while wearing seatbelts in their vehicle, their vehicle was struck in the rear by Defendants' vehicle on the Henry Hudson Parkway in the vicinity of West 159th Street, New York. Defendant Christian I. Kreps who was driving the Cadillac Escalade with the permission and consent of the vehicle's owner and his father, Defendant Joseph F. Kreps. Venue of this matter is based upon Plaintiffs' residence in Mount Vernon, Westchester County.

At the time their vehicle was rear-ended, Plaintiff Stati was the driver and Plaintiff Reyes was the front seat passenger. With regard to the occurrence of the accident, Plaintiffs offer the deposition testimony of Defendant Christian Kreps in support of their motion. (Pl. Exh. I). Defendant Kreps testified that he had taken the wrong exit off the George Washington Bridge and was driving on the Henry Hudson Parkway when the accident occurred. (P. 11, lines 24-25; p. 12, lines 2-4). He was looking to take the nearest exit and pull over at a gas station to regain his bearings. (P. 12, line 25; 13, lines 5-8). He saw the Stati vehicle maybe five seconds before the impact. He had looked up from when he turned his head from a car that was merging in the middle and he just didn't see them. At the time of the impact the Stati car was stopped. (P. 20, lines 10-25).

The Affidavits of the Plaintiffs submitted in support of the instant motion describe the impact of the accident. According to Plaintiff Stati, upon impact, "[she] was severely thrown inside the vehicle striking [her] head on the steering wheel. [Her] back also slammed against the seat. [Her] right knee also hit the middle console in [her] vehicle. [She] lost consciousness for a brief period of time and when [she] regained consciousness and exited [her] vehicle [she] was in shock, felt dizzy and had pain all over [her] body." (Stati Aff. ¶5).

Plaintiff Reyes states that “[he] was severely thrown inside the vehicle striking [his] left shoulder and left knee on the dash board. In addition, [his] head struck the head rest.” (Reyes Aff. ¶5). The following day, “[he] was experiencing extreme pain in [his] left shoulder, left knee, left elbow, back and neck as well as bleeding” from the site of an appendectomy performed five days before the accident. (*Id.* ¶6). For seven months following the accident and due to the injuries he sustained in the accident, he could not and did not engage in most of his usual and customary activities, including his usual exercise regimen, household activities, social, athletic, volunteer and recreational activities, working to full capacity, sitting for long periods of time, and standing and walking for extended periods of time. (*Id.* ¶11). As of February 2019, his activities were still very limited. He is unable to engage in exercise, athletic, volunteer and social activities. Food shopping and laundry is done with pain and difficulty. The pain interrupts his sleep, he still cannot sleep on his left side, often waking up with numbness to his left arm and shoulder. His injuries have impacted his romantic relations. (*Id.* ¶12).

It is well-established that “[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision.” *Williams v. Spencer-Hall*, 113 A.D.3d 759 (2d Dept. 2014); *Volpe v. Limoncelli*, 74 A.D.3d 795 (2d Dept. 2010); *Klopchin v. Masri*, 45 A.D.3d 737 (2d Dept. 2007); *Chepel v. Meyers*, 306 A.D.2d 235 (2d Dept. 2003); *Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 908 (2008); *Clarke v. Phillips*, 112 A.D.3d 872 (2d Dept. 2013).

Defendants have failed to oppose Plaintiffs’ motion and instead have filed a Cross-Motion for Summary Judgment seeking an Order dismissing Plaintiffs’ Complaint on the ground

that the injuries alleged by Plaintiffs do not satisfy the “serious injury “ threshold requirement of §5102(d) of the Insurance Law of the State of New York and their claims for non-economic loss are therefore barred under §5104(a) of the Insurance Law. As provided in the Insurance Law, under the “No Fault” statute there is no right of recovery for personal injuries arising out of negligence in the use or operation of a motor vehicle within the state, except in the case of “serious injury” or for basic economic loss. (see Insurance Law § 5104). The term “serious injury” is defined by condition-specific categories in Insurance Law § 5102(d), as a personal injury “[w]hich 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.”

The injuries alleged to have been suffered by Plaintiffs are set forth with particularity in their Verified Bill of Particulars (Def. Exh. C. ¶8), and are incorporated herein for purposes of this discussion.

In support of their motion, Defendants have submitted and principally rely on the medical reports and conclusions of Drs. Vincent I. Frazzini, Jr. (Def. Exh. D & E) and Ronald Mann (Def. Exhs. I & J). Their findings and opinions are discussed in detail in the Affirmation of Defendants’ counsel, Scott L. Mathless, Esq. (Mathless Affirmation).

With respect to Plaintiff Stati, Defendants acknowledge that a lumbar fracture which is

alleged to have been sustained by her as a result of the accident, would, if causally related to the accident would satisfy the “threshold” injury statute. However, reliance is placed on the opinion of retained expert Dr Frazzini who reviewed the June 2 and July 21, 2017 Lumbar MRI studies and the July 20, 2017 CT Scan and found that “the L5 Pars fractures are chronic and related to a congenital fracture, unrelated to a traumatic event.” According to Frazzini, the findings were all degenerative in nature. (Mathless Affirmation ¶6). With respect to the studies of Plaintiff’s lumbar and cervical spine, right knee and head, Dr. Frazzini opined that none of the studies showed any traumatically caused pathology. (*Id.* ¶7; Defs. Exh. D).

Dr. Frazzini opined that none of the diagnostic studies of Plaintiff Reyes’s left knee, left elbow, lumbar spine, left shoulder and cervical spine conducted in May 2017 showed any traumatically caused pathology. In his view, these injuries were either degenerative and/or chronic. (*Id.* ¶8; Def. Exh. E).

Plaintiffs Stati and Reyes were examined on October 9, 2018 by retained expert Dr. Robert Mann, who is Board Certified in Orthopedic Surgery. Dr. Mann’s reports on examination are submitted in support of Defendants’ motion. (Defs. Exhs I & J, respectively).

Dr. Mann’s examination of Plaintiff Stati included Range of Motion testing of Plaintiff Stati’s cervical spine, thoracolumbar spine and lower extremities with the use of a goniometer. He found the sprain/strain of the cervical spine, lumbar spine and right knee to be resolved. Dr. Mann concluded that from a medical standpoint there was no objective evidence of a disability, no objective evidence of limitations, and opined that Plaintiff is able to perform her usual and customary activities, and there was no evidence of any permanency or residuals. (Defs. Exhs I, p. 4).

Plaintiff Stati was examined by Dr. Rashmi Sheth on August 1, 2017 pursuant to her No-Fault policy. Dr. Sheth found full range of motion in each test conducted of Plaintiff's cervical, thoracic and lumbar spine, and right knee. (Defs. Exh. K).

With respect to Plaintiff Reyes, Dr. Mann conducted an examination which included Range of Motion testing of Plaintiff's cervical spine, thoracolumbar spine and upper extremities with the use of a goniometer. Dr. Mann found mild residuals causing minor impairment only to Plaintiff's left shoulder and knee, and concluded that Plaintiff is able to perform his usual and customary activities. (Defs. Exh. J, p. 4).

Defendants contend that the objective medical evidence demonstrates that the injuries claimed by Plaintiffs have not caused them to suffer a "permanent" or "significant" loss or limitation of use of their cervical or lumbosacral spine as alleged in the Verified Bill of Particulars. To make this point, Defendants cite portions of the Plaintiffs' deposition testimony. In particular, Plaintiff Stati testified, *inter alia*, that she never paid out of pocket for any treatment and stopped treating once insurance benefits stopped; she was discharged from the emergency room after about eight hours with only a "collar"; no air bags deployed and none of the window glass broke or shattered upon impact; she spent only ten days confined to bed after the accident. Defendants make reference to Reyes's testimony that although he was wearing a seatbelt that went across his waist and shoulder and was working properly, his left knee and left shoulder came into contact with the dashboard during the accident; no windows in the car were broken and no air bag was deployed; he decided against "tear repair surgery" recommended by his treating doctors. (Mathless Aff. ¶30).

The "Serious Injury" Threshold Motion

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of 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 judgment in favor of any party."

In *Andre v Pomeroy*, 35 NY2d 361, 364 (1974), the Court of Appeals held that:

[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

It is well-settled that "the 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 eliminate any material issues of fact from the case [citations omitted]. Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposing papers [citations omitted]." *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985); *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993); *Finkelstein v Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000).

As provided in the Insurance Law, under the "No Fault" statute there is no right of recovery for personal injuries arising out of negligence in the use or operation of a motor vehicle within the state, except in the case of "serious injury" or for basic economic loss. (see Insurance Law § 5104). The term "serious injury" is defined by condition-specific categories in Insurance Law § 5102(d), as a personal injury

“[W]hich 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.”

While summary judgment is available in some cases, its dire, case terminating effects preclude its use except in “unusually clear” instances. *Stone v Aetna Life Ins. Co.*, 178 Misc. 23, 25 (Sup. Ct., New York County, 1941). “A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a ‘day in court.’” *Wanger v Zeh*, 45 Misc.2d 93, 94, (Sup. Ct., Albany County, 1965), *aff'd* 26 A.D.2d 729 (3rd Dept. 1966). Given the fact that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is arguable, or “fairly debatable,” summary judgment must be denied. *Bakerian v H.F. Horn*, 21 A.D.2d 714 (1st Dept. 1964); *Jones v County of Herkimer*, 51 Misc.2d 130, 135 (Sup. Ct., Herkimer County, 1966); *Town of Preble v Song Mountain, Inc.*, 62 Misc.2d 353, 355 (Sup. Ct., Courtland County, 1970); *See also, Sillman v Twentieth Century-Fox Film Corporation*, 3 N.Y.2d 395, 404 (1957).

The movant has the burden of submitting evidence, in admissible form, to support the summary judgment motion. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

Unsworn documents are inadmissible evidence and thus a party's reliance thereon in support of a motion for summary judgment is improper. *See Huntington Crescent Country Club v M & M*

Auto & Marine Upholstery, Inc., 256 AD2d 551, 551 (2nd Dept. 1998).

It is well established that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to eliminate any material issues of fact from the case. (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 321[1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341, 357 N.Y.S.2d 478, 480 [1974]; *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 [1st Dept. 2000]). The moving party must affirmatively demonstrate the merits of its claim or defense, and cannot obtain summary judgment merely by “pointing to gaps in its opponent’s proof.” *Kajfasz v Wal-Mart Stores, Inc.*, 288 A.D.2d 902, 902 (4th Dept. 2001); *Dodge v City of Hornell Industrial Development Agency*, 286 A.D.2d 902, 903 (4th Dept. 2001); *Frank v Price Chopper Operating Co., Inc.*, 275 A.D.2d 940 (4th Dept. 2000).

Failure by the movant to meet this burden of proof “requires denial of the motion, regardless of the sufficiency of the opposing papers”. *Alvarez v. Prospect Hosp.*, *supra*; *Winegrad v New York University Medical Center*, *supra*, 64 N.Y.2d at 853; *See, also, Miccoli v Kotz*, 278 A.D.2d 460, 461 (2d Dept. 2000); *Karras v County of Westchester*, 272 A.D.2d 377, 378 (2d Dept. 2000); *Fox v Kamal Corporation*, 271 A.D.2d 485 (2d Dept. 2000); *Gstalder v State of New York*, 240 A.D.2d 541, 542 (2d Dept. 1997); *Lamberta v Long Island Railroad*, 51 A.D.2d 730, 730-731 (2d Dept. 1976); *Greenberg v Manlon Realty, Inc.*, 43 A.D.2d 968, 969 (2d Dept. 1974).

A defendant moving for summary judgment under Insurance law §5102(d) bears the

initial burden of establishing prima facie, by competent medical evidence, that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. (see *Toure v Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v Eyler*, 79 N.Y.2d 955 [1992]; *Walker v Village of Ossining*, 18 A.D.3d 867 [2d Dept. 2005]).

A defendant must demonstrate that all injuries presented by plaintiff fail to establish a serious injury. *Minori v Hernandez Trucking Co. Inc.*, 239 A.D.2d 322 (2d Dept. 1997). The omission of one of the foregoing will result in the denial of defendant's motion for summary judgment. See, *Meyer v Gallardo*, 260 A.D.2d 556, 557 (2d Dept. 1999). Failing to affirmatively demonstrate that an alleged injury was not causally related to the subject accident requires a denial of defendant's motion for summary judgment as having failed to make out a prima facie case. See, *Lubrano v Brown*, 251 A.D.2d 383 (2d Dept. 1998); *Fouad v Riser*, 246 A.D.2d 508 (2d Dept. 1998), *Feuerman v Achar*, 246 A.D.2d 577 (2d Dept. 1998).

In opposition to Defendants' motion, Plaintiffs have submitted, *inter alia*, their sworn Affidavits (the "Stati Affidavit" and "Reyes Affidavit"), the Affirmation of their attorney, Mitchell Franzblau, Esq. (Franzblau Affirmation), the reports of Dr. Imelda Cruz- Banting and Dr. Steven S. Klein.

As an initial matter, Plaintiffs take the position that Defendants' motion must be denied due to their failure to rule out every threshold category and establish that Plaintiffs' injuries do not qualify as a serious injury under any category of statute. Thus, Defendants' have not tendered sufficient evidence to eliminate any material issue of fact from the case.

Specifically, Plaintiffs' counsel points out that the report of Defendants' examining physician, Dr. Mann, fails to even address the 90/180 category under the Insurance Law and has

failed to state, let alone establish that Plaintiffs were able to perform their daily activities for the first 90 out of 180 days following the accident. In fact, none of Defendants' doctors make reference to the first six months following the accident as it related to Plaintiffs' activities. (Franzblau Aff. ¶15). (See *Seepersaud v. L&M Bus Corp.*, 140 A.D.3d 579 [1st Dept. 2016])[decision granting defendants' summary judgment reversed where defendants failed to meet their prima facie burden as to plaintiff's 90/180-day claim; Defendants' experts did not examine plaintiff until over three years after the accident and did not offer an opinion concerning her condition during the relevant period]).

The present motion suffers from the same infirmity. Dr. Mann examined both Plaintiffs on October 9, 2018, nearly one and one half years after the accident. His report states the identical conclusion with respect to each Plaintiff: "From an objective standpoint, the claimant is able to perform their usual and customary activities." (Def. Exh. I, p. 4; Def. Exh. J, p. 4). The No-Fault examination of Plaintiff Stati was the only examination conducted within four months of the accident. Dr. Sheth however, also neglected to comment on Plaintiff's abilities during the first 90 days after the accident.

Accordingly and based upon the failure of to meet their burden and establish that Plaintiffs did not sustain a serious injury under any threshold category, Defendants' motion is denied. The Court notes that notwithstanding the denial of Defendants' motion, the medical evidence and Plaintiffs' Affidavits submitted in opposition to the motion sufficiently raise triable issues of fact.

A plaintiff's medical proof of the extent or degree of a physical limitation may take the form of either an expert's "designation of a numeric percentage of plaintiff's loss of range of

motion”, or a qualitative assessment of plaintiff’s condition “provided that the evaluation has an objective basis and compares the plaintiff’s limitations to the normal function, purpose and use of the affected body, organ, function or system” (*Toure v. Avis Rent A Car Sys., Inc., supra* at 350). In *Altreche v. Gilmar Masonry Corp.*, 49 A.D.3d 479 (2d Dept. 2012), the opinion of plaintiff’s treating physician that the disc bulges at C2 through C5 and a disc herniation at L5-S1 seen on the cervical and lumbar magnetic resonance imaging (“MRI”) reports as well as range of motion limitations observed upon examination of plaintiff were permanent and causally related to the subject accident raised a triable issue of fact as to whether plaintiff sustained a serious injury under the permanent loss and permanent consequential and/or significant limitation of use categories of insurance Law 5102(d) to her cervical and/or lumbar spines as a result of the accident. In *Gutierrez v. Yonkers Contracting Co.*, 61 A.D.3d 823 (2d Dept. 2009), a finding of a triable issue of fact as to whether serious injury was sustained under the significant limitation of or the permanent consequential limitation of use categories of Insurance law 5102(d) by medical submissions of plaintiff’s treating physician and neurologist which opined that plaintiff’s lumbosacral spine injuries, evidenced by significant contemporaneous lumbar spine range of motion limitation upon examination and a disc herniation at L3-4 upon review of MRI films, amounted to a significant restriction of mobility and a permanent consequential limitation of use of his lumbosacral spine that were permanent and causally related to the accident.

The Affirmation of Plaintiff Stati’s treating physician, Dr. Imelda Cruz- Banting, coupled with Plaintiff’s own Affidavit establishes that Plaintiff’s injuries, including a fracture of the vertebrae of her lumbar spine, and various injuries to her neck, back, head and right knee which did not exist before, are causally related to the accident. At the time of the accident, Plaintiff was

working as a waitress six days per week for eleven to twelve hours per day hours per day with no limitation of her household tasks and recreational activities. For approximately 9 ½ months following the accident, due to the severe neck and back pain and right knee pain, Plaintiff was unable to perform most of her usual and customary activities of daily living and was required to significantly limit her work activities. (Cruz-Banting Aff. ¶14). Plaintiff's Affidavit describes in detail the limitations with respect to her daily activities and her work. (Stati Aff. ¶¶9-11). In addition to the continued subjective complaints made by Plaintiff Stati to Dr. Cruz- Banting, with whom she treated regularly for the first 9 ½ months, Dr. Cruz-Banting quantified the extent of Plaintiff's limitations with objective testing using a goniometer and inclinometer on several occasions from May 1, 2017 through January 16, 2019 and found significant loss of motion as recently as January 16, 2019. The following limitations were found to exist:

May 1, 2017

Cervical spine:

Flexion 0-30 degrees (normal 0-60 degrees), loss of 30 degrees. Extension 0-20 degrees (normal 0-60 degrees), loss of 40 degrees. Lateral Flexion 0-20 degrees (normal 0-45 degrees), loss of 25 degrees. Rotation 0-55 degrees (normal 0-90 degrees), loss of 25 degrees.

Lumbar spine: Flexion 0-50 degrees (normal 0-90 degrees), loss of 40 degrees. Extension 0-10 degrees (normal 30 degrees), loss of 20 degrees. Lateral Flexion 0-10 degrees (normal 0-35 degrees), loss of 25 degrees.

Right knee: Flexion 0-125 degrees (normal 0-135 degrees), loss of 10 degrees. (Banting Affirmation ¶6).

January 16, 2019

Cervical Spine:

Flexion 0-45 degrees, loss of 15 degrees. Extension 0-30 degrees, loss of 30 degrees. Lateral Flexion 0-30 degrees, loss of 15 degrees. Rotation 0-65 degrees, loss of 25 degrees.

Lumbar Spine:

Flexion 0-40 degrees, loss of 50 degrees. Extension 0-5 degrees, loss of 25 degrees. Lateral Flexion 0-10 degrees, loss of 25 degrees.

Right Knee:

Flexion 125 degrees, loss of 10 degree.

Dr. Cruz- Banting specifically opines that with a reasonable degree of medical certainty, Plaintiff is permanently partially disabled as a result of the accident and she sustained a fracture, significant limitation of use of a body function or system (her cervical and lumbar spine and right knee manifested by loss of motion, accompanied with significant pain and inability to perform many of her ususal and daily activities), a permanent consequential limitation of a body organ or member (her cervical and lumbar spine with significant loss of motion, accompanied with significant pain and inability to perform most of her ususal and daily activities), and that injuries prevented Plaintiff from performing substantially all of the activities which constituted her usual and customary activities for at least 90 days of the fist 180 days following the accident, and continues to do so.

This Court reaches a similar conclusion with respect to Plaintiff Reyes. Plaintiff Reyes treated with Dr. Steven S. Klein from May 3, 2017 to January 10, 2018, and was examined by him as recently as February 5, 2019. The findings of Dr. Klein are set forth in his Affirmation and report, both of which are submitted in opposition to Defendants' motion.

During an evaluation that took place more than three months after the accident on October 4, 2017, Dr. Klein noted " Plaintiff [Reyes]was again evaluated with the impression of persistent impingement, rent type tear of the supraspinatus of the left shoulder" for which Dr. Klein recommended surgery. (Klein Aff. ¶17). On January 10, 2018, the examination "revealed persistent impingement of the left shoulder with an additional diagnosis of early adhesive capsulitis to the left shoulder." (*Id.* ¶19). The most recent examination was conducted by Dr. Klein on February 5, 2019. Dr. Klein used an objective goniometer and determined that the **cervical spine** revealed a limitation of motion in all planes especially Right Lateral Extension 30

degrees (normal 40 degrees), loss of 10 degrees; Bilateral Rotation 50 degrees (normal 70 degrees), loss of 20 degrees. The **lumbar spine** reveals decreased lordosis and range of motion limitations as follows: Extension 20 degrees (normal 30 degrees), loss of 10 degrees; Flexion 40 degrees (normal 80 degrees), loss of 40 degrees. Examination of the **left knee** revealed quadriceps atrophy, retopatellar crepitus and tenderness with a loss of motion of 20 degrees. Examination of the left shoulder revealed active forward elevation and abduction 120 degrees (normal 180 degrees), loss of 60 degrees; external rotation 50 degrees (normal 70 degrees), loss of 20 degrees; internal rotation 60 degrees (normal 90 degrees), loss of 30 degrees. Dr. Klein found positive impingement and Kawkins signs. (Klein Aff. ¶¶21-22).

The Affidavit of Plaintiff Reyes details the degree of pain and limitations he experienced during the first 7 months after the accident, and the limitations that persist. (Reyes Aff. ¶¶10-23).

Dr. Klein's diagnosis of Plaintiff Reyes, confirmed by MRI's and clinical evaluation is:

1. Cervical strain/sprain with functional loss of motion;
2. Lumbar strain/sprain with functional loss of motion;
3. Left shoulder traumatic impingement with adhesive capsulitis (tear confirmed by MRI);
4. Left elbow epicondylitis;
5. Left knee traumatic chondromalacia patella.

Dr. Klein opined that with a reasonable degree of medical certainty, Plaintiff Reyes is permanently partially disabled as a result of the accident, having sustained partial but significant permanent impairments of the lumbar spine and cervical spine, left shoulder, left elbow and left knee causally related to the accident.

In his opinion, Plaintiff Reyes has sustained: 1) significant limitation of use of a body function or system; his cervical and lumbar spine, left shoulder, left elbow and left knee manifested by loss of motion, accompanied with significant pain and inability to perform many

of his usual and daily activities; 2) a permanent consequential limitation of a body organ or member; his cervical and lumbar spine, left shoulder, left elbow and left knee with significant loss of motion, accompanied with significant pain and inability to perform many of his usual and daily activities; and 3) based upon his examinations, lumbar spine and left shoulder MRI's, objective range of motion testing, objective testing and representations of Plaintiff himself, his injuries prevented him from performing substantially all of the activities which constituted his usual and customary activities for at least 90 days of the first 180 days following the accident, and continues to do so. (Klein Affirmation, ¶¶24-28).

Accordingly, and based upon the foregoing, it is hereby

ORDERED that Plaintiffs' Motion for Summary Judgment on the issue of liability is granted and Defendants' Cross-Motion for Summary Judgment is denied; and it is further

ORDERED that all parties and counsel shall appear at the Settlement Conference Part, Courtroom 1600 on September 10, 2019 at 9:15 am.

The foregoing constitutes the Decision and Order of the Court.

Dated: July 25, 2019
White Plains, New York


HONORABLE JOHN P. COLANGELO, J.S.C