To commence the statutory time
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 ORANGE

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**ANTHONY THOMPSON,**
Plaintiff,

-against-

**JANE F. RICHARDSON, KEVIN ELLIS, NICHOLE A. ELLIS, BLESSING WILLIAMS and MONOLESIA WILLIAMS,**
Defendants.

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**DECISION AND ORDER**
**INDEX NO.: EF002555-2017**
**Motion Date: 4/16/19**
Sequence Nos. 2 - 3

**SCIORTINO, J.**

The following papers numbered 1 to 24 were considered in connection with the motion of defendants Kevin Ellis and Nichole A. Ellis (Sequence No. 2) and the motion of defendants Blessing Williams and Monolesia Williams (Sequence No. 3), each for summary judgment pursuant to Civil Practice Law & Rules §3212 and Insurance Law §5102(d), dismissing the Complaint on threshold grounds:

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion (Seq. #2)/Affirmation (O'Neill)/Exhibits A-H | 1 - 10 |
| Notice of Motion (Seq. #3)/Affirmation (Welch)/Exhibits A-F | 11 - 18 |
| Affirmation in Opposition to both Motions (Cole-Hatcherd)/ Exhibits 1 and 2 | 20 - 22 |
| Reply Affirmation (O'Neill) | 23 |
| Reply Affirmation (Welch) | 24 |

**Background**

This negligence action arises out two motor vehicle accidents in which plaintiff was involved occurring on April 2, 2015 and April 17, 2015.. The first accident involved plaintiff and former

defendant Richardson, each of whom was driving. In the second accident, plaintiff was a rear-seat passenger in the Williams vehicle when it collided with the Ellis vehicle.

The action was commenced by the electronic filing of a Summons and Complaint on April 5, 2017. (Exhibit A)[1] An Answer with Cross-Claims was filed on behalf of former defendant Richardson on May 1, 2017. The Answer and Cross-Claims of the Ellis defendants was filed on May 24, 2017, together with Discovery Demands. The Answer and Cross-Claims of the Williams defendants was filed on October 31, 2017.

Verified Bills of Particulars were served on each defendant containing allegations of injuries to plaintiff's left wrist (including a tear of the triangular fibrocartilage complex (TFCC); cervical spine (disc herniations and bulges); lumbar spine (disc herniations and bulges); right shoulder (severe sprain/strain, internal derangement, impingement syndrome, tendinosis; and ribs (severe sprain/strain). Plaintiff claims to have sustained 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; significant limitation of use of a body function or system or, alternatively, 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." (Exhibit C) There is no indication in the Bills of Particulars whether the injuries were caused by the first or second accident.

Plaintiff served a Supplemental Bill of Particulars (Exhibit D) on or about February 21, 2018.

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[1]Except where otherwise indicated, all references to Exhibits, many of which are duplicated in other filings, refer to Motion Seq. No. 2.

He asserted that, as a result of the April 17, 2015 accident, he sustained "exacerbation, aggravation and activation" of injuries including the left wrist tear; neck and back herniations and bulges; and internal derangement and impingement syndrome of the right shoulder. No reference is made to the categories of injury under Insurance Law §5102(d).

The Examination Before Trial of plaintiff (Exhibit E) was conducted on July 19, 2018. An Independent Medical Examination was performed by Dr. Robert Hendler on November 13, 2018. Dr. Hendler's reports dated November 23, 2018 (Exhibit G) and January 7, 2019 (Exhibit H) were exchanged as part of Expert Disclosure on February 15, 2019.

The Note of Issue was filed on September 12, 2019. On February 14, 2019, defendant Richardson filed her motion for summary judgment (Sequence No. 1). The motions of the Ellis defendants (Sequence No. 2) and the Williams defendants (Sequence No. 3) were filed on February 15, 2019. Thereafter, the matter was discontinued as to defendant Richardson, and her motion was withdrawn.

Plaintiff's Deposition

With respect to the April 2, 2015 accident, plaintiff testified that he was driving his girlfriend's 2014 Nissan automobile. His girlfriend had picked the vehicle up earlier that day. (Exhibit E at 16-17) After dropping his girlfriend at her job in Newburgh, plaintiff intended to pick up his brother at Newburgh Free Academy. (Exhibit E at 20) Plaintiff, who had his learner's permit (Exhibit E at 21), made a left turn from Lake Street onto the far right lane on Broadway. (Exhibit E at 24, 26) Cars were angle-parked on the side of the street. (Exhibit E at 27) However, as he prepared to make a left turn onto Fullerton, he saw a car backing out of a parking space on Broadway. (Exhibit E at 32) The driver put her car in reverse and backed into his vehicle. (Exhibit

E at 29, 33) Plaintiff's car was struck in the right front fender and both passenger doors. (Exhibit E at 36) He was traveling between 5 and 10 miles per hour at the time of the impact. (Exhibit E at 42)

Plaintiff described the impact as "a little heavy." (Exhibit E at 42) He felt the seatbelt tighten on his left shoulder; this caused his right shoulder, where he has a shunt implanted, to "tense a little bit." (Exhibit E at 43-44) His body moved to the left and to the right; he felt a shift in his back and his entire chest was really sore. He felt most of the pain in his back. (Exhibit E at 47) When the police arrived, plaintiff told them he was okay. (Exhibit E at 53) He left the scene 10 to 15 minutes after the accident. (Exhibit E at 56) About four days later, he started to feel pain in his back and went to St. Luke's Hospital. He complained of pain in his back and his wrist, which had locked up on him. (Exhibit E at 61-62) Plaintiff could not remember what was done for him at the hospital, but did believe that he underwent an MRI which showed a disc herniation. (Exhibit E at 62, 66)

Plaintiff did not remember when he first saw his attorney or whether it was before or after the April 17, 2015 accident. (Exhibit E at 63) His attorney referred him to an orthopedist in New Windsor, where he went "probably a week or two after the accident." He believed, however, it was before the second accident. (Exhibit E at 78) At the orthopedist's office he complained to Dr. Sanz of pain in his back, and numbness in his feet and toes. He also complained of his left wrist and his right shoulder. (Exhibit E at 64) He was given x-rays, which again showed a herniated disc, and referred to physical therapy. (Exhibit E at 65, 67) He went to physical therapy for three to four months, mostly to treat his back. His therapy consisted of hot packs, stretching and exercises. (Exhibit E at 83-84) Plaintiff stopped going to physical therapy because he felt that it was making it worse. He also saw a chiropractor once, to whom his attorney referred him, but did not feel better,

so he did not return. (Exhibit E at 85, 123) However, plaintiff testified that he also stopped going to therapy because he lacked transportation to get there. (Exhibit E at 85)

On April 17, 2015, plaintiff was involved in the second accident. (Exhibit E at 69, 82) He testified that, before the accident that day, he was feeling pain in his back, left wrist and right shoulder. He had numbness in his toes. (Exhibit E at 79) At the time of the April 17th accident, plaintiff was a rear-seat passenger in a car being driven by defendant Blessing Williams. (Exhibit E at 70) Williams was making a left turn at the intersection of North Lake Drive and Lake Street in Newburgh when it came into contact with a cab which struck the rear fender on the driver's side. (Exhibit E at 72) Plaintiff testified that he tried to brace himself against the heavy impact by holding the center console in the back seat. (Exhibit E at 73, 122) The lower right side of his body came into contact with the console. (Exhibit E at 123)

Plaintiff went to St. Luke's Hospital with his girlfriend after the second accident, but did not get any treatment there. (Exhibit E at 81-82) He did not say anything about his physical problems to the staff at St. Luke's. (Exhibit E at 118) Although his back was a little worse, he "figured it was from the first [accident], so [he] didn't really pay mind to it, but it definitely got worse after that." (Exhibit E at 82)

Plaintiff did not have physical therapy or any other treatment for his right shoulder. The only treatment he had for his left wrist was a brace given to him in the first few weeks after the first accident. (Exhibit E at 86-87) His last treatment for his claimed injuries was "maybe 2015, 2016." (Exhibit E at 90) At the time of his deposition in July 2018, plaintiff continued to complain of daily sporadic pain in his back, numbness in his right foot and toes, and pain in. his left wrist. (Exhibit E at 91-92) Although his doctors did not instruct him to do so, plaintiff confined himself to bed

and his home for about a week after each accident. (Exhibit E at 126)

**Summary Judgment Motions**

Defendants aver that plaintiff did not sustain a serious injury in accordance with the provisions of Insurance Law §5102(d). Defendants assert that neither the sparse medical records nor the deposition testimony of plaintiff establish any significant treatment for injury following the April 17th accident. Nor does it appear that the April 2nd accident caused any serious injury to plaintiff. In short, there is no objective medical evidence of a serious injury under any of the section 5102(d) categories.

In support of their motions, defendants submit the affirmed reports of Robert C. Hendler, MD, dated November 28, 2018 (Exhibit G) and January 7, 2019 (Exhibit H).[2] Dr. Hendler, who is a board-certified orthopedic surgeon, duly affirmed both reports under the penalties of perjury, and both are accompanied by his *curriculum vita*. The November 23, 2018 report states that he reviewed the medical records submitted to him, noting that most refer to the accident of April 2, 2015, and not the April 17th accident. He examined plaintiff on November 13, 2018.

Dr. Hendler first observed that plaintiff claimed to have been taken by ambulance to St. Luke's after both accidents. However, his statement is contradicted by the medical records, which show he was first seen at St. Luke's three days after the first accident, on April 5th. There he complained of pain in his neck, back and right shoulder, but did not complain about his left wrist. No x-rays were taken, and his examination was normal. Dr. Hendler further reviewed the records of plaintiff's treatment with Orthopedic and Sports Medicine from April 10, 2015 through June

[2]It should be noted that the November 2018 report was addressed to counsel for former defendant Richardson, but was submitted by the other defendants as well. Only the Ellis defendants (Sequence 2) submitted the January 2019 report.

2016. Treatment consisted of physical therapy and one lumbar steroid injection. He reviewed the records of Dr. Dassa, and plaintiff's chiropractor, Dr. Kaloz. Finally, Hendler reviewed the radiological studies ordered by Dr. Dassa, including repeat MRI of the lumbar spine (4/12/16), showing bulges and herniations; MRI of the cervical spine (4/12/16) showing multiple disc herniations; MRI right shoulder (4/26/16) showing tendinosis of the supraspinatus tendon; and MRI left wrist (4/12/16) showing TFCC tear.

Dr. Hendler opined that the MRI films were "grossly over-read" in that the reported multiple disc abnormalities were unusual in a patient of 23 years. Moreover, he found no reported significant injury to account for the TFCC tear, apart from a childhood wrist fracture.

His examination of plaintiff's cervical spine was performed by visual measurement, and showed full range of motion in all joints, compared to values of the AMA Guide to Evaluation of Permanent Impairment. He found no atrophy and full grip strength. Neurological examination (pin prick) was within normal limits, and plaintiff demonstrated no pain on palpation. The lumbar spine also showed full range of motion, compared to normal values. He found no muscle spasm. Reflexes were normal active and equal bilaterally. Straight leg raising and other testing were negative. He found no detectable atrophy, an unremarkable gait on walking, and had no sensory deficits. He examined both shoulders and found them to have full range of motion in all directions, no atrophy, trigger zones or crepitus. Hawkins, Neer and O'Brien's tests were negative. There was also full range of motion on both wrists and hands. No atrophy was observed, and objective tests were negative bilaterally. Sensory examination was intact.

Dr. Hendler performed x-ray testing on November 13, 2018. The lumbar spine showed mild degenerative joint disease and mild degenerative disc disease in the lower regions. The right

shoulder showed no evidence of fracture or dislocation, no soft tissue calcification, and no subluxations. The cervical spine x-ray showed alignment within normal limits, with normal cervical lordosis. There was no significant degenerative change, and no evidence of fractures, dislocations or subluxations. The left wrist showed no evidence of fractures or dislocations, and no soft tissue calcifications.

Based on his review of the medical records, his x-rays and his physical examination, Dr. Hendler concluded that plaintiff may have sustained a cervical and lumbosacral sprain as a result of the April 2, 2015 accident. He found no mechanism of injury to account for the injuries claimed to the right shoulder or left wrist. The present physical examination was completely normal. There were no positive objective tests.

Dr. Hendler opined, with a reasonable degree of medical certainty, that with respect to plaintiff's neck and lower back, he has no disability, and no permanent findings causally related to either accident. His opinion was the same with respect to the claimed left wrist injury. He opined that it was possible plaintiff may have sustained a mild contusion of his right shoulder, which has completely resolved. There is no present disability, and no permanent findings causally related to the accidents.

In his affirmed report of January 7, 2019, Dr. Hendler confirmed the above findings, and further opined that the diagnoses he found were related to the accident of April 2, 2015, and not to the April 17, 2015 accident. Notably, none of the treating physicians' records make any significant mention of the second accident, and he reiterated that there are no permanent orthopedic findings related to either accident. (Exhibit H)

Defendants conclude that after reviewing the injuries and disabilities alleged, the EBT

testimony and the Hendler evaluation, all of the evidence demonstrates that there was no serious injury pursuant to Insurance Law §5102(d). Specifically, there is no evidence to establish that any claimed injury is attributable to the April 17th accident. Plaintiff's subjective complaints of pain, and his self-imposed restrictions in activities are insufficient to demonstrate a medically-determinable injury, in the absence of medical evidence, and insufficient to show that "substantially all" of plaintiff's activities were curtailed as a result of his injuries.

On that basis, summary judgment should be awarded to the Ellis and Williams defendants.

**Plaintiff's Opposition**

In opposition to the motions of the collective defendants, plaintiff asserts that he felt a jolt to his right shoulder and pain in his back after the April 2, 2015 accident. A few days later, he went to St. Luke's Hospital with back, shoulder and wrist pain. Plaintiff asserts that, after the St. Luke's visit, he had no further treatment until after the second accident on April 17, 2015.[3] (Exhibit E at 62, 68) His back pain worsened after the second accident in which he was jolted back and forth in the back seat. (Exhibit E at 74)

After the second accident, plaintiff underwent multiple tests;MRI exams; diagnoses and treatments and was found to have cervical and lumbar muscuoligamentous injuries; cervical and lumbar disc displacements; right shoulder impingement syndrome; left wrist sprain and strain, and a TFCC tear. (Exhibits 1 and 2 to opposing papers)

Plaintiff submits the affirmed report of Dr. Gabriel Dassa (Exhibit 1), dated September 25, 2018, in further opposition to defendants' motions. Dr. Dassa, a board-certified orthopedic surgeon,

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[3]Of note, plaintiff's deposition testimony is contradicted by the medical records showing plaintiff's first visit with Dr. Sanz, to whom his attorneys referred him, on April 11, 2015. (See Hendler Report, Exhibit G)

begins by stating that his examination follows up injuries sustained by plaintiff in the accident of April 2, 2015. He notes that plaintiff was evaluated with complaints of radiating back and neck pain, right shoulder pain, and left wrist pain, post the April 2nd accident. Dr. Dassa cites to a February 22, 2015 MRI (corrected in Exhibit 2 to read May 26, 2015) showing an L5-S1 disk bulge with congenital spinal stenosis at S1 and S2. An April 26, 2015 MRI of the cervical spine showed bulging disks at C2-C3, C3-C4, C5-6 and C-6-C7 with herniations at C4-C5 and C7-T1. A right shoulder MRI dated April 26, 2016 showed impingement syndrome. And a lumbar MRI dated April 26, 2016 showed L1-L2 herniations, with L2-L3, L3-L4 bulges.

Plaintiff underwent examination on September 23, 2018. Dr. Dassa performed range of motion testing with a handheld goniometer. In the cervical spine, he found restrictions in flexion 45/60; extension 60/75; lateral bending 30/45; and lateral rotation 45/80, with myospasm from C1 through C7 and positive Spurling findings. In the lumbosacral spine, Dr. Dassa found spasm from L1 through L5. Range of motion limitations included flexion 60/90; extension 20/30; lateral bending 25/40 and lateral rotation 20/30. The straight leg test was positive on the right.

He found swelling in the right shoulder, and range of motion limitations in flexion, 160 & 170/170; abduction 160 & 170/170; internal rotation 50 & 60/60; external rotation 80 & 90/90; extension 20 & 30/30 and adduction 30 & 40/40. Impingement, O'Brien and Speed tests were positive on the right side. Plaintiff's left wrist was also swollen and tender over the TFCC. The left wrist had limitations of range of motion of flexion, 75/90; and extension 60/70. There was positive ballottement on the left.

Diagnoses included cervical and lumbar musculoligamentous injury; cervical and lumbar traumatic disk displacement; right shoulder impingement syndrome; left wrist sprain and strain; and

TFCC tear. Dr. Dassa opined, with a reasonable degree of medical certainty, that plaintiff's signs and symptoms were consistent with those diagnoses and were directly caused by the accident of April 2, 2015. He found plaintiff to be a candidate for left wrist arthroscopic surgery which had been recommended to plaintiff in the past. (The report does not indicate which doctor made that recommendation.) Dr. Dassa further opined that the persistence of plaintiff's significant impairments in spite of treatment, combined with the plaintiff's financial inability to have surgery, indicate that the impairments are permanent. (Exhibit 1)

On April 1, 2019, Dr. Dassa signed an affirmation expanding on his September 25, 2018 report. (Exhibit 2) There, he indicates that his office was not informed of the April 17, 2015 accident until after his September 25, 2018 report. He notes that there was only one medical visit after April 2, 2015 (the date is not included). Because the two accidents were in close proximity and affected the same body parts, "there is no way to distinguish which accident caused the injuries." (Exhibit 2 at paragraph 3) In the same affirmation, Dr. Dassa corrected the date of plaintiff's MRI from February 22, 2015 (pre-dating the accident) to May 26, 2015.

Plaintiff argues that defendants failed to meet their *prima facie* burden for summary judgment. He asserts that Dr. Hendler's use of "visual measurement" to determine precise angles of movement are incredible and cannot support summary judgment. Defendants are required to show a quantitative, comparative determination of restrictions or limitations. Instead, Dr. Hendler merely stated that there were no injuries relatable to either accident, without the benefit of objective measurement. On that basis, defendants failed to meet their burden, and the sufficiency of plaintiff's papers need not be considered.

Further, even if defendants had met their burden, the conflicting reports of the experts raise

substantial issues of material fact rendering summary judgment inapplicable. The question of proximate causation is a jury question. Plaintiff need not show a causal connection between the claimed injuries and the accident of April 17th. Rather, defendants failed to come forward with any evidence of a prior or subsequent injury which would explain the objective evidence outlined in Dr. Dassa's report.

**Reply**

In reply, defendants reiterate that the affirmed report of Dr. Hendler, who opined that there was no objective medical findings to support plaintiff's claims, shifts the burden to plaintiff to submit admissible evidence to establish issues of fact. In this matter, Dr. Dassa's September 28, 2018 report clearly and unequivocally attributes the alleged injuries to the April 2, 2015 accident and not to the April 17th event, which he does not even mention.

Plaintiff's attempts to "rehabilitate" Dr. Dassa's report through the April 1, 2019 affirmation are unsuccessful, because there is no medical evidence providing a causal nexus between the alleged injuries and the April 17th accident. Because plaintiff's subjective complaints of pain are insufficient to support a claim of serious injury, Dr. Dassa's opinion as to causality is critical to the claim. Merely showing the existence of a herniation or even a tear is insufficient to show serious injury in the absence of objective evidence of the extent of the alleged limitations. There is simply no causal nexus shown, and Dr. Dassa's affirmation makes it clear he is unable to establish any. Thus, any conclusion that the injuries were the result of the April 17th accident could be based on nothing but speculation.

In contrast to plaintiff's argument, Dr. Hendler provided objective evidence in the form of quantitative comparison between his observed ranges of motion and "normal" ranges. Moreover,

Dr. Hendler's report makes it clear that the now-resolved injuries claimed by plaintiff were sustained in the first accident and not the April 17th event.

The Court has fully considered the submissions of the parties.

**Discussion**

Summary judgment is a drastic remedy, and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to resolve issues of fact or to determine credibility, but merely to determine whether such issues exist. (*Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005]) The Court must draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995]) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. (*Anyanwu v. Johnson*, 276 AD2d 572 [2d Dept 2000])

However, summary judgment shall be granted where, upon all the papers and proofs submitted, the cause of action or defense is sufficiently established to warrant the court as a matter of law, in directing judgment in favor of any party. (*Zuckerman v. City of New York*, 49 NY 2d 557, 52 [1980])

Defendants move for summary judgment claiming that plaintiff has failed to meet the threshold requirements of Insurance Law §5102 because he has not provided proof that he sustained a serious injury as a result of the accident. Defendants bear the initial burden of establishing a *prima facie* case that plaintiff did not sustain a serious injury. (*Toure v. Avis Rent-A-Car Sys.*, 98 NY 2d

345 [2002]) Where, as here, the argument relies on the findings of defendant's witness, the findings must be in admissible form, and not in unsworn reports, in order to demonstrate entitlement to judgment as a matter of law. (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]) Defendants have submitted the affirmed report of Dr. Hendler in support of the application. In his affirmation Dr. Hendler asserts that there is no evidence of an active disability and that, in his medical opinion, any sprain/strain injury sustained in the April 2, 2015 accident has fully resolved.

It is well-established that proof under the significant limitation of use and permanent loss/permanent consequential limitation categories require "comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence." (*Toure,* 98 NY 2d at 350-351) The Court has examined the range of motion report of Dr. Hendler, which compares his findings, in each instance, to what is normal. (*Walker v. Public Adm'r of Suffolk County*, 60 AD3d 757 [2d Dept 2009]) Contrary to plaintiff's position, the report of Dr. Hendler sufficiently establishes that the actual ranges of motion fall within the normal range. Plaintiff argues that Dr. Hendler's visual measurement is insufficient to comply with the "objective measurement" requirement. However, plaintiff offers no authority for such a position. In response, defendants cite to an unreported decision, *Brown v. Teepe*, 2011 579063 [Nassau Co. 2011], which, although not binding on this Court, is sufficiently on point to be instructive. In *Brown,* defendant's doctor performed range of motion testing through visual inspection. The Supreme Court rejected plaintiff's challenge of that practice showing that the doctor's quantification of those ranges of motion and comparison to "normal" findings was sufficient to establish the lack of limitations and, combined with the neurological examination performed (as it was by Dr. Hendler), was sufficient to make defendant's *prima facie* showing.

The Court notes plaintiff's citation to *Schacker v. Cty. of Orange*, 33 AD3d 903 [2d Dept 2006], in which Dr. Hendler's report was rejected. However, in that case, Dr. Hendler failed to provide the quantitative analysis necessary to compare plaintiff's range of motion to "normal" ranges. Such a holding is not determinative in the present matter. (*See also, Black v. Robinson*, 305 AD2d 438 [2d Dept 2003])

By reliance on the affirmed report of Dr. Hendler, who found no injury causally related to the accidents, defendants meet the *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the April 17, 2015. accident. An expert may qualitatively assess plaintiff's condition provided he has an objective basis and compares the plaintiff's limitations to normal function, purpose and use of the affected organ, member, function or system. (*See, Toure,* 98 N.Y.2d 345, 428; *Gaddy v. Eyler,* 79 NY 2d 955 [1992])

Once defendants 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. (*Cross v. Labombard,* 127 AD3d 1355 [3d Dept 2015]; *Heege v. Falisi,* 2013 NY Slip Op. 31475(U) [Suffolk Co. 2013]) In light of defendants' showing, the burden shifted to plaintiff to demonstrate, by admissible evidence, that the injuries sustained by him meet the threshold of Insurance Law §5012(d).

Plaintiff has failed to meet that burden.

Although the affirmed report of Dr. Dassa establishes the existence of potentially serious injuries, that establishment on its own is not sufficient. Plaintiff must show that the serious injury was caused by the accident. (*Thomas v. McMaster*, 165 AD3d 1511 [3d Dept 2018]) The Second

Department has made it clear that an automobile accident victim may rely on injuries suffered subsequent to an accident involving defendants to satisfy the threshold requirement of "serious injury", "*provided that plaintiff can establish a causal relationship between the injuries sustained in the two accidents.*" (*Daliendo v. Johnson*, 147 AD2d 312, 313 [2d Dept 1989] (emphasis added)

Here, the affirmed report of Dr. Dassa attributes the injuries allegedly sustained by plaintiff solely to the April 2, 2015 accident. (Exhibit 1) In his April 1, 2019 affirmation, Dr. Dassa attempts to explain this by claiming to have been unaware of the second accident, although he did not rescind his claim that he reviewed the medical records. He then goes on to state that because of the proximity in time of the two accidents, he cannot distinguish causality between them. The Court has given consideration to Dr. Dassa's claims and comes to an inevitable conclusion: if Dr. Dassa indeed reviewed the records before making his September 28, 2018 report, yet claimed to be unaware of that accident, there must be nothing in the medical records pointing to a causal nexus between the injuries and the April 17th report.

But even if that were not the case, the failure to establish a causal connection between the injuries and the accident, within the meaning of the No-Fault law, is fatal to a claim of serious injury. (*See, Graves v. L & N Car Service*, 87 AD3d 878 [1st Dept 2011])

On that basis, the claims for significant limitation of use and permanent loss/permanent consequential limitation categories cannot withstand defendants' motion and summary judgment is granted.

Defendants' application for summary judgment on the 90/180 claim is likewise granted. It is well-established that plaintiff must prove that his accident caused curtailment of his activities for a minimum of 90 days of the following 180 days. (*Licari v. Elliott*, 57 NY 2d 230 [1982]) A minor,

mild or slight limitation of use is insignificant within the meaning of the statute. (*Id.*) Dr. Hendler's finding that there was no connected injury necessarily negates any 90/180 claim. There is no dispute that plaintiff was not seen in the emergency room for several days after his accident; was never told by any doctor to remain at home or out of work, and was not confined for medical reasons to bed or to home. There is nothing in plaintiff's deposition (which consisted mainly of inability to remember and contradictions) to suggest that his activities were in any way curtailed. His self-imposed restrictions are simply insufficient to satisfy the threshold. Nor is there any medical evidence in Dr. Dassa's report to suggest that plaintiff's injuries prevented him in any way from performing substantially all of his customary activities. It need not be said that the failure to identify a causal connection to the April 17th accident further negates the claim.

In the absence of competent medical evidence that plaintiff was unable to perform substantially all of his daily activities for 90 of the 180 days following either accident, defendants' applications for summary judgment on this claim are likewise granted.

On the basis of the foregoing, defendants' motions for summary judgment are granted; and the complaint is dismissed.

This decision shall constitute the order of the Court.

Dated: June 18, 2019
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of record via NYSCEF*