| **Castro v Ortiz** |
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| 2020 NY Slip Op 30236(U) |
| January 30, 2020 |
| Supreme Court, Kings County |
| Docket Number: 512906/2018 |
| Judge: Debra Silber |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF KINGS : PART 9**

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**JEAN P. MENESES CASTRO,**

**Plaintiff,**

**-against-**

**CAROLINA ORTIZ and MORGAN A. ORTIZ,**

**Defendants.**

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**DECISION / ORDER**

**Index No. 512906/2018**
**Motion Seq. No. 1**
**Date Submitted: 11/14/19**
**Cal No. 35**

***Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.***

| Papers | NYSCEF Doc. |
|---|---|
| Notice of Motion, Affirmation and Exhibits Annexed..... | 16-21 |
| Affirmations in Opposition and Exhibits Annexed..... | 25-30 |
| Reply Affirmation..... | 33 |

**Upon the foregoing cited papers, the Decision/Order on this application is as follows:**

This is a personal injury action arising out of a motor vehicle accident which took place on September 4, 2016. Plaintiff was traveling straight on Jewel Avenue near the Van Wyck Expressway exit ramp in Queens when his vehicle was hit by a vehicle coming from the exit ramp, which was driven by defendant Carolina Ortiz and owned by defendant Morgan A. Ortiz. In his Bill of Particulars plaintiff alleges that as a result of the accident, he sustained, among other injuries, herniated discs at C3-C4, C4-C5 and L5-S1 with radiculopathy as well as injuries to his left arm. Plaintiff received physical therapy for six months following the accident. At the time of the accident, plaintiff was twenty-five years old.

Defendants contend that plaintiff did not sustain a serious injury, as is defined by Insurance Law § 5102(d). Defendants argue that insofar as plaintiff ceased all treatment after six months, he cannot claim a permanent injury and that defendants' examining neurologist found no permanent injury. Defendants submit the pleadings, plaintiff's EBT transcript and an affirmed IME report from a neurologist, Dr. Daniel J. Feuer, dated June 12, 2019. Dr. Feuer examined plaintiff and found a normal range of motion in plaintiff's cervical and lumbar spine, with negative test results, other than a "subjective left side sensory loss." He diagnoses plaintiff as "status post lumbosacral sprain - resolved" and "subjective left sided sensory loss - nonphysiologic." Dr. Feuer finds "no objective clinical deficits referable to the central or peripheral nervous system to support [plaintiff's] subjective complaints . . . [there are] presently no objective findings to support a diagnosis of radiculopathy." There is no evidence in the motion papers with regard to the 90/180 category of injury.

Plaintiff opposes the motion, arguing that defendants fail to make a prima facie showing that plaintiff was not restricted from performing substantially all of his usual and customary activities for 90 out of 180 days following the accident. Plaintiff claims this makes the motion frivolous, warranting the imposition of Rule 130 sanctions. In fact, plaintiff claims there is evidence that he sustained serious injuries under the 90/180 category. He states that he received medical disability letters from his treating chiropractor, Dr. Ronald Lambert, indicating plaintiff was totally disabled and unable to work from September 13, 2016 to February 10, 2017, and he provides certified copies. Plaintiff's deposition testimony states that after the accident, he was unable to return to his job delivering Rebar, and that he did not work again for over a year, other than

helping his wife a little in her barber shop. Further, plaintiff contends that there is evidence he has a permanent injury, based upon the affirmation of Douglas A. Schwartz, D.O., who examined plaintiff on July 11, 2019. Dr. Schwartz reports that plaintiff has significant and quantifiable limitations in his range of motion in his cervical and lumbar spine, with positive test results. He diagnoses plaintiff with cervical and lumbar derangement with myofascitis, with disc herniations at C3-C4, C4-C5 and L5-S1, with central and foraminal narrowing. Dr. Schwartz opines that the injuries plaintiff sustained are causally related to the subject motor vehicle accident and that plaintiff suffers from a permanent partial disability.

Conclusions of Law

Defendants have failed to make a prima facie showing that plaintiff was not prevented from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the 180 days following the accident (*see Fils-Aime v Colombo*, 152 AD3d 493, 494 [2d Dept 2017] ["defendants' submissions failed to eliminate triable issues of fact as to whether the plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)"]; *Sullivan v Illoge*, 50 AD3d 886 [2d Dept 2008] ["defendants' motion papers did not adequately address the plaintiff's claim . . . that [he] sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident]).

The Court, however, declines to award sanctions. First, plaintiff did not formally

cross-move for that relief. Second, plaintiff's bill of particulars does not set forth the categories of serious injury he is claiming in this action, which would have put defendants on better notice of his claims.

As the defendants have failed to meet their burden of proof as to all claimed injuries and all applicable categories of injury, it is unnecessary to consider the papers submitted by plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]). In any event, had defendants made a prima facie case for dismissal, Dr. Schwartz's affirmed report is sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the accident (*see Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Accordingly, it is

**ORDERED** that the motion is denied.

This constitutes the decision and order of the court.

Dated: January 30, 2020

**ENTER:**

**Hon. Debra Silber, J.S.C.**

Hon. Debra Silber
Justice Supreme Court