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 25th day of FEBRUARY, 2020.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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SHERMAN BENJAMIN,

Plaintiff,

-against-

HUSSEIN KHACHAB and LUXOR LIMO INC.,

Defendants.

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ALLSTATE INSURANCE COMPANY AS SUBROGEE OF VIRGIL BELL,

Plaintiff,

-against-

HUSSEIN KHACHAB and LUXOR LIMO INC.,

Defendants.

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Index No.: 514599/2017

Decision and Order

Index No.: 6394/2017

DG

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The following *papers* numbered 44 to 100 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause/Cross Motions Affidavits (Affirmations) Annexed	44-64; 83-86
Opposing Affidavits (Affirmations)	89-93
Reply Affidavit	95-100

MS #3,4

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

Defendants HUSSEIN KHACHAB and LUXOR LIMO INC., move this court pursuant to CPLR 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. Defendants HUSSEIN KHACHAB and LUXOR LIMO INC. also move this court by cross-motion pursuant to CPLR 3212, for an Order granting Defendant summary judgment on liability and dismissing the Complaint of the Plaintiff, upon the ground the defendants were not liable for the subject accident. Plaintiff opposes the same contending there are material issues of fact.

ARGUMENTS

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 plaintiff has not suffered a permenant loss of use of a body organ, member function or system as required by 5102(d), all range of motion measurements completed at the IME show normal ranges of motion. Defendants go on to contend the medical documentation and IME's coupled with the plaintiffs own testimony demonstrate plaintiff's back injuries are chronic in nature and existed prior to the accident, when the plaintiff was permenantly disable as the result of an accident in 2013 wherein the plaintiff sustained neck and back

injuries. Finally, defendants contend plaintiff cannot establish a claim under the 90/180 rule.

As to defendants cross-motion for summary judgment the defendant contends the police report being introduced into evidence by the plaintiff as well as the affidavit by the plaintiff was necessary to proceed on the issue of liability and constitutes good cause under *Brilll.*

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 (NYSup). 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" because the evaluating doctors find no loss in ranges of motion. However, in opposition the plaintiff raises a triable issue of fact as to serious injury threshold. The sworn reports annexed by the plaintiff do state what means were used to take any alleged measurements where abnormal ranges of motion were found, creating material issues of fact with these conflicting doctors' reports. This is similar to the situation in *Knokhinov v. Murray*, 27 Misc3d 1211(A), 2010 WL 1542529 (N.Y.Sup.), where the defendants evaluating doctors found differing normative values. In *Knokhinov*, the court denied summary judgment because when the findings reported by one doctor are assessed by application of the standard of "normal" stated by the other doctors, the reports present "contradictory proof". *Id. See also Dettori v. Molzon*, 306 AD2d 308, 309 [2d Dept 2003]. As Judge Battaglia noted in *Knokhinov supra.,* in the Second Department, measuring a plaintiff's range of motion and comparing it to a normal range of motion has become the

linchpin of determining if a soft tissue injury is a "serious injury." Therefore, in a case such as this where the ranges of motion observed by one of the doctors is less than the norm sworn to by another of the doctors, the defendant has failed to sustain its burden for summary judgment on the threshold.

Next the court shall address the defendant cross-motion and request for permission to file late summary judgment based on good cause under *Brill v. City of New York,* 2 NY3d 648, 781 NYS2d 261 (2004). This court rejects this argument for good cause based on the police report. The police report is a public record and could have been obtained by the defendants as they are parties to the accident. To argue that because the plaintiff introduced a police report after the 120-day expiration as a basis of good cause to extend the 120-day summary judgement *Brill* standard is unavailing and unpersuasive. Moreover, the statements referred to in the police report are hearsay and the defendants have failed to argue any exception to hearsay that would allow said statements to be admissible. Moreover, defendants cross-motion for summary judgment is procedurally defective and untimely. Therefore, defendants cross-motion for summary judgment is hereby denied.

Accordingly, defendant's motions for summary judgment dismissing the complaint for failure to establish serious injury pursuant to New York State Insurance Law Section 5102(d)is hereby denied; and defendants cross-motion for summary judgment is hereby denied, for the reasons stated above.

This constitutes the Decision/Order of the Court.

Date: February 25, 2019

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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