At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 2nd day of October 2020.

PRESENT:
Honorable Reginald A. Boddie, JSC

----------x

ANDREW FEBBRARO,

Plaintiffs,

Against

IGOR ROYTMAN and FELIX VAYNER,

Defendants.

----------x

Index No. 521039/2016
Cal. No. 12, 13 MS 3, 5

DECISION AND ORDER

Papers	Numbered
MS 3	Docs. # 44, 50-52, 84, 65-67
MS 5	Docs. # 76-82, 85-93

Upon the foregoing cited papers, the decision and order on plaintiff's order to show cause (MS 3) and defendants' threshold motion (MS 5), pursuant to CPLR 3211 (a) (7) and 3212 and Insurance Law §§ 5102 and 5104, is as follows:

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident on August 2, 2015, at the intersection of Shore Parkway and West 2nd Street in Kings County. In his deposition, taken on February 6, 2019, plaintiff testified he was proceeding on a green light, through the intersection, to turn right onto Belt Parkway when the vehicle owned by defendant Felix Vayner and driven by defendant Igor Roytman collided with the passenger side of his vehicle.

Plaintiff moved by Order to Show Cause for partial summary judgment on the issue of liability and for a conditional order striking defendants' Answer upon their failure to appear for

depositions within 20 days of execution of the Order to Show Cause. Pursuant to the March 27, 2019 order of the court, opposition was required to be e-filed on or before April 12, 2019. Defendant filed its opposition on April 15, 2019, which plaintiff rejected as untimely on the same day. On April 17, 2019, the Honorable Paul Wooten ordered Roytman to appear for an EBT on May 29, 2019, at 10:30 AM, at Diamond Brooklyn Reporting or risk an order of preclusion, striking of the answer or contempt. On May 1, 2019, the Honorable Lizzette Colon also ordered defendant to appear for an EBT on May 29, 2019, pursuant to the April 17, 2019 order.

In an Affirmation in Opposition, dated April 15, 2019, defense counsel alleged law office failure as the reason for the untimely opposition. Specifically, counsel alleged she was busy with pre-trial work on another case and failed to realize the due date for opposition to the instant motion had expired. Defense counsel also admitted that defendant Roytman, the driver of the vehicle, was not produced for a deposition on February 6, 2019, allegedly because counsel's office lost contact and could not get in touch with him.

On July 1, 2019, defendants filed an additional affirmation in opposition, which included Roytman's May 29, 2019 EBT transcript and the police report, Docs. # 65-67, listed incorrectly as associated with Motion #1. Defendant proffered such to raise a triable issue of fact as to liability on the grounds that Roytman testified he was proceeding on a green light when the accident occurred and the police report indicated both drivers stated they were proceeding on green lights, plaintiff making a right turn and defendant proceeding straight.

Although the Court finds defense counsel's proffered excuse for missing the opposition deadline lacking, on balance, in light of this case's procedural history, the date plaintiff's EBT was taken, defendant's compliance with the Justice Wooten's and Justice Colon's orders, and a genuine issue of fact as to liability in this case, the Court is not inclined to grant summary judgment on

default. Moreover, defendant appeared for his EBT pursuant to Court orders, rendering moot the branch of plaintiff's motion seeking to strike the Answer.

Defendants cross-moved for summary judgment on the grounds that plaintiff did not sustain a serious injury, pursuant to Insurance Law § 5102 (d). Plaintiff opposed. The Court notes that Exhibits A, B and C of plaintiff's opposition are MRI reports of the right shoulder and cervical and lumbosacral spine. The Court further notes the Bill of Particulars alleged disc herniations in the lumbosacral and cervical spine and a non-displaced slap tear in the right shoulder, and plaintiff testified that he experienced pain in his left shoulder, lower back and neck and underwent MRI studies of these body parts.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562).

Further, in a "serious injury" threshold motion for summary judgment, as here, defendants must initially submit competent medical evidence establishing that plaintiff did not suffer a "serious injury" and the injuries are not causally related to the accident (*see* Insurance Law 5102 [d]; *see Kelly v Ghee*, 87 AD3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). The issue is not whether plaintiff can ultimately establish a "serious injury," but whether

there exists an issue of fact in the case on such issue (*see Barr v Albany County*, 50 NY2d 247, 267 [1980]).

Defendants proffered the January 15, 2016 report of Dr. Mark Wilner, who reviewed plaintiff's medical records including MRI reports of the cervical and lumbosacral spine and left shoulder. He examined plaintiff's right knee, cervical spine, upper extremities, shoulders, and elbows and determined sprain/strain injuries to plaintiff's right knee, cervical spine and both shoulders had resolved.

In opposition, plaintiff proffered the October 1, 2019 affirmation of Dr. William Gibbs and raised a triable issue of fact (*see Winegrad*, 64 NY2d at 853). Dr. Gibbs reviewed plaintiff's medical records, including MRIs of plaintiff's lumbosacral and cervical spine and right shoulder. He examined plaintiff's cervical and lumbar spine and left shoulder and found decreased ranges of motion in each. He also found a positive Spurling's test on the left side of plaintiff's cervical spine.

Dr. Gibbs opined plaintiff's injuries will progressively worsen without further treatment. He recommended epidural steroid injections and fluoroscopically guided sacroiliac joint injection to help decrease inflammation and pain in the cervical and lumbar spine. He also recommended an injection with PRP (platelet rich plasma) for the left shoulder and did not rule out surgical repair in the neck, back or left shoulder.

Dr. Gibbs disagreed with Dr. Wilner's findings and noted that Dr. Wilner failed to examine plaintiff's lower back, even though he has known disc herniations. The Court notes, Dr. Wilner's review of records included an MRI report, dated September 25, 2015, which indicated disc herniations at L4-L5 and L5-S1. Dr. Gibbs further opined that plaintiff suffered permanent and significant limitations of use of his cervical and lumbar spine and left shoulder.

Accordingly, plaintiff's order to show cause (MS 3) and defendants' cross-motion (MS 5) seeking summary judgment are denied.

ENTER:

HON. REGINALD A. BODDIE J.S.C.

Honorable Reginald A. Boddie
Justice, Supreme Court

KINGS COUNTY CLERK FILED 2020 OCT -5 PM 3:15