STATE OF NEW YORK
SUPREME COURT **ULSTER COUNTY**

ANTHONY HARRIS,

Plaintiff,

- against -

DECISION & ORDER

Index No.: EF18-4294

JESSICA I. MERTES,

Defendant .

Supreme Court, Ulster County
R.J.I. No.: 55-19-00482

Present: James P. Gilpatric, J.S.C.

Appearances:

BASCH & KEEGAN, LLP
Attorneys for the Plaintiff
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By: Derek J. Spada, Esq.

LAW OFFICE OF M. RANDOLPH BELKIN
Attorneys for Defendants
26 Century Hill Drive, Suite 202
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By: Derek L. Hayden, Esq.

Gilpatric, J.:

This action arises from a motor vehicle accident that occurred on July 5, 2018, when plaintiff's vehicle was allegedly rear-ended while stopped in traffic by a car driven by defendant on Boices Lane in the Town of Ulster, County of Ulster and State of New York. The plaintiff alleges

that he was injured while stopped in traffic when the defendant failed to stop, rear ending and striking the motor vehicle operated by the plaintiff. The plaintiff alleges that the defendant was negligent, careless and reckless in the ownership, operation, management, maintenance, supervision, use and control of the aforesaid vehicle. Alleging that he suffered a serious injury as defined by the New York Insurance Law, plaintiff commenced the instant personal injury action on December 17, 2018. In his complaint, and, later in his bill of particulars, plaintiff alleges that he suffered: (1) a permanent loss of use of a body organ, member, function or system; (2) a permanent consequential limitation of use of a body function or system; (3) a significant limitation of use of a body function or system; and (4) a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than ninety (90) days during the one-hundred eighty (180) days immediately following the injury. Following joinder of issue, discovery, and the filing of issue, the defendant moves for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 (d). The plaintiff opposes the motion.

In New York State, a party alleging negligence in a motor vehicle accident may only recover damages for pain and suffering if they have suffered a "serious injury" pursuant to Insurance Law § 5102 (d) (*see* Insurance Law § 5104 [a]; Pommells v Perez, 4 NY3d 566, 570[2005]). As relevant here, a serious injury is defined by Insurance Law § 5102 (d) as:

> 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.

"As the proponent for the summary judgment motion, defendant ha[s] the initial burden of submitting evidence establishing that plaintiff did not suffer a causally related serious injury as a result of the subject accident" (Foley v Cunzio, 74 AD3d 1603, 1604 [3rd Dept 2010] *citing* Toure v Avis Rent A Car Sys., 98 NY2d 345, 352 [2002]; *see* Tubbs v Pallone, 45 AD3d 959, 960 [3rd Dept 2007], *lv denied* 10 NY3d 702 [2008]; Tuna v. Babendererde, 32 A.D.3d 574, 575 [3rd Dept 2006]).

Upon a showing, "[t]he burden then shifts to the plaintiff to present competent medical proof to raise a triable issue of fact" (Tubbs. 45 AD3d at 960).

To meet his initial burden, defendant may present plaintiff's statements, such as at an examination before trial (*see* Tuna v. Babendererde, 32 A.D.3d 574, 575 [3d Dept 2006]), medical records, if they are sufficiently complete and clear, of plaintiff's treating or consulting physicians showing that there is no serious injury (*see* Tuna v. Babendererde, *supra*; Seymour v. Roe, 301 A.D.2d 991 [3d Dept 2003]), or another doctor's affidavit establishing that there is no causal relationship between the accident and the alleged serious injuries (*see* Caron v. Moore, 301 A.D.2d 942, 944 [3d Dept 2003]; Seymour v. Roe, *supra* at 992, 995 [3d Dept 2003]), or that the alleged injuries do not qualify as a "serious injury" (*see* Tuna v. Babendererde, *supra*).

Here, the defendant argues, *inter alia*, that the plaintiff's medical records and testing do not indicate a serious injury, in that they do not establish permanent consequential limitation and/or loss of use, and for a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety (90) days during the one-hundred eighty (180) days immediately following the injury. The defendant argues that there is no objective proof that the plaintiff suffered any acute injury in the accident and, in and of themselves, his injuries are insufficient to meet the "serious injury" threshold since there is no competent objective medical evidence to sustain the plaintiff's burden establishing his limitations. In support of the motion and her arguments, the defendant has submitted, *inter alia*, a copy of the pleadings, a copy of the plaintiff's bill of particulars, a copy of the plaintiff's examination before trial testimony, a copy of the plaintiff's medical records and reports and, a copy of an affirmed report by Bradley D. Wiener, M.D., who performed an Independent Medical Exam ("IME") on plaintiff on March 12, 2020.

Notably, the defendant argues that Dr. Gabriel L Dassa, D.O. conducted an IME examination on the plaintiff on September 11, 2018 and that an office note from that exam indicated that the plaintiff's neck pain had resolved (Defendant's Exhibit "I"). The defendant further argues that at the plaintiff's February 21, 2019 no-fault IME with Dr. Michael Dudick, D.C., he also diagnosed resolved cervical strains (Defendant's Exhibit "J").

As to Dr. Wiener's IME report conducted on the plaintiff on March 12, 2020, he took a

history of the plaintiff's medical complaints, conditions and treatments and provided a comprehensive examination on the plaintiff and his prior medical records to date (Defendants' Exhibit "L"). Dr. Wiener's report detailed the plaintiff's medical records and test results (Defendants' Exhibit "L"). Dr. Wiener opined that plaintiff had reported a complaint of neck pain following the accident but denied any radicular complaints, numbness or tingling in the upper extremities at the time of the accident (Defendant's Exhibit "L"). He also stated that the plaintiff's initial documentation for findings of peripheral nerve compression comes from the electrodiagnostic study performed by Dr. Flynn on August 30, 2018 and that in the absence of a direct traumatic injury to either upper extremity, the findings for moderate carpal tunnel syndrome and mild left cubital tunnel syndrome represents preexisting, possibly asymptomatic conditions with the left upper extremity (Defendant's Exhibit "L"). In his exam of the plaintiff, Dr. Wiener found, *inter alia*, that the plaintiff's cervical spine range of motion in flexion is 50 degrees, normal 50-60 degrees, extension is 50 degrees, normal 50-60 degrees, 40 degrees of tilt to both the right and left side, normal 40-50 degrees, a negative Spurling's test and a negative compression test (Defendant's Exhibit "L"). Dr. Wiener also noted that distally on the upper extremities, there was no motor or sensory dysfunction in the radial, median or ulnar nerve distributions (Defendant's Exhibit "L"). His examination of the upper extremities also demonstrated no evidence of deformity and the active range of motion, as measured with a goniometer, was 0-130 degrees of flexion for the left elbow and 0-135 degrees of flexion for the right elbow, normal 0-145/150 degrees (Defendant's Exhibit "L"). Dr. Wiener also noted that there was no evidence of subluxation of the ulnar nerve in either upper extremity, as at the wrists, active range of motion was full and symmetric between the extremities and as measured with a goniometer, there was 70 degrees of dorsiflexion, normal 60-80 degrees, 80 degrees of palmar flexion, normal 60-70 degrees and 90 degrees of pronation and supination of the forearms, normal 80-90 degrees, (Defendant's Exhibit "L"). Dr. Wiener concluded that the Mr. Harris had no evidence of a serious or significant injury sustained to the cervical spine and no evidence of a permanent limitation in function or use of the cervical spine based upon the motor vehicle accident of record (Defendant's Exhibit "L").

In opposition, the plaintiff submits and relies, *inter alia,* on the plaintiff's medical records, the IME report of Dr. Gabriel L. Dassa, D.O.,Board Certified Orthopedic Surgeon, dated September

11, 2018, the report of David L. Rosenblum, D.C., dated June 15, 2020, and the results of an IME conducted by Dr. Michael Dudick, on February 21, 2019 to rebut the defendant's submissions for dismissal of the action. As to the June 15, 2020 affirmed report of David L. Rosenblum, D.C., M.D., he opined that based on his physical examination of the plaintiff and the diagnostic tests on the plaintiff, Mr. Harris has made a modest recovery under conservative chiropractic care and that as a result of the whiplash injury to his neck, the nerve damage to his left elbow and wrist, the plaintiff continues to suffer with left arm weakness and pain, cervical muscle spasms, myofascial trigger points, vertebral subluxations, headaches and aberrant spinal motion and pain (Plaintiff's Exhibit "C") .Dr. Rosenblum also noted the results of the IME examination performed on February 21, 2019 by Dr. Michael Dudick that found the plaintiff's cervical flexion was 32 degrees, normal 50 degrees, cervical extension was 18 degrees, normal 60 degrees, right lateral cervical flexion was 36 degrees, normal 45 degrees, left lateral cervical flexion was 28 degrees, normal 45 degrees, right cervical rotation was 42 degrees, normal 80 degrees and left cervical rotation was 38 degrees, normal 80 degrees (Plaintiff's Exhibit "C"). Dr. Rosenblum opined that said study revealed a marked loss of range of motion in the plaintiff's cervical spine (Plaintiff's Exhibit "C"). Dr. Rosenblum also opined that he cautioned Mr. Harris that lifting in excess of 25 pounds, prolonged bending or working with arms overhead must be avoided on a permanent basis (Plaintiff's Exhibit "C"). He concluded that, in his medical opinion, the plaintiff has suffered a permanent, serious and consequential injury to the area of his neck, left arm and wrist as a result of his automobile accident on July 5, 2018 and that it is not possible to determine at this time whether the plaintiff will require surgery in the future to correct his left arm and left wrist damage (Plaintiff's Exhibit "C").

As to the September 11, 2018 orthopedic evaluation of Dr. Gabriel L. Dassa, D.O., he opined that the EMG and NVC of the plaintiff's left upper extremity on August 30, 2018 documented moderate left carpal tunnel syndrome and mild left cubital tunnel syndrome (Plaintiff's Exhibit "B"). He also noted that the plaintiff claimed that he had continued to experience persistent ongoing pain and that he denied any prior or recent injury to the complained areas (Plaintiff's Exhibit "B"). Dr. Dassa's report also noted, upon examination, that the plaintiff's cervical spine has a decreased range of motion in that the flexion was 50 degrees, normal 60 degrees, extension 45 degrees, normal 75 degrees, lateral bending was 35 degrees right and left, normal 45 degrees and lateral rotation was 55

degrees right and left, normal 80 degrees (Plaintiff's Exhibit "B"). Dr. Dassa also noted a mild left elbow ulnar nerve neuropathy as documented by the aforementioned EMG and NCV (Plaintiff's Exhibit "B") .

Thus, in any event, the plaintiff has rebutted defendant's attempt to make a *prima facie* showing by the aforementioned physicians examinations and reports that provide several observations as objective findings with regard to the permanent consequential, significant limitation categories of serious injury and an injury of non permanent nature which prevented the plaintiff performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident. As such, there are questions of fact regarding whether Mr. Harris sustained a significant limitation and a permanent consequential limitation (Coston v McGray, *supra; see also* Tompkins v Burtnick, 236 AD2d 708 [3rd Dept 1997]; Parker v Defontaine-Stratton, 231 AD2d 412, 413 [3rd Dept 1996]).

Additionally, as to the 90/180 category of serious injury, the defendant has failed to present a *prima facie* showing of her entitlement to judgment as a matter of law (*see* D'Auria v Kent, 80 AD3d 956 [3rd Dept 2011]). The plaintiff's own testimony was that he was unable to continue working in his former capacity as an instructor at his spin cycle business (Plaintiff's Exhibit "I", pp 53-58). Additionally, he testified that he needed to close said business at the end of 2018 due to his inability to continue working at it as he had in the past (Plaintiff's Exhibit "I", pp 53-58). Simply put, the plaintiff's testimony is filled with examples of modifications to his abilities to perform his work due to his injuries from the automobile accident (Plaintiff's Exhibit "I"). It is also evident that the IME Report by Dr. Wiener took place well after the first 180 days after the subject accident, and he failed to address **all** [emphasis added] of the objective findings in the plaintiff's medical records that raise a question of fact whether he suffered a non-permanent injury that substantially prevented him from performing his usual and customary daily activities for at least 90 of the first 180 days following the accident as presented in various medical reports (*see* Colavito v Steyer, 65 AD3d 735, 736 [3rd Dept 2009]; Haack v Kriss, 47 AD3d 1007, 1009 [3rd Dept 2008]; Ames v Paquin, 40 AD3d 1379, 1380 [3rd Dept 2007]).

Consequently, in view of the Court's findings in the submissions set forth hereinabove, the

Court denies the motion for summary judgment dismissing the complaint as a matter of law (*see generally* Linton v Nawaz, 14 NY3d 821, 822 [2010]). Otherwise, the Court has considered the remaining arguments and finds them either unavailing or unnecessary to reach.

Accordingly, it is

ORDERED that Defendant's motion for summary judgement is denied.

This shall constitute the decision of the Court. The original decision and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this decision shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED!

Dated: August 12, 2020
Kingston, New York

ENTER,

JAMES P. GILPATRIC, J.S.C.

Papers considered:
1.) Notice of motion dated June 1, 2020;
2.) Memorandum of Law in Support by Derek L. Hayden, Esq., with exhibits, dated June 1, 2020;
3.) Affirmation in Opposition of Derek J. Spada, Esq., dated June 30, 2020;
4.) Reply Affirmation of Derek L. Hayden, Esq., dated July 27, 2020.