SHORT FORM ORDER

INDEX No. 609320-15
CAL. No. 19-00956MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 10-21-19 (006)
MOTION DATE 10-22-19 (007)
ADJ. DATE 6-6-20
Mot. Seq. # 006 - MotD
007 - MD

----------X

JOHN AVILES and BYRON SAMUEL,

Plaintiffs,

- against -

ANN MARIE BLATT, WILLIAM BLATT, and SEAN LEVI,

Defendants.

----------X

JOHN J. GUADAGNO, P.C.
Attorney for Plaintiffs
96 East Main Street, 2nd Floor
East Islip, New York 11730

JAMES F. BUTLER & ASSOCIATES
Attorney for Defendants Ann Marie Blatt and William Blatt
300 Jericho Quadrangle, Suite 260
Jericho, New York 11753

LAW OFFICES OF JENNIFER S. ADAMS
Attorney for Defendant Levi
One Executive Boulevard, Suite 280
Yonkers, New York 10701

Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant Levi, filed September 13, 2019, by the Blatt defendants, filed September 16, 2019; Notice of Motion/ Order to Show Cause and supporting papers ; Answering Affidavits and supporting papers by the Blatt defendants, October 11, 2019; by plaintiffs, filed March 17, 2020 ; Replying Affidavits and supporting papers by defendant Levi, filed October 18, 2019; by defendant Levi, filed May 4, 2020; by the Blatt defendants, filed May 4, 2020 ; Other ; it is,

ORDERED that the motion by defendant Sean Levi and the motion by Ann Marie Blatt and William Blatt are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Sean Levi for summary judgment dismissing the complaint against him is granted in part and denied in part; and it is further

ORDERED that the motion by Ann Marie Blatt and William Blatt for summary judgment dismissing the complaint against them is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiffs John Aviles and Byron Samuel as a result of a motor vehicle accident, which occurred on September 30, 2012, on Old Nichols Road, at or near its intersection with Veterans Highway, in the Town of Islip, New York. The accident allegedly occurred when a vehicle owned by defendant William Blatt and operated by defendant Ann Marie Blatt struck the rear of defendant Sean Levi's vehicle. Plaintiffs were riding in Mr. Levi's vehicle at the time of the accident. Mr. Aviles alleges, in relevant part, that he suffered various injuries as a result of the motor vehicle accident, including a disc herniation at L3-4, disc bulges at L4-5, L5-S1, C2-3, C3-4, C4-5, and C5-6, sprains to the cervical, thoracic, and lumbar regions of his spine, and right shoulder tendinosis. Mr. Samuel alleges, in relevant part, that he suffered various injuries as a result of the motor vehicle accident, including a disc bulge at C2-3, disc herniations at C3-4, C4-5, and C5-6, sprains to the cervical and lumber regions of his spine, and right shoulder tendinosis.

Mr. Levi now seeks an order granting summary judgment dismissing the complaint against him on the grounds that he was not negligent in the operation of his vehicle and that plaintiffs did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). Mr. Levi submits, in support of the motion, copies of the pleadings, the bill of particulars, an uncertified police report, the transcript of the deposition testimony of Mr. Aviles, Mr. Samuel, Mr. Levi, and Ms. Blatt, and the affirmed medical reports of orthopedic surgeon Gary Kelman, M.D., and radiologist Melissa Sapan Cohn, M.D. In opposition, the Blatt defendants argue that triable issues of fact remain as to whether Mr. Levi was comparatively negligent in the operation of his vehicle. Also in opposition, plaintiffs argue that issues of fact remain as to whether they sustained serious injuries. Plaintiffs submit, among other things, the affirmed medical reports of radiologist Steven Winter, M.D., and orthopedic surgeon Anthony Finuoli, M.D., and the medical records of LI Spine Medicine.

The Blatt defendants seek an order granting summary judgment dismissing the claims asserted by Mr. Samuel on the ground that he did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). They submit, in support of the motion, copies of the pleadings, the bill of particulars, the transcript of Mr. Samuel's deposition testimony, various medical records, the unaffirmed reports of radiologist Robert Diamond, M.D., and the affirmed medical report of orthopedic surgeon Gary Kelman, M.D.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" (***Kante v Tong Fei Chen***, 176 AD3d 928, 929, 111 NYS3d 612 [2d Dept 2019]; *see* ***Martinez v Allen***, 163 AD3d 951, 82 NYS3d 130 [2d Dept 2018]; ***Searless v Karczewski***, 153 AD3d 957, 60 NYS3d 431 [2d Dept 2017]; ***Bernstein v New York City Tr. Auth.***, 153 AD3d 897, 61 NYS3d 113 [2d Dept 2017]). There can be more than one proximate cause of an accident, and it is generally for the trier of fact to determine the issue of proximate cause (***Searless v Karczewski***, *supra*). The presumption of negligence in rear-end cases arises from the duty of the driver of the following vehicle to keep a safe distance and not collide with the traffic ahead (*see* Vehicle and Traffic Law § 1129 [a]; ***Witonsky v New York City Tr. Auth.***, 145 AD3d 938, 43 NYS3d 505 [2d Dept 2016]; ***Service v McCoy***, 131 AD3d 1038, 16 NYS2d 283 [2d Dept 2015]). A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on that driver to proffer a non-negligent explanation for the collision (***Clements v Giatas***, 178 AD3d 894, 112 NYS3d 539 [2d Dept 2019]; ***Mihalatos v Barnett***, 175 AD3d 492, 106 NYS3d 165 [2d Dept 2019]; ***Conroy v New York City Tr. Auth.***, 167 AD3d 977, 91 NYS3d 183 [2d Dept 2018]; ***Tsyganash v Auto Mall Fleet Mgt., Inc.***, 163 AD3d 1033, 83 NYS3d 74 [2d Dept 2018]). If the driver of the offending vehicle cannot come forward with evidence to rebut the inference of negligence, the driver of the stopped or stopping vehicle is entitled to summary judgment on the issue of liability (***Tsyganash v Auto Mall Fleet Mgt., Inc.***, *supra*; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]).

Mr. Levi failed to establish a prima facie case of entitlement to summary judgment as to liability, as he failed to demonstrated that he did not contribute to the happening of the accident by suddenly stopping and attempting to move from the turning lane into the through lane (*see* ***Moran v Singh***, 10 AD3d 707, 782 NYS2d 284 [2d Dept 2004]; *see also* ***Richter v Delutri***, 166 AD3d 695, 87 NYS3d 185 [2d Dept 2018]; ***Romero v Brathwaite***, 154 AD3d 894, 62 NYS3d 170 [2d Dept 2017]; *cf.* Perez v Persad, 183 AD3d 771, 123 NYS3d 683 [2d Dept 2020]). Mr. Levi testified that he approached a red traffic light in the left turn lane on Old Nichols Road with his left turn signal engaged. He stated that he traveled one or two car lengths and stopped for two or three seconds. Mr. Levi stated that he realized he needed to travel straight and "waved down" the driver to his right. The driver gestured that Mr. Levi could move ahead in front of his vehicle, so Mr. Levi engaged his right turn signal and then began to move forward by taking his foot off the brake. The rear of Mr. Levi's vehicle was then struck by Ms. Blatt's vehicle. Mr. Levi testified that the contact occurred while his front right tire was in the through lane of travel while the rest of his car was still in the left turn lane. Ms. Blatt testified that she came to a complete stop at a red traffic light behind approximately five cars. She stated that Mr. Levi's vehicle had its left turn signal engaged and then engaged its right turn signal, as it was trying to go right from the left turn lane. Ms. Blatt stated that Mr. Levi's vehicle stopped suddenly and abruptly, and that her vehicle struck the rear of his vehicle. Having determined Mr. Levi failed to meet his prima facie burden as to his negligence, it is unnecessary to consider whether the papers in opposition are sufficient to raise a triable issue of fact (***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; 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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" (***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's treating medical providers (***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which raises a material issue of fact (***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence demonstrating the extent or degree of the limitation of movement caused by the injury and its duration (***Schilling v Labrador***, 136 AD3d 884, 25 NYS3d 331 [2d Dept 2016]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose, and use of the body part (***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 25 NYS3d 672 [2d Dept 2016]). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]; ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]). The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***McLoud v Reyes***, *supra*; ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]; ***Simanovskiy v Barbaro***, 72 AD3d 930, 899 NYS2d 324 [2d Dept 2010]; ***Little v Locoh***, 71 AD3d 837, 897 NYS2d 183

[2d Dept 2010]; ***Larson v Delgado***, 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]). Sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) (***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Further, a plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (***Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). A plaintiff must demonstrate that his or her usual activities were curtailed to a "great extent rather than some slight curtailment" (***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Mr. Levi's submissions failed to establish a prima facie case that the alleged injuries to Mr. Aviles' spine do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Dr. Kelman's September 2018 examination found significant range of motion limitations in his thoracic and lumbar regions of his spine, as Dr. Kelman stated that Mr. Aviles "allowed no motion with range of motion testing" during an examination of his thoracic and lumbar regions (*see* ***Bertuccio v Murdolo***, 172 AD3d 988, 101 NYS3d 192 [2d Dept 2019]; ***Rivas v Hill***, 162 AD3d 809, 79 NYS3d 225 [2d Dept 2018]; ***Castro v Anthony***, 153 AD3d 655, 57 NYS3d 895 [2d Dept 2017]; ***Miller v Ebrahim***, 134 AD3d 915, 20 NYS3d 538 [2d Dept 2015]; ***Mercado v Mendoza***, 133 AD3d 833, 19 NYS3d 757 [2d Dept 2015]). Despite Mr. Levi's remaining contention, Mr. Aviles' cessation in treatment approximately 2 years after the subject accident, standing alone, is not dispositive (*see* ***Pommells v Perez***, *supra*; ***Bux v Pervez***, 156 AD3d 550, 68 NYS3d 67 [1st Dept 2017]; ***Browne v Covington***, 82 AD3d 406, 918 NYS2d 36 [1st Dept 2011]; ***DeLeon v Ross***, 44 AD3d 545, 844 NYS2d 36 [1st Dept 2007]). Having determined Mr. Levi failed to meet his prima facie burden as whether Mr. Aviles suffered a serious injury pursuant to Insurance Law § 5102 (d), it is unnecessary to consider whether plaintiffs' papers in opposition are sufficient to raise a triable issue of fact (***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Mr. Levi's submissions established a prima facie case that Mr. Samuel's alleged injuries to his spine and right shoulder do not constitute "serious injuries" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). Specifically, Mr. Levi presented competent evidence that none of Mr. Samuel's alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute (***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*).

The affirmed medical report of Dr. Kelman stated, in relevant part, that during a September 2018 orthopedic examination, Mr. Samuel exhibited normal joint function in his cervical and lumbar regions, and that no spasm, muscle atrophy, or tenderness was detected upon palpation of his spine. Dr. Kelman found Mr. Samuel's sensory responses intact throughout his upper and lower extremities. Plaintiff tested negative in the foraminal compression and straight leg raising tests. Further, he opined that Mr. Samuel exhibited normal joint function in his shoulders, and that no tenderness, muscle atrophy, or crepitus was present. In addition, he tested negative in the impingement and O'Brien's tests. Dr. Kelman diagnosed Mr. Samuel as having suffered sprains to his cervical and lumbar regions, and right shoulder, and

concluded that such conditions have resolved (*see* ***Brite v Miller***, *supra*; ***Damas v Valdes***, *supra*; ***Pagano v Kingsbury***, *supra*). Further, Dr. Kelman found "no orthopedic disability" based upon the examination and medical documentation he reviewed.

In her affirmed medical report, Dr. Sapan Cohn opined that the magnetic resonance imaging ("MRI") examination of Mr. Samuel's cervical region conducted in 2008, approximately four years before the accident, showed disc desiccation at C2-3 through C5-6 and disc bulges at C2-3, C3-4, C4-5, and C5-6. Dr. Sapan Cohn concluded that the findings revealed pre-existing multilevel degenerative changes. Dr. Sapan Cohn opined that the MRI examination of Mr. Samuel's cervical region conducted approximately four months after the accident showed disc desiccation at C2-3 through C4-5 and disc bulging at C2-3, C3-4, C4-5, and C5-6. Dr. Sapan Cohn found that as compared to the MRI examination conducted four years earlier, there was minimal progression of unconvertebral joint hypertrophy at C4-5 and C5-6. She concluded that the subject examination demonstrated a minimal progression of degenerative changes. Dr. Sapan Cohn opined that the findings of the previous examination evidenced that the findings of the later examination did not occur as a result of the accident.

Dr. Sapan Cohn opined that the MRI examination of Mr. Samuel's lumbosacral region conducted in 2008, approximately four years before the accident, showed loss of normal lordosis and mild disc bulging at all levels. Dr. Sapan Cohn opined that the MRI examination of Mr. Samuel's lumbosacral region conducted approximately four months after the accident showed mild disc bulging at L1-2 through L5-S1. She opined that there was no interval change compared with the previous examination. Dr. Sapan Cohn concluded that mild degenerative changes were present in the later examination, and that was no evidence of an acute traumatic related injury (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, 127 AD3d 811, 6 NYS3d 607 [2d Dept 2015]).

Dr. Sapan Cohn opined that the MRI examination of Mr. Samuel's right shoulder conducted in 2008, approximately four years before the accident, showed acromioclavicular joint hypertrophic degenerative changes, laterally downsloping acromion process, and supraspinatus and subscapularis tendinosis. She also opined that there was no evidence of a rotator cuff or labral tear.

Dr. Sapan Cohn opined that the MRI examination of Mr. Samuel's right shoulder conducted approximately three weeks after the accident showed acromioclavicular degenerative changes and laterally downsloping acromion process. She also found stable supraspinatus and subscapularis tendinosis without rotator cuff or labral tear. Dr. Sapan Cohn stated that there was no interval change compared to the prior examination. She opined that the findings of the previous examination evidenced that the findings of the later examination did not occur as a result of the accident.

Mr. Levi having met his initial burden on the motion as to the claims asserted by Mr. Samuel, the burden shifted to the nonmoving parties to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*; ***Pagano v Kingsbury***, *supra*). However, plaintiffs failed to raise an issue of fact as to whether Mr. Samuel's injuries constitute "serious injuries."

In his affirmed report, Dr. Winter opined that the MRI examination of Mr. Samuel's cervical region conducted approximately four months after the accident showed a disc bulge at C2-3 and disc

herniations at C3-4, C4-5, and C5-6. However, Dr. Winter failed to provide additional objective medical evidence showing that the accident resulted in significant physical limitations (*see* ***Pommells v Perez***, *supra*; ***Hayes v Vasilios***, *supra*; ***Scheker v Brown***, *supra*) or that any of these conditions are causally related to the accident (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*).

In his affirmed report, Dr. Finuoli stated that Mr. Samuel exhibited significant limitations in the joint function of his cervical region and right shoulder during an examination conducted within a week of the accident. However, despite noting range of motion values, Dr. Finuoli did not indicate what the normal range of motion would be (*see* ***Djetoumani v Transit, Inc.***, 50 AD3d 944, 857 NYS2d 601 [2d Dept 2008]; ***Vasquez v Reluzco***, 28 AD3d 365, 814 NYS2d 117 [1st Dept 2006]; ***Nagbe v Minigreen Hacking Group***, 22 AD3d 326, 802 NYS2d 416 [1st Dept 2005]). In addition, Dr. Finuoli's finding of range of motion restrictions in Mr. Samuel's cervical region and right shoulder are based only on an examination performed less than a week after the accident. Therefore, Dr. Finuoli's report is insufficient to demonstrate the duration of the claimed range of motion limitations, and that such limitations are causally related to the subject accident (*see* ***Pryce v Nelson***, *supra*; ***Rovelo v Volcy***, *supra*; ***McLoud v Reyes***, *supra*). He also stated that Mr. Samuel's previous spinal injuries were severely exacerbated by the subject accident. Specifically, Dr. Finuoli opined that the disc bulge at C5-6, originally seen following Mr. Samuel's 2008 MRI examination, worsened following the subject accident, as it is now a disc herniation encroaching on the neural foramina. However, Dr. Finuoli failed to address the findings of Dr. Sapan Cohn, who concluded that the conditions in Mr. Samuel's spine and right shoulder were degenerative in nature and unrelated to the subject accident. Dr. Finuoli also failed to discuss whether the pre-existing degenerative disc changes found by Dr. Sapan Cohn affected Mr. Samuel's range of motion in his spine and right shoulder (*see* ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Schilling v Labrador***, *supra*; ***Gouvea v Lesende***, *supra*). Therefore, his conclusion that Mr. Samuel's injuries and limitations were the result of the subject accident were speculative (*see* ***Casimir v Bailey***, *supra*).

The medical records of NY Spine Medicine are insufficient to raise a triable issue of fact, as they are uncertified (*see* ***D'Orsa v Bryan***, 83 AD3d 646, 919 NYS2d 881 [2d Dept 2011]; ***McLoud v Reyes***, *supra*; ***Singh v Mohamed***, 54 AD3d 933, 864 NYS2d 498 [2d Dept 2008]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2d Dept 2007]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2d Dept 2007]). However, even if such records were considered, they lack competent medical evidence of Mr. Samuel's alleged loss of range of motion based on contemporaneous and recent examinations. Therefore, plaintiffs failed to rebut Mr. Levi's prima facie showing that Mr. Samuel did not suffer a "serious injury" within the meaning of the statute (*see* Insurance Law § 5102 [d]; ***Perl v Meher***, *supra*; ***Pommells v Perez***, *supra*; ***Zuckerman v City of New York***, *supra*).

Accordingly, the motion by Mr. Levi is granted to the extent of dismissing the claims asserted by Mr. Samuel on the ground that he did not suffer a serious injury pursuant to Insurance Law § 5102 (d) and is otherwise denied. In light of the foregoing, the motion by the Blatt defendants is denied, as moot.

Dated: 7/15/2020

LINDA KEVINS, JSC

_____FINAL DISPOSITION __X____NON-FINAL DISPOSITION