SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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PATRICIA DOCKERY Individually and N.W. by her m/n/g PATRICIA DOCKERY,
Plaintiffs,

-against-

RYAN PERSAUD, ROSANNA VILLEGAS, and DANGELO CORP.,
Defendants.

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Index Number: 707233/2018

Motion Date: August 24, 2020

Motion Seq. No.: 2 3 4 5

The following electronically filed (EF) papers read on the motions below as follows:

Motion Sequence No. 2:

Defendants Rosanna Villegas (hereinafter "defendant Villegas") and Dangelo Corp. filed motion sequence no. 2 seeking an Order: pursuant to CPLR 3212 granting defendants summary judgment and dismissing the Complaint as plaintiffs Patricia Dockery (hereinafter "plaintiff Dockery") and N.W. (hereinafter "plaintiff N.W."), both fail to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (a) and granting such other further relief as the Court deems just and proper.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF23-35
Opposition- Affirmation- Exhibits.....	EF60-80
Affirmation in Reply.....	EF94

Motion Sequence No. 3:

Defendant Ryan Persaud (hereinafter "defendant Persaud") filed motion sequence no. 3 seeking an Order: granting summary judgment pursuant to CPLR 3212 dismissing the complaints and all cross complaints against it on the basis that there are no material issue of fact regarding the liability of defendant Persaud.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF38-50
Opposition- Affirmation- Exhibits.....	EF60-80

	EF99
Affirmation in Reply.....	EF98
	EF101

Motion Sequence No. 4:

Defendant Persaud filed motion sequence no. 4 seeking an Order: granting summary judgment pursuant to CPLR 3212 dismissing the complaint on the basis that the plaintiffs, Patricia Dockery and N.W, did not sustain a "serious injury" under Insurance Law § 5102(d) and for such other and further relief as this Court deems necessary and proper.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF52-58
Opposition- Affirmation- Exhibits.....	EF95
Affirmation in Reply.....	EF97

Motion Sequence No. 5:

Plaintiffs filed motion sequence no. 5 seeking an Order: granting plaintiffs summary judgment on the issue of liability and for such other and further relief which as to this Court seems just and proper.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF81-93
Opposition- Affirmation- Exhibits.....	EF100
Affirmation in Reply.....	EF108

Upon the foregoing papers, it is Ordered that aforementioned motions are determined as follows:

The instant action arises out of a three-car motor vehicle collision that occurred on or about November 5, 2017 at the intersection of Woodhaven Boulevard and Park Lane South, Queens, NY. It is alleged that a vehicle owned and operated by defendant Persaud was travelling northbound in the far-right lane when a vehicle owned by defendant Dangelo Corp., but operated by defendant Villegas was travelling northbound in the middle lane when defendant Villegas' vehicle made contact with defendant Persaud's vehicle and Defendant Persaud's vehicle made contact with a vehicle owned and operated by plaintiff Dockery. At the time of the collision, plaintiff N.W. was a passenger in plaintiff Dockery's vehicle.

Defendant Persaud filed motion (sequence no. 3) seeking an Order: granting defendant Persaud summary judgment pursuant to CPLR 3212 and dismissing the complaints and all cross complaints on the basis that there is no material issue of fact regarding the liability of defendant Persaud.

Plaintiffs oppose defendant Persaud's motion for summary judgment on the issue of liability. Plaintiffs aver that defendant Persaud failed to meet its prima facie burden of showing entitlement to summary judgment. In addition to opposing defendant Persaud's motion, plaintiffs move by motion (sequence no. 5) seeking an order granting plaintiffs' summary judgment on the issue of liability.

Defendants Villegas and Dangelo Corp. oppose defendant Persaud's motion for summary judgment on the issue of liability and aver *inter alia* that there are triable issue of fact warranting denial of defendant Persaud's motion.

Defendants Villegas and Dangelo Corp. also oppose plaintiffs' motion for summary judgment on the issue of liability and aver that plaintiff Dockery is negligent and violated title 34, rule 4-08 (e)(4) and (e)(12) of the New York City traffic rules.

In order to succeed on a motion for summary judgment "it is necessary that the movant establish [its] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in [its] favor [CPLR 3212, subd. (b)], and [it] must do so by tender of evidentiary proof in admissible form" (Zuckerman v City of New York, 49 NY2d 557 (1980). " Only if the movant succeeds in meeting its burden will the burden shift to the opponent to demonstrate through legally sufficient evidence that there exists a triable issue of fact" [cite omitted] (see *Richardson v County of Nassau*, 156 AD3d 924 [2d Dept 2017]). Consequently, where the movant fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers (see *Voss v Netherlands Ins. Co.*, 22 NY3d 728 [2014]). A court deciding a motion for summary judgment is required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and proof submitted by the parties in favor of the opponent to the motion" (*Myers v Fir Cab Corp.*, 64 NY2d 806 [1985]). "[I]n a comparative negligence case, a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (see *Rodriguez v City of New York*, 31 NY3d 312 [2d Dept 2018]).

Here, plaintiffs move for summary judgment on the issue of liability and submit an affidavit from plaintiff Dockery, which in relevant part states:

> "4. At the time of the accident, I was stopped at a red light on Park Lane South at its intersection with Woodhaven Boulevard, Queens, NY for at least 3 seconds when my

vehicle was struck. I sounded my horn, but there was no time to take any evasive action. The front of defendant's vehicle struck the front of my vehicle. Nothing I did or didn't do contributed to the cause of this accident."

Plaintiffs' also submit plaintiff Dockery's deposition transcript, which in relevant part states:

"Q. Did the accident occur while you were stopped at the red light at the intersection of Park Lane South and Woodhaven Boulevard or something else?
A. While I was stopped at the light.
Q. How long were you stopped at the light[1] for before the accident occurred?[2]
A. Maybe a few seconds.
Q. How did the accident happen?
A. I was stopped at the light. I looked up and I saw a car coming at me. I gauged to see if I can move and honked my horn, but it was too late."

" Q. what type of vehicle came into contact with your car?
A. Nissan.
Q. Was it a sedan, an SUV or something else?
A. Sedan
Q. What portion of that Nissan came into contact with your vehicle?
A. The front.
Q. The front bumper?
A. The front-end because everything was damaged of the impact so it was the whole front.
Q. What portion of your vehicle was involved in the impact with the Nissan?
A. the front."[3]

"Q. Can you describe the driver of the Nissan?
A. I don't want to be rude.
Q. Just describe him as best as you can?
A. Indian decent.
Q. was it a male or female?
A. It was a male drive.
Q. Any other features about him that you remember?
A. Tall, stocky."[4]

[1] Page 23, lines 20-25
[2] Page 24, lines 2-8
[3] Page 27, 2-17
[4] Page 31, lines 4-13

The Court finds that plaintiffs have established a prima facie entitled to judgment as a matter of law on the issue of liability through the submission of plaintiff Dockery's affidavit and deposition transcript. The Second Department, Appellate Division has held that defendant's affidavit, where "he stated that his vehicle was stopped for a red light at the intersection of Linden Boulevard and Elmont Road for at least 30 seconds in the right lane of the two lanes for traffic traveling in his direction on Linden Boulevard, when he was struck on the 'driver's side toward... the rear' by the vehicle operated" by codefendant established his prima facie entitlement to judgment as a matter of law (see *Rungoo v Leary*, 110 AD3d 781 [2d Dept 2013]).

The burden now shifts to defendants to raise a triable issue of fact (see *Richardson v County of Nassau*, 156 AD3d 924 [2d Dept 2017]). Defendant Persaud submits deposition transcripts in support of its motion and Defendant Villegas solely relies upon the evidence submitted by plaintiffs and defendant Persaud. In addition, defendants Persaud and Villegas do not submit affidavits refuting the version of events contained in plaintiff's affidavit and only rely upon their attorneys' affirmations which contain no evidentiary value (see *Winter v Black*, 95 AD3d 1208 [2d Dept 2012] [on a motion for summary judgment, a "bare affirmation of an attorney, who demonstrates no personal knowledge of the matter, is unavailing and without evidentiary value" [citations omitted]).

Upon a review of the deposition transcripts, defendants fail to raise any triable issue of fact concerning the collision between defendant Persaud's vehicle and the plaintiff's vehicle. Thus, plaintiffs have established a prima facia entitled to judgment as a matter of law on the issue of liability.

However, the deposition transcripts did raise a triable issue of fact concerning the factual account of how the collision between defendant Persaud's vehicle and the defendant Villegas' vehicle occurred. Thus, defendant Persaud has not established a prima facie entitled to judgment as a matter of law on the issue of liability.

Now turning to motion sequence no. 2 and 4, regarding summary judgment on the issue of serious injury pursuant to New York Insurance Law § 5102(d).

Defendants Villegas and Dangelo Corp. and defendant Persaud filed motions sequence no. 2 and 4 seeking summary judgment and dismissing the Complaint. Defendants aver *inter alia* that plaintiffs both fail to meet the serious injury threshold requirement mandated by Insurance Law § 5102(a).

Plaintiffs oppose defendants' motions and aver *inter alia* that they have suffered a serious injury pursuant to New York Insurance Law § 5102(d).

Pursuant to New York Insurance Law § 5102(d), " 'serious injury' means 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."

The Court of Appeals has long recognized that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (see *Toure v Avis Rent A Car Sys., Inc.,* 98 NY2d 345, 350 [2002] citing (*Dufel v Green,* 84 NY2d 795 [1995]; *see also Licari v Elliott,* 57 NY2d 230, 234-235 [1982]). As such, objective proof of a plaintiff's injury is required in order to satisfy the statutory serious injury threshold (*see e.g. Dufel,* 84 NY2d at 798; *Lopez v Senatore,* 65 NY2d 1017 [1985]); subjective complaints alone are not sufficient (*see e.g. Gaddy v Eyler,* 79 NY2d 955 [1992]; *Scheer v Koubek,* 70 NY2d 678 [1987]).

"In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury *Toure v Avis Rent A Car Sys., Inc.,* 98 NY2d 345 [2002] citing (*see e.g. Dufel,* 84 NY2d at 798; *Lopez,* 65 NY2d at 1020). "An expert's *qualitative* assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (see *Toure v Avis Rent A Car Sys., Inc.,* 98 NY2d 345, 350-51 [2002] citing *Dufel v Green,* 84 NY2d 795 [1995]).

Defendants Villegas and Dangelo Corp. submit a report dated May 30, 2019, affirmed by Doctor Thomas P. Nipper, M.D. (hereinafter "Dr. Nipper"), who examined plaintiff Dockery on April 18, 2019. The report in relevant part states:

> "Today's examination indicates that the claimant's injuries have fully resolved. There are no indications for further Orthopaedic treatment including physical therapy. In my medical opinion, the speeds and forces experienced by the claimant were sufficient to have resulted in sprain injuries to the affected areas noted above. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident."

Defendants Villegas and Dangelo Corp. submit another report dated June 4, 2019, affirmed by Dr. Nipper, who examined plaintiff N.W. on April 18, 2019. The report in relevant part states:

> "Today's examination indicates that the claimant's injuries have fully resolved. There are no indications for further Orthopaedic treatment including physical therapy. In my medical opinion, the speeds and forces experienced by the claimant were sufficient to have resulted in sprain injuries to the affected areas noted above. The claimant did not sustain any significant or permanent injury as a result of the motor vehicle accident."

Plaintiffs' submit an affirmation dated January 21, 2020, by Doctor Steven Ross, M.D. (hereinafter "Dr. Ross"), who examined plaintiff Dockery several times including December 23, 2019. The affirmation in relevant part states:

Specifically, range of motion testing in her lumbar spine revealed the following restrictions.

17. Test	Range	Normal	% of Loss
Flexion	45°	50°	10%
Extension	45°	60°	25%
Right Side Bending	40°	50°	20%
Left side Bending	35°	50°	35%
Left Rotation	60°	80°	25%
Right Rotation	55°	80°	31%

The examination also revealed the following range of motion limitations in Ms. Dockery's lumbar spine:

Test	Range	Normal	% of Loss
Flexion	70°	90°	22%
Extension	20°	30°	33%
Right Side Bending	15°	25°	40%
Left side Bending	15°	25°	40%
Left Rotation	30°	45°	33%
Right Rotation	35°	45°	22%

The examination also revealed the following range of motion limitations in Ms. Dockery's left knee:

Test	Range	Normal	% of Loss
Flexion	110°	140°	21%

18. All results from the aforementioned range of motion testing were obtained objectively through the use of a handheld goniometer.

19. Based on the foregoing, it is my opinion within a reasonable degree of medical certainty that Ms. Dockery sustained and continues to exhibit, as a result of the accident of November 5, 2017, the following serious injuries:

- Left knee anterior cruciate ligament;
- Exacerbation of prior left knee pain;
- Cervical disc herniations from C2-C3 to C6-C7
- Lumbar disc bulges from L2-L3 to L5-S1
- Left knee meniscal tear status post arthroscopy on February 6, 2018

20. While this accident occurred over two (2) years ago, Ms. Dockery continues to suffer from pain and restricted range of motion in her cervical spine, lumbar spine, and left knee.

21. it is my opinion, within a reasonable degree of medical certainty, and objective tests performed on Ms. Dockery, such as MRIs, range of motion testing, and physical examinations, that she sustained and continues to suffer from permanent and significant injuries to her left knee, cervical spine, and lumbar spine that are causally related to the automobile accident of November 5, 2017.

22. Based on continued complaints, positive examination findings, positive diagnostic test results and significantly diminished range of motion, and the film review of Dr. Kolb, it is my opinion within a reasonable degree of medical certainty that Ms. Dockery sustained permanent injuries to her cervical spine, lumbar spine, and left knee as a result of this accident, that may continue to worsen, and consequently the prognosis for full and complete recovery remains extremely poor…

28. It is my opinion within a reasonable degree of medicâl certainty that, as a result of the automobile accident of November 5, 2017, Ms. Dockery sustained a significant limitation of use of a body function or system.

29. Finally, it is my opinion, within a reasonable degree of medical certainty, that as a result of the accident on November 5, 2017, Ms. Dockery suffered a serious injury. It is my opinion within a reasonable degree of medical certainty that the limitations are significant because they have affected Ms. Dockery's everyday activities and continue to cause her pain."

Plaintiffs' also submit an affirmation dated January 21, 2020, by Doctor Steven Ross, M.D., who examined plaintiff N.W. several times including December 23, 2019. The affirmation in relevant part states:

12. I most recently examined Ms. W on December 23, 2019, when she returned with continued complaints of episodic severe left knee and low back pain, worsened with activity, motion, heavy lifting, bending, sitting and sta2ding for long periods of time, walking, and with using stairs. Since formal physical therapy ended, she had continued therapy via home exercise program. The injuries sustained in the subject accident continue to affect her activities of daily living,

13. Over two (2) years after the accident, my examination of her left knee and lumbar spine, revealed significant restrictions of her range of motion.

14. Specifically, range of motion testing in her lumbar spine revealed the following restrictions.

Test	Range	Normal	% of Loss
Extension	25°	30°	17%
Lateral Bending to the left	20°	25°	20%

Range of motion testing of her left knee revealed the following:

Test	Range	Normal	% of Loss
Flexion	110°	140°	21%

15. All results from the aforementioned range of motion testing were obtained objectively through the use of a handheld goniometer.

16. Based on the foregoing, it is my opinion within a reasonable degree of medical certainty that Ms. W sustained and continues to exhibit, as a result of the accident of November 5, 2017, the following serious injuries:

- Left knee meniscus tear status post arthroscopy on February 6, 2018;
- T12-L1 disc herniation; and
- L5-S1 disc herniation.

17. While this accident occurred over two (2) years ago, Ms. W continues to suffer from pain and restricted range of motion in her left knee and lumbar spine.

18. It is my opinion within a reasonable degree of medical certainty, and based on the objective tests performed on Ms. W, such as MRIs, range of motion testing, and physical examinations, that she sustained and continues to suffer from permanent and significant injuries to her left knee and lumbar spine that are causally related to the automobile accident of November 5, 2017.

19. Based on continued complaints, positive examination findings, positive diagnostic test results and significantly diminished range of motion, and the film review of Dr. Kolb, it is my opinion within a reasonable degree of medical certainty that Ms. 's sustained permanent injuries to her left knee and lumbar spine as a result of the subject accident, that may continue to worsen, and consequently the prognosis for full and complete recovery remains extremely poor.

20. It is my opinion within a reasonable degree of medical certainty that Ms. 's injuries were traumatically induced and not the result of any preexisting degenerative condition. Her initial complaints of pain in left knee and back following the accident on November 5, 2017 are consistent with traumatically induced injuries. I have read the expert affirmations of Dr. Eisenstadt and Dr. Nipper and disagree with its contents. Specifically, it is my opinion within a reasonable degree of medical certainty that considering the clinical findings with the MRI findings, Ms. W's injuries to her left knee and lumbar spine were traumatically induced and causally related to the subject accident, and not resolved.

22. Based upon the fact that the pain and restrictions to Ms. W 's left knee and lumbar spine, over two (2) years post trauma, they constitute a permanent loss. With the stated complaints, positive examination findings, positive diagnostic test results, and significantly diminished range of motion, Ms. W has sustained a permanent injury to her left knee and lumbar spine and the prognosis for a full recovery remains poor.

23. It is my opinion within a reasonable degree of medical certainty that, as a result of the automobile accident of November 5, 2017, Ms. W sustained a permanent consequential limitation of use of a body organ or member.

24. It is my opinion within a reasonable degree of medical certainty that, as a result of the automobile accident of November 5, 2017, Ms. W sustained a significant limitation of use of a body function or system."

Here, Dr. Nipper conducted an examination of the plaintiffs eight months prior to Dr. Ross' examination of the plaintiffs. Notably, Dr. Nipper concluded that both plaintiff Dockery and plaintiff N.W's injuries were resolved and that neither plaintiff sustained any significant or permanent injury as a result of the motor vehicle accident. In contrast, Dr. Ross concluded that the injuries sustained by the both plaintiffs were not resolved and that both plaintiffs had significant range of motion limitations as outlined in Dr. Ross' affirmation cited above. Most significant, Dr. Ross concluded, that the injuries sustained by both plaintiffs were causally related to the collision on November 5, 2017 and that said injuries are permanent.

The Court finds that the conflicting medical reports submitted by the parties raise triable issues of fact as to whether the plaintiffs sustained a "serious injury" within the meaning of Insurance Law § 5102(d) (see *Wilcoxen v. Palladino*, 122 AD3d 727 [2d Dept 2014][finding that "in light of the conflicting expert medical opinions submitted by the parties, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint on

the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident"]).

Accordingly, defendants' motions sequence no. 2 and 4 for an Order pursuant to CPLR 3212 on the issue of "serious injury" pursuant to of Insurance Law § 5102 is hereby denied. Defendant Persaud's motion sequence no. 3 for an Order pursuant to CPLR 3212 on the issue of liability is denied. Plaintiffs' motion sequence no. 5 for an Order pursuant to CPLR 3212 on the issue of liability is granted. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: December 11, 2020

LOURDES M. VENTURA, J.S.C.

FILED

12/14/2020
4:46 PM

COUNTY CLERK
QUEENS COUNTY