To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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SCOTT STAMFORD,

Plaintiff,

-against-

SAUL M. RUBINOFF and YOUNSHAN SHENG,

Defendants.

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DECISION & ORDER

Index No. 37261/2018
Order Date Mar. 4 2021
Motion Seq. 1-2

BERLINER, J.

The following papers were read on (1) this Notice of Motion by defendant Younshan Sheng for an Order pursuant to CPLR 3212 dismissing this action on grounds that plaintiff suffered no serious injury within the meaning of Insurance Law section 5102(d); and (2) this Notice of Cross Motion by defendant Saul Rubinoff for an Order pursuant to CPLR 3212 dismissing this action pursuant to CPLR 3212 dismissing this action on grounds that plaintiff suffered no serious injury within the meaning of Insurance Law section 5102(d):

Notice of Motion (#1), Aff in Support, Exhs A-F
Notice of Motion (#2), Aff in Support, Exhs A-G
Pl's Aff in Opposition, Auerbach Aff, Exhs 1-9
Reply Aff (#1)
Reply Aff (#2), Exh A (video)
Affs of Service
NYSCEF File

Upon the foregoing papers, and all prior papers and proceedings in this action, the motions are consolidated for purposes of decision and are determined as follows:

This action arises from a motor vehicle accident in the City of New York on January 14, 2015. By complaint filed in New York County under Index Number 158765/2017, on October 2, 2017, plaintiff alleges that he suffered personal injuries after defendant Younshan Sheng's

vehicle rear-ended plaintiff's vehicle, that defendant Saul Rubinoff's vehicle rear-ended Sheng's vehicle, and that the Rubinoff-Sheng collision caused Sheng's vehicle to collide with plaintiff's vehicle a second time (*see* Complaint [NYSCEF Doc. 1], at ¶ 18). The police report and Sheng's deposition testimony both suggest that Sheng's blood alcohol content far exceeded the legal limit. Defendants' separate answers generally deny plaintiff's allegations. Plaintiff's Bill of Particulars, dated July 2018, lists among plaintiff's injuries spinal cord impingement, disc bulges, radiculopathy, disc herniation at C3-4, multiple cervical spine disc annular tears, muscle tenderness and spasm, and anxiety (NYSCEF Doc. 78). By Decision and Order entered December 4, 2018, the Court (Silvera, J.) granted defendant Rubinoff's motion to transfer venue to Rockland County based on Rubinoff's residence in this venue.

The parties then completed discovery and the instant CPLR 3212 motions followed. The gravamen of both motions is that plaintiff did not sustain a serious injury within the meaning of Insurance Law section 5102(d), and therefore plaintiff's personal injury action must be dismissed. During the pendency of these motions, the parties stipulated four times to adjourn. Now upon the expiration of those adjournments, the motions come forward for decision.

Party Contentions

Defendants assert that plaintiff's Bill of Particulars, combined with plaintiff's deposition testimony of June 14, 2019, and the evidence exchanged in discovery, fail to establish any of the prongs of serious injury. They also assert that plaintiff had a two-year gap in any treatment he might have received, spanning from September 2017 forward, vitiating any proof of causation under *Pommells v Perez* (4 NY3d 566 [2005]). In furtherance of such attack on causation, they also point to plaintiff's subsequent accident on January 14, 2016, which they construe plaintiff's deposition testimony to concede that it occasioned symptoms similar to ones of which plaintiff's Bill of Particulars complain in the instant action. They also submit what they denominate as plaintiff's social media posts showing him actively lifting a child in June 2017 (NYSCEF Doc. 81, 89); as well as the independent medical examination ("IME") report of orthopedist Dr. Joseph Laico dated August 29, 2019, opining that plaintiff suffered only sprains and strains, plus a "[c]ontusion to the left shoulder with mild limited range of motion" (NYSCEF Doc. 80, 88).

In opposition, plaintiff offers the sworn affidavit of orthopedist Dr. Joseph Auerbach, who recites that plaintiff received injections for cervical neck pain, which did not suffice to relieve his pain; and that MRI results confirmed also C3-4 herniation impinging the spinal canal, and causing plaintiff to suffer substantial and permanent range of motion deficits in the neck. Dr. Auerbach's affidavit also opines that plaintiff's injury requires disc fusion surgery at C3-4 and C4-5, but that plaintiff declined surgery due to the risk that he might lose the full use of his voice that his national-level television broadcasting career requires (NYSCEF Doc. 104). Based on the foregoing, the continuation of severe pain and limited range of motion turning his neck, as well as the activity limitations to which plaintiff testified, plaintiff argues that his condition satisfies the permanent-consequential prong, significant limitation prong, and 90/180 prong of the Insurance Law section 5102(d) "substantial injury" requirement. As to the intervening motor vehicle accident, plaintiff points to his deposition testimony disclaiming any other injury to the body parts at issue in this action.

In reply, defendants retort that Dr. Laico found no objective evidence of orthopedic disability, that plaintiff's need for future surgery is speculative, and that Dr. Laico disagreed that plaintiff is a surgical candidate. As to plaintiff's activity limitations, defendants point to his deposition testimony that he continues to work full-time in television broadcasting, that he drives regularly from his New Jersey home to his Connecticut workplace, and that plaintiff's 2017 social media posts belie any allegation of substantial physical limitation. They also assert that plaintiff failed to rebut defendants' showing that plaintiff ceased treatment for two years, a defect that defendants assert is fatal to plaintiff's claim.

Analysis

As a prefatory matter, this Court finds that defendants, by bringing this motion only on grounds of their respective "substantial injury" defenses under Insurance Law section 5102(d), thereby waived all other affirmative defenses in their answers (*see e.g. New York Comm'l Bank v J Realty F. Rockaway Ltd.*, 108 AD3d 756, 757 [2d Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076, 1078 [2d Dept 2013]), other than defendant Rubinoff's defense and cross claim for defense and indemnification. Accordingly, all other affirmative defenses are dismissed.

Turning to the merits, a CPLR 3212 summary judgment movant must tender evidentiary proof in admissible form sufficient to show that there remains no reasonably disputable triable issue of material fact such that judgment should be directed in its favor as a matter of law (*see e.g. Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only upon the movant's sufficient prima facie showing does the burden shift to the respondent to rebut such showing (*see id.*). If defendant then adduces record evidence or other materials that create any triable issue of material fact – giving the party adverse to the motion the benefit of every reasonable favorable inference – then summary judgment must be denied (*see id.*).

Insurance Law section 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."

On a defense dismissal motion sounding under this statute, the movant bears the prima facie burden to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law section 5102(d) as a result of the accident (*see Toure v Avis Rent A Car System.*, 98 NY2d 345, 352 [2002]). If the moving defendant makes that prima facie showing, the burden then shifts "to plaintiff to come forward with sufficient evidence to overcome defendant's motion by demonstrating that [he or] she sustained a serious injury within the meaning of the No-Fault Insurance Law" (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992] [internal quotations omitted]).

In the Insurance Law section 5102(d) context, summary judgment generally is not appropriate where conflicting medical reports of the parties' respective experts raise a triable issue of fact as to whether the plaintiff sustained a serious injury within the meaning of Insurance

Law section 5102(d) (*see Garcia v Long Is. MTA*, 2 AD3d 675, 675 [2d Dept 2003]; *see also Wilcoxen v Palladino*, 122 AD3d 727, 728 [2d Dept 2014]). "However, expert opinions that are conclusory, speculative, or unsupported by the record are insufficient to raise triable issues of fact" (*Lowe v Japal*, 170 AD3d 701, 702 [2d Dept 2019] [internal citations omitted]).

This Court is satisfied that defendants raised their affirmative defense and pointed to sufficient record evidence including the IME report and plaintiff's deposition testimony, to establish their affirmative defense as a matter of law. Accordingly, under *Toure* and its progeny, the burden shifts to plaintiff to raise a triable issue of material fact that he did sustain a serious injury within the meaning of Insurance Law section 5102(d).

Notwithstanding defendants' contrary exhortations, plaintiff's reliance on Dr. Auerbach's affidavit is sufficient to raise such a triable issue of material fact, at least as to the "significant limitation of use of a body function or system" prong of "serious injury." The Court reaches this conclusion based on Dr. Auerbach's non-speculative expert report opining that plaintiff suffered vertebral disc herniations and tears, confirmed by MRI results and range of motion diminution consistent therewith, causally related to the 2015 accident (*see Pommells*, 4 NY3d at 580, *citing Lopez v Senatore* (65 NY2d 1017, 1020 [1985]). To the extent that Dr. Laico's IME opinion disagrees as to the scope, nature, permanence and treatment of plaintiff's alleged injuries, that contrary opinion raises a classic battle of the experts inapposite to dismissal on that basis (*see Garcia*, 2 AD3d at 675). Likewise, while a reasonable finder of fact might conclude that plaintiff's social media posts from 2017 belie his complaints of pain and motion restrictions substantially impairing qualifying life activities, plaintiff's burden on this motion is not to ultimately prove his case but merely to raise a triable issue of material fact sufficient to survive dismissal. Plaintiff has done so.

Defendants' reliance on *Pommells* to challenge plaintiff's alleged gap in treatment is misplaced because defendants failed to establish, prima facie, a lack of causation (*see e.g. Foy v Pieters*, 190 AD3d 700, 700 [2d Dept, Jan. 13, 2021]; *Ledee v Matthes*, 188 AD3d 857, 858 [2d Dept 2020]; *Reyes v Kashem*, 187 AD3d 1080, 1080 [2d Dept 2020]; *Lambropoulos v Gomez*, 166 AD3d 952, 952 [2d Dept 2018]). Defendants here do not allege a pre-existing condition and Dr. Auerbach's report posits substantially more than a soft-tissue injury. Defendants' allusion to

plaintiff's subsequent motor vehicle accident is insufficient to challenge causation especially lacking adequate record basis to attribute to that subsequent accident the injuries specified in plaintiff's Bill of Particulars and recited in Dr. Auerbach's affidavit, which also opined that plaintiff's injuries are causally related to the 2015 motor vehicle accident that is the subject of this action. Thus, defendants fail to satisfy the *Pommells* lack of causation predicate to obtain summary judgment on grounds of a substantial treatment gap.

Neither does *Pommells* stand for the bright-line proposition for which defendants rely on it. The *Pommells* Court narrated that even a cessation of treatment "is not dispositive – the law surely require a record of needless treatment in order to survive summary judgment – [but that] a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so" (*Pommells*, 4 NY3d at 574). Thus, even had defendants sufficiently challenged causation to require plaintiff to respond under *Pommells*, plaintiff's burden would be merely to offer a mere reasonable explanation, via plaintiff himself or an attesting clinician, for any lengthy treatment gaps (*see e.g. Hwang v Ilgar*, 178 AD3d 784, 785 [2019]; *Atken v Jackson*, 164 AD3d 869, 870 [2d Dept 2018]). A sufficient reasonable explanation may include, for example, that a condition is permanent and that any treatment would be merely palliative in nature (*see Jean-Baptiste v Tobias*, 88 AD3d 962, 962-963 [2d Dept 2011]; *Park v He Jung Lee*, 84 AD3d 904, 905 [2d Dept 2011]; *Paz v Wydrzynski*, 41 AD3d 453, 453-454 [2d Dept 2007]); or that plaintiff could not afford continuing treatment (*see Black v Robinson*, 305 AD2d 438, 440 [2d Dept 2003]).

Here, Dr. Auerbach recites that plaintiff's injuries are permanent but that the cervical fusion surgery indicated for plaintiff's condition could risk plaintiff's full use of voice that plaintiff needs for his television broadcasting career. This explanation for plaintiff's declination to seek surgery appears facially reasonable. While defense counsel dismisses this explanation on grounds that all surgeries entail risk and the particular risk of vocal impacts from cervical fusion surgery is "extremely minor" (Def Reply Aff [NYSCEF Doc. 113], at 2), defense counsel offers no competent medical evidence for that characterization. Even had defendants offered a sufficient retort to plaintiff's explanation, the result would be a triable question of material fact as to the reasonableness of plaintiff's explanation – a classic basis to deny summary judgment.

This Court has considered all other arguments raised by the parties and finds them to lack merit or to be moot in light of the foregoing. Accordingly it is hereby

ORDERED that defendants' respective motions to dismiss are denied; and it is further

ORDERED that all affirmative defenses other than plaintiff's lack of serious injury, and defendant Rubinoff's claim for third-party defense and indemnification, are dismissed as waived; and it is further

ORDERED that within seven days hereof, counsel for plaintiff shall serve this Decision and Order, with Notice of Entry, on defense counsel via NYSCEF; and it is further

ORDERED that within 14 days hereof, counsel for plaintiff shall file and serve a Note of Issue and Certificate of Readiness; and it is further

ORDERED that within 30 days hereof, shall meet and confer to explore settlement of this action, and all counsel shall diligently meet and confer in good faith for such purpose; and it is further

ORDERED that all counsel are directed to appear before this Court, by digital means, for a pretrial conference at **2:00 p.m.** on **April 6, 2021**, at which conference counsel shall report to the Court as to the status of their settlement discussions; and it is further

ORDERED that given the parties' many stipulations adjourning these motions and delaying determination of this action, the timetables specified herein shall be strictly construed and will not be extended absent a sufficient showing of exigent cause.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
March 4, 2021

HON. ROBERT M. BERLINER, J.S.C.

To: All counsel via NYSCEF