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 WESTCHESTER

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KENNETH G. MARTIN, JR.,

Plaintiff,

-against-

DECISION & ORDER
Index No. 57142/2016
Sequence No. 3

ANNMARIE FOGLIO and CONSOLIDATED EDISON COMPANY OF NEW YORK,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 70-92, were read in connection with the motion by defendants for summary judgment on the issue of Serious Injury under Insurance Law §§ 5102 and 5104.

This is an action for alleged serious personal injuries arising from a motor vehicle accident that occurred on March 23, 2015, on Route 133 (Croton Avenue) at its intersection with the south-bound exit/entrance ramp of Route 9A in the Village of Ossining. Plaintiff, a landscaping contractor, was driving eastbound on Route 133, when his vehicle was struck by a vehicle, owned by defendant Con Edison, and driven by defendant, Annmarie Foglio, which was making a left-hand turn. Defendants stipulated to concede liability in this matter.

Now, upon the foregoing papers, the motion is decided as follows:

A proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986];

Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court 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 the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

A plaintiff claiming personal injury as a result of a motor vehicle accident must first demonstrate a prima facie case that he or she sustained serious injury within the meaning of Insurance Law §5104 (a); (Licari v Elliott, 57 NY2d 230 [1982]). Insurance Law §5104(a) provides: "notwithstanding any other law, in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state there shall be no right of recovery for non-economic loss, except in the

case of serious injury." Pursuant to 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.

Whether a plaintiff has sustained a serious injury within the meaning of the statute is a threshold legal question within the sole province of the court (Hambsch v New York City Transit Authority, 101 AD2d 807 [2d Dept 1987]). Insurance Law §5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (Toure v Avis Rent-A-Car Systems, Inc., 98 NY2d 345, 350 [2002]).

Here, after plaintiff in his opposition papers conceded to the permanent loss of use categories and 90/180 category of serious injury, and the cognitive injuries or claims, the remaining two categories of serious injury plaintiff alleges are: a permanent limitation of use of an organ or member and a significant limitation of use of a body function or system referable to the cervical spine, lumbar spine, and right ankle.

The categories of the permanent consequential limitation category of use of a body organ or member or significant limitation of use of a body function or system, require a showing of a specific percentage of the loss of range of motion, or there must be a sufficient description of the qualitative nature of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function and purpose. For these two statutory categories, the Court of

Appeals ruled that that "[w]hether a limitation of use or function is 'significant' or 'consequential' (i.e., important) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (Toure v Avis Rent A Car Sys., Inc., 98 NY2d 345, 353 [2002]).

Specifically, for the significant limitation of use of a body function, a plaintiff must substantiate his or her complaints with competent medical evidence of any range-of-motion limitations that were contemporaneous with the subject accident (Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept 2008]). A minor, mild, or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, 57 NY2d 230). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (Perl v Meher, 18 NY3d 208, 218 [2011]). Of significance, the Court of Appeals noted that "in our view, any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well." Although Insurance Law §5102(d) does not expressly set forth any temporal requirement for a "significant limitation," there can be no doubt that if a bodily limitation is substantial in degree yet only fleeting in duration, it should not qualify as a "serious injury" (Thrall v City of Syracuse, 60 NY2d 950, *revg* 96 AD2d 715; Partlow v Meehan, 155 AD2d 647, 648 [2d Dept 1989]).

Permanent consequential limitation requires a greater degree of proof than a significant limitation, as only the former requires proof of permanence (Altman v Gassman, 202 AD2d 265, 265 [1st Dept. 1994]).

In support of defendants' motion for summary judgment regarding the permanent consequential limitation, and significant limitation categories, defendants offer the Independent

Medical Examinations of plaintiff, conducted by: Dr. John Buckner, orthopedist, on March 13, 2019. (NYSCEF##74,75); Dr. Orly Avitzur, neurologist, on June 13, 2019 (NYSCEF#76); and Dr. Todd Minken, radiologist (NYSCEF#77), who reviewed plaintiff's diagnostic studies.

Dr. Buckner found that at the clinical examination, plaintiff demonstrated a normal cervical spinal examination; a normal lumbar spinal examination; and a normal ankle examination. Dr. Buckner also relied on the following medical entries in plaintiff's medical records (among other things):

-"An interpretation of x-rays, lumbosacral spine, Dr. Scott Berger, MD, 12/03/14, "...comparison prior study date March 6, 2013..**severe degenerative disc** narrowing at L5-S1. Facet arthrosis at the lower lumbar levels. No visible compression fracture. No significant interval change when compare with the prior study from March 6, 2013."

-A report, Elliott G. Gross, MD, 1/29/16.. He was previously seen before my me and since then he has had physical therapy two to three times a week with Dr. Cash and spine injections in the lumbar region only, which afford temporary relief....an EMG was done.. and CT scans and MRI were also done.. he plans to see Dr. Thombush.. no prior injuries.. denies any medical illness. Surgically he has had two hip replacements from a motor vehicle accident before, and this motor vehicle accident increased his hip problems. Did not mention this on his prior examination. **Diagnosis: Lumbar strain, resolved. Cervical strain resolved**.... there is no need for further neurological treatment.."

- An Orthopedic IME report, Adam Soyer, DO, 6/08/2016. ".... **Diagnoses: cervical spine sprain, resolved. Lumbar spine sprain/exacerbation of pre-existing lumbar spondylosis, unresolved. Right ankle/foot sprain, resolved.** Left ankle/foot sprain, resolved.."

Defendants' expert neurologist examined plaintiff, and opined that:

"Examination of the lumbosacral spine reveals no tenderness over the lumber spinous processes. There is no evidence of sciatic notch tenderness. There is no paraspinous spasm. Lumber lateral flexion is intact to 30 degrees bilaterally by goniometer (normal according to the department of veteran affairs schedule for ratings disability)".

"It is my impression that he has a lumbosacral radiculopathy, however, medical records, including those of pain management and neurology, reflect that he had a pre-existing history of low back pain and at least one Incidence of lifting a 300-pound generator and experiencing low back pain was documented. He, himself, admits that in addition to a very physically demanding job, he also engaged in numerous hobbies including building cars, boats, snowmobiles and houses and riding motorcycles and four-wheelers. Additionally, prior medical records reveal that he has a positive rheumatoid factor and rheumatologic consultation was recommended by Dr. Szabo on 08/02/11. A positive rheumatoid factor is suggestive of rheumatoid arthritis, which may also contribute to back pain" (NYSCEF#76).

Defendants' expert radiologist, Dr.Minken, found that: Plaintiff's Cervical Spine: 6/15/2010 C/Spine Caremount 3/23/2015 C/Spine Phelps 5/20/2016 CT Neck Caremount The cervical spine series of June 15, 2010 demonstrates minimal retrolisthesis at C4/5. Intervertebral disc space narrowing is noted at C3/4 and C4/5. Bilateral foraminal narrowing is noted at C4/5 right greater than left. The cervical spine series dated March 23, 2015 (date of the accident) showed no acute findings. There is no change in the

retrolisthesis at C4/5. Intervertebral disc space narrowing in noted at C6/7 and C7-T1. I believe this is secondary to progressive degenerative changes and not related to the accident. No MRI of the cervical Spine has been submitted. (NYSEF#77).

Defendants' radiologist further opined that none of the lumbar films, particularly the films taken on the date of the accident, show any evidence of acute bone pathology. He did find progressive degenerative changes. He reviewed MRI studies taken two years before the accident with films taken subsequent to the accident. He opined that any changes in the subsequent films were related to progressive degenerative changes. Defendants'' radiologist also compared prior cervical spine studies with cervical spine studies taken on the date of the accident. The only changes were secondary to progressive degenerative changes, which were not related to the accident.

Defendants point out that the examination of plaintiff by defendants' orthopedist and neurologist occurred in May and June 2019. At that time, neither defendants nor their medical experts knew that plaintiff would assert a claim for exacerbation of either the cervical spine or the lumbar spine almost 2 years later, in January 2021, more than three months after the Note of Issue was filed, and after defendants had already filed the within motion.

Contrary to plaintiff's contention, defendants were not required to address a claim for exacerbation of either the cervical spine or the lumbar spine, as it presents a new theory not raised either in the complaint or in the original bill of particulars, especially since the Note of Issue has been filed, and plaintiff would have needed court permission to serve a second bill of particulars (Pom Chun Kim v Franco, 137 AD3d 991, 992 [2d Dept 2016]).

Therefore, plaintiff cannot now claim exacerbation for the first time, when opposing this threshold motion. The accident occurred in March of 2015; plaintiff commenced this case in May 2016; and the Note of Issue was filed on October 5, 2020.

In light of the foregoing, defendants established prima facie entitlement to judgment as a matter of law on motion for summary judgment by submitting competent medical evidence establishing plaintiff did not sustain series injury within meaning of the no-fault law, and that there was evidence of pre-existing degenerative injuries to plaintiff's spine.

In opposition, plaintiff's counsel argues that the medical treatment records demonstrate that plaintiff continues to be treated for his lumbar spine, and that the affirmed report by Dr. Harvey L. Seigel, also demonstrates that the cervical spine, lumbar spine, and right ankle have significant causally related injuries upon recent examination along with positive objective clinical orthopedic tests.

Plaintiff submitted the records of Brain & Spine Surgeons of New York and The Affirmed report of Dr. Harvey L. Seigel, M.D. dated July 12, 2019 (NYSCEF##90,91).

Examination of the lumbar spine by Dr. Seigel did not show a significant decrease in range of motion. Additionally, there was no competent evidence to support a serious injury in plaintiff's right ankle, as there was no showing of significant decreased range of motion, or other injury.

However, Dr. Siegel's testing of the cervical spine by goniometer and visual measurement reveals decreased range of motion as follows: Flexion: chin to chest. (60 degrees normal.) Extension: 35 degrees. (75 degrees normal.) Right rotation: 50 degrees. (80 degrees normal.) Left rotation: 45 degrees. (80 degrees normal.) Right lateral side bending: 25 degrees. (45 degrees normal.) Left lateral side bending: 25 degrees. (45 degrees normal.)

Significantly, as defendants point out, the opinion of plaintiff's expert as to causation, only offered conclusory opinions without addressing the pre-existing and degenerative conditions documented in plaintiff's own MRIs or medical records (NYSCEF#81) explaining why plaintiff's current reported symptoms were not related to the pre-existing condition. Plaintiff fails to raise a

triable issue of fact where his experts failed to address the findings of the defendants' radiologist that the plaintiff suffered from a long-standing and degenerative disc disease in his spine which was not caused by the subject accident (John v Linden, 124 AD3d 598, 599 [2d Dept 2015]). This rendered speculative plaintiff's expert's opinion that plaintiff's lumbar and cervical conditions were caused by the motor vehicle accident.

Lastly, plaintiff objects to the numerous exhibits submitted by defendants purportedly downloaded from Facebook. However, while the court viewed the CD of plaintiff holding and carrying boxes and observed the pictures that were a part of defendants' papers, the court did not need to consider these submissions, as the competent medical evidence alone demonstrates that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d).

Accordingly, it is

ORDERED, that the motion of defendants for summary judgment dismissing the complaint insofar as asserted against them on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102 (d), as a result of the subject accident is granted, and the complaint is dismissed. The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: March 29, 2021
White Plains, New York

Charles D. Wood
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HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF