SHORT FORM ORDER **INDEX NO.: 617410/2017**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 12/03/20
Mot Seq 001 MG; CASE DISP

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BRUCE R. MAHLER & JUDITH A. MAHLER,

Plaintiff,

-against-

WILDA I. LEWIS, JOHN DOE, AN UNIDENTIFIED INDIVIDUAL AND OPERATOR,

Defendants.

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PLAINTIFF'S COUNSEL:
LAW OFFICE OF JOSEPH B. FRUCHTER
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Hauppauge, NY 11788

DEFENDANTS' COUNSEL:
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In this electronically filed personal injury action, concerning defendants' motion for summary judgment, the Court considered the following in reaching its determination: NYSCEF Docs. Nos. 7 – 28; and upon due deliberation and full consideration of the same; it is

ORDERED that defendant's motion for summary judgment dismissing the complaint is **granted** as follows; and it is further

ORDERED that defendants' counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon plaintiff's counsel; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it is further

FACTUAL BACKGROUND & PROCEDURAL POSTURE

Plaintiff commenced this personal injury negligence action against defendants arising out of a motor vehicle collision which occurred on January 17, 2015 on Sunrise Highway (Route 27), in the vicinity of Route 112 in the Town of Brookhaven, Suffolk County, New York. The incident arose when plaintiff, the seat-belted operator of his vehicle on his commute home from work was rear-ended

by a vehicle involved a police pursuit. As a result of the rear-end impact, plaintiff was propelled into a guardrail. By his pleadings, plaintiff seeks damages for personal injury premised on defendants negligence as a proximate cause of the underlying motor vehicle collision and attendant alleged serious injuries.

In his verified bill of particulars, plaintiff alleges in pertinent part that he sustained various serious physical injuries including the following: Head trauma; Head pain; Concussion; Post-concussion syndrome; Major Depressive Disorder; Adjustment Disorder; Dizziness; Encephalopathy; Vestibular dysfunction; Loss of balance; Confusion; Anxiety; Cognitive impairment; Disorder of verbal function(s); Cervical trauma; Cervical pain; Disc herniation at C4/5; Disc herniation at C5/6; Disc bulge at C6/7; Disc herniation at C7/ T1; Ongoing and significant decreased ranges of motion in the cervical spine in all planes; Thoracic trauma; Thoracic pain.; Ongoing and significant decreased ranges of motion in the thoracic spine in all planes; Lumbar trauma; Lumbar pain; Ongoing and significant decreased ranges of motion in the lumbar spine in all planes; Right shoulder trauma; Right shoulder pain, Right hand pain; Left hand trauma; Left hand pain; Left knee trauma; Left knee pain; Left foot trauma; and Left foot pain.

Presently, defendants also seek summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint on grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d).

Submitted in support of their application annexed to defense counsel's affirmation are *inter alia* copies of the pleadings, the police accident investigation report, plaintiff's deposition transcript dated January 14, 2019, and affirmed medical reports of neuropsychologist Brian Lebowitz Ph.D.; orthopedist Arnold M. Schwartz, M.D.; radiologist Darren Fitzpatrick, M.D.; and neuropsychologist Edward J. Barnoski, Ph.D. In opposition, as relevant and bearing on defendants' motions, plaintiff submits his counsel's affirmation as well as his sworn affidavit and an affidavit by chiropractor Adam Cohen, D.C.

SUMMARY OF THE ARGUMENTS

Defendants seek judgment as a matter of law on the merits of plaintiff's claims of negligence arguing that plaintiff has failed to prove that he sustained a compensable "serious injury" under Insurance Law. Opposing defendants' motion, plaintiff contends that defendants have failed to make a *prima facie* case entitling them to judgment as a matter of law dismissing his complaint by failing to address the alleged documented cervical spinal herniations and related decreased range of motions indicated as well as persisting symptoms and effects of post-concussion syndrome and cognitive impairment. Failing that, plaintiff argues that his medical records from his treating chiropractor raise a triable question of fact precluding summary judgment and warranting a trial.

STANDARDS OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (***Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP***, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (***Gniewek v Consol. Edison Co.***, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment 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 Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

DISCUSSION

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 to establish, 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]). Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in . . . 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."

Findings of a defendant's own witnesses must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to summary judgment (***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*). 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]). 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]). Further, an injury under the "90/180-day" category of "serious injury" must be "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*). Specifically, plaintiff's usual activities must have been curtailed to a "great extent" to satisfy the 90/180-day category (***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

1. Permanent Consequential Limitation, Significant Loss of Use Categories &

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 *(see* ***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 NYS.2d 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 *(see* ***Perl v Meher***, 18 NY3d 208, 936 NYS.2d 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 (*see* ***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 Sampso,***;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]). Likewise, sprains and strains are not serious injuries within the meaning of Insurance Law § 5102 (d) *(see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2008]; ***Washington v Crosses***, AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [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 *(see **Pryce v Nelson***, 124 AD3d 859, 2 NYS3d 214 [2d Dept 2015]; ***Sirenk 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"*(see **Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

Defendant's submissions establish *prima facie* entitlement to summary judgment dismissing plaintiff's complaint for his failure to sustain a compensable "serious injury" within the meaning of Insurance Law.

In his independent orthopedic examination of the plaintiff conducted on May 1, 2019, Dr. Schwartz noted plaintiff's complaints of mid and lower back, neck, right shoulder, left hand , knee, and foot pain. The examination entailed evaluating range of motion utilizing a goniometer, on plaintiff's subjective complaints of pain and limitation of motion. Dr. Schwartz observed and reported decreases from normal range of motion in the plaintiff of 15 degrees in cervical flexion; 25 degrees in cervical extension, and 30 degrees in side bending bilaterally. He also observed mild point tenderness in the right trapezius and cervical thoracic junction, but no point tenderness in the cervical spinous processes. On examining plaintiff's thoracic spine, Dr. Schwartz observed and reported 10 degree limitation in flexion, 15 degree limitation in extension, 10 degrees side bending bilaterally and 35 degree limitation on rotation bilaterally. Further, Dr. Schwartz's examination of plaintiffs shoulder found no sign of bilateral impingement but did observe and record 10 degree limitation in plaintiff's right shoulder abduction and 30 degree limitation in plaintiff's right shoulder. The examination found no limitation of movement or decreased range of motion in plaintiff's knees and hands. Dr. Schwartz did note that plaintiff complained of toe numbness but observed full range of motion in the feet with normal gait. Based upon all of this, he concluded and opined within a reasonable degree of medical certainty that plaintiff's complaints of injury to the cervical and thoracic spine, right shoulder, hands, and left knee and foot all resolved with no ongoing and present evidence of orthopedic disability.

Defendant also relies upon the independent neuropsychological examination conducted by Dr. Lebowitz on May 3, 2019. Dr. Lebowitz reviewed plaintiff's medical records history and noted that plaintiff presented with complaints of dizziness, disorientation and slurred speech following the subject incident which resulted in plaintiff's consult with a treating neuropsychologist Edward J. Barnoski, Ph.D. During the course of his post-accident treatment, plaintiff complained of persistent inability to focus and problems with his memory. At time of Dr. Lebowitz's exam, plaintiff complained of continued memory issues such as "missing his exit" while driving on the highway, forgetfulness, or nominal aphasia. Dr. Lebowitz's exam entailed administration of a battery of cognitive functioning tests measuring plaintiff's general intellectual functioning, basic motor/psychomotor speed, attention/executive functioning, verbal/language functions, visual functions, new learning/memory, and mood/personality. Upon conclusion, Dr. Lebowitz observed that his review of plaintiff's MRI of his brain performed on February 21, 2015 revealed no cerebral pathology. Records from plaintiff's neuropsychological consult with Dr. Barnoski indicated normal cognition with some difficulties in higher reasoning, complex attention, and processing speed, along with post-concussion syndrome, major depressive disorder, and chronic pain disorder. At the conclusion of the examination, Dr. Lebowitz concluded that plaintiff presented with borderline impaired fine motor speed, low average

range in mental flexibility/ control, mental organization, and problem solving, suggestive of weakness in attention and executive functioning. Dr. Lebowitz noted plaintiff's symptoms were indicative of a non-complex mild concussion but that his slowing of fine motor skill and attention/execution functions were not likely causally related. Instead, Dr. Lebowitz, noting plaintiff's history of non-medically managed Type 2 diabetes, attributed this as the likely cause for these complaints, which in his view, were common among middle-aged and older adults of plaintiff's age (66).

Lastly, defendant submitted the radiological review done by Dr. Fitzpatrick who on November 4, 2019 reviewed an MRI films of plaintiff's brain and cervical spine dated November 17, 2015. Concerning plaintiff's brain scan, Dr. Fitzpatrick noted no signs of traumatic brain injury and an otherwise normal brain scan. Concerning plaintiff's cervical spine, Dr. Fitzpatrick noted degenerated disc changes at C4-C5, C5-C6, C6-C7 with determinations of: diffuse loss of disc signal with mild loss of disc height at C4-C5, C5-C6 and C6-C7; diffuse disc osteophyte complex with bilateral facet hypertrophy partially effaces the ventral thecal sac without central canal stenosis; moderate to severe bilateral neural foraminal narrowing at C3-C4; C4-C5; diffuse disc osteophyte complex with severe left-sided facet arthropathy and bilateral uncovertebral arthropathy with mild central canal stenosis with moderate right and severe left neural foraminal narrowing; C5-C6; diffuse disc osteophyte complex with left greater than right facet hypertrophy producing; mild central canal stenosis with moderate right and severe left neural foraminal narrowing; C6-C7 diffuse disc osteophyte complex which effaces the ventral thecal sac and contacts the ventral cord consistent with mild central canal stenosis, without neural foraminal narrowing. Dr. Fitzpatrick concluded and opined that plaintiff's sustained no traumatic injury, but that all his findings were due to degeneration attendant to age not causally related to the subject incident.

In view of all of the above, the Courts finds that defendants have met their initial burden on motion of establishing *prima facie* entitlement to summary judgment (*see e.g.* ***Noh v Duffe***, 70 AD3d 1017, 1018, 894 NYS2d 765, 766 [2d Dept 2010]; ***Kabir v Vanderhost***, 105 AD3d 811, 811, 962 NYS2d 703, 704 [2d Dept 2013]; ***Faulkner v Steinman***, 28 AD3d 604, 605, 813 NYS2d 529, 530 [2d Dept 2006]). Thus, the burden shifted to plaintiff to raise a triable issue of fact precluding summary judgment.

In opposition to defendants' motion, plaintiff submitted the affidavit of chiropractor Dr. Cohen who treated plaintiff for 18 months, from January 2015 to May 2016. following the subject incident with complaints of cervical neck pain, upper extremity numbness, muscle spasm and headaches. Dr. Cohen noted that prior to plaintiff's incident, his medical history had no prior indications of traumatic injury. Based upon observation of persistent decreased range of motion, pain, muscle spasm and stiffness, Dr Cohen referred plaintiff for physical therapy and neuropsychological consult. In January 2015, Dr. Cohen noted plaintiff initially presented with decreased range of cervical range of motion1 which did not resolve on re-examination in August 2015, along with plaintiff continued subjective complaints of head and neck pain and muscle spasm. Dr. Cohen further noted no significant improvement upon re-examination in September 2016. As a result, Dr. Cohen concluded that plaintiff's complaints of injury were traumatic in nature and casually related to the subject incident.

Plaintiff also relies upon the affirmed report from Dr. Barnoski prepared on his

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1 The Court notes that the affidavit is silent as to precisely what method, tool or methodology Dr Cohen employed to objectively measure or evaluate plaintiff's ranges of motion.

neuropsychological evaluations of the plaintiff in May and July 2015. There, Dr. Barnoski administered a battery of tests including the Wechsler Adult Intelligence Scale IV to measure plaintiffs' memory, reasoning, and other intellectual functioning. At the conclusion of his examination, Dr. Barnoski reported his findings that plaintiff exhibited average performance concerning memory despite reported memory difficulties. He further opined that plaintiff demonstrated mild symptoms of post-concussion syndrome with some deficit in higher reasoning, complex attention, and processing speed. Dr. Barnoski also observed significant depression and mild anxiety with difficulty with anger. Based on these findings, Dr. Barnoski in 2015, referred plaintiff to medical and neurological follow up, chiropractic care and psychotherapy. The Court notes that no findings made by Dr. Barnoski at that time indicated permanence or permanent disability.

Despite his submissions, this Court finds that plaintiff has failed to sustain his burden of raising a triable question of fact that he sustained serious injuries causally related to the subject incident. Dr. Cohen's affidavit is completely silent and wholly fails to address the issue of degenerative disc disease raised by defendants on motion (*compare* ***Scudera v Mahbubur***, 39 AD3d 620, 622, 833 NYS2d 239, 241 [2d Dept 2007][holding that a herniation together with other objective clinical tests providing a quantitative and or qualitative assessment of the plaintiff's condition resulting from the accident may establish a serious injury] *with* ***Franklin v Gareyua***, 136 AD3d 464, 465 [1st Dept 2016], *aff'd,* 29 NY3d 925 [2017][holding *inter alia* that plaintiff failed to raise a triable issue of fact as to causation where his treating orthopedist failed to refute or address the findings of preexisting degeneration laid out by defense]; ***Il Chung Lim v Chrabaszcz***, 95 AD3d 950, 951, 944 NYS2d 236, 236-37 [2d Dept 2012][same]). Moreover, as noted above, Dr. Cohen's affirmed medical report cites decreased range of motion, but fails to identify by what means or method plaintiff's ranges of motion were objectively measured (*see* ***Radoncic v Faulk***, 170 AD3d 1058, 1060, 96 NYS3d 352, 354 [2d Dept 2019][reasoning that plaintiff failed to raise a triable issue of fact precluding summary judgment on serious injury where the report of the plaintiff's treating orthopedist did not identify the objective tests utilized by the orthopedist to measure the plaintiff's range of motion]).

Similarly, plaintiff's submission of Dr. Barnoski's report is also unavailing. The reports of depression alone do not constitute a serious injury (***Kranis v Biederbeck***, 83 AD3d 903, 903, 920 NYS2d 725, 726 [2d Dept 2011][ruling that a causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury if accompanied by verifiable objective medical evidence]). Here, beyond plaintiff's subjective testimony and the report, plaintiff has not offered such proof. Moreover, despite having undergone an MRI bran scan, plaintiff offers no objective medical evidence corroborative of a lingering traumatic brain injury beyond the resolved mild concussion his records cite (***Rumford v Singh***, 130 AD3d 1002, 1004, 14 NYS3d 462, 464-65 [2d Dept 2015][determined on motion to set aside jury's verdict after trial and reasoning that the failure by plaintiff's expert psychologist to identify any objective medical evidence to support his conclusion that the plaintiff had suffered a concussive brain injury precluded plaintiff's recovery on allegations of cognitive functioning deficit]; ***Taranto v McCaffrey***, 40 AD3d 626, 627, 835 NYS2d 365, 366 [2d Dept 2007][any psychological condition or depression suffered by the plaintiff was found by the defendants' doctors to be unrelated to the automobile accident, especially in light of the passage of more than two years prior to the diagnosis of the psychological impairments]; ***Villeda v Cassas***, 56 AD3d 762, 762-63, 871 NYS2d 167, 168 [2d Dept 2008][holding that plaintiff failed to raise a triable issue of fact where affidavit submitted by the plaintiff's treating neurologist made diagnosis based solely on the plaintiff's subjective complaints despite finding by all admissible objective test results were normal or inconclusive]; ***House v MTA Bus Co.***, 71 AD3d 732, 733, 895 NYS2d 743, 744 [2d Dept 2010][in the absence of such evidence, the plaintiff's subjective complaints of pain were

insufficient to establish a serious injury]).

B. 90/180 Category

Defendants have established entitlement to judgment as a matter of law dismissing plaintiff's claim for serious injury on plaintiff's 90/180 claim. Plaintiff's testified at deposition that he only missed 2 weeks from work following the subject incident and has failed to otherwise adduce any competent admissible medical evidence meeting with the statute's minimum requirements. Thus, defendants demonstrated, prima facie, that the plaintiff did not sustain a serious injury under the 90/180–day category of Insurance Law § 5102(d) by submitting the plaintiff's deposition testimony, which demonstrated that she was not prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (***Frisch v Harris***, 101 AD3d 941, 942, 957 NYS2d 235, 236 [2d Dept 2012]; ***Sainte-Aime v Ho***, 274 AD2d 569, 570, 712 NYS2d 133, 136 [2d Dept 2000]; ***Lagana v Shamsian***, 270 AD2d 313, 313, 704 NYS2d 287, 288 [2d Dept 2000]).

In opposition, plaintiff's has failed to raise a triable issue of fact precluding summary judgment dismissing his claim that he sustained a serious injury under the 90/180 category of the statute (*see* ***Bong An v Villas-Familia***, 183 AD3d 582, 121 NYS3d 675,676 [2d Dept 2020]; ***Caseres v Verma***, 178 AD3d 660, 111 NYS3d 231, 232 [2d Dept 2019]).

CONCLUSION

Accordingly, in view of all of the foregoing, defendants' motion for summary judgment dismissing the complaint is **granted**.

All other remaining contentions not expressly addressed or referenced are **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: February 23, 2021
Riverhead, New York

WILLIAM G. FORD, J.S.C.

__X__ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**