To commence the statutory time 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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PETER CORELLI,

Plaintiff,

-against-

ALEXANDER P. MARASCO,

Defendant.

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DECISION AND ORDER
Index No.: 53516/2020
Motion Date: 07/19/2021
Seq. No. 1

DAMARIS E. TORRENT, A.J.S.C.

The following papers numbered 1 to 23 were read on this motion (Seq. No. 1) by defendant for an order granting summary judgment dismissing the complaint:

PAPERS	NUMBERED
Notice of Motion / Affirmation (Rubel) / Statement of Material Facts / Exhibits A – M	1 - 16
Affirmation in Opposition (Taub) / Response to Statement of Material Facts / Affidavit (Corelli) / Exhibits A – C	17 - 22
Reply Affirmation (Rubel)	23

Upon the foregoing papers, the motion is denied.

This action for personal injuries arises out of a motor vehicle accident which occurred on May 30, 2018 in Harrison, New York. By Notice of Motion filed on April 22, 2021, defendant seeks an order granting summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" as defined in Insurance Law § 5102(d).

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[T]he 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. . .. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . .. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].)

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014].) As stated in *Scott v. Long Island Power Auth.* (294 AD2d 348, 348, [2d Dept 2002]):

> It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Dolitsky v. Bay Isle Oil Co.*, 111 AD2d 366).

"On a motion for summary judgment dismissing a complaint that alleges a serious injury under Insurance Law § 5102(d), the defendant bears the initial 'burden of establishing by competent medical evidence that plaintiff did not sustain a serious injury caused by the accident'" (*Haddadnia v. Saville*, 29 AD3d 1211, 1211 [3d Dept 2006]; *Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]). The defendant may satisfy that burden if the defendant presents the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts, and identifies the objective tests performed to arrive at that conclusion (*see Lamb v. Rajinder*, 51 AD3d 430 [1st Dept 2008]).

Defendant made the requisite prima facie showing by submission of the affirmed report of Richard N. Weinstein, M.D. (Exh. G). Dr. Weinstein's examination of plaintiff revealed normal ranges of motion in the left shoulder, normal rotator cuff strength, negative impingement, non-tender AC joint, and negative cross-chest adduction. Dr. Weinstein reviewed an MRI report of the plaintiff's left shoulder which revealed no specific abnormality to the AC joint. Dr. Weinstein opined that the plaintiff suffers from left AC osteolysis, which is pre-existing and was not caused by the subject accident.

In opposition, plaintiff raised triable issues of fact by submission of the affirmed report of Scott V. Haig, M.D., and the Addendum thereto (Opp. Exh. C). Dr. Haig's examination of plaintiff revealed "crepitus with inferior loading" in the area of the AC joint. Dr. Haig further observed "chronic instability of the distal clavicle relative to the acromion." Dr. Haig opined that plaintiff's injury results in "chronic tenderness and weakness with a permanent loss of strength and resiliency of the left upper extremity stemming from acromioclavicular instability, arthrosis and likely cervical nerve impingement contributing to severity." Dr. Haig opined that plaintiff has a moderate, permanent disability. It is Dr. Haig's opinion that the surgery plaintiff underwent has not addressed stabilization of the acromioclavicular joint and plaintiff remains symptomatic; thus, he will require further surgery to stabilize the articulation.

Dr. Haig states that it is widely known that acromioclavicular instability does not affect the range of motion of the shoulder, but rather produces pain and fatigue with overhead or weight-bearing activities; thus, Dr. Weinstein's examination, which did not include evaluation of the stability of this joint, was incomplete. Rather than limitations in range of motion, Dr. Haig states that plaintiff's injury causes limitations in functional use of the injured area. As an example of this functional limitation, Dr. Haig observed that the plaintiff, a 21-year-old man with an athletic

history, was unable to do a pushup. Dr. Haig further states that simply sleeping on the side with the instability produces symptoms similar to those occurring from carrying weight on the affected shoulder or in the affected arm. Such a qualitative assessment, which "can be tested during cross-examination, challenged by another expert and weighed by the trier of fact" can suffice as proof of the extent or degree of physical limitation (*Toure*, *supra*, 98 NY2d at 350-51).

Dr. Haig further opined that the subject accident is the cause of plaintiff's acromioclavicular instability, "which is almost invariably a traumatically acquired condition involving impact to the point of the shoulder. . .." Dr. Haig's opinion specifically rebuts Dr. Weinstein's assertion that plaintiff's left shoulder injury is not causally related to the subject accident. By attributing plaintiff's injury to a different and equally plausible cause, Dr. Haig's report raised a triable issue of fact as to causation (*see Diaz v. Almodovar*, 147 AD3d 654 [1st Dept 2017]; *Grant v. United Pavers Co., Inc.*, 91 AD3d 499 [1st Dept 2012]).

Further, the short delay in treatment immediately following the subject accident is sufficiently explained and thus is not dispositive (*see Pommells v. Perez*, 4 NY3d 566 [2005]). Prior to the subject accident, plaintiff had already scheduled an appointment for July 26, 2018 with an orthopedic surgeon who had previously treated plaintiff for an unrelated condition, and he chose to keep that appointment (Exh. E at 60-64).

Defendant in reply points out that Dr. Haig does not address the claimed injury of left shoulder acromioclavicular join osteolysis, which Dr. Weinstein opined was a pre-existing condition. However, this does not change the outcome on this motion, as osteolysis is not the only injury claimed in plaintiff's Bill of Particulars, and Dr. Haig's examination raises triable issues of fact as to the severity of plaintiff's acromioclavicular instability.

Plaintiff's Bill of Particulars alleges serious in jury in the following categories: permanent loss of use, permanent consequential limitation, and 90/180. Defendant's reply correctly notes that, in response to the motion, on which defendant made a prima facie showing, plaintiff submitted evidence which defends his claims only in the significant limitation and permanent consequential limitation categories. Thus, in accordance with CPLR § 3212(g), evidence at trial on the issue of whether plaintiff suffered a serious injury as a result of the subject accident shall be limited to those two categories.

Accordingly, it is hereby ORDERED that defendant's motion is denied; and it is further

ORDERED that evidence at trial on the issue of whether plaintiff suffered a serious injury in the subject accident shall be limited to the categories of "significant limitation of use of a body function or system" and "permanent consequential limitation of use of a body organ or member"; and it is further

ORDERED that within ten (10) days of the date of entry hereof, the plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon defendant; and it is further

ORDERED that the plaintiff shall, within ten (10) days after service of notice of entry as aforesaid, file proof of said service via NYSCEF; and it is further

ORDERED that the parties shall appear in the Settlement Conference Part, Courtroom 1600 at 9:15 a.m. on Tuesday, August 17, 2021 for Pre-Trial Conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: July 27, 2021
White Plains, New York

E N T E R:

HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF