Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

SHOUROVE H BHUIYAN,

Plaintiff,

-against-

ZHIBO QU AND LOSSENY KONE,

Defendants.

IAS Part - 42

Index No.: 705944/2019

Motion Date: 8/5/21

Motion Cal. No. 3

Motion Seq. No. 1

The following electronically filed ("EF") documents read on this motion by Losseny Kone ("Mr. Kone" or "movant") for an order pursuant to CPLR § 3212 granting defendant summary judgment and dismissing the Complaint of plaintiff, in as much as Shourove H. Bhuiyan ("Mr. Bhuiyan" or "plaintiff") fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d) and granting such other further relief as the Court deems just and proper.

	Papers Numbered
Notice of Motion-Affirmation- Exhibits.....	EF 14 -23
Affirmation in Opposition-Exhibits.....	EF 28 - 33

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by Mr. Bhuiyan in a motor vehicle collision. In particular, the plaintiff alleges that on November 24, 2018 at approximately 9:30 p.m. at or near the intersection of Main Street and 56th Avenue, in Queens, NY, he was stopped at the red light controlling the intersection when a motor vehicle onwed by Zhibo Qu ("Mr. Qu") and operated by Mr. Kone rear-ended her motor vehicle. As a result, the plaintiff alleges that he sustained serious injuries to his cervical spine, right knee and

lumbar spine. On October 23, 2019, the plaintiff commenced the instant action against the defendants; and on December 10, 2019, issue was joined. Now Mr. Kone seeks summary judgment on the ground that Mr. Bhuiyan did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law as a result of the subject accident. It has long been established that the "legislative intent underlying the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (i.e., Insurance Law § 5101, *et seq.* – commonly known as New York's "No-Fault" Insurance Law) was to weed out frivolous claims and limit recovery to significant injuries (*Licari v. Elliot*, 57 NY2d 230 [1982]; *see also Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002] quoting *Duel v. Green*, 84 NY2d 795 [1995]). New York's No-Fault Insurance Law § 5102 (d) defines "serious injury" as follows:

> … 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 held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see Licari v. Elliott*, 57 NY2d 230 [1982]; *see also Charley v. Goss*, 54 AD3d 569 [1st Dept 2008] *aff'd* 12 NY3d 750 [2009]; *Porcano v. Lelzman*, 255 AD2d 430 [2d Dept 1998]; *Nolan v. Ford*, 100 AD2d 579 [2d Dept 1984], *aff'd* 64 NYS2d 681 [1984]).

On a motion for summary judgment, the defendant has the initial burden of making a *prima facie* showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of New York's No-Fault Insurance Law § 5102(d) (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Akhtar v. Santos*, 57 AD3d 593 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*Moore v. Edison*, 25 AD3d 672 [2d Dept 2006]; *Farozes v. Kamran*, 22 AD3d 458 [2d Dept 2005]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own

witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v. Kingsbury*, 182 AD2d 268, 270 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment by using medical reports and records prepared by the plaintiff's own physicians (*see Fragale v. Geiger*, 288 AD2d 431 [2d Dept 2001]; *Grossman v. Wright*, 268 AD2d 79 [2d Dept 2000]; *Vignola v. Varrichio*, 243 AD2d 464 [2d Dept 1997]; *Torres v. Micheletti*, 208 AD2d 519 [2d Dept 1994]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Xin Fang Xin v. Saft,* 177 AD3d 823 [2d Dept 2019]; *Rosenblum v. Schloss*, 175 AD3d 1339 [2d Dept 2019]; *Burns v. Stranger*, 31 AD3d 360 [2d Dept 2006]; *Rich-Wing v. Baboolal*, 18 AD3d 726 [2d Dept 2005]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see Duel v. Green*, 84 NY2d 795 [1995]; *Pagano v. Kingsbury*,182 AD2d 268 [2d Dept 1992]). The mere parroting of language tailored to meet statutory requirements is insufficient (*see Grossman v. Wright*, 268 AD2d at 84). Further, a plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings, which shall be based on a recent examination of the plaintiff (*Kauderer v. Penta*, 261 AD2d 365 [2d Dept 1999]; *Tobiolo v. Friedman*, 283 AD2d 483 [2d Dept 2001]). Lastly, the 90/180 category requires a demonstration that plaintiff has been unable to perform substantially all of his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the injury (*see Licari*, 57 NY2d at 236; *Romero v. Brathwaite*, 154 AD3d 894 [2d Dept 2017]). The words "substantially all" mean that the person has been "curtailed from performing his usual activities to a great extent rather than some slight curtailment" (*Licari*, 57 NY2d at 236).

Here, the court has competent, admissible, but conflicting medical evidence and/or affirmations on the issue of serious injury, which warrant denial of the instant motion for summary judgment. (*Tinao v. City of New York*, 112 AD2d 363 [2d Dept 1985]; *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]). It is well settled that conflicting medical evidence on the issue of the permanency and significance of a plaintiff's injuries warrants denial of summary judgment. (*Pommells v. Perez*, 4 NY3d 566 [2005]; *Wilcoxen v. Palladino*, 122 AD3d 727 [2d Dept 2014]; *Garcia v. Long Island MTA*, 2 AD3d 675 [2d Dept

2013]; *Noble v. Mathew*, 252 AD2d 392 [1st Dept 1998]). Notwithstanding the same, the plaintiff raised triable issues of fact, which were buttressed by the affirmations of Dr. Stanley Ikezi and Dr. Farshad David Hannanian. Clearly, this is a matter to be resolved by a trier of fact.

Accordingly, it is hereby

ORDERED that branch of the defendant's motion for summary judgment, pursuant to CPLR § 3212, is denied in its entirety; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry, via NYSCEF, upon the defendants and the clerk of this court on or before January 31, 2022.

The foregoing constitutes the decision and order of the court.

Dated: December 27, 2021
Long Island City, NY

FILED
1/5/2022
COUNTY CLERK
QUEENS COUNTY

Maurice E. Muir

MAURICE E. MUIR, J.S.C.