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 BRONX IAS PART 31

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CARLOS FIGUEROA,

Plaintiff,

-against -

AVLAREZ D. WILLIAMS and MARJORIE L. WILLIAMS,

Defendants

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Index No. 23017/2019E
DECISION/ORDER
Motion Seq. 1

VERONICA G. HUMMEL, A.J.S.C.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendants ALVAREZ D. WILLIAMS and MARJORIE L. WILLIAMS (defendants) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff CARLOS FIGUEROA (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a two-car motor vehicle accident that occurred on August 8, 2018, on East 167th Street and Teller Avenue, Bronx, N.Y. (the Accident).

In the amended bill of particulars, in relevant part, plaintiff alleges that as the result of the Accident he suffered injuries to neck and back that satisfy the following Insurance Law 5102(d) threshold categories: fracture; permanent loss of use; permanent consequential limitation; significant limitation; and 90/180 days. As plaintiff fails to address the grounds of

fracture, permanent loss of use, or 90/180 days on this motion, however, the grounds are deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]). In any event, as plaintiff does not allege a total loss of a body part, the permanent loss of use claim is dismissed (*Oberly v Bangs Ambulance, Inc*., 96 NY2d 29 [2001]).

While plaintiff has the burden of establishing a *prima facie* case of "serious injury" at trial (*Licari v. Elliott*, 57 NY2d 230 [1982]), defendants on a summary judgment motion must first present evidence establishing that plaintiff has not sustained a "serious injury" as a matter of law, and only after that burden has been met must plaintiff go forward and submit evidence to raise a question of fact (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Brown v Mat Enterprises of N.Y. Inc.,* 97 AD3d 401 [1st Dept 2012]). Defendants bear the initial burden of establishing the absence of a "serious injury" as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (*McElroy v Sivasubramaniam*, 305 AD2d 944 [3d Dept 2003]). If defendants fail to meet this burden, the motion is denied without consideration of the opposition papers. If defendants meet this burden, defendants have established *prima facie* entitlement to summary judgment.

It then becomes incumbent on the plaintiff to submit proof, in admissible form, of the existence of triable issues of fact with regard to the existence of a "serious injury" (*Franchini v Palmieri*, *supra*; *Shinn v Catanzaro,* 1 AD3d 195 [1st Dept. 2003]; *see Cabrera v Ahmed*, 189 AD3d 403 [1st Dept 2020]). Specifically, plaintiff must demonstrate that there is a "serious injury" under the Insurance Law, that summary judgment is not warranted and that the action mandates resolution by trial. Additionally, and equally important, plaintiff must establish, through admissible medical evidence, that the injuries sustained are causally related to the accident claimed (*see Pommells v Perez*,4 NY3d 566 (2005); *Tusu v Leone*, 187 AD3d 655 [1st Dept 2020]).

Here, defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d). Defendants argue that plaintiff's claimed injuries are not "serious," and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, plaintiff's deposition transcript, and the expert affirmation of Dr. Berman (orthopedist).

Dr. Berman bases his opinion on the details of a physical examination conducted of plaintiff on June 29, 2020 (two years post-Accident).The doctor writes that he reviewed the bill of particulars and plaintiff's medical records, including MRI reports. He states that plaintiff reported suffering a slip and fall accident in 2012 which injured his left knee, resulting in surgery and litigation.

Dr. Berman conducted range of motion tests on the cervical spine, and thoracolumbar spine, producing normal results. All objective tests are negative. He finds that the cervical and lumbar spine sprains resolved with no residuals with no objective findings and no radiculopathy to cervical spine or lumbar spine on exam. He opines that there is no clinical correlation between the normal exam and the MRI studies. The doctor states that plaintiff sustained strain injuries as the result of the Accident which are resolved.

There are no objective findings to substantiate plaintiff's subjective complaints of pain on examination. No further treatment is necessary, and plaintiff may participate in all activities of daily living, including regular employment. Plaintiff has not sustained any permanent injury or disability as the result of the Accident.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury under the permanent consequential limitation and significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; *see Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]).

Plaintiff opposes the motion, submitting an attorney affirmation, an affidavit of merit, plaintiff's medical records, the affirmation of Dr. Goldenberg (treating physician), and the affirmation of Dr. Kolb (radiologist).

In total, plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" as to the cervical and lumbar spines (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that he received medical treatment for the claimed injuries after the Accident, and that he had substantial limitations in motion in the relevant body parts after the Accident and at the recent examination by plaintiff's expert in October 2020 (*see Perl v Meher*, 18 NY3d 208 [2011]). Plaintiff's expert finds that, as a result of the Accident, and not degeneration, plaintiff suffered new and aggravated injuries to the cervical and lumbar spines, resulting in a decreased range of motion. The expert opines that these injuries are significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injuries (*Morales v Cabral, supra*; *see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Furthermore, the MRI reviews by the plaintiff's expert confirm the injuries in the cervical and lumbar spines. Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under threshold categories of permanent consequential limitation and significant limitation.

Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp*., 71 AD3d 548 [1st Dept 2010]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants ALVAREZ D. WILLIAMS and MARJORIE L. WILLIAMS [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff CARLOS FIGUEROA has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied; and it is further

ORDERED that this matter is scheduled for compliance conference on October 27, 2021. The attorneys are expected to review the revised Part 31 rules for compliance conferences (available on the homepage of the 12th J.D.), well ahead of that date and to follow the guidelines for using NYSCEF, rather than appearing in court, to meet their compliance conference obligations.

The foregoing constitutes the decision and order of the court.

Dated: July *29,* , 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 07/29/2021
Hon. Veronica G. Hummel, A.J.S.C.

1. CHECK ONE.....	CASE DISPOSED IN ITS ENTIRETY x CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT