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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GERARD O'REILLY,

Plaintiff,

-against-

Index No. 31860/2017e
DECISION/ORDER
Motion Seq. 1

FIORENTINOS 20 INC. and GAZI HOSSAIN,

Defendants.

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

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 FIORENTINOS 20 INC. and GAZI HOSSAIN [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff GERARD O'REILLY (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 motor vehicle accident that occurred around 4:40 a.m. on March18, 2015, near the intersection of Henry Hudson Parkway and Mosholu Parkway in Bronx County (the Accident). At the time of the collision, plaintiff was a passenger in defendants' vehicle.

Plaintiff alleges that as the result of the Accident she suffered injuries to the cervical spine, the lumber spine, and the right shoulder. Plaintiff argues that these injuries satisfy the following Insurance Law 5102(d) threshold categories: permanent consequential limitation; significant limitation; significant disfigurement; and 90/180 days. As plaintiff fails to address the

ground of significant disfigurement, however, that ground is deemed waived (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]).

Defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d) as a result of the Accident. 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 affirmed medical reports of Dr. Eisenstadt (radiologist) and Dr. Ferriter (orthopedic surgeon).

In her report, Dr. Eisenstadt reviews two MRIs taken of plaintiff's lumbar. The first MRI was taken on August 11, 2014, seven months prior to the Accident (the Pre-Accident MRI). The second MRI was taken on April 29, 2015, one month and eleven days after the Accident (the Post-Accident MRI). Dr. Eisenstadt finds that the Pre-Accident MRI reveals disc bulges herniations, and degenerative processes associated with disc degeneration and osteophyte formation at the L-2-3, L3-4, and L4-5 levels. These conditions are months to years in origin and are recognized in the Pre-Accident MRI study.

As for the Post-Accident MRI, the doctor notes the same degenerative processes at the L2-3, L3-4, and L4-5 levels, with no progression in the degenerative changes seen. Bulging discs and herniations are again noted as in the prior exam. At the L4-5 level, persistent disc herniation is seen, "now more central in location but no larger in size. Bulging is now also seen at the L4-5 level".

In conclusion, the expert opines that, to the extent that there are changes in disc bulges or herniations in the Post-Accident MRI, all of the changes are degenerative in origin. As the processes are shown on the Pre-Accident MRI and continue over time, requiring months or years to develop, she opines, in sum and substance, that the findings on the Post-Accident of

bulging discs or herniations have no traumatic basis. The doctor states that an annular tear at L4-5 level seen in the Pre-Accident MRI is resolved in the Post-Accident MRI and may indicate a pre-Accident trauma to the lower back, although the changes are seen as chronic in nature.

Similarly, the expert reviews a pre-accident MRI of the cervical spine (dated May 10,2013) (the Pre-Accident Cervical MRI) and a post-accident MRI (dated April 29, 2015) (the Post-Accident Cervical MRI). The review of the Pre-Accident Cervical MRI showed desiccation of the C2-3 through C6-7 vertebrate and bulging discs, but no herniations. The doctor states that the Post-Accident Cervical MRI reveals a stable spine when compared to the Pre-Accident Cervical MRI. The expert opines that the serial MRI examinations performed before and after the Accident reveal degenerative disc disease with bony productive and arthritic changes which could not have occurred prior to the Accident and are not causally related to the Accident. The osteophyte formations that are noted twenty-two months before the Accident have no traumatic etiology and show no progression on the Post-Accident Cervical MRI. The bulging discs on the Post-Accident MRI have no traumatic origin and the study does not show any herniations.

Finally, the expert reviews the right shoulder MRI taken on August 29, 2015, six months and eleven days after the Accident. In sum and substance, she found extensive degenerative joint disease and no tears or joint defect. The bony productive changes have no traumatic etiology and are degenerative in nature, requiring months or years to develop, appearing often as arthritis.

For his part, Dr. Ferriter bases his opinion on the details of a physical examination conducted on August 12, 2020, over four years post-Accident, and the plaintiff's bill of particulars. He avers that there were no legally authenticated medical records available for his review. In terms of the cervical spine and the lumbar spine, the doctor finds that plaintiff has no range of motion deficits and the results of all of the objective tests are negative. In terms of

the right shoulder, he finds a decrease in range of motion in extension and internal rotation of 10-20 degrees. The ten objective tests are negative.

In the "impression" section of the report, the expert finds that the cervical spine, lumbar spine, and the right shoulder are sprains that have resolved. He finds no evidence of orthopedic disability, permanency or residuals, and concludes that plaintiff can perform all of his activities of daily living as he was doing before the Accident.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or 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]). Of note, a defendants' experts are not required to review plaintiff's medical records (*see Jackson v Doe,* 173 AD3d 505 [1st Dept 2019]), or films from imaging studies (*see Oliveras v N.Y.C. Transit Auth.,* 179 AD3d 503 [1st Dept 2020]), prior to forming their opinions.

Plaintiff opposes the motion, submitting an attorney affirmation, plaintiff's affidavit, the affirmation of Dr. David Dynof (pain management), affirmation of treating physician Dr. Maim Tyorkin (orthopedic surgeon), and the medical reports/affirmation of Dr. Doug Schottenstein (neurologist).

In total, plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" as to the cervical spine, lumbar spine, and right shoulder under the threshold categories of permanent consequential limitation and significant limitation (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that he received medical treatment for his 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 July 2020 (*see Perl v Meher*, 18 NY3d 208 [2011]). Defendant's expert finds a decrease range of motion in the right shoulder. Dr Dynof finds significant decreases in range of motion as to the

cervical spine, lumbar spine, and right shoulder, and he opines that plaintiff's injuries are significant and causally related to the Accident and permanent in nature and the Accident was the primary competent cause of the injuries. As for the degenerative conditions revealed in the Pre-Accident Cervical MRI, and the Pre-Accident Lumbar MRI, he finds that the pre-Accident findings to degenerative changes, would have been exacerbated by the trauma of the Accident, plaintiff was asymptomatic prior to the Accident, and any degenerative changes to the spine or the shoulder were exacerbated by the Accident.

Both Dr. Dynof and Dr. Tyorkin point to the numerous lumbar and cervical herniations and bulges and opine that the pre-existing degenerative changes would have been exacerbated by the trauma of the Accident, demonstrated by the fact that plaintiff was asymptomatic before the Accident. Dr. Tyorkin also finds limitations in range of motion of the cervical spine, lumbar spine, and right shoulder and concludes that there is a direct cause and effect between the Accident and plaintiff's injuries. Similarly, Dr. Schottenstein opines that plaintiff's cervical, lumbar, and shoulder injuries are substantial and caused by the Accident. In total, plaintiff's experts opine that the plaintiff suffers from a decrease in range of motion of the cervical spine, the lumbar spine, and right shoulder that is significant, and that plaintiff suffered partial permanent injuries with a poor prognosis for recovery and the injuries are causally related to the Accident (*see Morales v Cabral, supra*; *see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). 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.

As for the 90/180 day category, plaintiff's testimony that he was disabled from work for four months, supported by the payment of no-fault benefits and his treating physician's designation of plaintiff as totally disabled during the relevant period, generates a question of fact warranting the denial of the motion to grant summary judgment dismissing the 90/180 category.

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 FIORENTINOS 20 INC. and GAZI HOSSAIN [Mot. Seq. 1], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff GERARD O'REILLY has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The parties are reminded that a compliance conference is scheduled in this matter on March 24, 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: January 29, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 1/29/2021
Hon. Veronica G. Hummel