At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of July 2023

HONORABLE FRANCOIS A. RIVERA

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JACINDA QUINONES,

Plaintiff,

- against -

YOLANDA ROJAS and MANUEL ROJAS,

Defendants.

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DECISION & ORDER

Index No.: 532014/2021

Oral Argument: 6/8/2023

Cal. No.: 62, Ms. No.: 1

Recitation in accordance with CPLR 2219(a) of the papers considered on the joint motion of defendants Yolanda Rojas and Manuel Rojas (hereinafter the defendants or movants) filed on December 29, 2022, under motion sequence number one, for an order pursuant to CPLR 3212 dismissing the complaint of plaintiff Jacinda Quinones (hereinafter the plaintiff) on the basis that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

-Notice of Motion
-Statement of material facts
-Affirmation in support
Exhibits A–J
-Affirmation in Opposition by plaintiff
–Memorandum of Law in opposition
Exhibits A-H
-Counterstatement of material facts
-Affirmation in reply

BACKGROUND

On December 15, 2021, plaintiff commenced the instant action for damages for personal injury by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On January 19, 2022, the defendants interposed and filed a joint verified answer with the KCCO. On November 11, 2022, plaintiff filed a note of issue with the KCCO.

Plaintiff's complaint and bill of particulars allege the following salient facts. On May 14,

2021, at approximately 8:41 AM, plaintiff was lawfully operating an e-scooter on 45th Street at or near its intersection with 5th Avenue in Brooklyn, New York. At that date, time and location defendant Manuel Rojas was operating a 2014 Chevrolet motor vehicle bearing New York State license plate number GZY4095 with the permission of its owner, defendant Yolanda Rojas. At that date, time and place, Manuel Rojas operated his vehicle in a negligent fashion and collided with the plaintiff's e-scooter (hereinafter the subject accident) seriously injuring the plaintiff.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v. Citibank*, 100 N.Y.2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez v. Prospect Hospital, supra*, 68 N.Y.2d at 324).

Pursuant to CPLR 3212(b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 [1990]) (*People ex rel. Spitzer v. Grasso*, 50 A.D.3d 535, 544 [1d 2008]).

Insurance Law § 5102(d) defines serious injury as: 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.

A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. (*see Grossman v. Wright*, 268 A.D.2d 79, 83 [2nd 2000]). With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. The plaintiff in such a situation must present objective evidence of the injury." (*Id.* at 84.)

Plaintiff has alleged in a verified bill of particulars injury to the cervical and lumbar spine and injury to the right wrist. Plaintiff has also alleged injuries under the 90/180 category of Insurance Law § 5102(d). In support of the instant motion, defendants annexed various medical records. Exhibit E is described as Emergency Room records of NYU Langone. Exhibit G and H are described as records from Tia Clinic. Exhibit I is described as an x-ray report. Neither the Emergency Room records, the records from Tia Clinic or the X-ray report were affirmed or certified and the defendants offered no foundation for their admissibility. A defendant may rely

on unsworn medical records provided by the plaintiff to the defendant in support of a motion for summary judgment (*Kearse v. New York City Tr. Auth.*, 16 A.D.3d 45 [n2d 2005]). The affirmation of defendants' counsel did not set forth the basis for counsel's knowledge that these records were what counsel purported them to be. They are, therefore, disregarded.

The defendants also offered the affirmed report of Dr. Pierce Ferriter, an orthopedist, that they hired to examine the plaintiff. On July 19, 2022, fourteen months after the subject accident, Dr. Ferriter examined the plaintiff, did range of motion testing of plaintiff's right wrist and cervical and lumbar spine, and issued an affirmed report of his findings. Dr. Ferriter conducted range of motion testing including a siting and supine straight leg raise test of the lumbosacral spine. Dr. Ferriter, however, did not compare the findings to what is normal (*see Shirman v Lawal*, 69 AD3d 838 [2nd Dept 2010], *citing Walker v Public Adm'r of Suffolk County*, 60 AD3d 757 [2nd Dept 2007]). Instead, Dr. Ferriter stated that the sitting and supine straight leg raising was "negative with no radiculopathy."

For the foregoing reasons, the movants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Inasmuch as the movants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Espinal v Shortis,* 164 AD3d 1217 [2nd Dept 2018]).

CONCLUSION

The motion by defendants Yolanda Rojas and Manuel Rojas to dismiss the complaint of Jacinda Quinones pursuant to CPLR 3212 based on plaintiff's alleged failure to sustain a serious

injury within the meaning of Insurance Law § 5102(d) is denied.

The foregoing constitutes the decision and order of this court.

ENTER: Francois A. Rivera

J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.