Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

MICHAEL TVILDIANI,

Plaintiff(s),

-against-

MARK JACKSON, FAT IKE & BIG BEY TRUCKING LLC, IAN TRUCKS LLC AND STOP N SHOP LLC,

Defendants.

IAS Part - 42

Index No. 706332/2019

Motion Date: 6/15/23

Motion Cal. No. 27

Motion Seq. No. 4

The following electronically filed ("EF") documents read on this motion by Mark Jackson and Fat Ike & Big Bey Trucking, LLC (collectively, "FIBBTL") seek an order pursuant to CPLR § 3212 dismissing the Complaint of plaintiff on the grounds that plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Section 5102(d) of the New York State Insurance Law together with such other and further relief as this Court may deem just and proper. Moreover, Ian Trucks LLC ("ITL" or "cross-movant") cross moves for the same relief.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memorandum of Law-Service.....	EF 66 - 77
Notice of Cross Motion-Affirmation-Exhibits-Service.....	EF 82 - 85
Affirmation in Opposition-Exhibits.....	EF 88 - 97
Affirmation in Reply.....	EF 99

Upon the foregoing papers, it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action to recover damages for personal injuries Michael Tvildiani ("Mr. Tvildiani" or "plaintiff") allegedly sustained in a motor vehicle collision. In particular, the plaintiff alleges that on November 12, 2018 the vehicle operated by Mark Jackson ("Mr. Jackson") and owned by Fat Ike & Big Bey Trucking LLC ("Bey Trucking") backed up and

struck his vehicle at the intersection of Marathon Parkway and Gaskell Road, County of Queens, state of New York. As a result, Mr. Tvildiani alleges that he sustained serious injuries to his neck, back, right shoulder and right knee. Consequently, on April 10, 2019, the plaintiff commenced this action; and on or before September 27, 2019, issue was joined. (Even though Stop N Shop, LLC ("Stop N Shop") was named as a co-defendant, there is no evidence that they appeared in the instant action.) Now the defendants seek summary judgment on the ground that Mr. Tvildiani did not sustain a "serious injury" as defined by § 5102(d) of the New York's Insurance Law.

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]). 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).

Here, the court finds that summary judgment is not appropriate in this action, because the defendants 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 (*see Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v. Eyler*, 79 NY2d 955, 956-957 [1992]). The papers submitted by the defendants failed to eliminate triable issues of fact regarding the plaintiff's claim that he sustained a serious injury to his neck, back, right shoulder and right knee – pursuant to Insurance Law § 5102 (d). (*see Fanfan v. Sowacki,* 202 AD3d 922 [2d Dept 2022]; *Che Hong Kim v. Kossoff*, 90 AD3d 969 [2d Dept 2011]; *Rouach v. Betts*, 71 AD3d 977 [2d Dept 2010]). Since the defendants failed to meet their prima facie burden, it is unnecessary to determine whether the submission by the plaintiff in opposition is sufficient to raise a triable issue of fact (*see Fanfan v. Sowacki,* 202 AD3d 922 [2d Dept 2022]; *Che Hong Kim v. Kossoff*, 90 AD3d 969 [2d Dept 2011]). Moreover, the court finds that the parties adduce conflicting medical expert opinions between Dr. Jason R. Baynes, Dr. Alexandre

B. De Moura, Dr. Robert Waxman and Dr. Herschel Kotkes. It is quite clear that such conflicting expert opinions has raised credibility issues, which can only be resolved by a jury. (*Cerrone v. North Shore-Long Island*, 197 AD3d 449 [2d Dept 2021]; *Tinao v. City of New York*, 112 AD2d 363 [2d Dept 1985]; *Cummings v. Brooklyn Hosp. Ctr.*, 147 AD3d 902 [2d Dept 2017]; *Cassagnol v. Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]).

Accordingly, it is hereby

ORDERED that defendants, Mark Jackson and Fat Ike & Big Bey Trucking, LLC, motion for summary judgment, pursuant to CPLR § 3212, is denied, in its entirety; and it is further,

ORDERED that defendant, Ian Trucks LLC, cross-motion for summary judgment, pursuant to CPLR § 3212, is denied, in its entirety; and it is further,

ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon defendants, via certified mail and NYSCEF, on or before October 20, 2023.

The foregoing constitutes the decision and order of the court.

Dated: September 12, 2023
Long Island City, NY

FILED
9/13/2023
COUNTY CLERK
QUEENS COUNTY

Maurice E. Muir

MAURICE E. MUIR, J.S.C.