At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 15th day of May 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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RACQUEL L. WHITE,

Plaintiff(s)

-against-

RUSSELL W. FRITZ and EAGLE HOME PRODUCTS, INC.,

Defendant(s)

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Index No: 531416/2021
Motion Seq. 1

ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/	24-47; 60
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	51-59

Upon the foregoing papers and following oral argument held May 8, 2024, Russel W. Fritz and Eagle Home Products' ("Defendants) move (Motion Seq. 1) for summary judgment pursuant to CPLR 3212 and Article 51 of the New York Insurance Law dismissing Racquel L. White's ("Plaintiff") complaint on the ground that Plaintiff's claimed injuries do no satisfy the "serious injury" threshold requirement of New York Insurance Law 5102(d). Plaintiff has opposed the motion.

Plaintiff commenced this action to recover for injuries allegedly sustained as a result of a motor vehicle accident. Plaintiff additionally seeks to recover for property damage sustained. At the outset, Plaintiff's claim for property damage is dismissed because payment has already been made.

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's*

Automatic Transmission Co., 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

Pursuant to Insurance Law § 5104(a), in an action by one covered person against another covered person, the plaintiff cannot recover for noneconomic injury unless he or she has sustained a "serious injury" as defined in section 5102(d) of the Insurance Law. Section 5102(d) defines in relevant part that a serious injury is a personal injury which results in:

> (6) permanent loss of use of a body organ, member, function or system,
>
> (7) permanent consequential limitation of use of a body organ or member;
>
> (8) significant limitation of use of a body function or system; or
>
> (9) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the Court (*Licari v Elliot,* 57 NY2d 230 [1982]). The movant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that a party has not suffered a serious injury proximately resulting from the subject motor vehicle accident (*Toure v Car Sys., Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [2016]). Once the movant has made such a showing that a party has not suffered a serious injury as a matter of law, the burden shifts to the opposing party to submit evidence in admissible form sufficient to create a material issue of fact warranting a trial (*Franchini v Palmieri,* 1 NY3d 536 [2003]; *Grasso v Angerami*, 79 NY2d 813 [1991]).

A plaintiff claiming permanent loss of use of a body organ, member, function or system must demonstrate that the permanent loss of use is a total loss of use (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). In *Toure v. Avis Rent–a–Car Systems, Inc.,* 98 NY2d (2002), the Court of Appeals stated that resolving the question of whether plaintiff suffered a "serious injury" involves a comparative analysis of the quantified degree and duration of an alleged injury, or its qualitative impact and duration in the claimant's normal activities. This analysis requires admissible proof of injury based on objective medical testing, which establishes a causal relation between the accident and the injury alleged, as well as between the injury and the claimed limitation and impairment. In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]; *Dufel v Green*, 84 NY2d 705 [1995]; *Lemieux v Horn*, 209 AD3d 1100 [3d Dept. 2022]). An

expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Id.*; *Black v Robinson*, 305 AD2d 438 [2d Dept. 2003; *Junco v Ranzi*, 288 AD2d 440 [2d Dept. 2001]; *Papadonikolakis v First Fid. Leasing Group*, 273 AD2d 299 [2d Dept. 2001]). Establishing a lack of limitations normally would enable a defendant to successfully establish that the permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system have not been satisfied by Plaintiff (*Toure* at 350; *Franchini* at 536).

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than a mild, minor or slight limitation of use and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Burnett v. Miller,* 255 A.D.2d 541 [2d Dept. 1998]; *Booker v. Miller,* 258 AD2d 783 [3d Dept. 1999]; *Jones v Marshall*, 147 AD3d 1279 [3d Dept 2017]). While the Appellate Divisions are split on what evidence should be submitted in support of this category, it has been Kings County Supreme Court's position that the guidelines which a medical expert uses to determine whether ranges of motion are deemed normal or limited must be reported in addition to which device was used to perform measurements to defeat dismissal (such as a goniometer or inclinometer) (*Wilks v Baichans*, 79 Misc.3d 1226[A] [Sup. Ct. Kings County 2023]).

Here, the court finds that Plaintiff has raised a triable issue of fact as to whether she has suffered a permanent or significant limitation. While Defendants submit in part a report from examining radiologist Dr. Greenfield, to argue that Plaintiff's injuries pre-dates and are unrelated to the subject accident, in opposition, Plaintiff submits medical reports from Drs. Ferruter, Gerling and. Reyfman which conclude that Plaintiff's injuries are casually related to the accident, not degenerative, and permanent in nature. Additionally, while Defendants submitted records demonstrate that Plaintiff had a reduced range of motion in the cervical and lumbar spine, the reports do not quantify those ranges of motion results nor were the ranges compared with any permissible medical guidelines. Since, Plaintiff's and Defendants' submissions contain conflicting medical evidence, the issue of credibility must be resolved by a jury.

As to the claim under the 90/180 category, the court finds that Plaintiff has failed to meet the threshold requirements, thus this cause of action is dismissed.

Accordingly, it is hereby,

ORDERED, that Defendant's motion for summary judgment to dismiss Plaintiff's complaint on the ground that Plaintiff's claimed injuries do no satisfy the "serious injury" threshold requirement of New York Insurance Law 5102(d) is granted to the extent that Plaintiff's claim under the 90/180 category

is dismissed. Defendants' motion to dismiss Plaintiff's claim under the permanent or significant limitation category is denied, and it is further,

ORDERED, that Plaintiff's claim for property damage is dismissed.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice