At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of July, 2024.

PRESENT:

HON. INGRID JOSEPH,
Justice.

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COSMO GORDON,

Plaintiff,

Index No.: 513268/2021

-against-

GURDIP SINGH and AMRITA SINGH,

DECISION & ORDER

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Affirmation/Memorandum of Law/Exhibits...	11 – 21
Affirmation in Opposition/Exhibits.....	26 – 34
Reply Affirmation.....	37

Upon the foregoing papers, Defendants Gurdip Singh and Amrita Singh (collectively, "Defendants") move for an order, pursuant to CPLR 3212, (i) granting them summary judgment on the basis that Plaintiff Cosmo Gordon's ("Plaintiff") alleged injuries do not meet the "serious injury" threshold under Insurance Law § 5102 (d), or, in the alternative, (ii) dismissing the subsections of Insurance Law § 5102 (d) which are not viable as a matter of law (Mot. Seq. No. 1). Plaintiff opposes the motion.

This action arises out of a motor vehicle accident that occurred on November 23, 2020, in which defendant Gurdip Singh was operating a vehicle owned by defendant Amrita Singh. In his complaint, Plaintiff seeks to recover damages for his personal injuries resulting from the subject accident. Specifically, Plaintiff alleges in his Bill of Particulars that he sustained injuries to his cervical spine, lumbar spine, left shoulder, and left knee. In addition, Plaintiff claims he suffered serious injuries as defined by Insurance Law § 5102 (d) resulting in (i) permanent consequential limitation of use of cervical spine, lumbar spine, left shoulder, and left knee; (ii) significant limitation of use of cervical

spine, lumbar spine, left shoulder, and left knee; and (iii) the inability to perform substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

Defendants now move to dismiss the complaint, arguing that Plaintiff did not sustain a "serious injury" as defined by Insurance Law 5102 (d). First, Defendants contend that Plaintiff's injuries are not supported by medical evidence, have completely resolved, are preexisting in origin, and/or did not result in any significant limitation of motion or residual disability. Defendants cite to the independent medical examinations performed by Dr. Pierce Ferriter, an orthopedic surgeon, and Dr. Daniel J. Feuer, a neurologist, which revealed that Plaintiff had full range of motion with no causally related disability. Defendants also cite to the radiological review of Plaintiff's pre- and post-incident MRIs by Dr. Jessica F. Berkowitz, who opined that there was no evidence of acute traumatic injury in the post-incident MRI. Furthermore, Defendants argue that Plaintiff was involved in a prior accident in 2019 (which resulted in litigation) wherein he claimed that he injured his neck, back, left shoulder and left knee—the same injuries alleged herein. Second, Defendants contend that there is no viable 90/180 claim. In support, Defendants cite to the Bill of Particulars, in which Plaintiff notes that he was confined to bed and home for a "few days." Defendants also refer to Plaintiff's deposition testimony, in which he stated that he did not have to modify his home in any way, did not have to hire any home aides, and travelled to Jamaica twice since the accident. Third, Defendants argue that Plaintiff cannot establish causality based on his deposition testimony, the litigation documents relating to the 2019 accident, and Dr. Berkowitz's radiological review reports.

In opposition, Plaintiff argues that Defendants failed to meet their prima facie burden of demonstrating that he did not sustain a serious injury. With respect to the 90/180 claim, Plaintiff asserts that Defendants' experts are silent as to the issue and Defendants submitted no testimony or medical records refuting this claim. Turning to the permanent consequential and significant limitation categories, Plaintiff cites to Defendants' medical experts' reports. Plaintiff contends that the orthopedic expert Dr. Ferriter did not opine as to whether Plaintiff's cervical and lumbar spine injuries were resolved and did not rule out the possibility that Plaintiff's injuries may be significant and/or permanent. In addition, while the neurologist Dr. Feuer noted that Plaintiff had complaints of low back stiffness, Plaintiff contends that he did not provide a possible explanation as to the nature of Plaintiff's complaints. Though Drs. Ferriter and Feuer found normal ranges of motion, Plaintiff argues that their findings are contradictory to those of Dr. Gordon C. Davis, Plaintiff's treating chiropractor, who found restricted range of motion in the cervical spine, lumbar spine and left shoulder. Since the independent medical examinations were performed 18 months after the subject accident, Plaintiff maintains that

Defendants' experts cannot comment on the injuries' severity and cannot make a prima facie showing of lack of a significant limitation of use of a body function for the period prior to the examination. Though Plaintiff contends that it is unnecessary to determine the sufficiency of Plaintiff's opposition papers, he claims that there are issues of fact as to whether he sustained a serious injury under the 90/180 category. Moreover, Plaintiff avers that Dr. Davis's affirmation raises a triable issue of fact as to whether Plaintiff sustained a serious injury. In addition, Plaintiff argues that evidence of complaints of pain and positive MRI findings are sufficient to defeat a motion for summary judgment.

In reply, Defendants maintain that Plaintiff has not established that the alleged injuries and symptoms are the result of the subject accident, rather than the 2019 accident. Defendants further assert that there is an unexplained gap in treatment by citing to Plaintiff's medical records which revealed that Plaintiff ceased treatment in 2021 and was examined in 2023 for purposes of responding to their motion. In addition, Defendants claim that Plaintiff's MRI reports with affirmations fail to address duration and causality; therefore, they are insufficient to raise an issue of fact. Defendants also argue that herniated discs, radiculopathy, and tears are not serious injuries where there is no evidence of the extent of the alleged physical limitation resulting therefrom and its duration.

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]). However, where the movant has made 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]).

The Court will first address Plaintiff's claim that he suffered a permanent consequential limitation of use of a body organ or member or a significant limitation of use of a body function or system. To establish that a plaintiff did not sustain a serious injury under these categories, a defendant must present medical evidence reflecting that the ranges of motion are all within normal range, the specific measurements taken and the methods used to perform the measurements (*Staff v Yshua*, 59 AD3d 614, 614 [2d Dept 2009]). "A defendant who submits admissible proof that the

plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), despite the existence of an MRI which shows herniated or bulging discs" (*Kearse v NY City Tr. Auth.*, 16 AD3d 45, 49-50 [2d Dept 2005]).

For Plaintiff's claims to survive, he must proffer sufficient evidence to raise a triable issue of fact. This evidence must be "objective medical evidence, based upon a recent examination, to verify his subjective complaints of pain and limitation of motion" (*Farozes v Kamran*, 22 AD3d 458, 458 [2d Dept 2005]). In addition, a plaintiff must adequately explain "any significant lapse in time between the conclusion of [his] medical treatment and the physical examination conducted by his physician" (*id.*). Where defendants proffer evidence indicating that a plaintiff's alleged injuries were related to a preexisting condition, the plaintiff must come forward with "objective medical evidence distinguishing plaintiff's preexisting condition from the injuries claimed to have been caused by [the] accident" (*Falkner v Hand*, 61 AD3d 1153, 1154 [3d Dept 2009]). It is not enough to merely state that an accident has exacerbated or aggravated a prior existing injury; instead, a plaintiff's expert must provide a basis for that determination (*Brand v Evangelista*, 103 AD3d 539, 540 [2d Dept 2013]).

Here, Dr. Ferriter's report indicates that all ranges of motion were determined by a goniometer and Plaintiff exhibited normal ranges of motion of his cervical spine, lumbar spine, left shoulder and left knee, pursuant to AMA Guidelines (NYSCEF Doc No. 16). Moreover, Dr. Ferriter opined that Plaintiff's injuries had resolved and concluded that no objective evidence of an orthopedic disability. Similarly, Dr. Feuer also opined that Plaintiff exhibited normal ranges of motion of his cervical and lumbar spine and that Plaintiff did not demonstrate an objective neurological disability or neurological permanency, which is causally related to the subject accident. Further, radiologist Dr. Berkowitz compared Plaintiff's MRIs of the cervical spine, lumbar spine, left shoulder and left knee performed in 2019 and 2021. Dr. Berkowitz did not find evidence of any acute traumatic injury or any causal relationship between the MRI findings and the accident. Therefore, the Court finds that Defendants have established, through competent medical evidence, that Plaintiff's alleged injuries do not constitute a serious injury under the permanent consequential or significant limitation of use categories and they also established the absence of causation.

In his opposition, Plaintiff adequately explained the gap in his treatment through the affirmation of Dr. Davis, in which he explained that Plaintiff continued treatment "until it was determined that he reached maximum medical improvement and his medical condition would not improve as a result of further treatment"[1] (*see Gaviria v Alvardo*, 65 AD3d 567, 569 [2d Dept 2009]). In his affirmation, Dr. Davis also summarized the results of physical examinations conducted on November 30, 2020 and May 1, 2023. On both dates, Dr. Davis stated that he measured Plaintiff's ranges of motion of the cervical spine, lumbar spine and left shoulder using a goniometer and found limitations. In addition, Dr. Davis averred that Plaintiff's prior injuries were aggravated and exacerbated by the subject accident and found that Plaintiff sustained new injuries that were causally related to the subject accident. Dr. Davis cited to the MRI reports from 2021 and Dr. Herschel Kotkes's operative reports in support of his conclusions.

The Court will first consider Plaintiff's left shoulder injury. Dr. Davis opined that the following conditions were new or progressed, pursuant to the 2021 MRI report: (1) left shoulder distal subscapularis tendinosis/tendinopathy; (2) effusion of the glenohumeral joint with fluid; and (3) fraying of the free edge of the anterior labrum. As for the tendinosis/tendinopathy, the more recent MRI report from Dr. Steven Winter reflects that when compared to the 2019 MRI findings, "[t]here is *again* distal subscapularis tendinosis/tendinopathy *without progression*" (*see* NYSCEF Doc No. 29 [emphasis added]). Thus, there is no objective basis for Dr. Davis's conclusion that this tendinosis or tendinopathy was a new or progressed injury. Turning to the effusion of the glenohumeral joint with fluid, Dr. Berkowitz did not deny the existence of fluid but still opined that the findings were postoperative and not causally related to the subject accident. Though Plaintiff's 2019 MRI reflected "[f]raying of the free margin of the anterior labrum" (NYSCEF Doc No. 29), the 2021 MRI showed "fraying of the free edge of the anterior labrum increasingly present with superficial tear with a rounded anterior labral appearance now present" (NYSCEF Doc No. 28). Dr. Berkowitz's report does not directly address this purported progressed injury. As Defendants contend in their reply, however, a tear is not evidence of a serious injury absent objective evidence of the extent of the alleged physical limitations resulting therefrom and its duration (*see Djetoumani v Tr., Inc.*, 50 AD3d 944, 945 [2d Dept 2008]). Dr. Davis's testing of Plaintiff's range-of-motion set forth the "requisite medical findings" (*id.*). Accordingly, the Court finds that Plaintiff has raised a triable issue of fact with respect to his left shoulder.

[1] NYSCEF Doc No. 28, at ¶ 15.

With respect to the cervical spine, based on the 2021 MRI report, Dr. Davis opined that Plaintiff obtained the following new or progressed injuries: (a) right posterolateral protruding disc herniation at C2-3; (b) impingement on the posterior thecal sac at C2-3 and C4-5; and (c) impingement on both lateral recesses and neural foramen at C5-6. In accordance with Dr. Herschel Kotkes's operative report dated June 1, 2021, Dr. Davis also concluded that Plaintiff sustained a cervical intervertebral disc displacement with annular tear.[2] Concerning C2-3, Dr. Berkowitz identified only disc bulging and spondylosis. Dr. Berkowitz also found that "[d]isc bulging and spondylosis asymmetric to the right impinging on the spinal cord and the right neural foramen at C3-4" and "[d]isc bulging, spondylosis and the very small central disc herniation at C4-5 impinging on the spinal" are "similar in appearance" to the 2019 MRI (NYSCEF Doc No. 18). Dr. Berkowitz acknowledged that the "extent of neural foraminal narrowing is difficult to assess due to the location of the slices" at C5-6 (*id.*). As with tears, MRI findings of bulging or herniated discs alone are insufficient to raise a triable issue of fact (*Yakubov v CG Trans Corp.*, 30 AD3d 509, 510 [2d Dept 2006]). Nonetheless, Plaintiff has proffered evidence that he sustained range of motion limitations in cervical spine contemporaneous with the subject accident and in a more recent follow-up, thus raising an issue of fact as to whether his injuries to his cervical spine constitute a serious injury (*cf. Rodriguez v Cesar*, 40 AD3d 731, 733 [2d Dept 2007]).

If a plaintiff raises an issue of fact as to the existence of a serious injury to one body part, he is entitled to seek damages for all injuries sustained as a result of the accident even if the other injuries do not independently meet the "serious injury" threshold (*see Marte v NY City Tr. Auth.*, 59 AD3d 398, 399 [2d Dept 2009]; *Prieston v Massaro*, 107 AD2d 742, 743-744 [2d Dept 1985]; *Oputa v NY City Tr. Auth.*, 216 AD3d 461, 462 [1st Dept 2023]; *Pantojas v Lajara Auto Corp.*, 117 AD3d 577, 578 [1st Dept 2014]). Thus, a plaintiff is required to establish that his other injures were also causally related to the accident (*Bonner v Hill*, 302 AD2d 544 [2d Dept 2003]). Where causation is not proven for all injuries, it is proper for the supreme court to "limit[] the issues for trial to the one injury the causation of which is in dispute" (*Bonner v Hill*, 302 AD2d 544 [2d Dept 2003]).

[2] According to Dr. Kotkes, Plaintiff's back injuries were causally related to the subject accident. Nonetheless, Dr. Kotkes's reports are devoid of any references to Plaintiff's prior accident and injuries. In fact, Dr. Kotkes states that Plaintiff "does not have history of back problems prior to this injury" from the subject accident (NYSCEF Doc No. 34).

Turning to Plaintiff's lumbar spine, Plaintiff contends that he sustained an annular disc bulge impinging on the anterior thecal sac at L3-4 per the 2021 MRI report. Dr. Berkowitz, however, found that the "disc bulging asymmetric to the right narrowing the right neural foramen at L3-4 is unchanged" from 2019 (NYSCEF Doc No. 18). Plaintiff further claimed that he sustained lumbar intervertebral disc displacement with annular tear and radiculopathy per Dr. Kotkes's operative report dated May 10, 2021. In forming his conclusion about causation, Dr. Davis cannot rely on the opinion of Dr. Kotkes, who did not consider all of Plaintiff's medical history,[3] as it amounts to mere speculation (*see Frisch v Harris*, 101 AD3d 941, 942 [2d Dept 2012]; *Vidor v Davila*, 37 AD3d 826, 826-827 [2d Dept 2007]; *Collins v Stone*, 8 AD3d 321, 322 [2d Dept 2004]; *Allyn v Hanley*, ___AD3d___, 767 NYS2d 885, 886 [2003]).

With respect to Plaintiff's left knee, the Court recognizes that the 2021 MRI report reflects the existence of a new tear, but Dr. Berkowitz found that the "image resolution is low for evaluating the menisci." Nonetheless, neither the records of Plaintiff's orthopedist Dr. Howard I. Baum (*see* NYSCEF Doc No. 33) nor Plaintiff's MRI reports address causation (*see* NYSCEF Doc No. 29). Thus, Dr. Davis's conclusory statement that the left knee injury was causally related to the accident lacks any foundation and is insufficient to raise a triable issue of fact (*Kabir v Vanderhost*, 105 AD3d 811, 812 [2d Dept 2013]; *Lagois v Pub. Adm'r*, 303 AD2d 644, 644 [2d Dept 2003]). In addition, Plaintiff "failed to address directly [Dr. Ferriter's] finding of normal range of motion, thus leaving no triable issue of fact with respect to his knee condition" (*DeJesus v Paulino*, 61 AD3d 605, 608 [1st Dept 2009]). Plaintiff's medical records reflect that Plaintiff exhibited normal ranges of motion of his left knee during multiple visits, including the initial visit a few days after the subject accident (NYSCEF Doc No. 28). Moreover, Plaintiff failed to proffer the results of any recent medical examination of his left knee (*Rovelo v Volcy*, 83 AD3d 1034, 1035-1036 [2d Dept 2011]) ["[I]n the absence of recent findings of range-of-motion limitations, the plaintiff failed to meet her burden in opposing the appellant's showing of prima facie entitlement to judgment as a matter of law"]).

Accordingly, Plaintiff is not entitled to seek recovery for the injury to his lumbar spine and left knee.

The Court will next address the 90/180 category of Plaintiff's claim. Under this category, a "serious injury" is defined as a plaintiff's inability to "perform[] substantially all of the material

[3] *See supra*, n 2.

acts which constitute [his or her] usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the date of the [accident]" (Insurance Law 5102 [d]). Therefore, a plaintiff's current condition has no bearing on whether he was unable to carry out her normal and customary activities during the statutory period. Moreover, a plaintiff's self-serving statement or testimony claiming an inability to engage in customary daily activities will not suffice (*Ryan v Xuda*, 243 AD2d 457, 457-458 [2d Dept 1997]). Instead, there must be objective evidence of a medically imposed limitation (*id.*; *Jones v Marshall*, 147 AD3d 1279, 1280-1281 [3d Dept 2017]). This limitation must have "curtailed [plaintiff] from performing [her] usual activities to a great extent rather than some slight curtailment" (*Licari*, 57 NY2d at 236).

Here, it is undisputed that Plaintiff was not confined to his bed or home for any significant amount of time, much less 90 days.[4] Plaintiff further testified that he did not miss any time from work[5] and did not need to modify his home or hire any home aide.[6] Thus, Defendants demonstrated, prima facie, that Plaintiff did not sustain a serious injury under the 90/180 category. In opposition, Plaintiff failed to raise a triable issue of fact. Plaintiff's reliance on his medical records is insufficient since they do not indicate that he was unable to perform substantially all of his daily activities for not less than 90 out of 180 days following the accident (*Muzashvili v Vicente*, 16 Misc 3d 1140[A] [Sup Ct, Kings County 2007], *affd* 59 AD3d 413, [2d Dept 2009]). Though Plaintiff testified that he could not play basketball or workout anymore[7] and has trouble getting off the bed, going up the stairs, sitting for a long period of time and bending,[8] the only support proffered by Plaintiff is his own testimony of limitations. Plaintiff's subjective description of his injuries are insufficient to make out a 90/180-day claim. Even if the Court were to consider Plaintiff's testimony, the Court finds his self-described limitations do not establish that he was prevented from performing "substantially all" of his usual activities for 90 out of the 180 days following the accident (*Perl v Meher*, 18 NY3d 208, 220 [2011]). Accordingly, Defendants are entitled to dismissal of Plaintiff's 90/180-day claim.

Accordingly, it is hereby

[4] NYSCEF Doc No. 14, ¶ 6.
[5] NYSCEF Doc No. 20, Plaintiff tr at 30, lines 9-12.
[6] *Id.* at 19, lines 15-23.
[7] *Id.* at 122, lines 4-8.
[8] *Id.* at 122, lines 9-23.

ORDERED, that Defendants' motion for summary judgment (Mot. Seq. No. 1) is granted to the extent of dismissing Plaintiff's claim that he sustained a "90/180 day" injury as a result of the subject accident; and it is further,

ORDERED, that Defendants' motion is further granted to the extent of dismissing Plaintiff's claim that he sustained a "serious injury" to his lumbar spine and left knee.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice