At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the _____ day of _____2024

SEP 17 2024

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

DECISION AND ORDER

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HENRY HARVARD,

Plaintiff,

-against-

Index No.: 501645/2021
Motion Date: 3/20/2024
Motion Cal. No.: 31
Mot. Seq. 2

METRO PROVISIONS, CORP. and JAMES J. CHIARELLO,

Defendants.

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Defendant's Notice of Motion for Summary Judgment filed on May 9, 2023, Statement of Material Facts filed on May 9, 2023, Attorney Affirmation in Support of the Motion affirmed by Keri A. Wehrheim, Esq. on May 8, 2023, Memorandum of Law filed on May 9, 2023 and Exhibits.....	35-42
Plaintiff's Affirmation in Opposition to the Motion affirmed by Mitro Guna, Esq. on March 8, 2024 and Exhibits.....	75-86
Defendant's Reply Affirmation in Further Support of the Motion affirmed by Keri A. Wehrheim, Esq., on March 15, 2024.....	87

MONTELIONE, RICHARD J., J.

Plaintiff Henry Harvard ("Plaintiff") commenced this action by filing a summons and complaint on January 1, 2021. Issue was joined by defendants Metro Provisions, Corp. and James J. Chiarello ("Defendants") interposing an answer on April 1, 2021. Defendants now move for summary judgment pursuant to CPLR 3212 on the basis that the plaintiff fails to meet the injury threshold limits under New York State Insurance Law §§ 5102(d) and 5104(a), or in the alternative for an order dismissing any and all sub-portions of Insurance Law § 5102(d) which are not viable as a matter of law (Motion Seq. No. 2).

This is an action to recover for personal injuries allegedly sustained by the plaintiff after a motor vehicle accident. On August 5, 2019, plaintiff was driving on Ashford Street at or near the intersection of

Linden Boulevard, in Kings County, New York. The accident occurred when the motor vehicle owned by defendant Metro Provisions, Corp., and operated by defendant James J. Chiarello, came into contact with plaintiff's vehicle. Plaintiff alleges injuries to his cervical and lumbar spine, and right hip. Plaintiff underwent a total right hip replacement on January 5, 2021, sixteen months later, by Dr. Raz Winiarsky. NYSCEF #39.

Under Insurance Law § 5104(a) "in any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic loss, except in the case of a serious injury." "In seeking summary judgment on the issue of whether the serious injury threshold has been satisfied, the burden is initially on a defendant to establish as a matter of law that the plaintiff did not suffer a 'serious injury.'" *Hines v. Capital Dist. Transp. Authority,* 280 A.D.2d 768, 769 (3d Dep't 2001) quoting *Anderson v. Persell,* 272 A.D. 733 (3d Dep't 2000). Insurance Law § 5102(d) defines a 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.

In support of their motion, defendants present the reports of two medical experts, Dr. Sasson and Dr. Marshall Keilson. On May 2, 2022, the plaintiff was examined by orthopedist Dr. Victor Sasson. Upon a review of plaintiff's medical records, Dr. Sasson found a history of prior injuries including, a prior motor vehicle accident, a work-related injury to the right knee in or around 2016 or 2017 which required

arthroscopic surgery, and an on-the-job injury to his right knee, neck, back and right hip in or around 2016. Upon physical examination of the plaintiff's cervical spine, lumbar spine and right hip using a goniometer, Dr. Sasson found no loss of range of motion. NYSCEF # 39. Dr. Sasson provided the range of motion of each specified body part and the "normal range." Dr. Sasson further opined that the plaintiff had preexisting osteoarthritis of his right hip which predated the motor vehicle accident on August 5, 2019. *Id.* According to Dr. Sasson, the plaintiff's development of osteoarthritis and subsequent total right hip replacement surgery were not casually related to the motor vehicle accident on August 5, 2019. *Id.* Dr. Sasson found no objective evidence of any permanent or residual limitations. *Id.* Defendants' expert, Dr. Marshall Keilson, conducted a neurological evaluation on April 5, 2022. NYSCEF #40. Upon physical examination of the plaintiff's cervical and lumbar spine with a goniometer, Dr. Marshall Keilson found no loss of range of motion, and no neurological disabilities. After examining the plaintiff's MRI studies of the cervical and lumbar spine, Dr. Marshall Keilson found discogenic and degenerative changes, but no objective signs to correlate with the patient's subjective symptomology or damages allegedly suffered as a result of the accident.

As the defendants' doctors have conducted objective medical examinations and concluded the plaintiff has no restrictions of movement, defendant meets its initial burden of establishing the alleged injuries do not "qualify as a serious injury under the significant limitation of use category." *Fillette v. Lundberg*, 150 A.D.1574, 1577 (3rd Dep't 2017). The burden then shifts to the plaintiff to raise a triable issue of fact. *Kabir v. Vanderhost*, 105 A.D.2d 811, 812 (2d Dep't 2013).

In opposition, plaintiff has failed to raise a triable issue of fact. The opinions of the plaintiff's experts that the condition of the plaintiff's spine and right hip were aggravated and/or exacerbated by the subject accident were conclusory, and insufficient to raise a triable issue of fact. *See, Williams v. Town of*

Greenburgh, 101 A.D.3d 990 (2d Dep't 2012). Both Dr. Winiarsky (M.D.) and Dr. Chaudary acknowledge the plaintiff's relevant injury history but fail to provide an explanation as to why they each believe the plaintiff's prior injuries were aggravated and/or exacerbated by the subject accident. NYSCEF #77, 79. Dr. Winiarsky indicates that he used a goniometer, but does not specify which body parts were tested, the limitations or the "normal range." The failure to provide such specificity, or to provide the "'qualitative nature' of plaintiff's limitations 'based on the normal function, purpose and use of the body part'" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353, 774 NE2d 1197, 746 NYS2d 865, 2002 NY Slip Op 05748, 2002 WL 1461317 [2002]) is fatal to meeting the plaintiff's burden. Dr. Battner's expert report, a chiropractor, opines that after review of the medical records, the traumatic nature of the injuries has resulted in permanent disability and plaintiff will require future medical care including surgical intervention, but fails to acknowledge the plaintiff's relevant injuries from 2016. NYSCEF #78. The court does not find the affidavit of a chiropractor to be competent to determine future surgical intervention. In addition, there is no basis given for Dr. Battner's conclusions and they are therefore rendered speculative. *See, Yunatanov v. Stein*, 69 A.D.3d 708, 709 (2d Dep't 2010); *See Nakamura v Montalvo*, 137 AD3d 695, 696, 29 NYS3d 285, 287, 2016 NY Slip Op 02517, 2016 WL 1249403 [1st Dept 2016]:

> Plaintiff's chiropractor provided only a conclusory opinion that plaintiff's injuries were caused by the 2012 accident, without addressing the preexisting conditions documented in plaintiff's own medical records, or explaining why her current reported symptoms were not related to the preexisting conditions (*see Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380, 830 N.E.2d 278 [2005]; *Alvarez*, 120 A.D.3d at 1044, 993 N.Y.S.2d 1; *Dawkins v. Cartwright*, 111 A.D.3d 559, 975 N.Y.S.2d 400 [1st Dept.2013]).

The plaintiff also fails to raise a triable issue of fact as to whether the injuries he allegedly sustained rendered him unable to perform substantially all of his usual and customary daily activities for not less than

90 days of the first 180 days after the accident. The plaintiff testified that he returned to work within 2 or 3 days after the accident and estimated losing 20 days of work for doctor's appointments. NYSCEF# 41, p. 61. *See also* BOP where plaintiff admits it is "impossible" to show period confined to bed due to the accident. NYSCEF#38, ¶ 11.

Based on the foregoing, it is

ORDERED that Metro Provisions, Corp. and James J. Chiarello's motion for summary judgment under Insurance Law §§ 5102(d) and 5104(a) (Motion Seq. No. 2) is **GRANTED**, and this case is dismissed.

This constitutes the decision and order of the court.

ENTER

Hon. Richard J. Montelione, J.S.C.