SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22**

Justice

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FRANKLIN LAMBERT,

Plaintiff,

- v -

ANTONIO TRISCARI, PENSKE TRUCK RENTAL, LAKEISHA TURNER, DANIEL BISHOP,

Defendants.

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INDEX NO. 154789/2021

MOTION DATE 12/20/2023, 01/08/2024

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 45, 47, 48, 50, 52, 53, 54, 55, 60

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 46, 49, 51, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY.

Pursuant to CPLR 3212, defendants Antonio Triscari and Penske Truck Rental (together, Penske Defendants) move for summary judgment to dismiss the complaint arguing that plaintiff did not sustain a serious injury under Insurance Law 5102 (d) (motion sequence 001). Pursuant to CPLR 3212, defendants Lakeisha Turner and Daniel Bishop[1] move for summary judgment to dismiss the complaint and all cross-claims against her arguing that plaintiff did not sustain a serious injury under Insurance Law 5102 (d) (motion sequence 002). Plaintiff opposes both motions and replies. For the reasons below, the motion by defendants Antonio Triscari, Penske Truck Rental (Motion Sequence Number 001) and by defendants Lakeisha Turner and Daniel Bishop (Motion Sequence Number 002) for summary judgment in their favor and dismissal of the Complaint and any cross-claims against them are granted.[2]

[1] The Notice of Motion only mentions defendant Lakeisha Turner. However, the court will treat this motion as if it were made on behalf of both defendants Lakeisha Turner and Daniel Bishop. Both are represented by the same counsel. The vehicle operated by Turner was owned by Bishop.

[2] This matter is joined with the related matter *Franklin Lambert v Signature Relocations LLC*, pending in this court under Index No. 157041/2021, which arises from the same motor vehicle accident.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On October 5, 2018, the parties were involved in a motor vehicle accident (NY St Cts Elec Filing [NYSCEF] Doc No. 1, summons and complaint). Ms. Turner was driving a vehicle, owned by Daniel Bishop and with his consent, with plaintiff as a passenger when they collided with a Penske truck driven by Mr. Triscari in the Holland Tunnel (*id.* at 4-6). Plaintiff injured his left shoulder, head, and cervical and lumbar spine because of the collision (NYSCEF Doc No. 25, Penske Defendants' exhibit C, Bill of Particulars at 2-3; NYSCEF Doc No. 39, Turner and Bishops' exhibit B, Bill of Particulars at 2-3).

On January 4, 2020, plaintiff was in another car accident (NYSCEF Doc No. 33, Penske Defendants' exhibit K, plaintiff's medical records; NYSCEF Doc No. 28, Penske Defendants' exhibit F, plaintiff's deposition at 87). This accident was a head on collision (NYSCEF Doc No. 28 at 87). In this accident, plaintiff injured his back and left hip and received treatment at Mercy Medical Center and Elmhurst Hospital where he complained of pain to his lower back and hip (NYSCEF Doc No. 33; NYSCEF Doc No. 28 at 87-88). Plaintiff stated that he received five months of therapy for his left hip and lower back due to the 2020 car collision (NYSCEF Doc No. 28 at 89). Plaintiff commenced a lawsuit based on the 2020 collision which was subsequently settled (*id.* at 91-92). Plaintiff also stated that after five months of therapy, the pain in his lower back improved but did not completely subside (*id.* at 93).

On May 17, 2021, plaintiff commenced this lawsuit based on the 2018 collision (NYSCEF Doc No. 23, Penske Defendants' exhibit A, plaintiff's summons and complaint; NYSCEF Doc No. 38, Turner and Bishop's exhibit A, pleadings). Plaintiff alleges that defendants were negligent in the operation of their vehicles and that the accident caused plaintiff's injuries (NYSCEF Doc No. 23; NYSCEF Doc No. 38). Plaintiff alleges that he sustained serious injury under Insurance Law 5102 (d) (NYSCEF Doc No. 23; NYSCEF Doc No. 38). Defendants Turner and Bishop filed their answer denying the complaint's allegations, asserting affirmative defenses, and brought a cross-claim against their co-defendants, Signature Relocations LLC and Penske Defendants (NYSCEF Doc No. 38). Penske Defendants filed their answer denying the complaint's allegations, asserting affirmative defenses, and answering cross-claims brought by Turner and Bishop (NYSCEF Doc No. 24, Penske Defendants' exhibit B, Penske Defendants' answer).

On February 4, 2022, the court issued an order consolidating Index Nos. 150707/2019 and 154789/2021 for discovery and trial (NYSCEF Doc No. 29, Penske Defendants' exhibit G,

consolidation order). On April 20, 2022, the court issued an order consolidating Index Nos. 150707/2019 and 154789/2021 with Index No. 157041/2021 for discovery and trial (NYSCEF Doc No. 30, Penske Defendants' exhibit H, consolidation order).

On June 22, 2023, plaintiff was examined by Dr. Andrew Bazos, M.D., for injuries arising from the October 5, 2018, car accident (NYSCEF Doc No. 31, Penske Defendants' exhibit I, Dr. Bazos's medical evaluation report). Dr. Bazos's report noted plaintiff's medical history stemming from the 2018 accident showed, *inter alia*, that plaintiff had diminished ranges of motion for his cervical and lumbar spines with tenderness to palpation and spasm, his shoulders had tenderness to palpation with minimally diminished range of motion, and he had post-traumatic headaches and dizziness (*id.* at 2). The report included approximate normal ranges of motion for the cervical spine, lumbar flexion, shoulder, elbow, wrist, interphalangeal, metacarpal-phalangeal, hip, knee, and ankle based on the 6th edition of the American Medical Association (AMA) guidelines (*id.* at 6). Dr. Bazos examined plaintiff's cervical spine, thoracolumbar spine, shoulders, elbows, wrists, hands, hips, knees, ankles, feet, and conducted sensory testing (*id.* at 6-8). Dr. Bazos found no abnormalities, normal ranges of motion, and concluded that plaintiff did not sustain injuries from the 2018 accident (*id.* at 6-10). The report noted that on October 9, 2018, four days after the collision, plaintiff self-presented to Mount Sinai St. Luke's Emergency Department but did not stay for evaluations and self-discharged (*id.*). Dr. Bazos concluded that had plaintiff been injured, he would have gone to the Emergency Department on the day of the accident or at least remain for evaluations (*id.*). Dr. Bazos determined that plaintiff was able to perform normal, daily activities without any impairments, disabilities, or limitations (*id.*).

At plaintiff's deposition, plaintiff stated that he complained of pain to his head and shoulder following the 2018 accident (NYSCEF Doc No. 28 at 49-50, 63-64). Plaintiff stated that he had hit his head and right shoulder into the window but did not have any cuts, scrapes, or bruises on his body (*id.* at 52, 54). Plaintiff also stated that he did not seek medical treatment immediately after the accident (*id.* at 65, 66). Plaintiff testified that he sought medical treatment four days after the collision because he had a headache and his body was sore (*id.* at 84-85, 102). Plaintiff stated that his left shoulder, lower back, neck, and right side of his head were injured by the accident (*id.* at 75, 79-80, 83, 84-85). Plaintiff stated that he received therapy for his injury from the 2018 collision for at least four or five months (*id.* at 121-122). Plaintiff testified that he stopped physical therapy after April 15, 2019, for his injuries (*id.* at 138). He also missed work for a week and a

half due to the accident and would leave work early to receive treatment (*id.* at 117, 120, 123-124). Plaintiff stated that he still has pain in his neck, left shoulder, and has migraines from the 2018 collision but does not have consistent pain in his lower back (*id.* at 170-172). Plaintiff stated that there was nothing he was unable to physically do because of the accident; however, he also said that his activities, such as walking, laying down, and playing with his daughter, are limited because of pain (*id.* at 180). Plaintiff also stated that he cannot work out at all because it is too painful (*id.*).

LEGAL STANDARD

"The proponent of a summary judgment motion must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). Without this *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The moving party has a heavy burden as the facts must be viewed in a light most favorable to the non-moving party (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). If the moving party meets their burden, the opposing party must produce evidentiary proof in admissible form that is sufficient to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]).

The defendant has a *prima facie* burden to show that the plaintiff did not suffer a serious injury under Insurance Law 5102(d) (*Wadford v Gruz*, 35 AD3d 258, 258 [1st Dept 2006]). Objective proof, rather than subjective complaints, is required to demonstrate a plaintiff's injury to satisfy the serious injury threshold (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). A defendant may satisfy their burden by submitting a report or affirmation from a doctor that examined the plaintiff and reviewed their medical records (*Linton v Gonzales*, 110 AD3d 534, 534 [1st Dept 2013]; *see also Gaddy v Eyler*, 79 NY2d 955, 956-57 [1992]). A defendant may also rely on a plaintiff's deposition testimony to show that the plaintiff was not seriously injured (*Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]; *Rodriguez v Moss*, 224 AD3d 418, 419 [1st Dept 2024]). If the defendant meets their burden, "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" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003] [internal quotation marks and citation omitted]; *see also Gaddy*, 79 NY2d at 957). "Failure to raise a triable issue of fact requires a court to grant summary judgment and to dismiss the complaint" (*Bent v Jackson*, 15 AD3d 46, 47 [1st Dept 2005]). To raise a triable issue of fact, a plaintiff's claim that a range of motion is limited must be sustained by objective medical findings based on a recent examination of the plaintiff (*id.* at 48).

DISCUSSION

Motion Sequence 001 – Penske Defendants' Motion For Summary Judgment

Penske Defendants argue, *inter alia*, that plaintiff was not seriously injured from the October 5, 2018, car accident (NYSCEF Doc No. 22, Penske Defendants' attorney affirmation at 4-10). They assert that plaintiff did not sustain a permanent injury under Insurance Law 5102(d) (*id.*). Dr. Bazos examined plaintiff and found no abnormalities (*id.* at 6-8). Dr. Bazos's report noted that plaintiff did not receive medical treatment until four days after the accident and did not stay at the hospital for evaluation (*id.* at 9). Dr. Bazos concluded that plaintiff's behavior showed that he was not seriously injured and was able to continue normal, daily activities without limitations (*id.*). Additionally, Penske Defendants argue that plaintiff testified that there was nothing he was physically unable to do because of the accident (*id.* at 10). Penske Defendants contend that plaintiff did not sustain injuries that would prevent him from normal, daily activities for 90 days during the 180 days immediately following the accident (*id.* at 10). Penske Defendants assert that plaintiff stated he only missed a week and a half of work immediately following the collision (*id.*). Additionally, Penske Defendants argue that plaintiff stated he stopped receiving physical therapy for injuries from the accident on April 15, 2019 (*id.*). Lastly, Penske Defendants assert that plaintiff's subsequent car accident on January 4, 2020, caused his injuries (*id.* at 11). This accident was a head on collision that injured plaintiff's neck and back, and plaintiff received physical therapy for five months for this accident (*id.* at 11). Plaintiff commenced a lawsuit for the 2020 collision that was subsequently settled (*id.*). Penske Defendants' reply reasserts the same arguments (NYSCEF Doc No. 60, Penske Defendants' attorney reply affirmation).

Motion Sequence 002 – Motion for Summary Judgment by Defendants Turner and Bishop

Defendants Turner and Bishop incorporate by reference the same factual statements, legal arguments, independent medical examination, and exhibits from Penske Defendants (NYSCEF Doc No. 37, defendant Turner and Bishop's attorney affirmation at 2). As such, they argue, *inter*

alia, that plaintiff has not sustained a serious injury from the October 5, 2018, car accident (*id.* at 7-11). Turner and Bishop assert that plaintiff did not have an injury that prevented him from substantially performing normal, daily activities for not less than 90 days during the 180 days immediately following the collision (*id.* at 7, 11). Additionally, defendant Turner and Bishop argue that plaintiff did not sustain a permanent injury from the collision (*id.* at 10-11). Defendant Turner and Bishop point to Dr. Bazos's report that found that plaintiff did not sustain serious injuries from the 2018 car accident (*id.*).

Plaintiff's Opposition to the Summary Judgment Motions

Plaintiff argues that there are factual issues precluding summary judgment (NYSCEF Doc No. 53, plaintiff's affirmation in opp). Plaintiff asserts that he received medical treatment for 15 months after the 2018 collision, demonstrating he suffered serious injury (*id.* at 2). Plaintiff also argues, *inter alia*, that Dr. Bazos's report admits that plaintiff suffered from impairments before the January 4, 2020, car accident (*id.* at 3-4). Plaintiff contends that Dr. Bazos's findings creates a triable issue of fact under the "significant limitation" category under Insurance Law 5102 (d) (*id.* at 4). Plaintiff further argues that Dr. Bazos's report attempts to impose plaintiff's range of motion evaluations from the 2018 accident onto the 2020 collision, thus creating other triable issues of fact (*id.* at 5). Additionally, plaintiff asserts that Dr. Bazos failed to take range of motion measurements for side bending or lumbar rotation and shoulder adduction or extension, which also creates triable issues of fact (*id.* at 5, 6). Plaintiff also asserts, as it relates to the permanent and consequential use category under Insurance Law 5102 (d), that Dr. Bazos's report does not explain how plaintiff's range of motion deficits could be solely attributed to the 2020 collision when plaintiff had similar issues before that accident (*id.* at 6). Plaintiff incorporates by reference the above arguments in addressing defendant Turner's motion (NYSCEF Doc No. 57, plaintiff's affirmation in opp).

Analysis

Insurance Law 5102 (d) defines "serious injury" as:

> Personal injury which results in . . . 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.

Under the "permanent loss of use category," the plaintiff must demonstrate a total loss of use of the body organ, member, function, or system (*Oberly v Bangs Ambulance*, 96 NY2d 295, 298 [2001]). Having some or a limited range of motion is not a total loss of use (*Gjoleka v Caban*, 188 AD3d 458, 458 [1st Dept 2020]).

Under the "permanent consequential limitation" or "significant limitation" categories, "[w]hether a limitation of use or function is 'significant' or 'consequential' . . . relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure*, 98 NY2d at 353 [internal quotation marks and citation omitted]). Thus, an expert's qualitative assessment of a plaintiff's condition may be sufficient "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.* at 350). However, if the evaluation specifies degrees of plaintiff's range of motion but fails to compare those findings to a normal range of motion, then a *prima facie* showing of serious injury is not made (*Bray v Rosas*, 29 AD3d 422, 423 [1st Dept 2006]). Moreover, a significant limitation does not need to be permanent to constitute a serious injury (*Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]). A minor or slight limitation is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 236 [1982]).

Under the "90/180 day" category, objective medical evidence in admissible form must be presented showing that the injury caused the alleged limitations in daily activity for not less than 90 days during the 180 days immediately following the occurrence of the injury (*Jean-Louis v Gueye*, 94 AD3d 504, 505 [1st Dept 2012]). Additionally, the limitation of a plaintiff's daily activities must be more than a slight curtailment (*Licari*, 57 NY2d at 236).

The Penske Defendants and Turner and Bishop have met their *prima facie* burden. Dr. Bazos's medical report found that plaintiff had normal ranges of motion as compared to the AMA's guidelines. Plaintiff stated at his deposition that the 2018 accident did not prevent him from physical activities and he only missed a week and a half of work from the accident. Additionally, plaintiff has not lost a complete or total use of the body organ, member, function, or system. The burden now shifts to plaintiff to show a serious injury.

Plaintiff fails to raise a triable issue of fact. Plaintiff points to Dr. Bazos's report noting plaintiff's medical history showing that plaintiff had spasms, tenderness, and diminished ranges of motion, and noted that physical therapy sessions did not show remarkable improvements for plaintiff. However, plaintiff's examinations were in late 2018 and early 2019. Plaintiff has not had a recent medical examination since that time. Further, plaintiff also stated that he only missed a week and a half of work due to the 2018 accident. Thus, plaintiff has not raised a triable issue of fact under the "permanent consequential," "significant limitation," or "90/180 day" serious injury categories.

WHEREFORE, it is hereby:

ORDERED that the motions of defendants Antonio Triscari and Penske Truck Rental (Motion Sequence Number 001) and the motion of defendants Lakeisha Turner and Daniel Bishop (Motion Sequence Number 002) for summary judgment in their favor and dismissal of the complaint against them are granted and the Complaint and any cross-claims against them are dismissed in their entirety and the Clerk is directed to enter judgment accordingly in their favor; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

2/28/2025
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE