Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. NICOLE McGREGOR MUNDY** IA PART 7
Acting Justice

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GENEROSO VARGAS,

Plaintiff(s),

-against-

NY TRUCKING CO, INC. "JOHN DOE", the name "JOHN DOE" being fictitious and intended to designate the person operating the automobile of said NY TRUCKING CO. INC. at the time and place herein alleged

Defendant(s).

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Index No.:711013/2020

Motion Date: October 1, 2024

Motion Seq. No.: 009

The following numbered papers read on this motion by the defendant NY Trucking Co, Inc. (defendant) for an order granting summary judgment dismissing the Complaint on the ground that the plaintiff Generoso Vargas (plaintiff) did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

	PAPERS NUMBERED
Notice of Motion – Affidavits – Exhibits.....	EF 33–EF50
Answering Affidavits – Exhibits.....	EF 55–EF 65

Upon the foregoing papers it is ordered that the motion is determined as follows:

The plaintiff commenced this action for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on August 25, 2014. The accident occurred on a bridge off of the Fordham Road exit of the Major Deegan Expressway, Bronx County. The plaintiff alleges injuries to his right shoulder, right knee, thoracic spine, cervical spine, and lumbar spine. The defendant avers that the plaintiff has not suffered a "serious injury" as defined in Insurance Law § 5102 (d), and as such, seeks dismissal of the plaintiff's Complaint.

Under the Insurance Law § 5102 (d), a "serious injury" is defined as one which results in, among others, (1) permanent loss of use of a body organ, member, function or system, (2) permanent consequential limitation of use of a body organ or member, (3) significant limitation of use of a body function or system or a medically determined injury, or (4) 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 (*see Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 298-299 [2001]).

Whether a plaintiff has sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) is initially a question of law for the court (*see Licari v Elliott*, 57 NY2d 230, 235-237 [1982]). The defendant has the burden of establishing prima facie that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). " '[A] defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim' " (*Nunez v Teel*, 162 AD3d 1058, 1059 [2d Dept 2018], quoting *Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 431 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 519 [2d Dept 1994]). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*id.* at 84; *see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of its motion, the defendant submits, among other things, the pleadings, the plaintiff's deposition transcript, an expert affidavit from engineer Dr. Joseph C. McGowan, independent orthopedic examination reports from Dr. Daniel S. Rich and Dr. Andrew Casden, and medical records[1] from Columbus Imaging Center.

The affirmed medical reports of Dr. Rich and Dr. Casden have established, prima facie, that the alleged injuries to the plaintiff's right knee, right shoulder, cervical spine, and lumbar spine did not constitute serious injuries under the permanent consequential limitation of use or significant limitation of use categories of Insurance Law §5102 (d). In their affirmations, Dr. Rich and Dr. Casden reported normal ranges of motion of plaintiff's right knee, right shoulder, cervical spine, and lumbar spine in all directions, which was supported by objective testing and compared to normal function (*see Ramirez v L-T. & L. Enter., Inc.*, 189 AD3d 1636, 1638 [2d Dept 2020]). Both Dr. Rich and Dr. Casden further concluded that the plaintiff had no objective evidence of continued disability (*see Bykova v Sisters Trans, Inc.*, 99 AD3d 654 [2d Dept 2012]). Additionally, Dr. Rich and Dr. Casden each indicated that a review of the MRI films of the plaintiff's right knee, right shoulder, cervical spine, and lumbar spine exhibited pre-existing degenerative changes that were unrelated to the subject accident (*see Amirova v JND Trans, Inc.*, 206 AD3d 601 [2d Dept 2022]). Based upon the review of Dr. Rich's and Dr. Casden's reports,

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[1] " '(A) physician's office records, supported by the statutory foundations set forth in CPLR 4518 (a), are admissible in evidence as business records' " (*Bronstein-Becher v Becher*, 25 AD3d 796, 797 [2d Dept 2006], quoting *Wilson v Bodian*, 130 AD2d 221, 231 [2d Dept 1987]). "However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion or expert proof" (*Bronstein-Becher*, 25 AD3d at 797). As such, any unaffirmed and uncertified reports and/or medical records are disregarded (*see Nicholson v Kwarteng*, 180 AD3d 695, 696 [2d Dept 2020]; *Irizarry v Lindor*, 110 AD3d 846, 847 [2d Dept 2013]; *Cebron v Tuncoglu*, 109 AD3d 631, 633 [2d Dept 2013]; *Dixon v Fuller*, 79 AD3d 1094, 1095 [2d Dept 2010] [portions of plaintiff's expert's "affirmation had to be disregarded because they recited unsworn findings of other doctors"]).

the Court finds that the defendant has established its prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

The defendant also made a prima facie showing that the plaintiff did not sustain a "serious injury" under the 90/180-day category by submitting the plaintiff's deposition testimony and Bill of Particulars, which demonstrated that plaintiff was not prevented from performing substantially all of his usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident (*see Frisch v Harris*, 101 AD3d 941, 942 [2d Dept 2012], citing *Beltran v Powow Limo, Inc.*, 98 AD3d 1070, 1071 [2d Dept 2012]).

Furthermore, Dr. McGowan conducted a biomechanical analysis of the accident, reviewing the plaintiff's records, depositions, and both vehicles involved to assess whether the accident caused or worsened the injuries documented in the plaintiff's medical records. He concluded that the highest force the plaintiff experienced was 1.5g and that the compressive forces on his spine were lower than those from routine activities such as bending over, doing laundry, taking out the trash, or grocery shopping. Dr. McGowan found no mechanism by which the accident could have caused the plaintiff's injuries or exacerbated his pre-existing conditions beyond normal daily activities.

The burden now shifts to the plaintiff to establish the existence of a triable issue of fact that she sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see McNeil v New York City Tr. Auth.*, 60 AD3d 1018, 1019 [2d Dept 2009]). In opposition, the plaintiff submits, among other things, an affidavit from Dr. Michael Dauria, a chiropractor, an affirmation from Dr. Ross Nochimson who specializes in interventional pain and regenerative medicine, an affirmation from Dr. Gerling, an orthopedic, an expert affidavit from bioengineer Dr. Paul C. Ivancic, and medical records[2] from New York Heights Medical P.C., and Columbus Imaging Center.

The plaintiff raised a triable issue of fact that she sustained a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see McNeil v New York City Tr. Auth.*, 60 AD3d 1018 [2d Dept 2009]). In their separate affirmations, the plaintiff's physicians incorporated by reference various medical reports and concluded through objective testing conducted during contemporaneous and recent examinations of the plaintiff, that he suffered from limitations in the ranges of motion of his right shoulder, right knee, thoracic spine, cervical spine, and lumbar spine which were specifically quantified and compared to normal function. Additionally, Dr. Gerling addressed defendant's expert's findings of degenerative condition by stating in his affirmation that the plaintiff's injuries were causally related to the subject accident (*id.* at 1019).

Additionally, Dr. Ivancic addressed Dr. McGowan's findings by affirming that the accident caused the plaintiff's injuries or exacerbated his pre-existing conditions beyond normal daily activities. He stated, among other things, that the high lateral impact to the rear right of the plaintiff's vehicle was consistent with a side impact sufficient to cause lateral and rotational

[2] Any unaffirmed and uncertified reports and/or medical records are disregarded because they recited unsworn findings of other doctors (*see Nicholson*, 180 AD3d at 696; *Irizarry*, 110 AD3d at 847; *Cebron*, 109 AD3d at 633; *Dixon*, 79 AD3d at 1095).

motion. At 60 years old, the plaintiff faced a higher risk of injury due to slower muscle response time, decreased muscle strength and range of motion, and age-related degenerative changes. These factors made him more susceptible to traumatic injuries, leading Dr. Ivancic to conclude that the accident caused the plaintiff's injuries.

Accordingly, the defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102(d) is denied.

Dated: February 14, 2025

NICOLE MCGREGOR MUNDY
A.S.C.J.