Lopez v Davis
2012 NY Slip Op 30451(U)
February 9, 2012
Sup Ct, Nassau County
Docket Number: 10295/10
Judge: Denise L. Sher
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARIANO LOPEZ and HIMILICE LOPEZ,

Plaintiffs,

- against -

RONNELL R. DAVIS and ELRAC, INC.,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 10295/10
Motion Seq. No.: 01
Motion Date: 01/06/12

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

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

Defendants move, pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York, for an order granting them summary judgment on the ground that plaintiffs did not suffer a "serious injury" in the subject accident as defined by New York State Insurance Law § 5102(d); and move for an order dismissing the action as against defendant ELRAC, Inc. ("ELRAC") pursuant to the Graves Amendment, as there is no vicarious liability for leasing or rental car companies under New York Vehicle and Traffic Law § 388. Plaintiffs oppose the motion.

The above entitled action stems from personal injuries allegedly sustained by plaintiffs as

[* 2]

a result of a pedestrian knockdown/automobile accident with defendants which occurred on March 12, 2010, at approximately 9:15 a.m., on Albany Avenue, Amityville, County of Suffolk, State of New York. At the time of the accident, plaintiff Mariano Lopez was a pedestrian and defendant Ronnell R. Davis ("Davis") was the operator of a 2009 Dodge Charger that was owned by rental company, defendant ELRAC. Defendant Davis' girlfriend, Natasha Barnwell, had rented the vehicle from defendant ELRAC. *See* Defendants' Affirmation in Support Exhibit M.

Plaintiffs allege that at the time of the accident, plaintiff Mariano Lopez, a school security guard, was struck by the front of defendants' automobile when it was in the driveway in front of the school where plaintiff Mariano Lopez was working. It is alleged that defendants' vehicle entered the school driveway to drop off a child and was unable to back out of said one-way driveway due to a school bus pulling behind it. Plaintiffs contend that, when defendants' vehicle was moving forward after being blocked by the school bus, it struck plaintiff Mariano Lopez in the area of his right knee, causing him to fall onto the hood of defendants' vehicle. Defendant Davis argues that his vehicle never struck plaintiff Mariano Lopez and that the only contact between plaintiff Mariano Lopez and defendants' vehicle was when plaintiff Mariano Lopez placed his hands on said vehicle to prevent defendant Davis from moving the vehicle any further.

As a result of the collision, plaintiff Mariano Lopez claims that he sustained the following injuries:

Lumbar radiculopathy;

Cervical radiculopathy;

MRI of the lumbosacral spine reveals subligamentous posterior disc herniations at L4/L5 and at L5/S1 impinging on the anterior aspect of the spinal canal and on the neural foramina bilaterally;

[* 3]

Right hip sprain;

Right knee medial meniscus tear;

Surgical recommendation for right knee arthroscopy;

Lumbar spine lumbago;

Lumbar spine HNP;

EMG/NCV testing to the lower extremities revealed right S1 radiculopathy;

MRI of the right knee revealed: synovial effusion knee joint, lateral patellar tilt and lateral patellar subluxation with patellofemoral chondromalacia spurring and narrowing lateral patellofemoral joint compartment, medial femorotibial joint compartment narrowing with chondromalacia, strain medical collateral ligament and motion artifact noted.

Knee Chondromalacia;

Knee internal derangement;

Right joint effusion. *See* Defendants' Affirmation in Support Exhibit E.

Plaintiffs commenced this action by service of a Summons and Verified Complaint on or about May 20, 2010. *See* Defendants' Affirmation in Support Exhibit A. Issue was joined by defendant ELRAC on or about September 8, 2010. *See* Defendants' Affirmation in Support Exhibit B. Plaintiffs served a Supplemental Summons with Amended Verified Complaint on or about August 17, 2010. *See* Defendants' Affirmation in Support Exhibit C. Issue was joined by defendants Davis and ELRAC on or about September 9, 2010. *See* Defendants' Affirmation in Support Exhibit D.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-*

[* 4]

Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S. 2d 793 (1988). Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law § 5102(d). *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Upon such a showing, it becomes incumbent upon the non-moving party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury." *See Licari v. Elliott*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982).

In support of a claim that the plaintiff has not sustained a serious injury, the defendant may rely either on the sworn statements of the defendant's examining physicians or the unsworn reports of the plaintiff's examining physicians. *See Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept. 1992). However, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 (2002) stated that a plaintiff's proof of injury must be supported by objective medical evidence, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both sides rely on those reports. *See Gonzalez v. Vasquez*, 301 A.D.2d 438, 754 N.Y.S.2d 7 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an

[* 6]

intervening medical problem or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005).

Plaintiffs claim that, as a consequence of the above described automobile accident with defendants, plaintiff Mariano Lopez has sustained serious injuries as defined in New York State Insurance Law § 5102(d) and which fall within the following statutory categories of injuries:

1) permanent loss of a body organ, member, function or system; (Category 6)

2) a permanent consequential limitation of use of a body organ or member; (Category 7)

3) a significant limitation of use of a body function or system; (Category 8)

4) 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.(Category 9).

See Defendants' Affirmation in Support Exhibit E.

For a permanent loss of a body organ, member, function or system to qualify as a "serious injury" within the meaning of No-Fault Law, the loss must be total. *See Oberly v. Bangs Ambulance, Inc.*, 96 N.Y.2d 295, 727 N.Y.S.2d 378 (2001); *Amata v. Fast Repair Incorporated*, 42 A.D.3d 477, 840 N.Y.S.2d 394 (2d Dept. 2007).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *See Gaddy v. Eyler,* 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992); *Licari v. Elliot*, 57 N.Y.2d 230, 455 N.Y.S.2d 570 (1982). A minor, mild or slight limitation will be deemed

insignificant within the meaning of the statute. *See Licari v. Elliot, supra.* A claim raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *See Toure v. Avis Rent-a-Car Systems, supra.* In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose and use of the affected body organ, member, function or system. S*ee id.*

Finally, to prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102(d)) "which would have caused the alleged limitations on the plaintiff's daily activities." *See Monk v. Dupuis*, 287 A.D.2d 187, 734 N.Y.S.2d 684 (3d Dept. 2001). A curtailment of the plaintiff's usual activities must be "to a great extent rather than some slight curtailment." *See Licari v. Elliott, supra* at 236. Under this category specifically, a gap or cessation in treatment is irrelevant in determining whether the plaintiff qualifies. *See Gomez v. Ford Motor Credit Co.,* 10 Misc.3d 900, 810 N.Y.S.2d 838 (Sup. Ct., Bronx County, 2005).

With these guidelines in mind, the Court will now turn to the merits of defendants' motion. In support of their motion, defendants submit the pleadings, plaintiffs' Verified Bill of Particulars and Supplemental Verified Bill of Particulars, the transcript of plaintiff Mariano

[* 8]

Lopez's Examination Before Trial ("EBT") testimony, the transcript of plaintiff Himilice Lopez's EBT testimony, the transcript of defendant Davis' EBT testimony, the transcript of non-party witness Kim Hargwood's EBT testimony, the affirmed report of Leon Sultan, M.D., who performed an independent orthopedic examination of plaintiff on June 2, 2011, the rental car agreement entered into by Natasha Barnwell, the Police Accident Report and the Affidavit of Daniel Madden, a risk manager for defendant ELRAC.

When moving for dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury. *See Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). Within the scope of the movant's burden, defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part. *See Gastaldi v. Chen*, 56 A.D.3d 420, 866 N.Y.S.2d 750 (2d Dept. 2008); *Malave v. Basikov*, 45 A.D.3d 539, 845 N.Y.S.2d 415 (2d Dept. 2007); *Nociforo v. Penna*, 42 A.D.3d 514, 840 N.Y.S.2d 396 (2d Dept. 2007); *Meiheng Qu v. Doshna*, 12 A.D.3d 578, 785 N.Y.S.2d 112 (2d Dept. 2004); *Browdame v. Candura*, 25 A.D.3d 747, 807 N.Y.S.2d 658 (2d Dept. 2006); *Mondi v. Keahan*, 32 A.D.3d 506, 820 N.Y.S.2d 625 (2d Dept. 2006).

Dr. Leon Sultan, a board certified orthopedist, reviewed plaintiff Mariano Lopez's medical records and conducted an examination of him on June 2, 2011. *See* Defendants' Affirmation in Support Exhibit J. Dr. Sultan examined plaintiff Mariano Lopez and performed quantified and comparative range of motion tests on his cervical spine, thoracolumbar spine, right hip and right knee. The range of motion testing was conducted by way of a goniometer and the results of the tests indicated no deviations from normal. Dr. Sultan's diagnosis was "[t]oday's

orthopedic examination in regard to this gentleman's cervical spine, thoracolumbar spine, right hip and right knee reveals him to be orthopedically stable and neurologically intact. Today's examination does not confirm any ongoing causally related orthopedic or neurological impairment in regard to the occurrence of 3/12/10. From a clinical point of view, there is no correlation between today's examination and the above-described MRI readings."

Defendants argue that plaintiffs' Bill of Particulars, dated September 14, 2010, alleges that plaintiff Mariano Lopez suffered a medial meniscus tear, but the Supplemental Bill of Particulars, dated August 19, 2011, only alleges chondromalacia. Defendants contend that plaintiff Mariano Lopez had a right knee MRI on July 13, 2010, which found no proof of any tears, but contained the diagnosis of chondromalacia and joint effusion. Defendants further argue that plaintiff Mariano Lopez has not had any diagnostic testing which found any meniscus tear. Defendants submit that, on the date of the accident, plaintiff Mariano Lopez went to the Emergency Room at New Island Hospital, had x-rays done of the femur and was found to have mild degenerative disease in his right hip.

With respect to plaintiff's 90/180 claim, defendants rely on plaintiff's testimony at his EBT, which indicated that, as a result of the subject accident, he missed one day of work and that he was not confined to bed or home for more than three days. Defendants submit that the subject accident occurred on a Friday and that plaintiff Mariano Lopez only missed work on the following Monday. When plaintiff Mariano Lopez returned to work, he returned to his usual duties as a security guard at the school. Defendants contend that, other than less marital relations and the inability to play baseball with his grandchildren, plaintiff Mariano Lopez has not been unable to engage in his usual activities. Defendants argue that "[r]eduction in relations and inability to play baseball does not give rise to satisfaction of the requirement to be unable to

[* 10]

engage in material acts which constituted his usual and customary daily activities for more than 90 (*sic*) during the 180 days immediately following the occurrence."

Defendants further argue that "[t]here have been no specific findings as to the frequency, the severity, or the duration of the pain in the right knee, back or neck areas of the plaintiff or whether those pains were associated with and/or occasioned by muscle spasms or limitation of motion of the spine. Accordingly, any alleged pains are subjective and are not supported by credible medical foundation."

With respect to defendants' "Graves Argument," defendants submit that "[c]onceding for the purposes of this motion that defendant, ELRAC, Inc. was the actual vehicle owner as alleged in the complaint, the plaintiff's Complaint as against defendant, ELRAC, Inc., must be dismissed as against it. Specifically, pursuant to federal law Transportation Equity Act of 2005, Section 14, as embodied in Federal statute as 49 United States Code, chapter 301, Subchapter 1, Section 30106 entitled 'Rented or leased motor vehicle safety and responsibility', New York Vehicle & Traffic Law Section 388 does not apply hereto....Clearly the federal law, otherwise known as the Graves Amendment, pre-empts (*sic*) New York Vehicle & Traffic Law § 388....Under the Transportation Equity Act of 2005, 49 U.S.C. section 30106, there can be no vicarious liability as against defendant, ELRAC, Inc., a non-actively negligent owner of the rented/leased vehicle over which it had no control at the time of the accident. There is no liability upon a leasing/rental company vehicle owner for the alleged negligent acts of a renter/lessee."

Based upon this evidence, the Court finds that defendants have established a *prima facie* case that plaintiff Mariano Lopez did not sustain serious injuries within the meaning of New York State Insurance Law § 5102(d).

The burden now shifts to plaintiffs to come forward with evidence to overcome

defendants' submissions by demonstrating the existence of a triable issue of fact that serious injuries were sustained. *See Pommells v. Perez,* 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005); *Grossman v. Wright*, 268 A.D.2d 79, 707 N.Y.S.2d 233 (2d Dept. 2000).

To support their burden, plaintiffs submit the affirmed report of Richard Rizzuti, M.D., of All County Open MRI & Diagnostic Radiology, who performed an MRI of plaintiff Mariano Lopez's lumbosacral spine on May 8, 2010, the affirmed report of Robert Diamond, M.D., of Stand-Up MRI of Carle Place, who performed an MRI of plaintiff Mariano Lopez's right knee on July 14, 2010, the unaffirmed medical narrative reports of Richard Parker, M.D., of South Nassau Orthopedic Surgery & Sports Medicine, P.C., dated March 18, 2010, April 15, 2010, May 12, 2010 and September 13, 2010, the affirmed medical narrative reports of Richard Parker, M.D., of South Nassau Orthopedic Surgery & Sports Medicine, P.C., dated July 18, 2011 and December 13, 2011, the unaffirmed operative report of Jacob Rauchwerger, M.D., of South Nassau Communities Hospital, dated August 5, 2011, the affirmed medical narrative report of Walter E. Mendoza, D.C., dated January 16, 2010 (with plaintiff Mariano Lopez's EMG report dated May 15, 2010) and the unsigned report of Nidia R. Currero, M.D., dated July 22, 2010.

Plaintiffs argue that "the concomitant effects of all Plaintiff's aforementioned injuries [as detailed in the Verified Bill of Particulars and Supplemental Verified Bill of Particulars] and it sequelae will be permanent in nature, and that the aforementioned injuries were caused, aggravated, exacerbated and/or precipitated by the aforementioned accident, together with their natural flowing sequelae, are permanent and progressive in nature, and/or effects."

Plaintiffs submit the report of Dr. Richard Rizzuti, of All County Open MRI & Diagnostic Radiology, under whose auspices administered and supervised the administration and examination of the MRI of plaintiff Mariano Lopez's lumbosacral spine performed on May 8,

2010. *See* Plaintiffs' Affirmation in Opposition Exhibit 1. With respect to the MRI of the lumbosacral spine, the impression was, "[s]ubligamenious posterior disc herniations at L4-5 and at L5-S1 impinging on the anterior aspect of the spinal canal and on the neural foramina bilaterally." *See id.*

Plaintiffs also submit the report of Dr. Robert Diamond, of Stand-Up MRI of Carle Place, under whose auspices administered and supervised the administration and examination of the MRI of plaintiff Mariano Lopez's right knee on July 14, 2010. *See* Plaintiffs' Affirmation in Opposition Exhibit 2. With respect to the MRI of the right knee, the impression was, "[s]ynovial effusion knee joint. Lateral patellar tilt and lateral patellar subluxation with patellofemoral chondromalacia spurring and narrowing lateral patellofemoral joint compartment. Medial femorotibial joint compartment narrowing with chondromalacia. Strain medical collateral ligament. Motion artifact noted." *See id.*

As previously stated, unlike the movant's proof, unsworn reports of the plaintiff's examining doctors or chiropractors are not sufficient to defeat a motion for summary judgment. *See Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991). Therefore, the unsworn medical narrative reports of Richard Parker, M.D., of South Nassau Orthopedic Surgery & Sports Medicine, P.C., dated March 18, 2010, April 15, 2010, May 12, 2010 and September 13, 2010 are not sufficient to defeat defendants' instant motion. *See* Plaintiffs' Affirmation in Opposition Exhibit 3. Additionally, the unaffirmed operative report of Jacob Rauchwerger, M.D., of South Nassau Communities Hospital and the unsigned report of Nidia R. Currero, M.D., dated July 22, 2010 are not sufficient to defeat defendants' instant motion. *See* Plaintiffs' Affirmation in Opposition Exhibits 4 and 6.

However, the July 18, 2011 and December 13, 2011 medical narrative reports of Richard

Parker, M.D., of South Nassau Orthopedic Surgery & Sports Medicine, P.C., were affirmed. *See* Plaintiffs' Affirmation in Opposition Exhibit 3.

Dr. Parker's July 18, 2011 report indicates that plaintiff Mariano Lopez was seen that date in follow-up for injuries sustained as a result of a work related accident, which occurred on 3/12/2010. On said date, range of motion tests performed on plaintiff Mariano Lopez's lumbar spine indicated deviations from normal. Examination of plaintiff Mariano Lopez's right knee revealed "patient has pain and tenderness over the medial joint line." Dr. Parker's assessment was "[l]umbar Spine Lumbago. Lumbar Spine Right Side Herniated Nucleus Pulposus. Right Knee Chondromalacia." Dr. Parker stated "[d]ue to the subjective and objective findings, the patient is recommended physical therapy at a frequency of two time per week for six to eight weeks for exercise, ultrasound, electrical stimulation and massage therapy. The goal is to increase flexibility and decrease pain and increase motion. Assuming the history to be correct as provided by the patient, it is my orthopedic opinion that the aforementioned occurrence is the competent producing cause of the injury and disability sustained by this patient." *See id.*

Dr. Parker's December 13, 2011 report indicates that plaintiff Mariano Lopez first presented to his office on March 18, 2010 for evaluation of right hip pain and right knee pain. Plaintiff Mariano Lopez advised Dr. Parker that he was a pedestrian who was struck by a car during the working hours on 3/12/10. On said date, range of motion tests, conducted by way of a goniometer and performed on plaintiff Mariano Lopez's lumbar spine, indicated deviations from normal. Examination of plaintiff Mariano Lopez's right knee revealed pain and tenderness. Dr. Parker's assessment was "[r]ight Knee Sprain. Herniated Nucleus Pulposus Lumbar Spine. Lumbar Radiculopathy Right. Sciatica Right." Dr. Parker further stated, "[t]he patient has a Scheduled Loss of Use of the Right knee of 15%. Right Hip is not amenable to a Schedule of

Loss of Use since the pain is coming from the back. The patient has Right Sciatica....Patient responded to epidural steroid injection; patient needs another epidural steroid injection. Patient has pain in the lumbar spine with radiation into the right lower extremity. There are paresthesias in the right lower extremity." Dr. Parker concluded, "[a]ssuming the history to be correct as provided by the patient, it is my orthopedic opinion that the aforementioned occurrence is the competent producing cause of the injury and disability sustained by this patient." *See id.*

The affirmed medical narrative report of Walter E. Mendoza, D.C., dated January 16, 2010 indicates that plaintiff Mariano Lopez first presented to his office on March 12, 2010 and returned for re-examinations seven separate times between April 26, 2010 and August 10, 2011. *See* Plaintiff's Affirmation in Support Exhibit 5. At all of the visits, quantified and computerized range of motion tests performed on plaintiff Mariano Lopez's lumbosacral spine indicated deviations from normal. Additionally, at all of the visits, tests performed on plaintiff Mariano Lopez's right knee revealed pain. Dr. Mendoza concluded his reports stating, "[t]he patient remains partially disabled she (*sic*) can no longer perform all duties, including lifting, bending, climbing or kneeling. His concluding symptoms and disability are consistent with those of my experience as well as the chiropractic, medical and automotive literature. Mr. Lopez has permanent ratable factors of disability that will affect his home and work activity. It is reasonably certain that he will have future pain and disability solely from the residual musculoskeletal dysfunction he suffered in the motor vehicle accident of 3/12/2010. Based on the evaluation of Ms. (*sic*) Lopez history, subjective complaints and objective findings, it is evident from a chiropractic/medical standpoint that this type of injury is consistent with the type of motor vehicle accident she (*sic*) experienced on 3/12/2010, and that his above injuries are traumatic in nature and caused by the above dated motor vehicle accident. In my opinion, stated with a

reasonable degree of certainty, the patient sustained limitation of use of a body function or system and has sustained a permanent injury as a result of the accident on 3/12/2010 from this date to present....It is therefore, my opinion to a reasonable degree of chiropractic certainty that a prognosis for a full and complete recovery is most certainly poor. The patient will be left with a permanent partial disability."

With respect to the 90/180 claim, plaintiffs submit that, in his EBT testimony, plaintiff Mariano Lopez stated that his employment duties have become more difficult due to his inability to standing without feeling pain to his right knee. Additionally, plaintiff Mariano Lopez testified that, prior to the subject accident, he would regularly play baseball with his grandchildren, but since the date of accident, and solely as a result of said accident, he has been totally unable to play baseball. Plaintiff Mariano Lopez added that he cannot stand, walk up/down stairs and walk for long periods of time without feeling pain due to the injuries he sustained in the subject accident.

Plaintiffs failed to address defendants' arguments with respect to dismissal of the action against defendant ELRAC based upon the Graves Amendment.

Accordingly, the portion of defendants' motion for an order dismissing the action as against defendant ELRAC, Inc. pursuant to the Graves Amendment as there is no vicarious liability for leasing or rental car companies under New York Vehicle and Traffic Law § 388 is hereby **GRANTED**.

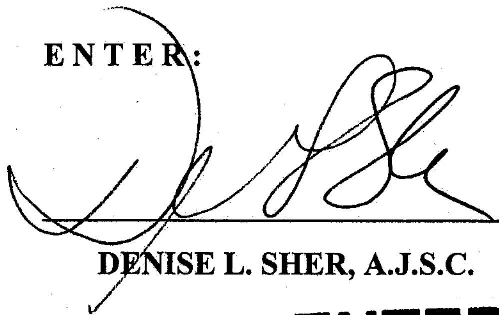
However, with respect to plaintiffs' claims of "serious injury" under the categories of permanent loss of a body organ, member, function or system; (Category 6), a permanent consequential limitation of use of a body organ or member (Category 7), a significant limitation of use of a body function or system (Category 8) and 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 (Category 9), the Court concludes that the acceptable evidentiary documentation presented by plaintiffs clearly raise genuine issues of fact as to injuries causally related to the March 12, 2010 accident. Consequently, the portion of defendants' motion for an order pursuant to CPLR § 3212 and Article 51 of the Insurance Law of the State of New York granting them summary judgment and dismissing plaintiffs' Verified Complaint is hereby **DENIED**.

The remaining parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on February 28, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

E N T E R:



DENISE L. SHER, A.J.S.C.

ENTERED
FEB 15 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
February 9, 2012