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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN M. KENNEY Justice

PART 8

Pedro Malaquias Lopez

- v -

Bernardo S. Espinal and Corosa Auto Corp.,

INDEX NO. 103756/10

MOTION DATE 2/15/12

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 12 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-8
Answering Affidavits — Exhibits	9-11
Replying Affidavits	12

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: May 15, 2012

JOAN M. KENNEY J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

----------X

Pedro Malaquias Lopez,

Plaintiff,

-against-

Bernardo S. Espinal and Berrosa Auto Corp.,

Defendants.

----------X

DECISION AND ORDER
Index Number: 103756/10
Motion Seq. No.: 001

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation and Exhibits, and Memo of Law	1-8
Opposition Affirmation, Memo of Law, and Exhibits	9-11
Reply Affirmation	12

In this personal injury action, defendants, Bernardo Espinal and Berrosa Auto Corp., move for an Order, pursuant to CPLR § 3212, dismissing the complaint.

Factual Background

On October 15, 2009 plaintiff, Pedro Lopez, was in a car accident with defendant, Espinal, who was working for and driving a car owned by defendant Berrosa Auto Corp. (the accident). It is undisputed that immediately following the accident, plaintiff did not seek medical assistance. However, on October 22, 2009 plaintiff sought medical assistance at S&S Medical (S&S), as he began to notice pain in different areas on his body. The doctor at S&S, Dr. Stephen Silverman, states that plaintiff complained of injuries to his head, neck, lower back, left shoulder, and right knee. (Dr. Silverman Report at 1). At plaintiff's examination before trial (EBT), he testified that after X-Rays were taken at S&S, it was recommended that he receive surgery on his knee, but opted not to do so out of fear. (Lopez EBT at 82).

In the exam conducted on October 22, 2009, Dr. Silverman compiled a Range of Motion Report, which found a substantial list of losses of range of motion in plaintiff's cervical spine, lumbar spine, right knee, and left shoulder. (Range of Motion Report, 10/22/09). Dr. Silverman states in the same report that plaintiff's injuries were causally related to the accident. (Range of Motion Report, 10/22/09).

Plaintiff then was examined by Dr. Joseph Gorum on December 8, 2009, and July 15, 2011, who concluded that plaintiff had a reduced range of motion of the right knee, causally related to the accident, and permanent in nature. (Dr. Gorum Affirmation).

Per Dr. Gorum's request, plaintiff followed up with Dr. Paul Ackerman on August 1, 2011. Dr. Ackerman found plaintiff's range of motion to be affected in the right knee, and that based on plaintiff's history, examinations, MRI, and complaints, plaintiff had a torn medial meniscus of the right knee, and needed arthroscopic surgery. (Dr. Ackerman Affirmation). Dr. Ackerman also concluded that plaintiff's injuries were causally related to the accident and permanent in nature. (Dr. Ackerman Affirmation).

Arguments

Defendants contend that plaintiff did not sustain a serious injury, as defined under Insurance Law 5102(d), because his alleged injuries do not qualify as: resulting in death; dismemberment; significant disfigurement; 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 non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days out of 180 days immediately following the accident.

Plaintiff argues that his alleged injuries have resulted in permanent consequential limitation of use of his knee and/or significant limitation of use of his knee, thus proving he did sustain a 5102(d) serious injury; or at the very least, raise a triable issue of fact regarding the serious injury question.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a 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 University Medical Center*, 64 N.Y.2d 851 [1985]; *Torterello v Carlin*, 260 A.D.2d 201 [1st Dept 1999]).

In determining a motion for summary judgment where the issue is whether plaintiff has sustained a serious injury defined by Insurance Law 5102(d), the defendant bears the initial burden to present competent evidence that the plaintiff has no cause of action. (*Rodriguez v. Goldstein*,

182 A.D.2d 396, 582 N.Y.S.2d 395 [1st Dept. 1992]). It then becomes the plaintiff's burden to submit proof, in admissible form, of the existence of triable issues of fact with regard to the existence of a serious injury. (*Franchini v. Palmer*, 1 N.Y.3d 536, 775 N.Y.S.2d 232 [2003]). Additionally, plaintiff must establish, through admissible medical evidence, that the injuries sustained are causally related to the accident claimed. (*Pommells v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 [2005]; *Chatah v. Iglesias*, 5 A.D.3d 160, 772 N.Y.S.2d 522 [1st Dept. 2004]).

Insurance Law 5104(a) states:

> "Notwithstanding any other law, 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, or for basic economic loss."

Insurance Law 5102(d) states:

> "'Serious injury' means 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."

A plaintiff's submission of sworn medical reports of physicians who examined the plaintiff that state a diagnosis of loss of range of motion in the knee, which could require surgery, can establish a prima facie case of serious injury. (see, *Brown v. Achy*, 9 A.D.3d 30, 776 N.Y.S.2d 56 [1st Dept. 2004]; *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 746 N.Y.S.2d 865 [2002]; *DeAngelo v. Fidel Corp. Services, Inc.*, 171 A.D.2d 588, 567 N.Y.S.2d 454 [1st Dept. 1991]).

Plaintiff is basing his serious injury claim on the "permanent/significant limitation of use of a body function or system" party of Insurance Law 5102(d). Plaintiff alleges that his right knee that

was injured in the accident restricts and/or limits him in daily life activities.

Defendants meet the initial burden by presenting sworn medical records stating that the plaintiff did not show any evidence of "residuals or permanency" of any alleged injury from the accident. (Dr. Nason IME). Dr. Nason further states that plaintiff is able to perform daily living activities with no restrictions, and shows no loss of range of motion in his right knee. (Dr. Nason IME). Because of this, defendant contends that plaintiff did not sustain an injury meeting any of the threshold serious injury requirements. Plaintiff, however, has sufficiently rebutted defendants' assertions by submitting affirmations detailing his permanent loss of range of motion in the right knee, causally relating to the accident. Accordingly, a factual dispute exists as to whether plaintiff suffered serious injuries and summary judgment must be denied. It is thereby

ORDERED, that defendants' motion summary judgment motion, is denied, in its entirety; and it is further

ORDERED, that the parties proceed to mediation, forthwith.

Dated: 5-15-12

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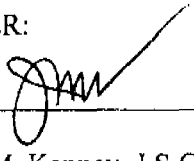

Joan M. Kenney, J.S.C.