NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 27

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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MOREL,ANGEL Index №. **0306571/2009**

-against- Hon..**JULIA RODRIGUEZ** ,

EXECUTIVE PICKUPS INC. Justice.

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The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT DEFENDANT** Noticed on **May 21 2012** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion + ~~cross~~ motion of the defendants to dismiss the complaint based on the plaintiff's alleged failure to sustain a serious injury is granted in part, and denied in part (see attached Order + Decision).

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 5/16/13

Hon. _____
JULIA RODRIGUEZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 29

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ANGEL MOREL and LENNY SANTOS,

DECISION AND ORDER

Plaintiffs, **Index No. 306571/2009**

-against-

EXECUTIVE PICKUPS, WILLY J. RODRIGUEZ. E & a TRANSPORT CORP., and JOSE L. CORDERO,

Defendants.

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Hon. R. E. Torres, J. :

This is a personal injury action, in which the plaintiff Angel Morel (Morel) seeks to recover damages for injuries sustained on April 25, 2009, as a result of a motor vehicle accident in the Bronx. Defendants Executive Pickups Inc. (Executive Pickups) and Willy J. Rodriguez (Rodriguez), move, pursuant to CPLR 3212, for summary judgment dismissing the plaintiff's complaint on the ground that he failed to sustain a prima facie case of "serious injury" as defined in Insurance Law 5102 (d). Subsequently, the co-defendants E & A Transport Corp. (E & A) and Jose L. Cordero (Cordero) also cross-moved, pursuant to the same statute, for summary judgment on the same ground. Plaintiffs oppose the motion and cross motion, contending that material, triable factual issues exist as to whether Morel sustained a "serious injury."

For the reasons that follow, the motion for summary judgment is granted in part, and denied in part. Defendants' motion is granted to the extent that the plaintiff alleges a serious injury based on a "permanent consequential limitation" and a "significant limitation." In all other respects, the defendants' motion is denied.

FACTS

At approximately 4:40 p.m. on April 25, 2009, Morel, a Bronx resident, was driving his car, accompanied by his wife, Lenny Santos, on E. Kingsbridge Road and Morris Avenue. As the plaintiff stopped for a red light, he claims that his car was rear-ended by a 2001 Ford Crown Victoria owned by co-defendant E & A, and operated by co-defendant Cordero. In turn, the Cordero-driven vehicle had been rear-ended by the 2001 Lincoln Town car,

operated by co-defendant Rodriguez, and owned by co-defendant Executive Pickups. Following the accident, Morel was taken by ambulance to St. Barnabas Hospital. He was examined, given pain medication, referred to his primary physician and released. When his right knee, neck, right wrist and back pain persisted, Morel sought medical treatment from various medical service providers, and began an intensive program of physical therapy on April 29, 2009. He went every day of the week. He also saw a chiropractor and an acupuncturist during those sessions. Eventually, Morel underwent arthroscopic surgery.

This action was commenced by the filing and service of a Summons and Complaint, dated August 11, 2000. Issue was joined by service of a Verified Answer and Cross Claim with Demand for Bill of Particulars dated November 16, 2009. Plaintiffs served a Verified Bill of Particulars dated December 15, 2009. Morel alleges that the three-car collision caused serious injuries to him. Section 5102(a) of the New York Insurance Law provides several alternative definitions of a "serious injury," three of which the plaintiff claims are relevant here: (1) a "permanent consequential limitation of use of a body organ or member;" (2) a "significant limitation of a body function or system," and (3) "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 the usual and customary daily activities for not less than 90 days of 180 days immediately following the occurrence of the injury or impairment" (*see also* Sands' affirmation, exhibit C, plaintiff's Verified Bill Of Particulars, at 6, ¶ 20).

DISCUSSION

The damages sought by the plaintiff are exclusively for "non-economic" loss which are defined by New York Insurance Law § 5102(c) as "pain and suffering and similar non-monetary detriment." Accordingly, Section 5104 (a) requires that a plaintiff show that he has suffered "serious injury" before he can recover such non-economic losses. The issue of whether a claimed injury falls within the statutory definition of "serious injury" is a question of law for the courts, which may decide the issue on a motion for summary judgment (*see Perez v Rodriguez*, 25 AD3d 506, 507 [1st Dept 2006]).

On a motion for summary judgment on the "serious injury" threshold, "[i]t is well-settled that the defendant . . . bears the initial burden of establishing the absence of a serious injury as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case [internal citations omitted]" (*McElroy v Sivasubramaniam*, 305 AD2d 944, 945 [3d Dept 2003]; *see also Licari v Elliot*, 57 NY2d 230, 235-237

[1982]). Assuming that the defendant meets this initial burden, the burden then shifts to plaintiff "to demonstrate the existence of a triable issue of fact, through competent medical evidence based on objective findings and diagnostic tests [internal citations omitted]" (*Armstrong v Morris*, 301 AD2d 931, 932 [3d Dept 2003]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 957 [1992]). The New York Court of Appeals said in *Toure v Avis Rent A Car Sys.*:

> "In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's condition also may suffice, 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 [internal citations omitted]."

(*id.*).

Accordingly, subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*see Gaddy v Eyler*, 79 NY2d at 957; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]). An "objective basis" for the expert's assessment may be provided by, for example, competent interpretations of MRI or CT scans (*id.* at 353, 355). However, contemporaneous quantitative measurements of range of motion are not a prerequisite to recovery for "serious injury" under the no-fault statute (*see Perl v Meher*, 18 NY3d 208, 218 [2011]).

Nonetheless, 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 the plaintiff's complaint. Those factors include a gap in treatment, an intervening medical problem, or a preexisting condition, that could interrupt the chain of causation between the accident and the claimed injury (*see Pommells v Perez*, 4 NY3d 566, 572 [2005]).

By way of his Verified Bill of Particulars, Morel claims that as a consequence of the motor vehicle accident with defendants, he sustained serious injuries as defined in New York State Insurance Law 5102 (d). Morel specifically alleges that he suffered a tear of the anterior horn of the medial meniscus of the right knee; medial collateral ligament sprain of the right knee; lateral collateral ligament and retinacular sprains of the right knee; torn meniscus of the right knee; torn medial and menisci of the left knee and synovitis; tear of the posterior

horn of the medial meniscus of the left knee; medial collateral ligament scarring of the left knee; joint effusion of the right and left knees; straightening of the cervical lordosis; osteophyyte disc complex impinging upon the anterior spinal canal at C3-C4, and compression of the ventral secal sac and lateral neural formaina at C5-C6. These injuries required arthroscopic surgical repair, synovectomy, partial medial and vasectomy and injection of the right knee with 0.5% marcanine for postop analgesia and physical therapy. His injuries are allegedly accompanied by severe pain, stiffness, swelling of the knee, degeneration of the soft tissues, weakness and anthropy of the calf as well as limited motion of the right knee.

In order to be a significant limitation, the limitation must be something more than a "minor, mild or slight limitation of use" (*Licari v Elliot*, 57 NY2d at 236). "Whether 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" (*Dufel v Green*, 84 NY2d 795, 798 [1995]). Therefore, a plaintiff's subjective pain, standing alone without some objective indicia, cannot make a significant limitation (*see Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

As in a significant limitation, an alleged permanent limitation must be more than "minor or trivial," but rather "consequential" (*Altman v Gassman*, 202 AD2d 265, 265 [1st Dept 1994]). When a plaintiff claims that he has suffered a "permanent loss of use of a body organ, member, function or system," that plaintiff has to establish that the injury sustained has caused a total loss of use, of the affected body part to establish a serious injury under that category of the insurance law (*see Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 299 [2001] ["[T]o qualify as a serious injury within the meaning of the statute, 'permanent loss of use' must be total"). The mere use of the word "permanent" in a physician's affidavit is insufficient to establish a "serious injury" under this category of serious injury (*see Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]).

If a plaintiff claims serious injury under the 90/180 category of the Insurance law 5102(d), he must initially demonstrate that substantially all his usual activities were curtailed during the requisite time period and then submit competent credible evidence based on the objective medical findings of a "medically determined" injury or impairment which caused the alleged limitations in his daily activities (*see Toure v Avis Rent A Car Sys.*, 98 NY2d at 357).

"[A] defendant can establish that the plaintiffs 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 plaintiffs claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [2d Dept 2000], citing *Turchuk v Town of Wallkill*, 255 AD2d 576, 576 [2d Dept 1998]). In this case, the defendants' motion is based on the affirmed examination report of the defense expert orthopedist, Gregory Montalbano, M.D. (Dr. Montalbano); the deposition testimony of Morel; a copy of the pleadings; and the affirmed report of the defense expert radiologist, David A. Fisher, M.D. (Dr. Fisher).

Dr. Montalbano conducted an independent medical examination of Morel on October 15, 2010, almost one and one-half years after the accident. In connection with his examination, Dr. Montalbano reviewed the plaintiff's Bill of Particulars, police report, St. Barnabas Hospital Emergency Room records, radiological reports and other treatment records. In reviewing the medical records from St. Barnabas, he noted there were no complaints of right knee pain or injury to the knee during his initial evaluation (*see* defendant's motion, exhibit E, Notice of Exchange of Expert Information, Dr. Montalbano's Report, dated December 1, 2010, at at 3). He also noted that no radiographic studies or treatment was prescribed or given for a right knee injury (*id.*). Additionally, the clinical examination revealed a diminished range of motion on lateral bending. Morel was given a diagnosis of musculoskeletal sprain/strain and instructed to follow-up with his primary care physician in one or two days (*id.*).

Thereafter, Morel underwent an outpatient evaluation on April 28, 2009 with complaints of right knee pain, and neck pain and stiffness. On April 28, 2009, a clinical examination reported swelling and tenderness over the medial and lateral collateral ligaments with a diminished range of motion (Dr. Montalbano's Report, dated December 1, 2010, at 3). The diagnosis was knee sprain and the treatment recommended was physical therapy. For Morel's neck pain, he was given a diagnosis of musculoskeletal sprain/strain, with treatment consisting of physical therapy, a cervical collar and a series of MRIs (*id.*). An MRI done on May 6, 2009, showed a tear in the anterior horn of the medial mensicsus, Grade I signal posterior horn as well as in the anterior and posterior horns of the lateral meniscus (*id.*).

On May 29, 2009, Morel underwent another outpatient orthopedic evaluation on May 29, 2009. A clinical examination reported joint line tenderness over both knees, posititive McMurray, mild effusion with a diminished range of motion. He underwent surgical treatment on July 29, 2009.

Upon his own examination of Morel's right knee, Dr. Montalbano found no effusion and pain, with patella compression. With respect to the range of motion, Dr. Montalbano found an extension of "0" degrees; normal is "0" degrees (*see* Dr. Montalbano's Report, dated December 1, 2010, at . During flexion testing, Dr. Montalbano found "0 degrees"; he pointed out that normal is 140 degrees. Although Dr. Montalbano found limitation of range of motion of Morel's right knee on flexion, he also observes that while seated, Morel was able to flex his knee to 90 degrees (*see* Dr. Montalbano's Report, dated December 1, 2010, at 3). Citing to *Santos v Tavaras* (55 AD3d 405 [1st Dept 2008]), defendants' counsel thus argues "[t]he clear inference is that plaintiff's limitation was self-imposed" (affirmation of Sands, at 13, ¶ 19).

Dr. Montalbano further opines that a "complex tear of the meniscus involves tearing in multiple planes and is synonymous with a degenerative type tear patterns and consistent with the chronologic age fo the knee" (*id.* at 4). He adds that grade III chondromalacia "is medical terminology for moderate-advanced osteoarthritis. This is a degenerative condition and is unrelated to [a] traumatic event" (*id.*). Nonetheless, Dr. Montalbano notices that Morel's gait is "slightly antalagic on the right" (*id.* at 2). Dr. Montalbano concludes that Morel did not sustain any substantial or permanent injury to the right knee in the accident.

With respect to the plaintiff's alleged spinal injuries, Dr. Montalbano made findings of normal lordosis, with no spasms or tenderness. While he did make findings of a limited range of motion for Morel's cervical spine during his examination on October 15, 2010, he concludes that x-rays and MRIs performed some 14 days after the accident revealed only degenerative changes (*id.*). He states: "There was no evidence of an acute traumatic injury such as soft tissue swelling or spinal malalignment."

On April 9, 2011, Dr. Fisher examined Morel's cervical spine MRI scan which was taken on May 5, 2009, ten days after the accident. Since an MRI taken shortly after the accident by another radiologist, Dr. David R. Payne, was lost, the only MRI film of plaintiff's cervical spine which was available for Dr. Fisher's review was taken on May 5, 2009 at Socrates Medical Health Center (*see* defendant's motion, exhibit F, Notice of Exchange of Expert Information, Dr. Fisher's Report, dated April 9, 2011, at 1). Dr. Fisher notes that Morel's cervical vertebral bodies were normal in height and alignment (*id.*, exhibit F, Dr. Fisher Report, at 1). He also notes degenerative changes at the C3/4 and C5/6 levels (*id.* at 2). He found no herniations or

bulges, concluding that the MRI scan revealed degenerative changes with no signs of trauma (*id.*).

Morel was deposed on June 16, 2010. He was 54 years old when the subject accident occurred. Morel testified that his car was initially stopped at a red light when he felt an impact from the rear (*see* defendant's motion, exhibit D, Morel Deposition Transcript [Morel Tr.], dated June 16, 2010, at 12, 36-39). When his car was hit, he felt an "explosion" (Morel Tr., at 39). His body was "shaken," but he could not recall whether any parts of his body, including his knees, came into contact with his vehicle (Morel Tr., at 44-45). However, Morel did feel pain in his right hand, neck, back and right knee. Morel further testified that the impact knocked him out for a brief period of time (Morel Tr., at 48). His right knee allegedly ended up "folded, bent" (Morel Tr., at 45-46). He was helped out of his car by a passerby, placed on a stretcher with a neck brace, and taken by ambulance to the Emergency Room at St. Barnabas Hospital, located on East 183rd Street (*id.*, at 48, 51, 55). He was discharged that night, and he was given pain medications (*id.*, at 57-58, 60).

He stated that he stayed in bed for only two to three days. Since his knee and back pain continued, Morel eventually went to S.S. Medical Care, at 961 E. 174th Street (*see* exhibit D, Morel Tr., at 59, 62), at his sister's recommendation (*id.* at 59, 62). There, he complained about pain in his right knee, neck and back (*id.* at 67). He was referred for an MRI scan. He was also treated with physical therapy, pain medications and warm compresses (*id.* at 68-69). Morel was also given a cane to use.

Morel testified that the physical therapy helped alleviate the pain in his right knee and back. S.S. Medical Care also referred him to the Boulevard Surgical Center, where he subsequently underwent arthroscopic surgery on his right knee on July 1, 2009 (*id.*, at 77-78), 67 days after the accident. His surgeon, Dr. Paul Ackerman, reported findings of a "complex tear in the anterior horn of the medial meniscus, a tear in the anterior horn of the lateral meniscus and grade III chondromalcia of the patellofremoral joint" (exhibit E). Following his surgery, plaintiff resumed his physical therapy.

Lastly, Morel testified that, as a result of the accident, he cannot stand for long periods, has difficulty walking and running, cannot lift heavy objects, and cannot play baseball with his children or sit down on the floor. He still has pain in his shoulder and neck, and his knee "gives way," and he does not walk "normally"(Morel Tr., at 74, 78, 85-86). He admitted, however, that there was no lost work time as he was unemployed at the time of the accident.

In opposition, Morel submits the affirmed examination report

of Jeffrey S. Kaplan, M.D. (Dr. Kaplan), a board certified orthopedic surgeon. Dr. Kaplan reviewed all the prior medical records that Dr. Montalbano had reviewed. Dr. Kaplan also examined, and evaluated, Morel on August 21, 2012. On that day, he administered a range of motion, tenderness and muscle strength tests. He looked for objective signs of injury such as swelling, spasm, and anthropy. The examination revealed that "the circumferential measurement of the knee is 39 cm on the right knee, and 38 cm on the left, showing persistent swelling on the right. Circumferential measurement of the calves is 35 cm on the right, and 36 cm on the left, indicating atrophy of the right lower extremity" (*see* plaintiff's affirmation in opposition, exhibit 1, Kaplan Report, at 3).

After conducting valgus stress testing on Morel's right and left knees, Dr. Kaplan opined that "his right knee active and passive flexion was limited to 115 degree. Normal flexion is 140 degrees" (*id.* at 4). There was also pain with valgus stress testing on the right knee (*id.* at 4). Dr. Kaplan further notes that Morel walks with a limp, and appears to favor the right leg. He further found that Morel has crepitus, which, in his opinion, indicates joint irregularity. He concluded that Morel suffered an internal derangement of the right knee including medial meniscus tear, partial lateral meniscus tear, anterior horn and synovitis requiring surgical arthroscopy. Additionally, Dr. Kaplan opines that Morel was unable to perform his normal activities for at least 90 days following the accident because of the surgery, and that the prognosis for the resolution of Morel's symptoms is poor (*id.*). Lastly, he opines, with a reasonable degree of medical certainty, that the need for arthroscopic right knee surgery was causally related to the accident of April 25, 2009 (*id.*).

Here, the defendants failed to meet their initial burden of establishing prima facie that the plaintiff did not sustain serious injury within the meaning of Insurance Law 5102 (d). Both defense experts found limitations in range of motion for the back and right knee. Both defense experts opined that they were due to degenerative changes. The New York Court of Appeals has already held that a defendant's allegations of a pre-existing condition based solely upon the defendant's radiologist's "conclusory notation" of a degenerative condition following review of an MRI and nothing more is "itself insufficient to establish that plaintiff's pain might be chronic and unrelated to the accident" (*Pommells v Perez*, 4 NY3d 566, 577-579 [2005] [comparing another joined case, in which defendants proffered "persuasive" evidence of "preexisting degenerative disc condition" where defendants' expert had " physically examin[ed] plaintiff and review[ed] prior medical records, including MRIs

and x-rays" and plaintiff's own treating physician found degenerative conditions]). Both experts, as well, also observed Morel walking with an unusual gait. Moreover, Dr. Kaplan's opinion that Morel's symptoms were caused by the accident is sufficiently supported by Morel's claim hat he was asymptomatic prior to his accident.

Plaintiff's evidence showed that he began treatment shortly after the accident, and while several months of physical therapy did help him, anthroscopic surgery was required, which revealed mensical tears. In his most recent examination with Dr. Kaplan, the examining physician found at least 15-to-20 degree limitations in active and passive range of motion which offered objective quantitative proof as to the extent of the plaintiff's physical limitations. He also observed an abnormal gait. In addition, plaintiff's expert radiologist linked the torn meniscus to the plaintiff's accident.

This evidence fails to eliminate all material issues of fact. For example, the defendants' evidence is insufficient to show that the plaintiff's alleged injuries are not permanent in nature or insignificant. Therefore, the court concludes that the contrary opinions of the parties' respective experts militates against summary judgment (*Kawasaki v Hertz Corporation*, 199 AD2d 46, 47 [1st Dept 1993]).

"It is well established that conflicting expert opinions may not be resolved on a motion for summary judgment [internal quotation marks omitted]" (*Corbett v County of Onondaga*, 291 AD2d 886, 887 [4th Dept 2000], *quoting Williams v Luciantelli*, 259 AD2d 1003, 1003 [4th Dept 1999]). When, as here, "conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury [internal citation omitted]" (*Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, 307 [1st Dept 2008]). Thus, defendants' motion, to the extent that it seeks dismissal of plaintiff's claims that he suffered either a permanent consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, "must be denied since the court cannot pass on the credibility of witnesses on such a motion" (*Hourigan v McGarry*, 106 AD2d 845, 845 [3d Dept 1984]).

The court, however, is dismissing the 90/180 claim. To begin, "[t]he reports of the defense medical experts, based on examinations of plaintiff conducted . . . years after the subject automobile accident, addressed plaintiff's condition as of the time of the examination, not during the six months immediately after the accident, and were, accordingly, insufficient to sustain defendant[s'] burden of proof to establish prima facie

that plaintiff had not sustained serious injury by reason of having been incapacitated from performing substantially all of his customary and daily activities for 90 of the 180 days following the accident" (*Toussaint v Claudio*, 23 AD3d 268, 268 [1st Dept 2005]; *see also Thompson v Ramnarine*, 40 AD3d 360, 360-361 [1st Dept 2007]).

Additionally, Morel testified, at his disposition, that he was confined to bed for only a few days. Plaintiff's statements that he could not run, play baseball, or stand for very long do not constitute the loss of "substantially all" of plaintiff's usual activities required to make a showing of serious injury under this category (*see Dembele v Cambisaca*, 59 AD3d 352, 352 [1st Dept 2009]). More importantly, the claimed restrictions of his usual and customary activities are unsupported by objective medical evidence (*see Mitchell v Calle*, 90 AD3d 584, 585 [1st Dept 2011]; *Nelson v Distant*, 308 AD2d 338, 340 [1st Dept 2003]).

CONCLUSION

For the reasons set forth above, the court finds that plaintiff has failed to establish a genuine issue of fact as to the third alternative related to the 90/180 claim, but has succeeded as to the first and second alternatives. Accordingly, it is hereby

ORDERED that the defendants' motion for summary judgment to dismiss the complaint is granted only as to the plaintiff's claim of "serious injury" based on the 90/180 category of Insurance Law 5102 (d); and it is further

ORDERED that the defendants' motion is denied in all other respects; and it is further

ORDERED that the plaintiff shall serve a copy of this order with a notice of entry within 30 days; and it is further

ORDERED that upon service of a copy of this order with notice of entry, this action shall be placed on the trial calendar.

Dated: May 16**, 2013**
New York, New York

ENTER:

ROBERT E. TORRES, J.S.C.