SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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TYRONE L. NICHOLAS,

Index No. 157524/2014

Plaintiff,

-against-

CARMEN VAZQUEZ-FUENTES,

Defendant.

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Hon. Paul A. Goetz:

In this negligence action, in which plaintiff Tyrone L. Nicholas (Nicholas) claims that he was seriously injured in an automobile accident, defendant Carmen Vazquez-Fuentes (Vazquez-Fuentes) moves for an order, pursuant to CPLR 3212, granting him summary judgment "on the issue of damages and for any possible claim of economic loss" on the ground that Nicholas has not sustained serious injury, as defined by Insurance Law § 5102 (d), and "as [allegedly] required by Insurance Law § 5104 (a)." Notice of Motion.

Background

On January 17, 2013, Nicholas, then 34 years of age, and wearing a seatbelt, was driving a car in Manhattan when Vazquez-Fuentes, who was driving a car in the opposite lane of traffic, made a U-turn, crossed over the double yellow center line, and struck the rear driver's side of the car Nicholas was driving, causing it to fishtail about 180 degrees. No part of Nicholas's body hit any part of the car's interior. Nicholas tr at 34, 40. He instantly left the car, and, after the police arrived, "within seconds," Nicholas claims that he told them that he was injured and had

immediately felt whiplash and neck and lower back pain. *Id.* at 36, 40, 41; *but see* Vydyula affirmation, exhibit C, Beth Israel Medical Center (BIMC) chart. He allegedly declined an ambulance, and took a cab to his Lower East Side apartment. However, the Police Accident Report has slashes though the section where the officer was to list injured persons.

Late the next afternoon, Nicholas walked into BIMC's emergency department, near his home, and complained of feeling non-radiating lower back pain and right arm numbness/tingling, "since" waking up that morning, but explicitly denied neck pain. Vydyula affirmation, exhibit C, BIMC chart. He informed the staff that he initially felt fine and, therefore, did not seek treatment. BIMC listed Nicholas's insurer as no-fault. His extremity exam revealed no limitation of motion, and his sensation was intact. His neck's range of motion (ROM) was "full."[1] *Id.* BIMC's chart also recites "FROM [presumably, full ROM] of the neck and lumbar spine." *Id.* Nicholas was given a primary diagnosis of a back contusion, and the most likely cause of his pain was listed as muscle spasms caused by strain of back muscles or ligaments supporting his spine, a common injury. He was told to rest for a day or two, that such injury usually healed in a few weeks, and to avoid bending or heavy lifting. BIMC prescribed medication and back exercises, told him to move around to promote healing, referred him to a local orthopedist at Union Square, and discharged him within a couple of hours of his arrival.

Instead of seeing that orthopedist, Nicholas, at a friend's suggestion, went, about a week later, to Brooklyn Premier Orthopedic Group (Premier) in Flatbush, where he was seen by Steven

[1] ROM is the common medical abbreviation for range of motion. Steadman's Medical Dictionary (27th ed 2000) at 2016.

Horowitz, M.D. (Horowitz).[2] Nicholas advised him that he had awoken the day after the accident with lower back pain and, contrary to BIMC's chart, neck pain, and currently had discomfort in his lower back and neck, with pain and stiffness, which radiated to his right upper arm, with tingling and numbness. Nicholas reported no prior relevant injuries. Horowitz found tenderness and myospasm on the cervical and lumbar spines. The notes of that visit recite that the cervical spine's ROM was "somewhat limited" as to flexion and extension, and that, as to the lumbar spine, there was pain with ROM, especially as to "pure extension." Vydyula affirmation, exhibit D. Horowitz administered a cervical injection, prescribed physical therapy (PT), various medications, and MRI studies of the cervical and lumbar spine, and asked Nicholas to return after he had begun PT and had the MRIs. Horowitz concluded, as he did in his notes of Nicholas's future visits, that his injuries, disabilities, and treatment "[we]re directly and causally related to the . . . accident." *Id.* Horowitz electronically signed his notes, affirming their contents.[3]

Nicholas went to Precision Imaging where the two MRI studies were performed and read by radiologist Thomas Kolb, M.D. (Kolb), who sent his reports to Horowitz. At Nicholas's February 2013 visit, Horowitz noted that Kolb's reports found various lumbar and cervical herniations and one cervical disc bulge. Horowitz administered another injection, continued medications, gave Nicholas an appointment, and referred him to Premier's spinal surgeon, Jonathan Lewin, M.D. (Lewin), to evaluate his spinal cord. Lewin saw Nicholas late that month,

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[2] According to New York State's Doctor Profile website, Horowitz practiced in the areas of pain management/physical medicine and rehabilitation.

[3] *See Martin v Portexit Corp.*, 98 AD3d 63, 65-67 (1st Dept 2012) (as to the validity of electronically signed doctors' affirmations).

and noted that he was having PT with pain improvement.[4] Lewin found tenderness and myospasm in the cervical and lumbar spine. The cervical spine's ROM was "limited secondary to pain and stiffness." Vydyula affirmation, exhibit D. As for the lumbar spine, forward flexion was 30°, extension was 10°, lateral bend was 25°, and straight leg raise was negative. Lewin reviewed Kolb's reports, and decided to proceed conservatively, with Horowitz continuing to treat Nicholas with pain medication and injections, and that he should return to Lewin after completion of his epidural injections. Lewin noted that Nicholas would be sent for an EMG (electromyogram) of his upper extremities,[5] evidently to evaluate the claimed radiculopathy.[6]

Nicholas saw Horowitz every month between March and August 2013, during which time he continued Nicholas's PT, performed cervical and lumbar injections, and prescribed medications. His lumbar and cervical spines improved significantly by March 2013, and, by mid-July, 2013, after the cervical epidural, the same was true of his right arm. Nicholas's main complaint at that July visit was of continuing neck pain, especially when he bent his head backward. Horowitz's examination findings continued to be essentially the same as those of his initial examination of Nicholas.

Meanwhile, in March 2013, Lewin saw Nicholas for a second time, found minimal cervical tenderness with myospasm, and an intact cervical ROM, which ROM persisted at all

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[4] The notes from Back to Health PT, P.C., which was located at the same address as Premier, indicate that Nicholas's first evaluation at Back to Health PT, P.C. was on March 23, 2013, and its notes attached to Nicholas's papers begin on that date, but the last page of notes recites that March 23, 2013 was a re-examination. *See* Vydyula affirmation, exhibit D, Back to Health PT, P.C.'s notes. Thus, earlier PT notes appear to be missing.

[5] An electromyogram is a "graphic representation of the electric currents associated with muscle action." Stedman's Medical Dictionary.

[6] Radiculopathy is a "[d]isorder of the spinal nerve roots." *Id.*

future visits to him. As for the lumbar spine, Lewin noted at that visit, and at all subsequent visits, the same ROM findings as he had on the first visit. Lewin wanted Nicholas to have another cervical epidural, and believed, if his symptoms continued, that surgery was indicated. Lewin further noted that Nicholas was to schedule his EMG. In early May 2013, Nicholas returned to Lewin, who noted that Nicholas's one cervical epidural provided 40-50% improvement of his cervical symptoms, that he continued to complain about numbness and tingling in his right arm, but that he still had not had an EMG. Lewin instructed Nicholas to schedule the EMG and have Horowitz administer another cervical epidural, but that, if symptoms persisted, Nicholas would make a good surgical candidate. He was asked to return by mid-June.

Instead, he returned on August 1, 2013, when Lewin noted that Nicholas had minimal complaints of back pain, had responded well to the two lumbar epidurals, and that he denied arm radiculopathy, claiming that it had ceased after the second or third cervical epidural. He still complained of neck pain on extension. Because Nicholas refused surgery, Lewin told him to return as needed, continue with PT, and to follow up with Horowitz. As recited in prior notes, Lewin concluded, somewhat unintelligibly, that Nicholas's "injuries current disability need for treatment of causing directly related to the motor vehicle accident on 1/17/13." Vydyula affirmation exhibit D.

In late August 2013, Nicholas saw Horowitz. Because Nicholas was still complaining of pain when bending his neck back, Horowitz indicated that he was going to refer him back to Lewin. Premier's records fail to reflect that Nicholas ever saw Lewin after August 1, 2013. Nicholas, who had been on vacation for two months, returned to Horowitz in October 2013 with the same neck complaints and requested to restart PT. Horowitz granted that request and asked

him to return. On November 12, 2013, Nicholas saw Horowitz, and told him that he had been going to PT, and that his neck pain was "mild" and "greatly improved." *Id.* Nicholas was directed to continue PT, and, because he was doing "very well," Horowitz told him to return "on an as needed basis." *Id.* Nicholas seemingly failed to continue with PT, his Back to Health PT, P.C. records having ended on November 7, 2013, and never returned to Horowitz, claiming that Premier's location was then inconvenient.

The Instant Action

In July 2014, Nicholas commenced this action against Vazquez-Fuentes, alleging that he had sustained serious injuries and asserting claims for conscious pain and suffering and for economic loss over and above basic economic loss, as defined in Insurance Law § 5102 (a). Complaint, ¶¶ 9-11. Nicholas's bill of particulars alleges permanent injuries, including that he sustained various specified herniated lumbar and cervical discs and one bulging cervical disc, neck and lower back pain, limited ROM, and cervical radiculopathy. That pleading advises that there was no claim of confinement to bed or home (*see also* Nicholas tr at 59-60), and alleges medical expenses of about $20,000.00 due to the aforementioned 2013 treatment.

Nicholas's further bill of particulars asserts that the accident incapacitated him from working in his union construction trade between January 17, 2013 through about June 1, 2015, resulting in lost wages. Nicholas, who had been a member of the pointing, caulking, and cleaning union since 1997, testified in September 2015 that, before the accident, he had last worked in "2011 or '12, I think. I think it was '12." Nicholas tr 10, 12-13; *but see id.* at 12, 13 (last time he worked before June 2015 was"[l]ike four years ago"). He further testified that he was on the union's out-of-work list, waiting to be called for work, and that, even when

employed, he did not work in winter because one allegedly could not work in his trade on a scaffold then. *Id.* at 12, 13; *but see id.* at 12 (some workers are employed the whole year, and others are laid off because they are not needed). Nicholas also testified that his usual and customary activities before the accident consisted of "[n]ot much," and, when unemployed, included waiting to get back to work, contacting his union's out-of-work list, and attending practices at his union school. Nicholas tr at 14. He performed no chores at home, and only helped his grandmother, with whom he lived, with the rent and bills. As for pre-accident hobbies, Nicholas played basketball in warm weather and went to bars. *Id.*

In accordance with Insurance Law § 5102 (d)'s definition of serious injury, Nicholas alleges that he suffered a

> "permanent loss of use of a body organ, member, function or system [permanent loss of use claim], and/or permanent consequential limitation of use of a body organ or member [permanent consequential limitation claim], and/or [a] significant limitation of use of a body function or system [significant limitation claim], and/or a medically determined injury or impairment of a non-permanent nature which prevents plaintiff from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following plaintiff's injury [90/180-day claim]."

Nicholas bill of particulars, ¶ 12.

He testified that the only thing that he could no longer do, which he could do prior to the accident, was to bend down for longer than "probably a few minutes, some minutes," and that the only thing that he could do before the accident, that he could still do, but with pain or discomfort, was work. Nicholas tr at 60-61. In that regard, he maintained that on "mostly" any work day he would feel a "little bit" of neck pain and "more" lower back pain. *Id.* at 61, 65. At the time he was deposed, in September 2015, he claimed that he experienced right arm tingling and/or

numbness two or three times a day, and back pain once or twice a week. *Id.* at 64, 65.

Summary Judgment Motion

Vazquez-Fuentes moves for an order granting him summary judgment on the issue of damages and on any claim for economic loss, on the sole ground that Nicholas has not suffered a serious injury. The motion is supported by the pleadings, Nicholas's deposition, and the affirmations of orthopedist, Stuart Hershon, M.D. (Hershon), and of neurologist, Roger A. Bonomo, M.D. (Bonomo), each of whom examined Nicholas for the defense, respectively, in December 2015 and January 2016, reviewed the pertinent pleadings and medical records, and elicited from Nicholas his work history immediately before and after the accident.

When he saw Hershon, Nicholas complained of cervical pain and occasional pain in his left upper extremity. Hershon examined Nicholas and performed ROM tests on Nicholas's cervical and lumbar spine in the areas of flexion, extension, left and right lateral bends, and lateral rotation of his cervical spine and straight leg raising. Hershon set forth Nicholas's numerical ROM in each area, compared them to normal ranges, and found full ROM in every category. Hershon diagnosed Nicholas with resolved cervical and lumbar sprains, and opined that he had no current disability as to his activities of daily living and occupation.

During his examination, Nicholas advised Bonomo of the nature of the accident and complained mostly of lower back pain, which recurred, "without provocation," up to two to three times a month, and caused him to walk over in a bent position for a few days. McSherry affirmation exhibit F; *but see* Nicholas tr at 65. Nicholas also informed Bonomo that the neck pain with tingling down past his elbow had improved, but that it, too, could recur without provocation, and that he took no medication for pain. After examining Nicholas, Bonomo found,

among other things, that Nicholas flexed fully at his waist, that he exhibited full neck ROM, and reported "posterior neck pain on full neck extension." McSherry affirmation exhibit F. Nicholas's straight leg raising was negative, but he reported lower back pain with straight leg raising to 90 degrees. Bonomo concluded that Nicholas's history and examination were consistent, at most, with resolved muscle strain, that there was no objective evidence of any spinal or nervous system injury, and that the herniations reported by Kolb were "not the cause of any symptoms or the effect of any specific trauma." *Id.* Bonomo opined that Nicholas needed no further testing or treatment and that there was no reason why he was incapable of fully working.

Vazquez-Fuentes's motion is also supported by the affirmation of his expert radiologist, Jonathan Lerner, M.D. (Lerner), who, in April 2016, reviewed Precision Imaging's lumbar and cervical MRI studies, and set forth his findings in a separate affirmed report as to each. As for the cervical spine, Lerner lists a number of findings as to C3-4, C4-5, and C5-6. He observes that "[t]here is a diffuse loss of height and signal within the cervical intervertebral discs consistent with dehydration." *Id.*, exhibit G. All of these findings, asserts Lerner, were seen in the setting of "diffuse desiccation of the cervical intervertebral disc space levels,[7] which is consistent with degenerative disc disease and "suggestive of a chronic degenerative process as opposed to an acute traumatic event." *Id.* Additionally, Lerner notes that a specified finding at C5-C6 suggested a chronic degenerative process, as opposed to an acute traumatic event." *Id.*

As for Lerner's review of the lumbar MRI study, with respect to the L4-5 and L5-S1 intervertebral discs, he again found loss of height and signal intensity consistent with disc

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[7] Desiccation is a thorough drying out and is "synonymous with dehydration." Stedman's Medical Dictionary.

dehydration. As for L4-5 and L5-S1, Lerner set forth various findings. Lerner, then claims that his findings, as to all of the foregoing, were seen in the setting of dessication of the L4-5 and L5-S1 intervertebral disc spaces,"which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event." *Id.* Further, Lerner notes that lumbar disc bulges are "seen in up to 63% of asymptomatic individuals," and are, therefore, often nonspecific. *Id.* As to both MRI evaluations, Lerner concludes that each established a lack of causal relationship between the accident and the MRI findings.

In opposition, Nicholas relies on the Police Accident Report, his deposition transcript, and on his 2013 BIMC, Premier, Precision Imaging/Kolb, and Back to Health, PT, P.C. records. He also relies on Kolb's December 2016 affirmation, in which he attests that, at counsel's request, he had reviewed Premier's 2013 MRI studies, which reveal cervical herniations at C3-4, C4-5, and C5-6, a disc bulge at C2-3 and lumbar herniations at L4-5 and L5-S1.

Discussion

On summary judgment, the movant has the prima facie burden of establishing his entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The failure to meet that burden mandates the motion's denial, irrespective of the opposing papers' sufficiency. *Id.* When the movant makes the requisite showing, the burden shifts to the other side to demonstrate the existence of a material fact. *Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 (2009). Conclusory and unsubstantiated allegations and hopeful expressions do not suffice to meet that burden. *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 (1988).

In a serious injury case, the moving defendant must, on summary judgment, establish that

the plaintiff did not, as a result of the accident, sustain a serious injury within the intendment of Insurance Law § 5210 (d). *Spencer v Golden Eagle, Inc*, 82 AD3d 589 (1st Dept 2011); *Thompson v Abbasi*, 15 AD3d 95, 96 (1st Dept 2005). A defendant can meet this burden through the submission of affirmations of experts who have examined plaintiff and demonstrate that the objective medical findings fail to support the plaintiff's claims. *Macdelinne F. v Jimenez,* 126 AD3d 549, 550-551 (1st Dept 2015); *Shinn v Catanzaro*, 1 AD3d 195, 197 (1st Dept 2003). This burden can be met without addressing reports of diagnostic testing, e.g., MRI reports showing bulging or herniated discs. *Onishi v N&B Taxi, Inc.*, 51 AD3d 594, 595-596 (1st Dept 2008); *see also Kearse v New York City Tr. Auth.*, 16 AD3d 45, 47-51 (2d Dept 2005). Even if objective medical proof of serious injury exists, "when additional contributory factors interrupt the chain of causation between the accident and claimed injury--such as a gap in treatment, an intervening medical problem or a preexisting condition-- summary dismissal of the complaint may be appropriate." *Pommells v Perez*, 4 NY3d 566, 572 (2005); *see e.g. Valdez v Benjamin*, 101 AD3d 622, 623 (1st Dept 2012).

To rebut a defendant's showing of a lack of serious injury, the plaintiff must submit objective evidence of serious injury, for example, ROM limitations, such as positive straight-leg raising test results and positive EMG/NCV (nerve conduction velocity), coupled with MRI test results. *Brown v Achy*, 9 AD3d 30, 31-32 (1st Dept 2004). To demonstrate a ROM limitation, the expert must identify the objective test used (*Linton v Nawaz*, 62 AD3d 434, 438-439 [1st Dept 2009], *affd* 14 NY3d 821 [2010]), set forth a "numeric percentage of a plaintiff's loss" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]), and relate such percentage to the range of normal. *See Pommells v Perez*, 4 NY3d at 575-578; *Linton v Nawaz*, 62 AD3d at 436;

see also Antonio v Gear Trans Corp., 65 AD3d 869, 870 (1st Dept 2009). A plaintiff can also establish the existence of a serious injury through a "*qualitative* assessment of a plaintiff's condition . . ., 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." *Toure v Avis Rent A Car Sys.*, 98 NY2d at 350-351.

An expert's equivocal and speculative opinion, based on the plaintiff's subjective complaints of pain, is inadequate to sustain a serious injury claim. *Kordana v Pomellito*, 121 AD2d 783, 784 (3d Dept 1986). Bulging or herniated discs, standing alone, do "not constitute a serious injury." *Toure v Avis Rent A Car Sys.*, 98 NY2d at 353 n 4; *see also Pommells v Perez*, 4 NY3d at 574; *Style v Joseph*, 32 AD3d 212, 214 (1st Dept 2006). Further, where the plaintiff fails to explain the defendant's showing of a lengthy gap in treatment, summary judgment may be warranted. *See Melendez v Feinberg*, 306 AD2d 98, 99 (1st Dept 2003); *Jaromin v Northrup,* 39 AD3d 1264, 1265 (4th Dept 2007); *see also Toulson v Young Han Pae*, 13 AD3d 317, 319 (1st Dept 2004). In addition, when a defendant demonstrates that an alleged serious injury, claimed by a plaintiff to have been due to the accident, instead resulted from a preexisting condition, such as a degenerative process, the plaintiff, to avoid summary judgment, must come forward with evidence rebutting defendant's showing sufficiently to at least raise an issue of fact. *See generally Pommells v Perez*, 4 NY3d at 578-580; *Franklin v Gareyua*, 136 AD3d 464, 465-466 (1st Dept 2016), *affd* 29 NY3d 925 (2017); *Swift v New York Tr. Auth.*, 115 AD3d 507, 508 (1st Dept 2014); *Valdez v Benjamin*, 101 AD3d at 622-623.

Turning to the instant case, defense counsel, in his moving affirmation, did not allege a gap in treatment or assert it as a ground in support of Vazquez-Fuentes's motion. Accordingly,

that ground, which was first raised in Vazquez-Fuentes's reply papers, cannot be considered. *Mulligan v City of New York*, 120 AD3d 1155, 1156 (1st Dept 2014); *Tadesse v Degnich*, 81 AD3d 570, 570 (1st Dept 2011). In any event, this is not a case where Nicholas resumed treatment after a significant period, since he seemingly had no treatment after November 2013. It should also be noted that Lerner never specifically addressed the C2-3disc bulge that was mentioned in Kolb's cervical MRI report, and was claimed, in Nicholas's pleadings, to have been caused by the accident, except to observe, as a general matter, that cervical disc bulges "will be seen in up to 57% of asymptomatic individuals" and are, therefore, often "nonspecific." McSherry affirmation, exhibit G. This statement, and Lerner's similar statement as to lumbar disc bulges, standing alone, do not, as a general matter, eliminate disc bulges as a cause of pain or other signs or symptoms, because such statements fail to establish that disc bulges are always asymptomatic and nonspecific.

Also unavailing is Vazquez-Fuentes's attempt to show that he is entitled to summary judgment dismissing Nicholas's claims, arising out of the permanent consequential and significant limitations categories of serious injury, on the ground that a review of Precision Imaging's MRIs allegedly demonstrates that the condition of Nicholas's lumbar and cervical spine was not caused by the accident, but was, instead, the result of a degenerative condition. Although Nicholas's counsel did not ask Kolb to review or respond to Lerner's assertions regarding causation, and submitted no evidence attempting to rebut such assertions, Lerner failed to prima facie establish in clear, unequivocal language that Nicholas's injuries were proximately caused by a preexisting degenerative disease. Thus, the burden to disprove that theory never shifted to Nicholas.

In particular, that something was "consistent with dehydration," i.e., dessication (*id.*, Lerner cervical and lumbar MRI reports at 1), does not constitute an assertion that there was dehydration/dessication or that the finding was more likely than not dehydration/dessication, because something can be consistent with more than one thing. Lerner, thereafter, without any further explanation, characterized the finding, which was "consistent" with dehydration, i.e., dessication, as dessication (*see id.*, Lerner cervical and lumbar MRI reports at 2), which he then claimed was "consistent" with degenerative disc disease and "suggestive" of a chronic degenerative process, as opposed to a traumatic event. Lerner, concluded, based on his MRI evaluations, that a causal relationship between the accident and the MRI studies was lacking.

However, Lerner failed to opine that one who has disc disease cannot suffer a disc herniation or bulge from an accident. Nor did he claim that one can distinguish a disc herniation or bulge caused by an accident from one caused by disc disease, or explain the distinguishing characteristics, particularly the characteristics of herniations and bulges caused by an accident, and whether they were present. Furthermore, Lerner's analysis and conclusions, based on the phrases "consistent with" and "suggestive of," do not convey any particular level of certainty on the issue of causation; thus, they are too equivocal, vague, and speculative to find that he was opining that it was more likely than not that each MRI study establishes that each of Nicholas's bulges and herniations was due to a chronic degenerative disc process or disease, and that there was an absence of any causal relationship between each study's findings and the accident. *See Norfleet v Deme Enter., Inc.*, 58 AD3d 499, 500 (1st Dept 2009); *Glynn v Hopkins*, 55 AD3d 498, 498 (1st Dept 2008); *but see Pietropinto v Benjamin,* 104 AD3d 617, 617 (1st Dept 2013) (defendant prima facie established that plaintiff did not sustain a serious injury through

defendant's neurologist, who opined as to the lack of any significant limitations, and defendant's radiologist, who concluded that the disc bulges were degenerative, which "strongly suggested" that the herniation was also degenerative).[8] Lerner does not even state that each cervical disc that was noted to be bulging or herniated was desiccated, or why a desiccation in one disc would lead to a herniation or bulging in a non-desiccated disc. It is not readily apparent whether Nicholas's relatively young age of 34 factored into Lerner's hazy opinion on degeneration.

Vazquez-Fuentes fails to eliminate triable issues of fact as to whether Nicholas sustained serious injuries to his cervical and lumbar spine. Hershon and Bonomo conclude that Nicholas's injuries to his cervical and lumbar spine are resolved but Lerner concludes that Nicholas's injuries to his cervical and lumbar spine are "suggestive of a chronic degenerative process as opposed to an acute traumatic event." These contradictory findings concerning Nicholas's cervical and lumbar spine raise triable issues of fact for the jury to resolve. *Karounos v Dolalas*, 154 AD3d 1166 (1st Dept 2017); *Johnson v Salaj*, 130 AD3d 502 (1st Dept 2015); *Martinez v Pioneer Transp. Corp.*, 48 AD3d 306 (1st Dept 2008). Therefore, that portion of Vazquez-Fuentes's summary judgment motion, which seeks an order dismissing Nicholas's serious injury claims to his cervical and lumbar spine is denied.

As for the branch of this summary judgment motion which seeks an order dismissing Nicholas's serious injury claims under the 90/180-day category, Vazquez-Fuentes must prima facie disprove Nicholas's assertion, that "non-permanent injuries prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for

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[8] It is unclear whether the word "strongly" was instrumental in the Court's finding that the movant had shown that the degenerative process was the proximate cause of the herniation.

at least 90 of the 180 days following the accident." *Correa v Saifuddin*, 95 AD3d 407, 409 (1st Dept 2012). Hershon and Bonomo's reports fail to disprove these allegations, because they examined Nicholas approximately three years after the accident, and opined only as to his improved condition at the time of their examinations. Neither physician opined on whether Nicholas could perform substantially all the acts comprising his usual and customary activities during the first 180 days after the accident, particularly as to whether any injuries he sustained in the accident, including any sprains/strains, affected his ability to perform his work and, if so, for how long. *See Seepersaud v L&M Bus Corp.*, 140 AD3d 579, 579 (1st Dept 2016); *Rivera v Super Star Leasing, Inc.*, 57 AD3d 288, 288-289 (1st Dept 2008); *Toussaint v Claudio*, 23 AD3d 268, 268 (1st Dept 2005). That Nicholas was able to get out of bed and leave his apartment during the entire 180-day period is not, in and of itself, determinative. *Correa v Saifuddin*, 95 AD3d at 409.

Whether Nicholas's usual and customary activities included work is unclear, because, on the record presented, he last worked before his accident at some unspecified date in 2011 or 2012. Vazquez-Fuentes did not explore, at Nicholas's deposition, why he had not worked during that period, except to extract from him that he did not work in the winter. *See also* Vydyula affirmation, exhibit D (Horowitz's "Social History" chart entry of first visit listing Nicholas as "unemployed" and his construction work as "seasonal"). Neither did Vazquez-Fuentes present any evidence, from Nicholas's union or from his last pre-accident employer, Technical (*see* Nicholas tr at 13), as to when, before his accident, he last worked, why he stopped working, and when, both before and after the accident, he asked for, and was asked to, work. As for post-accident work, Nicholas, who did not begin working until close to two and a half years after the

accident, testified that he was "probably" twice offered work at some unspecified time within a year of his accident (*id.* at 62), but was unable to accept it because of his injuries. However, Nicholas also claimed that he "waited for a little while," within a "few months" of the accident, before contacting his union for work, and that he waited, not because it was winter, but because of his injuries. *Id.* at 66.

Nicholas's testimony was also inconsistent as to whether any doctor had told him that he should not work for a period of time as a consequence of his alleged injuries. *Compare id.* at 61-62 (no doctor told him) with *id.* at 67 ("they . . . I think Premier. I forgot the name," told him to wait to contact his union for work). Even if Nicholas's doctors were silent on the issue of work, that would not necessarily be determinative of whether he was able to stand outside all day and perform physical labor. Furthermore, on summary judgment it is not plaintiff's prima facie obligation to provide nonhearsay proof from his doctors medically certifying him as having been unable to work during that 180-day period. *See generally Correa v Saifuddin*, 95 AD3d at 408.

On March 20, 2013, when spring began, about 120 days remained of the 180-day period following the January 17 accident, and Vazquez-Fuentes has failed to prima facie establish that Nicholas's alleged injuries were not the reason he was out of work during the remaining 120 days. It is also notable that, at Nicholas's September 10, 2015 deposition, defense counsel explored those activities which Nicholas could no longer perform as of that date, and, except for work, did not explore the limitations, shortly after the accident, on Nicholas's other usual and customary activities. In view of all of the foregoing, the branch of Vazquez-Fuentes's motion which seeks an order dismissing Nicholas's serious injury claims under the 90/180-day category is denied.

The branch of Vazquez-Fuentes's summary judgment motion, which seeks an order dismissing the complaint's demand for any economic loss, which necessarily encompasses economic loss in excess of basic economic loss, on the sole ground that Nicholas did not sustain a serious injury, is denied. Insurance Law § 5104 (a) provides that, in a personal injury action arising from the negligent occupation or use of a motor vehicle, a covered person cannot recover for non-economic loss, unless he or she has sustained serious injury, or for basic economic loss. Therefore, serious injury is not an element of a plaintiff's claim for economic loss beyond basic economic loss, as defined in Insurance Law § 5102 (a). *Martin v LaValley*, 144 AD3d 1474, 1477 (3d Dept 2016); *Tortorello v Landi*, 136 AD2d 545, 545-546 (2d Dept 1988). Vazquez-Fuentes does not assert or attempt to establish that Nicholas's claim for economic loss (*see* Complaint ¶ 10; Plaintiff's bill of particulars, ¶¶ 3 [a], 8) constitutes basic economic loss or otherwise lack merit. Further, it is not evident from the face of Nicholas's bill of particulars whether his itemized medical expenses are those in excess of his basic economic loss. Additionally, Vazquez-Fuentes fails to demonstrate that Nicholas lost no earnings in excess of basic economic loss as a consequence of any injuries sustained in the accident. Nicholas testified that his wages, at the time of his deposition, were about $48 an hour, during his eight and a half hour day, five-day work week, and, at his last job before the accident, were $46 an hour. Nicholas tr at 10,11, 13. Although Nicholas's testimony was inconsistent as to when he was able to work, Vazquez-Fuentes provided no evidence as to when, after the accident, Nicholas was first able to work, called his union for work, was offered work, and turned it down. Movant's examining physician, Hershon, conceded that Nicholas suffered from resolved cervical and lumbar sprains, but did not opine on when such sprains would have resolved, or what effect they

may have had on his ability to perform his union work. Accordingly, Vazquez-Fuentes failed to meet his burden of establishing that Nicholas lacked economic loss exceeding his basic economic loss.

In conclusion, it is hereby

ORDERED that the branch of Vazquez-Fuentes's motion, which in essence seeks an order granting him summary judgment dismissing the complaint's claims of serious injury that are based on any permanent consequential use, significant limitation, and permanent loss of use categories, is DENIED, and all such serious injury claims are dismissed; and it is further

ORDERED that the branch of Vazquez-Fuentes's motion, which effectively seeks an order granting him summary judgment dismissing the complaint's claims of serious injury that are based on the 90/180-day category, is DENIED; and it is further

ORDERED that the branch of Vazquez-Fuentes's motion, which effectively seeks an order granting him summary judgment dismissing Nicholas's complaint's demand for economic loss in excess of basic economic loss, is DENIED; and it is further

ORDERED that the parties are directed to appear for a settlement conference in Part 22 at 80 Centre Street, Room 136 on February 27, 2018, at 9:30 a.m.

Dated: New York, New York
January 14, 2018

ENTER:

Hon. Paul A. Goetz, J.S.C.