To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOSE ORTEGA,

Plaintiff,

-against-

SYLVIA RUCCI,

Defendant.

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DECISION AND ORDER

Sequence No. 1
Index No. 53027/2017

RUDERMAN, J.

The following papers were considered in connection with defendant's motion for summary judgment dismissing the complaint:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A-G	1
Affirmation in Opposition	2

Plaintiff Jose Ortega commenced this action on March 7, 2017 to recover for personal injuries sustained when he was struck by a vehicle operated by defendant Sylvia Rucci. The complaint alleges that on March 19, 2015, plaintiff was a pedestrian at a gas station parking lot located at 3911 Crompond Road, in the Town of Yorktown, County of Westchester, when he was struck as he was walking, and that as a result of defendant's negligence, he sustained severe, serious and permanent personal injuries.

Defendant now moves for an order granting summary judgment, pursuant to CPLR 3212, dismissing the complaint, based on the contention that plaintiff did not sustain serious injury as that term is defined by Insurance Law § 5102. Plaintiff opposes.

Analysis

A movant on a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, providing sufficient evidence to eliminate any material issue of fact from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d851, 853 [1985]; *Zuckerman v City of New York*, 49NY2d 557, 562 [1980]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]).

Defendant has the initial burden of presenting competent evidence to prove that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see Gaddy v Elyer,* 79 NY2d 955 [1992]). If defendant does not meet this prima facie burden it is unnecessary for the Court to determine whether any papers submitted in opposition are sufficient to raise a triable issue of fact (*see Silan v Sylvester*, 122AD3rd 713 [2d Dept 2014]; *Artis v Lucas*, 84 AD3d 845 [2d Dept 2011]).

A defendant can establish that a plaintiff did not sustain serious injury within the meaning of the Insurance Law by the submission of an affirmed report from a medical expert who has examined the plaintiff and has determined that no objective medical findings support the plaintiff's alleged claims (*see Rodriguez v Huerfano*, 46 AD3d 794 [2d Dept 2007]). In support of the instant motion, defendant submits the affirmed report of orthopedic surgeon Louis D. Nunez, M.D., who conducted an Independent Medical Examination of plaintiff on March 4, 2016. Dr. Nunez opined, inter alia, that plaintiff suffered a myofascial strain of the cervical and

lumber spine, but that the condition had resolved. However, he also found defendant has "significant restricted range of motion of the lumbar spine."

Defendant also submits the affirmed report of neurologist Elliot Gross, M.D., who opined that the plaintiff suffered no neurological disability due to the accident in question. However, he also stated "[I]f the history provided by the claimant is accurate then subsequent complaints are related to the accident of record." Both doctors opined there was evidence of "symptom embellishment." Both doctors also note that past medical history indicates there were no injuries prior to the accident of March 19, 2015.

Also included among defendant's submissions are plaintiff's medical records, including the report of Dr. Stanley Holstein, who examined plaintiff on March 24, 2015, and who opined after conducting his examination that plaintiff was "totally disabled" at that time and that his functional disabilities were caused by the March 19, 2015 automobile accident. MRIs of the cervical and lumbar spine were performed, and revealed the presence of disc herniations. On a follow-up visit to Dr. Holstein on December 22, 2015, limitations in his lumbar range of motion were noted, as well as other positive test results, and Dr. Holstein concluded that plaintiff was partially disabled and that his limitation and functional disabilities were causally related to the accident.

Further, evaluation by orthopedist Louis C. Rose, M.D., who examined plaintiff on April 8, 2015, August 26, 2015, and December 30, 2015 is also submitted with defendant's motion. Dr. Rose reported injury to plaintiff's wrists.

Finally, the submissions on the motion include plaintiff's deposition, in which he asserted an inability to work for a year after the accident, due to pain in his back, and further, that he still

cannot lift heavy things or perform certain work involving heavy lifting, such as patio construction.

Defendant's submissions on the motion fails to establish her entitlement to judgment as a matter of law on the issue of whether plaintiff sustained a serious injury as defined in Insurance Law §5102(d). Specifically, defendant's submissions establish the existence of material issues of fact as to whether plaintiff suffered a medically determined injury of a 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 ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Defendant does not refute that plaintiff did not return to work for approximately a year after the accident. In fact, both Independent Medical Examiners note that in their reports that plaintiff had not worked since the incident. Furthermore, while both the Independent Medical Examiners found evidence of symptom embellishment, that is squarely a credibility issue and is not properly decided in the context of a summary judgment motion.

Finally, defendant's argument that the 90/180 claim must be dismissed on the ground that plaintiff failed to seek treatment related to the accident more than 90 days after the accident, is not warranted based on defendant's submissions. For instance, defendant acknowledges that on November 3, 2015, more than 90 days following the March 19, 2015 incident, plaintiff sought treatment at the emergency room complaining of lower back pain relating to the injuries allegedly caused by the accident.

Therefore, upon review, and viewing the evidence in the light most favorable to the plaintiff, defendant has failed to meet her burden of demonstrating entitlement to summary judgment as a matter of law. Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that defendant shall serve this decision and order, with notice of entry thereof, on plaintiff within seven days of the date hereof; and it is further

ORDERED that the parties appear in the Settlement Conference Part on Tuesday, November 13, 2018 at 9:15 a.m. at the Westchester County Supreme Courthouse, 111 Dr. Martin Luther King Jr., Boulevard, White Plains, New York 10601 for the scheduling of a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 24, 2018

HON. TERRY JANE RUDERMAN, J.S.C.