To commence the statutory time period 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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**JAMAR MCCALLA,**

**Plaintiff,**

**-against-**

**DECISION & ORDER**
**Index No. 54392/2019**
**Sequence No. 1**

**WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION, BEE-LINE BUS COMPANY, LIBERTY LINES TRANSIT, INC., AND ORIOL BRICE,**

**Defendants.**

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**WOOD, J.**

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 60-80,92-96, 100-104, were read in connection with the motion by defendants for summary judgment on the issue of Serious Injury under Insurance Law 5104.

This is an action for alleged serious personal injuries arising out of an automobile accident on June 26, 2016, at the intersection of Boston Road and Corsa Avenue in the Bronx at approximately 8:30 A.M. As amplified by plaintiff's Bill of Particulars, plaintiff alleges the following injuries as a result of his accident: left shoulder labral tear and shoulder surgery; right shoulder labral tear; and lumbar disc bulges' cervical spine herniations at C4-C5, C5-C6 and C6-C7.

Plaintiff commenced this action originally in Bronx County, and the case was subsequently transferred to Westchester County.

Now, upon the foregoing papers, the motion is decided as follows:

A 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact in admissible form "sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

A plaintiff claiming personal injury as a result of a motor vehicle accident must

demonstrate a prima facie case that he or she sustained serious injury within the meaning of Insurance Law §5104(a) (Licari v Elliott, 57 NY2d 230 [1982]). Insurance Law §5104(a) provides: "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 serious injury." Pursuant to Insurance Law §5102(d), 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.

Whether a plaintiff has sustained a serious injury within the meaning of the statute is a threshold legal question within the sole province of the court (Hambsch v New York City Transit Authority, 101 AD2d 807 [2d Dept 1987]). Insurance Law §5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (Toure v Avis Rent-A-Car Systems, Inc., 98 NY2d 345, 350 [2002]).

To recover under the permanent loss of use category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (Oberly v Bangs Ambulance Inc., 96 NY2d 295 [2001]). For the permanent consequential limitation category of use of a body organ or member or significant limitation of use of a body function or system, either a specific

percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the qualitative nature of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (98 NY2d 345). The consequential limitation of use category also requires that the limitation be permanent (Lopez v Senatore, 65 NY2d 1017 [1995]).

A plaintiff claiming a significant limitation of use of a body function must substantiate his complaints with competent medical evidence of any range-of-motion limitations that were contemporaneous with the subject accident (Ferraro v Ridge Car Serv., 49 AD3d 498 [2d Dept 2008]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott, 57 NY2d 230). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (Perl v Meher, 18 NY3d 208, 218 [2011]). The Court of Appeals noted that "in our view, any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well." Although Insurance Law §5102(d) does not expressly set forth any temporal requirement for a "significant limitation," there can be no doubt that if a bodily limitation is substantial in degree yet only fleeting in duration, it should not qualify as a "serious injury" under the state (Thrall v City of Syracuse, 60 NY2d 950, *revg* 96 AD2d 715; Partlow v Meehan, 155 AD2d 647, 648 [2d Dept 1989]).

To prove the 90/180 day category, an injury must be (1) medically-determined injury or impairment of a nonpermanent nature (2) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment and (3) there must be curtailment of usual activities to a great

extent, rather than some slight curtailment (Damas v Valdes, 84 AD3d 87, 91 [2d Dept 2011]). Resolution of the issue of whether "serious injury" has been sustained 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 (98 NY2d 345). In order to establish serious injury here, the plaintiff must establish that he "has been curtailed from performing his [or her] usual activities to a great extent" (57 NY2d at 236; Lanzarone v Goldman, 80 AD3d 667, 669 [2d Dept 2011]).

As the moving party, it is the defendant's initial burden to establish that the plaintiff has not sustained a "serious injury" (Gaddy v Eyler, 79 NY2d 955, 956 [1992]). This is accomplished by submitting objective proof, generally in the form of "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79, 84 [2d Dept 2000]). Such proof can even include "unsworn medical reports and uncertified records of an injured plaintiff's treating medical care providers" (Elshaarway v U-Haul Company of Mississippi, 72 AD3d 878 [2d Dept 2010]; see Itkin v Devlin, 286 AD2d 477[2d Dept 2001]). A defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn reports of plaintiff's examining physician (Pagano v Kingsbury, 182 AD2d 268 [2d Dept 1992]).

If defendants establish their prima facie entitlement to judgment as a matter of law, the burden shifts to the plaintiff to produce evidence sufficient to demonstrate a triable issue of fact on the existence of a "serious injury" as defined by the statute (see Sanevich v Lyubomir, 66 AD3d 665 [2d Dept 2009]; Azor v Torado, 59 AD3d 367, 368 [2d Dept 2009]).

It is well-settled that "in order to successfully oppose a motion for summary judgment on the issue of whether an injury is serious within the meaning of Insurance Law §5102(d), the

plaintiff's expert must submit quantitative objective findings in addition to an opinion as to the significance of the injury" (Grossman v Wright, 268 AD2d at 84). An affidavit or affirmation simply setting forth the observations of the affiant is not sufficient unless supported by objective proof such as X-rays, MRIs, straight-leg or Laseque tests, and any other similarly-recognized tests or quantitative results based on a neurological examination (Grossman v Wright, 268 AD2d at 84). To meet its burden of proof, a plaintiff is required to submit medical evidence based on an initial examination close to the date of the accident (Griffiths v Munoz, 98 AD3d 997, [2d Dept 2012]). Equally important, plaintiff must also establish through admissible medical evidence that the injuries sustained are causally related to the accident claimed (Pommells v Perez, 4 NY3d 566 [2005]). A plaintiff's submission must contain a competent statement under oath and must demonstrate that plaintiff sustained at least one of the categories of serious injury as enumerated in Insurance Law §5102(d). Where there has been a gap or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or cessation (Neugebauer v Gill, 19 AD3d 567 [2d Dept. 2005]). While plaintiff is not required to submit contemporaneous range of motion testing, he is required to submit competent medical evidence demonstrating that he sustained range of motion limitations contemporaneously with the accident (Perl v Meher, 18 NY3d 208, 218 [2011]). The absence of a contemporaneous medical report invites speculation as to causation (Griffiths v Munoz, 98 AD3d at 999). Even if plaintiff's doctor does not specifically address the findings in the reports submitted by defendants that the abnormalities in the tested areas were degenerative, rather than traumatic, the findings of the plaintiff's doctor that the injuries were indeed traumatic and were causally related to the collision, is sufficient as it implicitly addressed the defendants' contention that the injuries were degenerative (Fraser-Baptiste v New York City Transit

Authority, 81 AD3d 878 [2d Dept 2011]). Subjective complaints of pain, without more, are not sufficient to establish a serious injury (Scheer v Koubek, 70 NY2d 678 [1987]).

As a preliminary matter, plaintiff abandons the category of the 90/180 category, and this category is dismissed.

Turning to the merits of defendants' motion, they offer the Affirmation of board certified Orthopedic Surgeon, Dr. Richard N. Weinstein, M.D., who conducted an IME on September 11, 2019 (NYSCEF#s 75&77) Dr. Weinstein's examination revealed a healed left shoulder arthroscopic procedure. As to plaintiff's left shoulder and cervical spine, examination revealed limitation on range of motion. As for plaintiff's lumbar spine and plaintiff's left knee, Dr. Weinstein's examination found that range of motion was normal. Dr. Weinstein's report found the following :

CERVICAL SPINE: Examination of the cervical spine demonstrates flexion 30, (normal 45), extension 30 (normal 45), right and left rotation 60 (normal 80), right and left lateral bending of 30. (normal 45). Negative paraspinal tenderness. Negative paraspinal spasm. Negative midline bony tenderness. Positive trapezial tenderness on the left, negative on the right. Negative Spurling's test. Negative cervical compression test.
THORACOLUMBAR SPINE: Examination of the thoracolumbar spine demonstrates completely normal range of motion of 90 degrees of flexion (normal 90); 30 degrees of extension (norrnal 30) and 30 degrees of right and left rotation (normal 30), 30 degrees of right and left lateral bending (normal 30). Reflexes 2+/4 on the left and 1+/4 on the right. With regard to the cervical and lumbar spine, today's examination of the cervical spine revealed a decrease in range of motion which can be considered a subjective finding as testing is actively performed by the claimant at their own volition. The range of motion testing was normal for the lumbar spine. There was no objective evidence of cervical or lumbar radiculopathy. In review of the MRI image of the cervical spine it revealed evidence of preexisting degenerative changes. In review of the MRI image of the lumbar spine it revealed no acute findings.
LEFT SHOULDER: Examination of the left shoulder demonstrates well-healed arthroscopic portals. Positive subacromial crepitus with motion of the shoulder. Forward elevation 170 degrees (normal 180). Internal rotation to T8 (normal T6). External rotation of 6 degrees (normal 60). Abduction 170 degrees (normal 180). Rotator cuff strength is 5-/5. According to the expert, with regard to the left shoulder, the MRI of the left shoulder revealed no tear but did reveal tendinosis and minimal fraying of the anterior midportion of the labrum which is degenerative in etiology. I
RIGHT SHOULDER: Examination of the right shoulder demonstrates range of motion of

180 degrees of forward elevation (normal 180); and 180 degrees of abduction (normal 180); internal rotation to T6(normal T6) and external rotation of 60 degrees (normal 60). Rotator cuff strength is 5/5. With regard to the right shoulder, the examination of the right shoulder was normal with full range of motion and no objective evidence of impingement or internal derangement. The MRI of the right shoulder revealed no tear but mild tendinosis which is degenerative inetiology. The claimant had no complaints of right shoulder pain at the examination.

Defendants also submit a report from Dr. Jonathan Lerner, M.D. P.C, who is currently the Director of Musculoskeletal Imaging Catholic Health Services of Long Island. Dr. Lerner examined the MRI results of plaintiffs injuries and submits reports dated January 13, 2020. From MRI studies that occurred in June and July 2015, Lerner concludes that the etiology of the herniated discs are degenerative conditions, and thus, there is no causal relationship to the accident. "The above findings are seen in the setting of desiccation of the C3-C4 through C6-C7 intervertebral disc space levels, which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event" (NYSCEF #78).

Defendants point out that even where a plaintiff has undergone arthroscopic surgery, it may nevertheless be determined that the plaintiff did not sustain a serious injury under the Insurance Law (Byrd v Limo, 61 AD3d 801 [2d Dept 2009]). Dr. Weinstein, although observing restricted range of motions for the left shoulder and cervical spine, attributed the same to something other than the accident, but rather a self imposed restriction.

Taking into consideration defendants submissions, including the reports of Drs. Weinstein and Lerner, defendants established, prima facie, that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d), as a result of the subject accident (Powell v Prego, 59 AD3d 417, 418–19 [2d Dept 2009]).

However, plaintiff's expert reports raised triable issues of fact, including Dr. Gautam

Khakhar, who examined plaintiff shortly after the accident on July 3, 2015, and opines that:

"It is my considered medical opinion, within a reasonable degree of medical certainty that the accident referenced herein was the competent producing cause of the injuries delineated in these reports. The patient was asymptomatic prior to the said motor vehicle accident. Also, the patient was 21 years old at the time of the accident and, as such, degeneration is not something normally found at this age. This accident was the cause of the injuries listed in the MRIs" (NYSCEF # 101).

"It is my opinion that the patient's current complaints and limitations and limitation of motion are entirely consistent with his injuries as described above that were traumatic in nature and exacerbated by the above-said accident which took place on June 26, 2015, and not related to any pre-existing conditions or intervening medical problems. The restricted range of motion as reported above is permanent in nature. He will not be able to achieve his pre-accident medical status. His complaints will be subject to periods of exacerbation which will require physical therapy, pain management and orthopedic visits. At this point, any further organized treatment will be palliative in nature. His therapy was discontinued for this very reason along with the fact that insurance was discontinued" (NYSCEF # 101).

Dr. Emmanuel Hostin, M.D. states that plaintiff was first examined by him on August 13, 2015, with treatment limited to his shoulders. His examination of plaintiff revealed left shoulder positive impingement; right shoulder equivocal impingement. Dr. Hostin reviewed his right shoulder MRI dated July 10, 2105, which exhibited a tear of the anterior/inferior labrum with extension to the equator. Dr. Hostin also reviewed his July 9, 2015, left shoulder MRI exhibited anterior/inferior labral tear.

Dr. Hostin attests that:

"23. It is my opinion that JAMAR MCCALLA's shoulder limitations of motion are entirely consistent with his injuries as described above that were traumatic in nature, caused by the above-said accident which took place on June 26, 2015, and not related to any pre-existing conditions or intervening medical problems.
24. The restricted range of motion as reported above is permanent in nature. He will not be able to achieve his pre-accident medical status.
26. It is my opinion that as a result of the above-mentioned accident, the patient sustained a personal injury resulting in a permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; and a significant limitation of use of a body organ, member, function or system" (NYSCEF #102).

The third expert is David R. Payne, M.D., a Board Certified Radiologist. His diagnosis

and impression upon review of the MRI study of the left shoulder is a Anteroinferior labral tear. The right shoulder is a Tear of the anteroinferior labrum with extension to equator. No acute bony pathology for both. His diagnosis and impression upon review of the MRI study of the cervical spine is a right paracentral herniation at C4/5 with thecal sac indentation, right paracentral herniation at C5/6 with thecal sac indentation, central herniation at C6/7 with thecal sac indentation. His diagnosis and impression upon review of the MRI study of the lumbar spine is a lumbar bulge at L4/5 and L5-Sl.

Clearly, the conflicting affidavits submitted present a credibility battle between the parties' experts regarding the extent of plaintiff's injury, and issues of credibility are properly left to a jury for its resolution (Ain v Allstate Ins. Co., 181 AD3d 875, 878–79 [2d Dept 2020]).

Accordingly, it is

ORDERED, that defendants' motion for summary judgment under the 90/180-day category is **granted**, as it was not addressed by plaintiff, and denied otherwise; and it is further

ORDERED, that the parties are directed to appear in the Settlement Conference Part in Courtroom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601, at a date, time, and place, as so designated by that Part.

All matters not herein decided are denied.

This constitutes the Decision and Order of the court.

Dated: September 28, 2020
White Plains, New York

**HON. CHARLES D. WOOD**
**Justice of the Supreme Court**

TO: All Parties by NYSCEF