| **Lozier v Prevot-Woolery** |
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| 2020 NY Slip Op 34958(U) |
| October 16, 2020 |
| Supreme Court, Rockland County |
| Docket Number: Index No. 030883/2019 |
| Judge: Sherri L. Eisenpress |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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ROBERT LOZIER,

Plaintiff,

-against -

D. PREVOT-WOOLERY and SOMAYA K. PREVOT,

Defendants.
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**DECISION/ORDER**

Index No. 030883/2019

(Motion #1)

HON. SHERRI L. EISENPRESS, A.J.S.C.

The following papers, numbered 1-4, were read in connection with Defendants D. PREVOT-WOOLERY and SOMAYA K. PREVOT's (collectively "Defendants") Notice of Motion for summary judgment and dismissal of the Complaint against them on the ground the plaintiff cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d):

| **PAPERS** | **NUMBERED** |
|---|---|
| NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-D | 1-2 |
| AFFIRMATION IN OPPOSITION/EXHIBITS A-F | 3 |
| AFFIRMATION IN REPLY | 4 |

Plaintiff commenced the instant action to recover damages for personal injuries arising out of an automobile accident which occurred on August 15, 2018, on West Eckerson Road at or near the intersection with Oak Street, in the County of Rockland. Plaintiff, a 75 year old man at the time, alleges that as a result of the accident, he sustained the following injuries: tear of the right medial meniscus, tear of the lateral meniscus and grade 4 chondromalacia of the right knee, all necessitating arthroscopic surgery; and cervical and lumbar radiculopathy. After completion of discovery, Defendants move to dismiss the action for failure to meet the "serious injury" threshold under the no-fault law.

In support of the summary judgment, Defendants submit the affirmed medical report of Dr. Ronald L. Mann, orthopedic surgeon, dated November 20, 2019. Dr. Mann examined Plaintiff and reviewed his medical records including from Dr. Mian; MRI report for Plaintiff's right knee showing tears of the medial and lateral meniscus of the right knee; MRI report from Northeast Orthopedics and Sports Medicine of Plaintiff's lumbar spine and the operative report dated February 20, 2019 with respect to arthroscopic surgery of Plaintiff's right knee. Dr. Mann opines that upon review of the imaging studies, the findings with regard to Plaintiff's right knee and lumbar spine were degenerative in nature, not traumatically induced and unrelated to the subject occurrence.

Upon examination, Dr. Mann finds Plaintiff's cervical spine to have right and left rotation of 70 degrees (normal 80); flexion and extension to 40 degrees (normal 45). Examination of the lumbar spine revealed right and left flexion to 20 degrees (normal 25). Examination of the right knee revealed findings of positive crepitus and mild positive Apley's test with tenderness in the knee. Defendants also argue that Plaintiff fails as a matter of law to demonstrate that he qualifies under the 90/180 day no-fault category given his testimony that he was only out of work for two weeks after the accident and his surgery was more than six months after the incident.

In opposition to the motion, Plaintiff submits the affirmed surgical report of Dr. Mian who performed the surgery on February 20, 2019; Dr. Chen's procedure reports of cortisone injections to the right knee and epidural steroid injections to Plaintiff's lumbar spine; the certified medical records and reports from Plaintiff's treating physicians and therapists including range of motion tests conducted directly after the accident; and Dr. Mian's affirmed reports dated January 2, 2019, and July 2, 2020, and an affirmed addendum report dated July 28, 2020. Plaintiff argues that Defendants have not met their burden on summary judgment due to the positive findings noted in Dr. Mann's affirmed report.

Plaintiff argues that in the event Defendants have met their burden that there are triable issues of fact requiring denial of the motion. Plaintiff submits medical records that demonstrate limited range of motion contemporaneous to the accident. Plaintiff also underwent range of motion testing on July 9, 2020, at which time his treating physician, Dr. Mian, found: lumbar flexion to 70 degrees (normal 90); lumbar extension to 20 degrees (normal 30); and lateral flexion to 20 degrees (normal 30); and right knee motion limited to 1-120 (normal 0-150). Dr. Mian attributes the right knee and lumbar spine injuries to be causally related to the accident and finds them to be permanent in nature.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). Precedent in the Second Department holds that where a defendant relies upon the affirmed medical report of its examining physician in support of its motion for summary judgment which notes a significant limitation of motion in a body part, the defendant has

failed to meet his prima facie burden and the Court need not consider the sufficiency of the plaintiff's opposition papers. Robinson v. Yeager, 62 A.D.3d 684, 880 N.Y.S. 88 (2d Dept. 2009); Locke v. Buksh, 58 A.D.3d 698; 872 N.Y.S.2d 148 (2d Dept. 2009); Bentivegna v. Stein, 42 A.D.3d 555; 841 N.Y.S.2d 316 (2d Dept. 2007); Zamaniyan v. Vrabeck, 41 A.D.3d 472; 835 N.Y.S.3d 903 (2d Dept. 2007); Kovalenko v. General Electric Capital Auto Lease Inc., 37 A.D.3d 664; 831 N.Y.S.2d 438 (2d Dept. 2007).

In Meyer v. Gallardo, 260 A.D.2d 556; 688 N.Y.S.2d 624, 625 (2d Dept. 1999), the Second Department affirmed a denial of summary judgment where one of the physicians who examined the injured plaintiff on behalf of the defendant stated that the lateral rotation of his cervical spine was 80 degrees to the right and 50 degrees to the left. The Court found that this alone raised an issue of fact as to whether the injured plaintiff suffered a "significant limitation of use of a body function or system." Id. See also Rodriguez v. Ross, 19 A.D.3d 395, 396; 796 N.Y.S.2d 398 (2d Dept. 2005)(since defendants' own examining physician recorded some significant limitations in the plaintiff's movement of his cervical and lumbar spines, and his right shoulder, he did not make a prima facie showing of entitlement to summary judgment.); Korpalski v. Lau, 17 A.D.3d 536; 793 N.Y.S.2d 195 (2d Dept. 2005)(dismissal of complaint reversed because defendant failed to make prima facie showing that plaintiff did not sustain a serious injury where defendant's experts reported finding a limitation of motion in plaintiff's left shoulder and lower back.); Alam v. Karim, 61 A.D.3d 904, 879 N.Y.S.2d 1151 (2d Dept. 2009); Bagot v. Singh, 59 A.D.3d 368; 871 N.Y.S.2d 917 (2d Dept. 2009); Colon v. Chu, 61 A.D.3d 805; 878 N.Y.S.2d 127 (2d Dept. 2009).

Even if Defendants had met their burden, Plaintiff has established a triable issue of fact sufficient to require denial of summary judgment. A plaintiff must come forward with sufficient evidentiary proof in admissible form to raise a triable issue of fact as to whether the plaintiff, suffered a "serious injury" within the meaning of the Insurance Law. Zoldas v St. Louis Cab Corp., 108 A.D.2d 378, 489 N.Y.S.2d 468 (1st Dept 1985); Dwyer v Tracey, 105

AD2d 476, 480 N.Y.S.2d 781 (3d Dept. 1984). One way to substantiate a claim of serious injury is through an expert's designation of a numeric percentage of a plaintiff's loss of range of motion, i.e., quantitatively. McEachin v. City of New York, 137 A.D.3d 753, 756, 25 N.Y.S.3d 672 (2d Dept. 2016). However, 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. Id. By establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law §5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident. Bonner v Hill, 302 AD2d 544, 756 N.Y.S.2d 82 (2d Dept 2003); O'Neill v O'Neill, 261 AD2d 459, 690 N.Y.S.2d 277 (2d Dept 1999).

In the instant matter, Plaintiff has demonstrated a triable issue of fact requiring denial of the summary judgment motion based upon his certified medical records, which are in admissible form, which document limitation of motion in Plaintiff's right knee and spine contemporaneous to the accident, as well as permanent injuries as set forth in Dr. Mian's expert affirmation. Where conflicting medical evidence is offered on the issue as to whether the plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury. Martinez v Pioneer Transportation Corp., 48 A.D.3d 306, 851 N.Y.S.2d 194 (1st Dept 2008). Further, when discrepancies between the competing reports of the physicians create issues of credibility, those issues of fact should not be resolved on summary judgment and require a trial. Francis v Basic Metal, Inc., 144 AD2d 634 (2d Dept 1981); Cassagnol v Williamsburg Plaza Taxi, 234 AD2d 208, 651 N.Y.S.2sd 518 (1st Dept 1996). As such, the triable issues of fact require denial of Defendants' summary judgment motion with respect to the categories of significant limitation of use and permanent consequential limitation of use.

In the instant matter, upon examination, Dr. Mann found physical limitations in Plaintiff's lumbar spine and knee, including positive crepitus and a positive Apley's test. As such, Defendants have failed to sustain their prima facie burden upon summary judgment and the Court need not address the sufficiency of Plaintiff's opposition papers. The Court notes, however, that Defendants have met their burden with respect to the 90/180 day no-fault threshold category by virtue of Plaintiff's testimony that he missed only two weeks of work after the accident.

Moreover, Plaintiff has failed to demonstrate a triable issue of fact that he was disabled for the minimum duration necessary to state a claim for serious injury under the 90/180 day category. His allegations that he had some restrictions with regard to work and/or everyday activities, coupled with his failure to submit medical evidence which documents that he was prevented from performing "substantially all" of his usual and customary activities for the requisite period is insufficient to sustain his burden upon summary judgment. See Rubin v. SMS Taxi Corp., 71 A.D.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010). As such, that claim is hereby dismissed.

Accordingly, it is hereby

**ORDERED** that Defendants D. Prevot-Woolery and Somaya K. Prevot's motion (#1) for summary judgment, pursuant to CPLR § 3212, is DENIED, except with respect to the 90/180 no-fault category, which is dismissed; and it is further

**ORDERED** that this matter is scheduled for a settlement conference on **December 16, 2020, 11:00 a.m. via Microsoft Teams.** Link to be provided by the Court prior to the conference.

The foregoing constitutes the Opinion, Decision & Order of the Court on Motion #1.

Dated: New City, New York
October 16, 2020

**HON.SHERRI L. EISENPRESS, A.J.S.C.**

TO:

All Parties (by e-file)