At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 10th day of December 2020.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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Frantz Dabel,

Plaintiff,

Index No. 502325/2018
Cal. No. 9 MS 1

-against-

DECISION AND ORDER

Kislev Enterprises, Inc. and Fnu Zulfiqar,

Defendants.

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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers	Numbered
MS 1	Docs. # 12-20; 36-41

Upon the foregoing cited papers, defendant's motion for summary judgment on the issue of threshold, pursuant to CPLR 3212 and Insurance Law §3101(d), is decided as follows:

Plaintiff commenced this action to recover for personal injuries allegedly sustained as the result of a motor vehicle accident on November 7, 2017, on Brighton Third Street, at or near its intersection with Neptune Avenue, in Brooklyn, New York. He was the driver of the vehicle that collided with a vehicle owned by defendant Kislev Enterprise Inc., and operated by Fnu Zulfiqar.

As the result of the accident, plaintiff alleged the following injuries to the cervical and lumbar spine: disc herniation at L4-5 and L5-S1, disc bulge at L3-4, cervical sprain/strain, lumbar sprain/strain, lumbar radiculopathy and restricted range of motion. Plaintiff also alleged a left knee contusion, restricted range of motion and strain/sprain. Plaintiff averred he has continued pain in the neck and back, including problems walking, carrying heavy items,

bending, and climbing and descending stairs. During his deposition, plaintiff admitted having been involved in a prior accident where his neck, back and right arm were injured, and that he was still undergoing treatment when the current accident occurred.

Defendants moved for summary judgment, pursuant to CPLR 3212, to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposed.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman*, 49 NY2d at 562).

In a "serious injury threshold" motion for summary judgment, as here, defendant must initially submit competent medical evidence establishing that plaintiff did not suffer a "serious injury" and the injuries are not causally related to the accident (*see* Insurance Law 5102 [d]; *see Kelly v Ghee*, 87 Ad3d 1054, 1055 [2d Dept 2011]; *see Winegrad*, 64 NY2d at 853). "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 (Insurance Law § 5102 [d]). The issue is not whether plaintiff can ultimately establish a "serious injury," but whether there exists an issue of fact in the case on such issue (*Zuckerman*, 49 NY2d at 562).

Here, defendants proffered the affirmed report of Dr. Mark Decker, a radiologist, who after reviewing the MRI films of plaintiff found bulges at L1-2; L3-4, L4-5 and L5-S1. The bulges at L4-5 and L5-S1 were reported to be broad and asymmetric to right herniations impressing on the thecal sac. The radiologist concluded plaintiff has degenerative disc disease throughout his lumbar spine and such was longstanding and not causally related to the accident on November 7, 2017.

Defendants also proffered the affirmed report of Dr. Dana Mannor, a board certified orthopedic surgeon. Dr. Mannor examined plaintiff on September 26, 2019. She reported plaintiff complained of neck, back and left knee injury. She further reported a normal orthopedic examination, including full ranges of motion in the knee and cervical and lumbar spine. She opined plaintiff's cervical spine sprain/strain, lumbar spine sprain/strain, and left knee sprain/ strain were resolved. Defendants further averred that there is no proof on this record to support a 90/180 claim. Defendants therefore met their prima facie burden of proof, shifting the burden to plaintiff.

Plaintiff, in opposition, produced a radiology report of Dr. Steven B. Losik, dated December 8, 2017. The radiology report revealed a L3-4 disc bulge with encroachment on the neural foramina, a posterior L4-5 disc herniation with compression on the thecal sac and nerve

roots and L5-S1 disc herniation with compression on the ventral thecal sac and impingement on the nerve roots.

Plaintiff also produced an affirmed report of Dr. Nicky Bhatia, a neurologist, dated December 27, 2019. Dr. Bhatia noted in the history section of his report,

> This is a 58 year old man who was involved in a traumatic injury on 11/7/17. He was a driver of a car; was seatbelted. The car was struck at the front. On impact he suffered a largely anterior-posterior whiplash type injury at the neck . . . After 3-4 days started feeling pain in the neck and left knee. Since the accident he has had episodic neck pain; states that about every two months or so will feel it wherein can be severe, limiting motion and in particular ability to perform at occupation-works as a taxi driver. Pain is sharp and localized to the middle posterior cervical base of the neck and without radiation to either armor hand; no associated numbness or tingling. During pain will have OTC analgesics which help briefly . . . He had a prior accident Aug 2017; MVA, as taxi driver. He suffered right elbow and lower back injuries; still has some lingering symptom sat (sic) the right arm.

On the date of the examination, Dr. Bhatia determined plaintiff had limited range of motion of the cervical spine extension 45/60 and right lateral flexion 30/45 and diagnosed him with episodic cervical pain related to the current accident.

Subsequently, on January 28, 2020, Dr. Bhatia reviewed the radiology films of plaintiff's back and indicated he disagreed with Dr. Decker's conclusion that the positive findings are due to degeneration. He opined there is compression on the thecal sac and nerves related to this accident and not due to a pre-existing condition. However, it must be noted, there is no evidence that Dr. Bhatia ever examined plaintiff's back or suspected any injury related to his back since he did not record any complaints of back problems made by plaintiff. Furthermore, no report of a current medical examination was provided.

Plaintiff contends despite the lack of evidence regarding any current condition, he nevertheless has a 90/180 claim under the statute. Defendants contend even if he suffered a medically determined injury, he does not meet the remaining requirements to support a 90/180

claim. Here, although plaintiff was already receiving physical therapy related to a prior accident when the subject accident occurred, the physical therapy did not terminate until "mid-of 2018." He was confined to bed approximately ten days and the house for fifteen days. He was unable to work for eight months. He averred, as a result of the accident, he could not lift heavy items, have personal relations, walk fast, or bend without difficulty. Accordingly, on these facts, there are questions of fact as to whether plaintiff suffered a serious injury which qualifies for relief under the 90/180 provision of the Insurance Law (*Toure v Avis Rent A Car Sys*, 98 NY2d 345[2002]). Therefore, the motion for summary judgment is denied.

ENTER:

HON. REGINALD A. BODDIE J.S.C.

Hon. Reginald A. Boddie
Justice, Supreme Court