Kocak v Sabato
2021 NY Slip Op 31954(U)
April 9, 2021
Supreme Court, Broome County
Docket Number: EFCA2019002708
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 9th day of April 2021, by virtual oral argument.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

MICHAEL KOCAK,

Plaintiff,

-against-

DANIEL M. SABATO,

Defendant.

DECISION AND ORDER

Index No. EFCA2019002708

APPEARANCES:

Counsel for Plaintiff: James Alexander & Associates, LLC
By: James L. Alexander, Esq.
6713 Collamer Rd., Suite 1
East Syracuse, NY 13057

Counsel for Defendant: Barth Condren
By: John Condren, Esq.
367 Linwood Ave
Buffalo, NY 14209

[* 2]

EUGENE D. FAUGHNAN, J.S.C.

On October 30, 2016 at around 1:20 a.m., Plaintiff, Michael Kocak, was a passenger in a car driven by Defendant Daniel M. Sabato, and their vehicle was involved in an accident with a vehicle driven by Kiernan Macmyne, who is not a party to this action. Plaintiff alleges that Defendant negligently turned left into the path of the Macmyne and was responsible for the accident and Plaintiff's resulting injuries. Plaintiff commenced this action on August 28, 2019, and Defendant served an Answer with Affirmative Defenses on October 22, 2019. The parties have engaged in discovery, including relevant depositions.

Defendant has filed a motion for summary judgment pursuant to CPLR §3212 contending that the proof shows that Plaintiff has not sustained a "serious injury" under New York Insurance Law § 5102(d). Defendant has also requested that its motion be considered timely pursuant to Executive Order 202.8. Plaintiff filed opposition papers arguing that an issue of fact exists, which precludes the granting of summary judgment.[1] After due deliberation and for the reasons set forth below, the Defendant's motion for summary judgment is denied.

BACKGROUND

On the date of the accident, the Sabato vehicle was proceeding on Hawley Street in the City of Binghamton, and Sabato attempted to turn left into a parking lot. He pulled into the path of an oncoming SUV, which impacted the passenger side of the Sabato vehicle. In his complaint, Plaintiff alleged that Defendant was negligent in causing the collision, by virtue of making the unsafe turn, and operating under the influence of alcohol. Defendant has already conceded liability for causing the accident and the Court issued a Decision and Order dated September 16, 2020, granting Plaintiff's motion for summary judgment on liability. The only issue at this point is whether Plaintiff sustained a "serious injury" under New York Insurance Law.

[1] All the papers filed in connection with the motion and cross motion are included in the NYSCEF electronic case file, and have been considered by the Court.

Plaintiff served a Verified Bill of Particulars asserting that he sustained "serious injury" under Insurance Law § 5102(d) as follows: 1) permanent loss of use of a body organ, member, function or system; 2) significant or consequential limitation of use of a body organ or member; and/or 3) a medically determined injury or impairment of a non-permanent nature that 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.

Plaintiff and Defendant were both deposed on May 19, 2020 and Plaintiff's deposition transcript was included as part of Defendant's motion. Plaintiff primarily alleges injuries to his cervical spine.

Defendant served a notice of physical examination of the Plaintiff, which was conducted by Dr. Robert Knapp, a neurologist, on June 27, 2020. Plaintiff failed to provide diagnostic studies at the time of the examination, causing a delay in the preparation of the report, but Dr. Knapp finally issued a report dated October 9, 2020. Dr. Knapp concluded that Plaintiff's neurologic examination was normal, and he did not find any objective evidence of a serious permanent injury in this case.

Defendant filed this motion for summary judgment on November 12, 2020. Plaintiff filed opposition papers to Defendant's motion and included an affirmation of Sajid A. Khan, M.D., Plaintiff's pain management physician, as well as other treatment records, and two Independent Medical Examinations conducted for the No-Fault Carrier. Plaintiff believes that his evidence raises a triable issue of fact as to whether he sustained a "serious injury", precluding summary judgment for Defendant.

LEGAL DISCUSSION AND ANALYSIS

1. <u>Timeliness of the motion</u>

Plaintiff filed his Note of Issue on August 4, 2020. Under the Rules for the Sixth Judicial District, dispositive motions are to be made within sixty days of the filing of the Note of Issue.

Defendant's motion for summary judgment was made on November 12, 2020, which was more than sixty days after the filing of the Note of Issue. On November 5, 2020, Defendant filed a letter seeking permission from the Court to file a motion for summary judgment beyond the sixty day period, on the grounds that the report from Dr. Knapp was delayed due to the Plaintiff not providing the diagnostic studies at the time of the examination. Defendant's request for an extension was opposed by Plaintiff. On November 9, 2020, the Court issued a Letter Decision and Order, permitting Defendant until November 16, 2020 to file his summary judgment motion, without specifically ruling on the timeliness, and permitting both parties to address the question of whether the late filing should be permitted.

In his motion papers, Defendant also asserts that he is entitled to a toll of the sixty day requirement because of Executive Orders placed in effect as a result of the COVID-19 pandemic. This argument requires a review of various Executive Orders issued throughout 2020 by Governor Cuomo in response to the COVID-19 public health emergency. Executive Order 202.8 issued on March 20, 2020 provided that:

> any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby *tolled* from the date of this executive order until April 19, 2020.

Executive Order 202.8 (emphasis added)

Executive Order 202.8 was extended multiple times in 2020 on approximately a monthly basis. One such extension, Executive Order 202.67 dated October 4, 2020, provided that "[t]he suspension in Executive Order 202.8 ... that tolled any specific time limit for the commencement, filing, or service of any ... motion, or other process... is hereby continued [and] such suspension is only effective until November 3, 2020, and after such date any such time limit will no longer be tolled." Thus, the extension of Executive Order 202.8 was effective until

November 3, 2020, and motions were one of the listed items effected by the Executive Orders.[2] The Executive Orders use both the words "suspension" and "toll", which have very different meanings and impact. A suspension prevents the expiration of time limitations during the suspension, but no additional time is added at the end of the suspension. Thus, during the suspension, no steps can be taken to enforce a time limitation, but once the suspension is over, enforcement of the relevant time limitation can occur. A toll, on the other hand, stops the clock for a finite period of time, and the period of the toll is excluded from the calculation of whatever action must be taken. *See, Chavez v. Occidental Chem. Corp.*, 35 NY3d 492, 505 n.8 (2020), *reh'g denied* 36 NY3d 962 (2021). With a toll, the time limitation is not running at all during the period of the toll, and whatever time remained for any action to be taken is added to the end of the tolling period. This Court concludes that the Executive Orders issued in 2020 constitute a toll, not a suspension. *Brash v. Richards*, 2021 App. Div. LEXIS 3555 (2nd Dept. June 2, 2021).[3] While there is some disagreement amongst commentators as to whether the Executive Orders should be interpreted as suspending or tolling applicable time limitations, the language of Executive Orders 202.8, 202.67 and 202.68 is most consistent with those Orders providing a toll. *See, e.g. Foy v. State of New York*, 71 Misc3d 605 (NY Ct. Cl. 2021); *Kugel v. Broadway 280 Park Fee LLC*, 2021 NYLJ LEXIS 25 (Sup. Ct. New York County 2021); *Zaborski v. MB Lorimer LLC*, 2021 NY Misc LEXIS 806 (Sup. Ct. New York County 2021); Siegel & Connors, New York Practice §33 (Thompson, 6th ed. 2018 and 2021 Supp); *cf. McLaughlin v. Snowlift Inc.*, 2021 NY Misc LEXIS 2794 (Sup. Ct., Kings County 2021). Accordingly, Defendants' time to make a dispositive motion did not even start to run until November 4, 2020, when the extension of Executive Order 202.8 ceased. As a result, Defendant's motion for summary judgment, filed on November 12, 2020 was timely.

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[2] Executive Order 202.72, dated November 3, 2020, extended various provisions contained in prior Executive Orders for another 30 days, but noted that the suspension for civil cases that tolled specific time limits was no longer in effect as of November 4, 2020.

[3] In the absence of decision from the Third Department addressing this issue, this Court is obligated to follow the precedent set by the Appellate Division of another Department. *Maple Med., LLP v. Scott*, 191 AD3d 81 (2nd Dept. 2020).

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2. Defendant's Motion for Summary Judgment

Having resolved the procedural argument regarding the timeliness of the motion, the Court will now turn to the merits of the motion. When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the opposing party to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination ... and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000) (internal citation omitted); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

In the context of motor vehicle accidents, "[u]nder New York's no-fault system of automobile insurance, a person injured in a motor vehicle accident may only recover damages if he or she sustained a serious injury." *Altman v. Shaw*, 184 AD3d 995, 996 (3rd Dept. 2020), *quoting Sul-Lowe v. Hunter*, 148 AD3d 1326, 1327 (3rd Dept. 2017). The "legislative intent

underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries." *Dufel v. Green*, 84 NY2d 795, 798 (1995); *Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 (2002); *see also Licari v. Elliott*, 57 NY2d 230, 234-235 (1982). In order for a plaintiff to bring a suit for non-economic loss, i.e. pain and suffering, the plaintiff must show that he has sustained a "serious injury" as defined by the statute. *Pommells v. Perez*, 4 NY3d 566, 571 (2005); *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 (2001); *see* Ins. Law § 5104(a); *see also Jones v. Marshall*, 147 AD3d 1279 (3rd Dept. 2017). To satisfy the serious injury threshold, plaintiff must provide objective proof, and subjective complaints alone are insufficient. *Toure v. Avis Rent A Car Sys.*, 98 NY2d 345, 350; *see, Perl v. Meher*, 18 NY3d 208, 216 (2011). If a Plaintiff establishes that any of his or her injuries qualify as a "serious injury" the Plaintiff is entitled to seek recovery for all the injuries sustained, even if any one of the injuries individually might not meet the "serious injury" threshold. *Kelley v. Balasco*, 226 AD2d 880 (3rd Dept. 1996); *O'Neill v. O'Neill*, 261 AD2d 459 (2nd Dept. 1999). Although Plaintiff has the burden of proof to establish serious injury at trial, on Defendant's motion for summary judgment, the Defendant has "the initial burden of establishing, through competent medical evidence, that plaintiff did not sustain a serious injury caused by the accident." *Altman v. Shaw*, 184 AD3d at 997 (citations omitted); *Jones v. Marshall*, 147 AD3d at 1281; *Fillette v. Lundberg*, 150 AD3d 1574, 1576 (3rd Dept. 2017); *Lawyer v. Albany OK Cab Co.*, 142 AD2d 871 (3rd Dept. 1988). If that burden is met, then the burden is shifted to the Plaintiff "to produce competent medical evidence, based upon objective medical findings and diagnostic tests, which create a genuine triable issue of fact concerning the existence of a serious injury." *John v. Engel*, 2 AD3d 1027, 1028 (3rd Dept. 2003) (citation omitted).

A. Permanent loss of use of a body organ, member, function or system

Only a total permanent loss of use is compensable under this category. *Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295 (2001). Defendant satisfied his *prima facie* burden in this category by submitting the report of Dr. Knapp who found no neurologic deficits, and no serious permanent injury.

In opposition, Plaintiff did not advance any arguments on the permanent loss of use category. His opposing medical evidence did not reveal the requisite "total loss of use". *See Pezzino v. Woodruff*, 103 AD3d 944 (3rd Dept. 2013). Thus, Plaintiff has not raised a triable issue of fact under the permanent loss of use category. However, the Court's inquiry does not end there, as Plaintiff need only satisfy one of the serious injury categories.

B. Permanent consequential limitation of use of a body organ or member/ significant limitation of use of a body function or system

In his Bill of Particulars, Plaintiff claimed serious injury under the categories of "permanent consequential limitation" and "significant limitation of use." Plaintiff's claimed injuries are primarily cervical in nature, and the following conditions (among others) are alleged in his Bill of Particulars: bilateral occipital neuralgia, C3-C4 disc osteopathe complex; herniated cervical disC foraminal stenosis on the right at C6-7 and C7-T1; cervical radicular pain; chronic right shoulder pain; chronic headaches; significant loss of range of motion and mobility and inability to sleep. He claims that some of the injuries are permanent and progressive.

To qualify as a "permanent consequential limitation of use", the injury must be important or significant and obviously, permanent. *See Kordana v. Pomellito*, 121 AD2d 783 (3rd Dept. 1986). The two categories of "permanent consequential limitation" and "significant limitation" are quite similar, with the main difference being that under the "significant limitation" category, the injury need not be total or permanent, although it may be. *See, Poole v. State of New York*, 68 Misc3d 1218(A) (NY Ct. Cl., 2020); *Lavrinovich v. Conrad*, 180 AD3d 1265, 1269 (3rd Dept. 2020); *Decker v. Rassaert*, 131 AD2d 626 (2nd Dept. 1987). "When a plaintiff relies upon the permanent consequential limitation and/or significant limitation of use categories, such claims must be grounded upon 'objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing [the] plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system.'" *Jones v. Marshall*, 147 AD3d at 1280, *quoting Raucci v. Hester*, 119 AD3d 1044, 1045-1046 (3rd Dept. 2014) (other citation omitted); *see*, *Clements v. Lasher*, 15 AD3d 712, 713 (3rd Dept. 2005) *citing Toure v. Avis Rent A Car Sys.*, 98 NY2d 345. The medical evidence must also establish that the

"limitation of use that he or she sustained was more than mild, minor or slight." *DeHaas v. Kathan*, 100 AD3d 1057, 1058 (3rd Dept. 2012), *citing Womack v. Wilhelm*, 96 AD3d 1308 (3rd Dept. 2012) (other citation omitted); *Booker v. Miller*, 258 AD2d 783 (3rd Dept. 1999).

The "quantitative" approach focuses on specific range of motion deficits and is usually based upon numerical values or percentages as to loss of range of motion. The "qualitative" approach relies upon medical proof of a functional impairment. *See Rodman v. Deangeles*, 148 AD3d 119 (3rd Dept. 2017).

Defendant contends that the medical report from Dr. Knapp as well as Plaintiff's sworn testimony and Plaintiff's Verified Bill of Particulars show that any injuries sustained by the Plaintiff in the accident do not qualify as a "serious injury" under the law. The Court will evaluate that evidence to determine if Defendant has made a *prima facie* case for summary judgment.

Dr Knapp examined Plaintiff on July 27, 2020 and he reviewed treatment records, the Bill of Particulars, Plaintiff's deposition and various imaging studies. Dr. Knapp described his review of diagnostic studies, including an MRI of the cervical spine, from March 21, 2017, which revealed a small disc bulge at C3-4 without herniation. A follow up MRI on May 22, 2019 showed a similar disc protrusion at C3-4. Dr. Knapp recorded that the physical examination showed "[c]ervical spine range of motion was full in all planes. No paracervical muscle spasms were identified....Station gait and balance unremarkable." Dr. Knapp reported on other tests and findings, but did not elaborate on the significance or methodology of those other tests.

Based upon his examination, Dr. Knapp concluded that the Plaintiff had a normal neurologic examination. He felt that the disc bulges shown on the MRIs were normal findings, and not indicative of trauma. The absence of disc herniation in the cervical spine was also viewed as evidence that there was no significant or residual injury from the motor vehicle accident. Dr. Knapp concluded that he did "not see any objective evidence of a serious permanent injury in this case."

The quantitative approach generally compares a patient's performance to average normal findings. Here, although Dr. Knapp did find that Plaintiff's cervical spine range of motion was

full in all planes, he did not detail what tests were performed to evaluate range of motion, nor did he specify what the findings were in this case, and what the normal range of motion findings were for each test.

Dr. Knapp also did not provide any specific opinion as to the qualitative nature of any limitations. Presumably, that was due to the fact that he concluded that there was no objective evidence of serious permanent injury in this case, so there is no limitation.

A medical opinion from Defendant's examining physician is insufficient if it fails to set forth the objective test or tests the doctor performed that support the doctor's opinion. *See, Zavala v. DeSantis*, 1 AD3d 354 (2nd Dept. 2003); *Nembhard v. Delatorre*, 16 AD3d 390 (2nd Dept. 2005); *see also, Schilling v. Labrador*, 136 AD3d 884, 884-885 (2nd Dept. 2016) (an affirmation that "does not identify the objective tests which were utilized to measure range of motion ... does not support the limitation conclusion.") Thus, even though Dr. Knapp stated that Plaintiff had full range of motion in all planes, since he did not set forth the objective tests performed, or results, to support that claim, Defendant has failed to meet his *prima facie* burden. *Exilus v. Nicholas*, 26 AD3d 457 (2nd Dept. 2006).

Under the "qualitative" approach, Dr. Knapp did not provide any opinions as to functional limitations, if any. He did not comment as to any restrictions on Plaintiff's work activities (e.g. lifting, positional, or durational limitations), or activities of daily living. While it may be inferred that he does not feel there are any limitations because he did not see any objective evidence of a serious permanent injury, he did not specifically make any statement as to Plaintiff's qualitative capabilities. Moreover, his opinion is that he does not believe there is a "serious" permanent injury, but that does not preclude limitations, possibly permanent that may be less than "serious" in his opinion. What is medically "serious" may not equate with what the law determines is a "serious injury". Further, the determination of whether there is a "serious injury" under any category of the No-Fault Law is a legal conclusion, which is evaluated by the Court based upon the evidence provided. Dr. Knapp's opinion simply does not address any "qualitative" limitations.

Considering the deficiencies of Dr. Knapp's opinion, both on the "quantitative" and "qualitative" prongs, Defendant has failed to establish a *prima facie* entitlement to summary

judgment. If defendant fails to make a prima facie showing, the burden does not shift to the Plaintiff, and the motion must be denied without regard to the sufficiency of opposing papers. *Vandetta v. Adams*, 121 AD3d 1328, 1330 (3rd Dept. 2014) *citing Pezzino v. Woodruff*, 103 AD3d at 944; *see also, Pommells v. Perez*, 4 NY3d at 578.

Nevertheless, even if the Court were to conclude that Defendant's evidence was sufficient to satisfy his burden on this motion, the Plaintiff has raised a triable issue of fact. If Defendant did satisfy that burden, then Plaintiff has to "raise a triable issue of fact through the use of competent, objective medical evidence and diagnostic tests." *Buster v. Parker*, 1 AD3d 659, 660 (3rd Dept. 2003) (citations omitted); *Cross v. Labombard*, 127 AD3d 1355 (3rd Dept. 2015). The use of objective tests is not incumbent on the Plaintiff in the first instance, although the absence of such objective tests could be used to support a Defendant's IME. *See Franchini v. Palmieri*, 1 NY3d 536 (2003).

Following the motor vehicle accident, Plaintiff treated with Lourdes Primary Care Associates and was referred for physical therapy. Physical therapy notes from November and December 2016 indicate reduced cervical range of motion, described in percentage deficits from normal. Plaintiff began treatment at Dr. Khan's office on January 26, 2017, first with another physician, and then came under Dr. Khan's care in the fall of 2017. The office note from the January 26, 2017 visit shows that lateral flexion was 40 degrees to the right and 40 degrees to the left; extension was 55 degrees and flexion was 45 degrees; rotation to the left and right was 70 degrees. Dr. Khan treated Plaintiff 20 different times between September 2017 and October 2020, and opined that Plaintiff was consistently positive on physical examination for abnormal range of motion testing and decreased passive range of motion in the cervical region. Dr. Khan felt that Plaintiff's cervical range of motion was moderately reduced throughout the course of treatment.

Plaintiff has undergone various tests and treatments, including acupuncture treatments averaging once every four or five days. He also underwent nerve blocks and epidural steroid injections. He also underwent MRI scans, EMGs and x-rays. He was also evaluated by a No-Fault IME (Justin B. Delchman, LAc) on March 21, 2019 and found to have limited cervical range of motion, 25-50 percent in all planes. That IME report also indicated that Plaintiff

"should be restricted from activities which provoke his cervicogenic symptoms, specifically but not exclusively, overhead lifting or carrying weights greater than fifteen pounds, or not entirely comfortably tolerated." Dr. Khan's affirmation also gave an opinion that "[g]iven the longevity of his symptoms … [Plaintiff's] injuries from the motor vehicle accident constitute a permanent consequential limitation of his musculoskeletal and peripheral nervous system, as well as a permanent and significant limitation of his musculoskeletal and peripheral nervous system."

Plaintiff also testified with various limits on his activities, which are consistent with the diagnostic studies and medical records. Plaintiff has not been able to return to working out at the gym, has pain that flares up when lifting overhead, has not been able to ski since the accident and experiences difficulty sleeping due to neck pain. He also cannot fully turn his head when driving.

The Plaintiff has submitted both quantitative and qualitative evidence in support of a claim for "permanent consequential limitation of use" or significant limitation of use". Plaintiff has raised a triable issue of fact under these categories, precluding summary judgment for Defendant.

C. 90/ 180 days category

Defendant's motion also claims that Plaintiff cannot establish that he was prevented from performing substantially all of his usual and customary daily activities for at least 90 days out of the 180 days following the accident. Insurance Law § 5102 (d). The curtailment of activities must rise to the level of a "great extent rather than some slight curtailment" based upon objective medical findings." *Licari v. Elliott*, 57 NY2d at 236.

Defendant relies upon the deposition transcript of Plaintiff's testimony on May 19, 2020, claiming that Plaintiff's testimony was that he missed "a couple of months maybe" from work as a result of this accident. Defendant does not highlight any other evidence to support the motion in this category, and the report of Dr. Knapp does not address Plaintiff's activities following the accident. As noted above, even though it is Plaintiff's burden to establish "serious injury" at

trial, it is Defendant's burden, on this motion, to establish that Plaintiff did not sustain a "serious injury." The scant evidence relied upon by Defendant is not sufficient to satisfy its *prima facie* burden. Although the ability or inability to work following the accident is an important consideration in the 90/180 category, it is not the sole factor, as the statutory language references usual and customary daily activities, not just work. The fact that Plaintiff was out of work for a couple of months is apparently being used to show that the duration was less than 90 days out of the 180 days following the accident, and therefore Plaintiff cannot show he was out of work for 90 of the first 180 days after the accident. However, that information does not address the remaining approximately 4 months of the 180 days, and whether Plaintiff was performing any work, perhaps in a light duty or restricted capacity. It also does not touch upon any of the Plaintiff's other activities of daily living. Standing on its own, evidence that Plaintiff was out of work a couple of months after the accident is not enough to satisfy Defendant's burden under the 90/180 day category.

Moreover, Plaintiff's medical evidence and his own testimony raise a triable issue of fact under this category. Dr. Galyon, a neurosurgeon, evaluated Plaintiff on January 10, 2017, and referred him to pain management. Plaintiff testified that Dr. Galyon took him out of work following the accident and told him he could no longer work in construction due the injuries sustained in the accident. Dr. Galyon saw Plaintiff again on May 20, 2017 and Dr. Galyon did not recommend surgery, but he did release Plaintiff to work. Plaintiff contends this shows he was disabled from his work for at least the time frame of October 30, 2016 through May 20, 2017. As also discussed above, Plaintiff testified regarding his limitations on going to the gym, skiing and driving. The Court finds that Plaintiff has raised a triable issue of fact as to the 90/180 day category.

CONCLUSION

Based on all the foregoing, it is hereby

ORDERED, that Defendant's motion is timely under the Rules of the Sixth Judicial District and based upon the toll provided under the Executive Orders discussed above; and it is further

ORDERED, that Defendant's motion for summary judgment is DENIED in all respects.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: June 23, 2021
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice