Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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KERRITH A. RICKETT AND RENEE RICKETT,

Plaintiff(s),

- against -

FITZROY A. REID,

Defendant(s).

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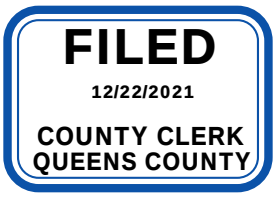
Index No.: 713830/17

Motion Date: 10/26/21

Motion Cal. No.: 38

Motion Seq. No.: 04



The following papers numbered 1 - 10 read on this motion by defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Exhibits-Service.....	8 - 10

Upon the foregoing papers, it is **ORDERED** that the above-referenced motion is decided as follows:

This personal injury action arises from an October 22, 2014 automobile collision that occurred at or near the intersection of Street and Avenue, County of Queens, City and State of New York. According to the bill of particulars ("BP"), plaintiff Kerrith A. Rickett, the operator of plaintiffs' vehicle, sustained injuries to, *inter alia*, the cervical and lumbar regions of the spine, including herniated and bulging discs.[1] He was allegedly confined to a bed from the day of the accident to his October 26, 2014 hospital release, and, thereafter, to home until February 16, 2015. The BP also invokes the following "serious injury" categories:

> "permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of

[1]As plaintiff Renee Rickett asserts a claim only for damage to her vehicle, this decision shall use "plaintiff" to refer to plaintiff Kerrith A. Rickett.

> 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 happening of this occurrence."

Defendant now moves for summary judgment dismissing the complaint. Summary judgment is a drastic remedy that will be granted only if the movant has demonstrated, through submission of evidence in admissible form, the absence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), and has affirmatively established the merit of their cause of action or defense (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Failure to make a *prima facie* showing of entitlement to judgment as a matter of law "requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Upon such a showing, the burden shifts to the non-movant to raise a material issue of fact requiring a trial (*see id*). Courts must view the evidence in the light most favorable to the non-movant (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), drawing all reasonable inferences in their favor (*see Haymon v Pettit*, 9 NY3d 324, 327, n* [2007]).

Defendant argues that plaintiff's alleged injuries do not meet the threshold for maintaining a personal injury action under the "No-Fault Law," which "bars recovery in automobile accident cases for 'non-economic loss' (e.g., pain and suffering) unless the plaintiff has a 'serious injury' as defined in the statute" (*Perl v Meher*, 18 NY3d 208, 215 [2011]; *see* Ins Law § 5104[a]), and the injury is "causally related to the accident" (*Elshaarawy v U-Haul Co. of Mississippi*, 72 AD3d 878, 881 [2d Dept 2010]). This "require[s] objective proof of a plaintiff's injury," as "subjective complaints alone are not sufficient" (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]). Defendant, as the proponent of summary judgment, bears the "prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident" (*Luque v Flovictov Cab Corp.*, 168 AD3d 922, 923 [2d Dept 2019]).

In support of the motion, defendant submits, *inter alia*, the BP, plaintiff's certified deposition transcript, as well as the affirmed reports of orthopaedic surgeon Jeffrey Passick, M.D., F.A.A.O.S., and neurologist Michael J. Carciente, M.D. Dr. Passick performed an independent medical examination ("IME") of plaintiff on July 13, 2020, and found, *inter alia*, that plaintiff "has the pre-existing condition of degenerative disc disease," and his tests indicated a normal range of motion in plaintiff's cervical and lumbar spine. Dr. Passick concluded that: the strains of those

spinal regions had resolved, "there was no objective evidence of disability from a medical standpoint," and that plaintiff "is capable of working and performing his customary activities of daily living with no limitations." Dr. Cariente performed an IME of plaintiff on March 15, 2021, and concluded that there were "no objective neurological findings," and that his examination "does not support the presence of an ongoing neurological injury, disability, or permanency."

The court rejects defendant's first contention, that plaintiff did not sustain injuries causally related to the subject accident. It is axiomatic that a defendant cannot establish lack of causation, or the absence of a qualifying injury, with an expert opinion that is conclusory (*see e.g. Gray v Patel*, 171 AD3d 1141, 1144 [2d Dept 2019]; *Yaegel v Ciuffo*, 95 AD3d 1110, 1112-1113 [2d Dept 2012]). The same quality of evidence is required to make a *prima facie* showing that a claimed injury is pre-existing or caused by a degenerative condition (*see Pommells v Perez*, 4 NY3d 566, 577-578 [2005]; *McGee v Bronner*, 188 AD3d 1033, 1035 [2d Dept 2020] [rejecting as "speculative and wholly conclusory" a defendant's contention that the plaintiff's injuries were degenerative in nature]). Here, neither defense expert opines as to whether the claimed injuries were causally related to the accident. To the contrary, Dr. Passick summarized the contents of the reports of MRIs taken of plaintiff's lumbar and cervical spine on November 14, 2014, less than a month after the accident, which included findings of bulging and herniated discs. Although defendant presented these findings, he did not proffer any medical expert evidence explaining why they are not causally related to the accident. Dr. Passick also failed to explain the basis for his statement that plaintiff suffered from degenerative disc disease. The court, thus, concludes that defendant failed to satisfy his *prima facie* burden to establish the lack of causation.

Defendant also argues that plaintiff's injuries do not qualify as "serious" under the No-Fault Law because the defense orthopaedic and neurology experts concluded that plaintiff's claimed injuries had resolved, and he was not suffering from a disability or any physical limitations. Even assuming *arguendo* that these conclusions would negate the "permanent loss of use" and "permanent consequential limitation of use" categories, it does not necessarily foreclose applicability of the significant limitation of use category, which does not require a finding of permanency (*see Estrella v GEICO Ins. Co.*, 102 AD3d 730, 731-732 [2d Dept 2013]; *Decker v Rassaert*, 131 AD2d 626, 627 [2d Dept 1987]). Each defense expert examined plaintiff only once, approximately six years after the subject accident, and neither opined as to whether plaintiff had experienced any significant limitation of use during the several years preceding their respective IMEs. Relatedly, in the BP, plaintiff specifically alleged injuries to, *inter alia*, the lumbar and cervical regions of his spine, expressly incorporating

the findings of the November 14, 2014 MRI, and additional testing done on June 9, 2015 indicating limited range of motion ("ROM") in those regions. Defendant did not address, in its moving papers-in-chief, these specific alleged medical findings bearing on the significant limitation of use category. This further buttresses the court's conclusion that defendant failed to make a *prima facie* showing as to the inapplicability of this category.

Similarly, neither defense expert's opinion bears on whether plaintiff was unable to perform substantially all of the material acts comprising his usual and customary daily activities for 90 of the first 180 days after the accident, *i.e.* "the 90/180 category," despite each having recorded that plaintiff reported that the accident caused him to miss a year of work (*see e.g. Kapeleris v Riordan*, 89 AD3d 903, 904 [2d Dept 2011] [summary judgment denied where IME was held years after the accident and the defense expert failed to relate findings to the 90/180 category during the applicable time period]; *Reynolds v Wai Sang Leung*, 78 AD3d 919, 920 [2d Dept 2010] [same]; *Smith v Quicci*, 62 AD3d 858, 859 [2d Dept 2009] [same]).[2] Defendant's failure to make a *prima facie* showing requires denial of his motion regardless of the sufficiency of plaintiff's opposition (*see Alvarez*, 68 NY2d at 324; *Penoro v Firshing*, 70 AD3d 659, 660 [2d Dept 2010]; *Powell v Prego*, 59 AD3d 417, 419 [2d Dept 2009]).

In any event, plaintiff has raised triable issues of fact as to whether he sustained a significant limitation of use of the affected body regions through the affirmed medical reports of his treating physiatrist, Raj Tolat, M.D. The reports indicate that Dr. Tolat examined plaintiff on October 27, 2014 (five days after the subject accident), November 17, 2015, and June 22, 2021. Dr. Tolat's measurements during each examination indicated losses of ROM in the cervical and lumbar spinal regions, which, he stated, would be consistent with the injuries allegedly sustained in the accident. After the November 17, 2015 visit, Dr. Tolat discontinued plaintiff from additional formal physical therapy because he felt that plaintiff had "plateaued and reached maximum medical benefit." After the June 22, 2021 visit, Dr. Tolat opined that because the ROM limitations have persisted for some seven years, they "constitute a permanent loss," and "my prognosis for any full recovery of the cervical spine and lumbar spine remains extremely poor." These conclusions by Dr. Tolat as to continued losses of ROM in the affected spinal regions obviously contrast with the normal ROM findings indicated by defense orthopaedic expert Dr. Passic. Such a material factual dispute precludes an

[2]Defendant argues that the 90/180 category is inapplicable because plaintiff testified that no doctor told him that he should stop working after the accident. For the reasons explained below, the court need not resolve whether, even in the absence of medical evidence from defendant on the subject, this testimony would suffice to negate the category's applicability.

award of summary judgment.

It is well-settled that the statutory threshold categories are read in the disjunctive, and so, the failure to qualify under one category "does not necessarily preclude a recovery for the same alleged injuries under another category" (*see Damas v Valdes*, 84 AD3d 87, 92 [2d Dept 2011]). Therefore, a plaintiff need only establish one qualifying injury, after which he or she is "entitled to seek recovery for all injuries [] allegedly incurred as a result of the accident" (*Swed v Pena*, 65 AD3d 1033, 1034 [2d Dept 2009]; *see also Linton v Nawaz*, 14 NY3d 821, 822 [2010]). Defendant's failure to affirmatively establish that plaintiff's injuries do not qualify under the significant limitation of use category, thus, requires the denial of his motion for summary judgment, rendering his arguments regarding the other categories academic.

Accordingly, the above-referenced motion by defendant for summary judgment dismissing the complaint is **DENIED.**

The foregoing shall constitute the decision and order of this court.

Dated: December 22, 2021

JANICE A. TAYLOR, J.S.C.

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