SHORT FORM ORDER **INDEX NO.: 604574/2019**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 08/06/20
Mot Seq #: 001- Mot D; RTC

---x

JAMIE R. MORAN,

Plaintiff,

-against-

S. COLLAZO-KANE & PATRICK F. KANE,

Defendants.

---x

PLAINTIFF'S COUNSEL:
CANNON & ACOSTA, LLP
1923 New York Avenue
Huntington Station, NY 11746

DEFENDANTS' COUNSEL:
DAVID J. SOBEL, P.C.
811 West Jericho Turnpike, Suite 105
Smithtown, NY 11787

In this electronically filed personal injury action, concerning defendants' motion for summary judgment and, in the alternative for dismissal, the Court considered the following in reaching its determination: NYSCEF Docs. Nos. 12 – 39; and upon due deliberation and full consideration of the same; it is

ORDERED that defendants' motion for dismissal on the grounds of release pursuant to CPLR 3211 & CPLR 3123 is **denied** as provided below; and it is further

ORDERED that defendant's motion for summary judgment dismissing the complaint is **granted in part and otherwise denied** as follows; and it is further

ORDERED that defendants' counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon plaintiff's counsel; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it is further

ORDERED that counsel shall appear remotely at a discovery certification conference via

the Microsoft Teams platform, invitation and link to be provided by the Court under separate cover to counsel of record via email at their addresses on file with the Court via NYSCEF, on the previously scheduled date of **Thursday, May 6, 2021 at 10:30 a.m.**. Counsel may waive appearance provided a proposed compliance conference order certifying all pretrial disclosure as complete is entered into and filed for "so-ordering" by this Court in accord with the following prior to the calendared conference date.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

Plaintiff commenced this personal injury negligence action against defendants arising out of a motor vehicle collision which occurred on April 3, 2018 at the intersection of Peninsula Boulevard and Gordon Road in Valley Stream, Nassau County, New York. By the pleadings filed, plaintiff seeks damages for personal injury premised on defendants negligence as a proximate cause of the underlying motor vehicle collision and attendant alleged serious injuries.

In his verified bill of particulars, plaintiff alleges that he sustained various serious physical injuries including the following: bulging cervical spinal discs at C5-6 impressing the thecal sac and abutting the cord; C2-3 impressing the thecal sac; C3-4 impressing the thecal sac; L5-S1 disc herniation causing nerve root impression and annular tear; L4-5 disc herniation and annular tear; tendinosis/tendinitis of the supraspinatus and subscapularis tendons of the right shoulder; synovial [sic] fluid within the glenohumeral joint of the right shoulder; and right shoulder impingement for which injection was recommended.

Presently, defendants move pursuant to CPLR 3211 and 3123 for dismissal of plaintiff's complaint on the grounds that a general release had and executed by plaintiff in consideration of the payment of $1,300.00 by defendants' liability insurance carrier barred the prosecution and maintenance of this action. Failing that, defendants also seek summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint on grounds that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d).

Submitted in support of their application annexed to defense counsel's affirmation are *inter alia* copies of the pleadings, an uncertified copy of the transcript of plaintiff's examination before trial dated January 10, 2020, a general release dated April 4, 2018 and related settlement check dated April 5, 2018; and the affirmation of neurologist Matthew M. Chacko, M.D.

In opposition, as relevant and bearing on defendants' motions, plaintiff submits his counsel's affirmation as well as his sworn translated 1affidavit and copies of the police accident investigation report; property damage photographs, an additional copy of the release; and affirmations by radiologist Ronald Wagner, M.D.; radiologist Steven Winter, M.D.; and the sworn affidavit of treating chiropractor Robert M. Burrma, D.C.

SUMMARY OF THE ARGUMENTS

Defendant first moves to dismiss plaintiff's complaint on grounds that defendants' insurance carrier paid him a settlement and plaintiff in consideration thereof executed a general release and covenant not to sue releasing defendants from liability from the subject incident.

---

1 Plaintiff's affidavit was translated from Spanish to English, his first and native language.

Alternatively, defendant seeks judgment as a matter of law on the merits of plaintiff's claims of negligence arguing that plaintiff has failed to prove that he sustained a compensable "serious injury" under Insurance Law.

Opposing defendants' motion, plaintiff argues that defendants' release is invalid and should not be enforced on grounds of mutual mistake; i.e. the release was presented to plaintiff before he was represented by counsel and before he had been examined by or treated with a competent medical professional for the injuries he claims he sustained by reason of the incident. Further, plaintiff contends that the release was presented to him in English, not his first language as he is a native Spanish speaker with a GED education.

Lastly, plaintiff contends that defendants have failed to make a *prima facie* case entitling them to judgment as a matter of law dismissing his complaint by failing to address his alleged shoulder injuries at his independent medical examination and the resulting report prepared by Dr. Chacko. Failing that, plaintiff argues that his medical records from his treating chiropractor as well as those of his radiologist raise a triable question of fact precluding summary judgment and warranting a trial.

STANDARDS OF REVIEW

A. Dismissal Based on Release

"In resolving a motion for dismissal pursuant to CPLR 3211(a)(5), the plaintiff's allegations are to be treated as true, all inferences that reasonably flow therefrom are to be resolved in his or her favor, and where, as here, the plaintiff has submitted an affidavit in opposition to the motion, it is to be construed in the same favorable light."(***Webster v Forest Green Apt. Corp.***, 174 AD3d 668, 669, 104 NYS3d 688, 689-90 [2d Dept 2019]). "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the cause of action may not be maintained because of ... [a] release" (CPLR 3211[a][5]). However, a motion pursuant to CPLR 3211(a)(5) to dismiss a complaint on the basis of a release "should be denied where fraud or duress in the procurement of the release is alleged" (***Sacchetti-Virga v Bonilla***, 158 AD3d 783, 784, 73 NYS3d 194, 196 [2d Dept 2018]).

B. Summary Judgment

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (***Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP***, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (***Gniewek v Consol. Edison Co.***, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary

judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment 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 Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman****, supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

DISCUSSION

A. Does Release Operate to Bar Plaintiff's Complaint?

In making their application for dismissal of the plaintiff's complaint, defendant relies on General Obligations Law 15-108(b), entitled "Release or covenant not to sue" which provides in relevant part the following:

> (b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(Gen. Oblg. L. § 15-108 [McKinney's 2021])

It is fundamentally true that "a valid release constitutes a complete bar to an action on a claim which is the subject of the release." If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (***Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.***, 17 NY3d 269, 276 [2011]). " 'A release is a contract, and its construction is governed by contract law." "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release 'shifts the burden ... to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release"(***Cames v Craig***, 181 AD3d 851, 851-52, 119 NYS3d 888 [2d Dept 2020]).

However, the precedent is equally clear that "[a] valid general release will apply not only to known claims, but "may encompass unknown claims, ... if the parties so intend and the agreement is 'fairly and knowingly made." "However, a release may not be read to cover matters which the parties did not intend to cover." "[I]ts meaning and coverage necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given." "Moreover, there is a requirement that a release covering both known and unknown injuries be fairly and knowingly made"(***Burnside 711, LLC v Amerada Hess Corp.***, 175 AD3d 557, 559, 106 NYS3d 368, 371 [2d Dept 2019]).

Thus, where as here, a litigant attempts to invalidate or prevent reliance on or operation of a release to bar litigation, such efforts must be based on or rely upon "the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake." "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release 'shifts the burden ... to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release"(***Carew v Baker***, 175 AD3d 1379, 1381, 109 NYS3d 205, 207 [2d Dept 2019]). This requirement may be applied in situations "falling far short of actual fraud" such as when, "because the releasor has had little time for investigation or deliberation, or because of the existence of overreaching or unfair circumstances, it was deemed inequitable to allow the release to serve as a bar to the claim of an injured party" (***Haynes v Garez***, 304 AD2d 714, 715, 758 NYS2d 391, 393 [2d Dept 2003]).

To interpret a contract we look first to the words the parties used. It must be construed 'in the strictest manner' "with the guarantor being bound to the express terms of the written guaranty (***Wider Consol., Inc. v Tony Melillo, LLC***, 107 AD3d 883, 884, 968 NYS2d 521, 523 [2d Dept 2013]). "A written agreement that is complete, clear, and unambiguous on its face must be enforced so as to give effect to the meaning of its terms and the reasonable expectations of the parties, and the court should determine the intent of the parties from within the four corners of the contract without looking to extrinsic evidence to create ambiguities" (***Wider Consol., Inc. v. Tony Melillo, LLC***, 107 A.D.3d 883, 884, 968 NYS2d 521 [2d Dept 2013]). "An agreement 'is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (***Texas 1845, LLC v Kyaw***, 117 AD3d 1028, 1031, 986 NYS2d 574, 576–77 [2d Dept 2014]). "A party who signs a document without any valid excuse for not having read it is 'conclusively bound' by its terms" (***Stortini v Pollis***, 138 AD3d 977, 978, 31 NYS3d 90, 92 [2d Dept 2016]).

Here, the defendants have met their burden on motion of establishing that plaintiff executed a general release whose terms clearly and unambiguously related to waiver of the right to sue and seek recovery of damages for the negligence claims asserted in the complaint before this Court. Defendant produced plaintiff's own sworn deposition testimony demonstrating that plaintiff signed the document without duress and understood that in exchange for his signature on the preprinted release form, he would receive a settlement check from the defendants' insurer concerning the subject incident. The Court notes that plaintiff's assertion that he does not understand English contrasts with the fact that he was deposed without aid of a Spanish speaking interpreter.

Nevertheless, plaintiff has opposed operation of the release also calling into question its

timing. Plaintiff's incident occurred on April 3, 2018, and the insurance adjuster appeared at his home presenting the release and settlement check the following day before plaintiff had time to consult legal counsel which would not occur for several days thereafter.2 Therefore, plaintiff argues that he did not have the benefit of time to investigate thoroughly and become aware of the true nature, extent or scope of his alleged injuries at the time he executed the defendants' release. Adding this temporal component to his background and his claims that defendants' adjuster did not adequately explain the nature and importance of the document he signed, all amount to plaintiff's attempt to vitiate the knowledge requirement to bargain away as of then unknown and future claims by release.

The Appellate Divisions have focused on the timeline in evaluating such assertions. Thus, the Second Department has previously declined to enforce a release on grounds of mutual mistake, where it determined fact questions existed concerning whether the release was 'fairly and knowingly' governing plaintiff's assertion of injury particularly where plaintiff subsequently learned he would require surgery for those injuries (*see e.g.* ***Cabibi v Lundrigan***, 7 AD3d 556, 557, 775 NYS2d 892-893 [2d Dept 2004]; *see also* ***Curry v Episcopal Health Services, Inc.***, 248 AD2d 662, 662-63, 670 NYS2d 590, 590 [2d Dept 1998][affirming trial court's setting aside release in slip-and-fall matter where plaintiff subsequently discovered an annular tear and other back injuries after execution of the release]; ***Fimbel v Vasquez***, 163 AD3d 1120, 1121-22, 80 NYS3d 527, 528-29 [3d Dept 2018]; ***Ford v Phillips***, 121 AD3d 1232, 1235, 994 NYS2d 688, 691 [3d Dept 2014][refusing to enforce release where fact questions existed on whether plaintiff was aware of alleged cervical and herniated disc injuries at time of execution]).

Based on the parties' motion record and all of the arguments for and against, the Court finds that defendants have met their burden of establishing a facially valid release. With the burden having shifted to plaintiff to establish a basis to prevent operation of the same, the Court further finds, viewing all of the contentions and allegations in the opposing papers a in a light for the plaintiff-non-movant, that plaintiff has raised triable questions of fact questioning whether, at the time the release was executed, plaintiff was unaware, and more importantly, had insufficient time to fully investigate the true nature, extent or scope of his alleged injuries sustained in the incident.

The motion record assembled by the parties reveals that plaintiff was removed from his vehicle by police and taken by ambulance to a local hospital in Nassau County directly from the collision scene. At the hospital, plaintiff was given an X-ray and examined and treated for, amongst other things, reported pain and injury to his neck, back and shoulder which entailed examination and evaluation of ranges of motion to each area finding "no significant abnormality." Two days later, plaintiff presented to Dr. Buurma with continued complaints of neck, back and shoulder pain. In his affidavit, Dr. Buurma testified that plaintiff denied any major traumatic prior history. During his examination of the plaintiff, Dr. Buurma, making use of a goniometer, observed significant deviations from the norm concerning the range of motion for flexion and extension with subjective complaints of pain concerning plaintiff's cervical and lumbar spine, as well as decreased strength in plaintiff's right shoulder and lower extremities which he attributed to subjective complaints of pain in the shoulder and lumbar spine. Based

2 Plaintiff explained that he consulted with and ultimately retained his attorneys on or about April 9, 2018, nearly 4 days after he had time to seek treatment from his chiropractor Dr. Buurma, which itself was 2 days after the incident on April 5, 2018.

upon his examination, Dr. Buurma opined that plaintiff sustained traumatic injuries to the cervical, thoracic and lumbar spine were casually related to the subject incident, and he referred plaintiff for additional treatment with a chiropractor and to undergo an MRI. Dr. Buurma's later review of plaintiff's MRI imaging records (for imaging done of plaintiff's cervical and lumbar spine in the latter part of April 2018 and his right shoulder in May 2018) confirmed the injuries plaintiff now alleges in his bill of particulars.

Based upon the foregoing, this Court finds that plaintiff has raised a triable question of fact of whether his execution of the release was fair or knowing. Therefore, that aspect of defendant's motion to dismiss the complaint on the grounds of release is hereby **denied**.

B. Did Plaintiff Sustain a Compensable Serious Injury?

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden to establish, prima facie, that the plaintiff did not sustain a "serious injury" (***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070, 951 NYS2d 231 [2d Dept 2012]). Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in . . . 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."

Findings of a defendant's own witnesses must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to summary judgment (***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Damas v Valdes***, 84 AD3d 87, 921 NYS2d 114 [2d Dept 2011], *citing* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and unsworn medical reports and records prepared by the plaintiff's treating medical providers (***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]; ***Elshaarawy v U-Haul Co. of Miss.***, 72 AD3d 878, 900 NYS2d 321 [2d Dept 2010]; ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Pagano v Kingsbury***, *supra*). Proof of a herniated or bulging disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not sufficient to establish a "serious injury" within the meaning of the statute (***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Scheker v Brown***, 91 AD3d 751, 936 NYS2d 283 [2d Dept 2012]). The mere existence of a tear is not a serious injury without objective evidence of the extent and duration of the alleged physical limitations resulting from the injury (*see* ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***McLoud v Reyes***, *supra*; ***Resek v Morreale***, 74 AD3d 1043, 903 NYS2d 120 [2d Dept 2010]). Further, an injury under the "90/180-day" category of "serious injury" must be "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (***Pryce v Nelson***, 124 AD3d

859, 2 NYS3d 214 [2d Dept 2015]; ***Strenk v Rodas***, 111 AD3d 920, 976 NYS2d 151 [2d Dept 2013]; ***Beltran v Powow Limo, Inc.***, *supra*). Specifically, plaintiff's usual activities must have been curtailed to a "great extent" to satisfy the 90/180-day category (***Licari v Elliott***, 57 NY2d 230, 236, 455 NYS2d 570 [1982]).

1. Permanent Consequential Limitation & Significant Loss of Use Categories

Here, ddefendants' submissions failed to establish a *prima facie* case that the alleged injury to plaintiff's shoulder does not constitute a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345; ***Gaddy v Eyler***, 79 NY2d 955; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070). In relevant part, by his affirmation, Dr. Chacko stated that during his March 5, 2020 independent neurological examination of plaintiff he, amongst other things, he made a qualitative assessment of plaintiff's motor strength observing "normal tone and strength" was reported in the upper extremities. However, no objective quantitative assessment of range of motion was conducted or reported. This is contrasted with plaintiff's submission of Dr. Buurma's affidavit, as bearing directly on this issue, upon plaintiff's reexamination on May 29, 2020, documented observation of muscle spasm in plaintiff's "right and left upper trapezium", wholly unaddressed by defendant's submissions. This was further buttressed via plaintiff's submission of the affirmation of Dr. Wagner interpreting an April 29, 2018 MRI of plaintiff's right shoulder concluding it exhibited "tendinosis/tendinitis of the supraspinatus and subscapularis tendons" as well as the presence of "synovial fluid within the glenohumeral joint extending into the long head biceps tendon sheath and bursal flued collection within the subscapular recess."

Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint concerning the plaintiff 's alleged injuries fall under the "permanent consequential limitation," "permanent loss," or "significant limitation" of use categories of the statute is **denied** (*see e.g.* ***Levin v Khan***, 73 AD3d 991, 992, 904 NYS2d 73, 75 [2d Dept 2010][denying defendant summary judgment where neurologist failed to conduct objective quantitative assessment of plaintiff's right knee range of motion]; *accord* ***Giangrasso v Callahan***, 87 AD3d 521, 523, 928 NYS2d 68, 69 [2d Dept 2011][denying defendant summary judgment where defense examining physicians failed to compare the results of their findings as to the plaintiff's range of motion in his spine after the subject accident with his condition before the accident]; *see also* ***Starkey v Curry***, 94 AD3d 866, 867, 941 NYS2d 882, 883 [2d Dept 2012][holding where defendant failed to meet the *prima facie* threshold on summary judgment, it is unnecessary to consider whether the plaintiffs' opposition papers were sufficient to raise a triable issue of fact]).

2. Plaintiff's Gap in Treatment

Moreover, plaintiff sufficiently explained the gap in treatment cited by defense counsel. Plaintiff's incident occurred in April 2018. Defendant cites plaintiff's deposition testimony for the proposition that plaintiff treated for approximately only 4 to 6 months post incident, and thereafter only saw Dr. Buurma to prepare for litigation in May 2020. Plaintiff testified that he ceased treating in or around August or October of 2018 to be able to travel to El Salvador, his birthplace, to visit with family for 3 weeks. Additionally, plaintiff made unspecified claims that insurance coverage issues further explained any gap in treatment.

In response, plaintiff submitted Dr. Buurma's affidavit wherein he testified that in his opinion rendered within a reasonable degree of medical certainty, that further treatment to plaintiff would be merely palliative in nature, and that further there were unspecified medical insurance coverage issues. Here, plaintiff has adequately explained any perceived gap in his treatment (*see e.g.* ***Austin v Dominguez***, 79 AD3d 952, 953, 913 NYS2d 757, 758 [2d Dept 2010][reversing motion court's grant of summary judgment to defendant explaining that plaintiff adequately explained perceived gap in treatment via submission of her doctor's affidavit opining that plaintiff had reached maximal medical improvement rendering further treatment unnecessary]; ***Shtesl v Kokoros***, 56 AD3d 544, 546, 867 NYS2d 492, 494 [2d Dept 2008]). Thus, that branch of defendants' motion for summary judgment dismissing plaintiff's complaint for failure to sustain a "serious injury" within meaning of the Insurance Law founded upon a gap in treatment theory is accordingly hereby **denied**.

3. 90/180 Category

All of the foregoing notwithstanding however, defendants have established entitlement to judgment as a matter of law dismissing plaintiff's claim for serious injury on plaintiff's 90/180 claim. Plaintiff's testified at deposition that he only missed 8 days from work following the subject incident and has failed to otherwise adduce any competent admissible medical evidence meeting with the statute's minimum requirements. In opposition, plaintiff's has failed to raise a triable issue of fact precluding summary judgment dismissing his claim that he sustained a serious injury under the 90/180 category of the statute (*see* ***Bong An v Villas-Familia***, 183 AD3d 582, 121 NYS3d 675,676 [2d Dept 2020]; ***Caseres v Verma***, 178 AD3d 660, 111 NYS3d 231, 232 [2d Dept 2019]).

CONCLUSION

In sum, in view of all of the foregoing, defendants' motion to dismiss plaintiff's complaint on the grounds of release is **denied**. Defendants' motion to dismiss plaintiff's complaint on grounds that plaintiff failed to adduce evidence that he sustained a serious injury within meaning of the Insurance Law as regards the permanent consequential and significant limitation categories is **denied** but **granted** concerning the 90/180 category.

All other remaining contentions not expressly addressed or referenced are **denied**.

The foregoing constitutes the decision and order of this Court.

Dated: February 22, 2021
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**