To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31

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JOSE PATINO,

Plaintiff,

-against-

CARRETERA INC. and JUAN MEDINA,

Defendants.

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Index No. 29631/2019E
DECISION/ORDER
Motion Seq. 2

VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of defendants CARRETERA INC. and JUAN MEDINA [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff JOSE PATINO (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained as a result of a rear-end motor vehicle accident that occurred on October 13, 2017 ("the Accident"). Plaintiff's motion for an order granting partial summary judgment as to liability as against defendants was granted on May 7, 2020. [NYSCEF No. 26].

Plaintiff alleges that as the result of the Accident he suffered injuries to the cervical spine, lumbar spine, and left knee. In the bill of particulars, plaintiff argues that these injuries satisfy the following Insurance Law 5102(d) threshold categories: permanent loss of use of a body part; permanent consequential limitation; significant limitation; and 90/180 days. As

plaintiff fails to address the ground of permanent loss of use of a body part on this motion, however, that ground is deemed waived[1] (*Burns v Kroening*, 164 AD3d 1640 [4th Dept 2018]).

Defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d) as a result of the Accident. Defendants argue that plaintiff's claimed injuries are not "serious," and that any injuries or conditions from which plaintiff suffers are not causally related to the Accident. The underlying motion is supported by the pleadings, the bill of particulars, photographs, plaintiff's deposition transcript, and the affirmed medical reports of Dr. Fitzpatrick (radiologist) and Dr. Denton (orthopedic surgeon).

In his report, Dr. Fitzpatrick reviews MRIs, dated November 13, 2017, taken one-month post-Accident of the cervical spine, lumbar spine, and left knee. Dr. Fitzpatrick's review of the cervical MRI finds no traumatic injury and finds disc degeneration and bulges based on age-related factors. He opines that the MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic cervical spine injury.

As for the MRI of the lumbar spine, the expert makes similar findings of mild to moderate disc degenerative disease spanning C-3-C-4 and C5-C6. He opines that the MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic lumbar spine injury. The osteophyte formations found on the MRI require at least six months to form and, therefore, he opines, did not arise from trauma.

[1] It is obvious, in any event, that plaintiff did not sustain a permanent loss of use (*see Riollano v Leavey,* 173 AD3d 494 [1st Dept 2019]). Such loss must be total (*Swift v N.Y. Transit Auth.,* 115 AD3d 507 [1st Dept 2014]; *see Oberly v Bangs Ambulance Inc.,* 96 NY2d 295 [2001]), and evidence of mere limitations of use is insufficient (*see Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]; *Byong Yol Yi v Canela*, 70 AD3d 584 [1st Dept 2010]).

In terms of the left knee MRI, Dr. Fitzpatrick finds normal results, with the ligaments and cartilage intact. There is no internal derangement. The expert opines that there is no traumatic injury and any variant are nontraumatic in nature and not based in trauma.

Dr. Denton bases his opinion on the details of a physical examination conducted on August 12, 2020, three years post-Accident, and the plaintiff's bill of particulars. He avers that there were no legally authenticated medical records available for his review. In terms of the cervical spine, the doctor finds that plaintiff has decreased flexion, extension, right lateral flexion, left lateral flexion, and right rotation at various levels from 10-40 degrees. The results of all of the objective tests were negative.

As for the lumbar spine, the expert finds a no complaint of tenderness and pain. The range of motion examine reveals a decrease in flexion of 20 degrees. The objective tests and the neurological examination of the bilateral lower extremities are negative.

In terms of the left knee, there was no complaint of tenderness and the range of motion is normal. The objective tests are negative.

In the "impression" section of the report, the expert finds that: the cervical spine, the lumbar sprain and the left knee sprains are all resolved. He finds no evidence of orthopedic disability, permanency or residuals, and concludes that plaintiff can perform his activities of daily living as he was doing before the Accident. He opines that "decreased ranges of motion are as allowed by the claimant".

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation or significant limitation categories (*Stovall v N.Y.C. Transit Auth.*, 181 AD3d 486 [1st Dept 2020]; *see Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]). Of note, a defendants' experts are not required to review plaintiff's medical records (*see Jackson v Doe,* 173 AD3d

505 [1st Dept 2019]), or films from imaging studies (*see Oliveras v N.Y.C. Transit Auth.,* 179 AD3d 503 [1st Dept 2020]), prior to forming their opinions.

Plaintiff opposes the motion, submitting an attorney affirmation, the affirmation and certified medical records of Dr. McMahon (orthopedist), uncertified police report, certified medical records from Capital Chiropractic (Dr. Kreshover), MRI reports dated November 2017 (Dr. Prakash) of the cervical spine, lumbar spine and left knee, and the affirmation and records of Dr. Kaisman (pain management).

In total, plaintiff's evidence raises triable issues of fact as to his claims of "serious injury" as to the cervical spine, lumbar spine, and left knee under the threshold categories of permanent consequential limitation and significant limitation (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that he received medical treatment for his claimed injuries after the Accident, and that he had substantial limitations in motion at the relevant body parts at recent examinations in November and December 2020 (*see Perl v Meher*, 18 NY3d 208 [2011]). The MRIs taken soon after the Accident diagnose plaintiff with cervical and lumbar disc herniations and a partial tear of the anterior cruciate ligament in the left knee. Plaintiff's experts opine that the plaintiff suffers from a decrease in range of motion of the cervical and lumbar spine that is significant, and that plaintiff suffered partial permanent injuries with regards to the cervical and lumbar spine and the left knee with a poor prognosis for recovery. The doctors reviewed the MRIs and found that the injuries were caused by the Accident, were not degenerative and were permanent, causing a significant loss of use and function in the cervical spine, lumbar spine, and left knee (*see Morales v Cabral, supra*; *see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). In addition, Dr. McMahon opines that the gap and cession of treatment are appropriate in light of the permanent nature of the injuries and the futility of treatment.

As for the 90/180 days category, while defendants met their initial burden of showing no causation between plaintiff's injuries and the Accident, plaintiff's testimony that he was

unable to work for three months, combined with the plaintiff's medical evidence, generates an issue of fact as to the category of 90/180 days (*Massillon v Regalado*, 176 AD3d 600 [1st Dept 2019; *Coley v DeLarosa*, 105 AD3d 527 [1st Dept 2013];*see Paulling v City Car & Limousine Services, Inc.,* 155 AD3d 481 [1st Dept 2017]). Of course, if a jury determines that plaintiff has met the threshold for serious injury, it may award damages for any injuries causally related to the accident, including those that do not meet the threshold (*Morales v Cabral, supra*; *Rubin v SMS Taxi Corp*., 71 AD3d 548 [1st Dept 2010]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants CARRETERA INC. and JUAN MEDINA [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff JOSE PATINO has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied with the exception that it is granted with respect to the claims made under the threshold category of permanent loss of use.

The parties are reminded that a compliance conference is scheduled in this matter on February 3, 2021. The attorneys are expected to review the revised Part 31 rules for compliance conferences (available on the homepage of the 12th J.D.), well ahead of that date and to follow the guidelines for using NYSCEF, rather than appearing in court, to meet their compliance conference obligations.

The foregoing constitutes the decision and order of the court.

Dated: January 29, 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 1/29/2021
Hon. Veronica G. Hummel