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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LEOMARVIN BRITO,

Plaintiff,

-against -

PARVINDER PARMAR

Defendant.

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Index No. 25054/2018E
DECISION/ORDER
Motion Seq. 3

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 defendant PARVINDER PARMAR (defendant) [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff LEOMARVIN BRITO (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 collision between plaintiff's bicycle and defendant's motor vehicle that occurred on April 14, 2018 (the Accident). At the time of the Accident, plaintiff was approximately 28 years old.

Plaintiff alleges that plaintiff suffered serious injuries to the left shoulder, cervical spine and lumbar spine that satisfy the following Insurance Law 5102(d) threshold categories: permanent consequential limitation; significant limitation; and 90/180 days.

Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d). Defendant argues 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 motions are supported by the pleadings, the bills of particulars, the affirmation of plaintiff's attorney, plaintiff's deposition transcripts, and the expert affirmations/reports of Dr. Elfenbein (orthopaedic surgeon), Dr. Cristofaro (orthopaedic surgery), and Dr. Payne (radiologist).

Dr. Elfenbein bases his opinion on the details of a physical examination of plaintiff conducted on August 21,2019, approximately one year post-Accident. He reviewed the bills of particulars. The doctor performed range of motion tests on the cervical spine, thoracic spine, and lumbar spine, all of which produced essentially normal results. The expert finds no significant restriction in range of motion and all objective tests are negative. He did not examine plaintiff's left shoulder.

In the "Impression" section of the report, the expert describes the cervical spine, thoracic spine, and lumbar spine as "sprain-resolved". The expert opines that there is no orthopedic disability or limitation and concludes that plaintiff is capable of working without restrictions and can perform his activities of daily living as he was doing prior to the Accident.

Plaintiff underwent left shoulder surgery on December 17,2019.

Dr. Cristofaro examined plaintiff on December 9, 2020, one year post-surgery and almost three years post-Accident. The doctor performed range of motion tests on the cervical spine, thoracic spine, and lumbar spine, all of which produced essentially normal results. The expert finds no significant restriction in range of motion and all objective tests are negative. His impression as to plaintiff's spine is "sprain-resolved".

The expert also examined plaintiff's left shoulder. The examination reveals healed arthroscopy scars. The expert finds no restriction in range of motion and the objective orthopedic tests produced negative results. As an "impression" the physician opines "status post left shoulder surgery on 12/17/2019-resolved". There is no evidence of orthopedic

disability, plaintiff is capable of working without restrictions, and plaintiff can perform his activities of daily living as he was doing prior to the Accident. The expert finds that there is no evidence of permanency or residuals. Upon examination, plaintiff offers no complaints as the result of the examination.

In his report in support of defendant's motion, Dr. Payne reviews the April 30, 2018 (same month as the Accident) MRIs of plaintiff's cervical spine and lumbar spine. In terms of the lumbar MRI, the expert finds no fractures, no disc herniations and some bulging discs. As for the cervical spine, the physician makes a similar finding of no fractures, no disc herniations, and some bulging discs.

Based on the submissions, defendant sets forth a *prima facie* showing that plaintiff did not suffer a serious injury to the relevant body parts under the permanent consequential limitation, and 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]).

Plaintiff opposes the motion by submitting an attorney affirmation, a personal affidavit, plaintiff's medical records, the police report, and the records/affirmations/reports of Dr. Hausknecht (neurology), Dr. Payne, Dr. Dassa, Dr. Tyorkin (orthopedic surgeon), and Dr. Hussman (radiologist). Of note, the experts review the MRI taken of plaintiff's left shoulder on July 16,2018, in addition to the spinal MRIs that were reviewed by defendant's experts.

In total, plaintiff's evidence raises triable issues of fact as to the cervical spine, lumbar spine, and left shoulder under the relevant threshold categories (*Morales v Cabral*, 177 AD3d 556 [1st Dept 2019]). Plaintiff's submissions demonstrate that plaintiff received medical treatment for the claimed injuries promptly after the Accident, and that plaintiff had substantial limitations in motion in the relevant body parts at the examinations immediately after the Accident, and more recently at the recent examination in March 2021 (*see Perl v Meher*, 18 NY3d 208 [2011]). The MRIs taken soon after the Accident diagnosed plaintiff with injuries,

including bulging discs in the cervical and lumbar spine, and a tear in the left shoulder. Plaintiff's experts opine that the Accident was the competent producing cause of the injuries. The experts opine that the plaintiff suffers from a decreased in range of motion that is significant, and that plaintiff suffered permanent injuries to the relevant body parts. The experts reviewed the records and opine that the injuries to the relevant body parts were caused by the Accident, and are permanent (*see Morales v Cabral, supra*; *see Aquino v Alvarez*, 162 AD3d 451, 452 [1st Dept 2018]). Under the circumstances, plaintiff's submissions generate a question of fact as to whether plaintiff suffered a serious injury under the threshold categories of permanent consequential limitation and significant limitation (see *Smith v Green*, 188 AD3d 473 [1st Dept 2020]; *see Bonilla v Vargas–Nunez*, 147 AD3d 461 [1st Dept 2017]; *Morales v Cabral, supra).* 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]).

As for plaintiff's 90/180-day claim, defendant establishes entitlement to summary judgment by submitting plaintiff's deposition testimony stating that plaintiff returned to work soon after the Accident (*Pakeman v Karekezia*, 98 AD3d 840 [1st Dept 2012]; *see Licari v Elliott*, 57 NY2d 230 [1982]), and plaintiff's submissions in opposition fail to generate a question of fact as to the issue (*Tarjavaara v Considine,* 188 AD3d 509 [1st Dept 2020]).[1]

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

[1] *Plaintiff, who was a self-employed Uber driver on the date of the Accident, also claims that he suffered an economic loss greater than basic economic loss. While plaintiff is correct that a claim for economic loss in excess of basic economic loss does not require plaintiff to have sustained a serious injury (Martin v LaValley, 144 AD3d 1474 [3d Dept 2016]), the existence and amount of said damages must be proven at trial (see Nicholas v Vazquez-Fuentes, 2018 N.Y. Slip Op. 31359 [N.Y. County 2018]; Barnes v Kociszewski, 4 AD3d 824 [4th Dept 2004]; Colvin v Slawoniewki, 15 AD3d 900 [4th Dept 2005]).*

ORDERED that the motion of defendant PARVINDER PARMAR [Mot. Seq. 3], made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff LEOMARVIN BRITO has not sustained a "serious injury" as defined by Insurance Law 5102(d) is denied.

The foregoing constitutes the decision and order of the court.

Dated: October 4 , 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 10/04/2021
Hon. Veronica G. Hummel, A.J.S.C.

1. CHECK ONE.....	[] CASE DISPOSED IN ITS ENTIRETY x CASE STILL ACTIVE
2. MOTION IS.....	☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT