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| Lyons v New York City Tr. Auth. |
| 2021 NY Slip Op 30379(U) |
| February 8, 2021 |
| Supreme Court, New York County |
| Docket Number: 153430/2017 |
| Judge: Suzanne J. Adams |
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| This opinion is uncorrected and not selected for official publication. |

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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|-----------------|------------------------------|------------------------|----------------------|
| PRESENT: | <u>HON. SUZANNE J. ADAMS</u> | PART | <u>IAS MOTION 21</u> |
| | <i>Justice</i> | | |
| -----X | | INDEX NO. | <u>153430/2017</u> |
| DANIEL LYONS, | | MOTION DATE | <u>N/A</u> |
| Plaintiff, | | MOTION SEQ. NO. | <u>001</u> |

- v -

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN
AND BRONX SURFACE TRANSIT OPERATING
AUTHORITY, METROPOLITAN TRANSIT AUTHORITY,
JAMOA PAGE

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is ordered that defendant's motion for summary judgment is granted. This personal injury action arises out of an incident that occurred on March 12, 2016, when plaintiff alleges the vehicle he was driving came into contact with a bus owned by defendant New York City Transit Authority and operated by defendant Jamoa L. Page on Madison Avenue near the intersection of 38th Street in Manhattan. Defendants now move pursuant to CPLR 3212 for summary judgment on the grounds that none of plaintiff's alleged injuries amount to a "serious injury" as defined in Insurance Law § 5102(d), New York's "No-Fault Law." Plaintiff opposes the motion.

It is well-settled that "the proponent of a summary judgment motion 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 Hospital*, 68

N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). The party opposing a motion for summary judgment is entitled to all reasonable inferences most favorable to it. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 521 (1st Dep't 1989). Summary judgment will only be granted if there are no genuine, triable issues of fact. *Assaf*, 153 A.D.2d at 522. The question of whether a plaintiff suffered a "serious injury" within the meaning of § 5102(d) of the No-Fault Law is one of law that can and should be disposed of by summary judgment. See *Toure v. Avis Rent A Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

Viewing the evidence in a light most favorable to the non-moving party, defendants have made a *prima facie* showing of entitlement to judgment as a matter of law, having tendered sufficient evidence to demonstrate the absence of any material issues of fact as to whether plaintiff sustained a "serious injury" as a result of the alleged accident. *Alvarez*, 68 N.Y.2d at 324. It is undisputed that plaintiff's injuries do not fall under the statutory categories of "death," "dismemberment," "significant disfigurement," "fracture" or "loss of fetus," and defendants proffer evidence that the alleged injuries also do not fall under the remaining categories of permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; or a non-permanent injury or impairment preventing the performance of substantially all usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence. For example, defendants cite to the reports of plaintiff's various MRIs (Affirmation in Support, Exhibits J, K, L and M) which reveal that he sustained only soft tissue injuries of the type which are not actionable under the No-Fault Law. See *Licari v. Elliott*, 57 N.Y.2d 230 (1982). Defendants also rely on the independent medical examinations of Dr.

Jeffrey Warhit (Affirmation in Support, Exhibits P and Q), which found no evidence of traumatic injury, and that of Dr. Elizabeth Ortof (Affirmation in Support, Exhibit R), which found, *inter alia*, that plaintiff had normal ranges of motion of the cervical and lumbar spines.

The burden now shifts to plaintiff to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so].” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980). *See also Winegrad*, 64 N.Y.2d at 853. Plaintiff argues that a question of fact exists as to whether he suffered a “serious injury,” citing to the report of an independent medical examination by Dr. Richard Levitt, conducted three years after the underlying incident, which found that plaintiff had limitations in ranges of motion of the cervical, thoracic and lumbar spines; right and left shoulders; right and left knees; and right and left hips. (Affirmation in Opposition, Exhibit 2) Significantly, however, Dr. Levitt’s report also noted throughout that plaintiff displayed “suboptimal effort during the examination,” and stated that plaintiff “displayed symptom magnification.” (*Id.*) Findings based on subjective complaints of pain are insufficient to raise a triable issue of fact on a motion for summary judgment as to whether a plaintiff suffered a “serious injury” under the No-Fault Law. *Lloyd v. Green*, 45 A.D.3d 373, 374 (1st Dep’t 2007) Dr. Levitt also concluded that plaintiff was capable of performing all the tasks of daily living independently. (Affirmation in Opposition, Exhibit 2) Plaintiff submits no other proof as to the alleged nature, permanency or causal connection to the underlying incident of his injuries. As such, plaintiff has failed to meet his burden.

Accordingly, it is hereby

ORDERED that defendants’ motion for summary judgment dismissing the complaint herein is granted and the complaint is dismissed in its entirety as against defendants, with costs

and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the dismissal of the action; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

2/8/2021
DATE



SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE