SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LISA HEADLEY** **PART** **22**

Justice

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PAVEL AKHMADEEV

Plaintiff,

- v -

AMEZE ORONSAYE,

Defendant.

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INDEX NO. 160036/2015

MOTION DATE 03/30/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

were read on this motion to/for STRIKE PLEADINGS.

Before the court is plaintiff's motion to impose sanctions on defendant by striking defendant's answer for spoliation of evidence; or in the alternative to impose sanctions which would preclude defendant from arguing at trial as to the mechanism of the collision between defendant's vehicle and the plaintiff; and to direct that a negative inference charge be given to the jury at trial. The defendant opposes plaintiff's motion, and cross-moves for an order pursuant to *CPLR §3212*, granting summary judgment and dismissing the complaint as a matter of law because plaintiff has not sustained a serious injury pursuant to *Insurance Law § 5102(d)*.

In this personal injury action, plaintiff alleges that he suffered a "serious injury" within the meaning of *Insurance Law §5102(d)*. According to the complaint, on August 18, 2013, at 3:13 a.m., the then 25-year old plaintiff was struck by defendant's car while lawfully crossing the crosswalk on Sixth Avenue in New York, NY.

Plaintiff moves for an order imposing sanctions on defendant for alleged spoliation of evidence consisting of an appraisal report, allegedly provided to defendant by defendant's insurer, non-party Country-Wide Insurance, Inc., that was the subject of a July 22, 2019 supplemental notice of production, requesting production of "Country-Wide Insurance Company's inspection report and/or appraiser's report and/or damages report of Defendant's vehicle conducted after the subject accident, as testified by the defendant during her July 19, 2019 deposition." (*See, Barovick affirmation, exhibit F*).

In opposition, defendant argues, *inter alia*, plaintiff's motion is untimely and should be denied as per the stipulation dated December 20, 2019, plaintiff was to make a motion regarding the appraisal report within 30 days, however, this motion was filed on the 31st day on January 20, 2020. In addition, defendant argues that defendant has already responded to plaintiff's demand. Plaintiff seeks an appraisal report of the defendant's vehicle, and defendant contends that she is not in possession of any report since the accident occurred in 2013. Defendants also submit a letter indicating that defendant is not in possession of an appraisal report, and there has been no spoliation. Defendant argues that the accident occurred in 2013, and this action was filed in 2015,

and on the date of opposing this motion, six years has passed since the accident occurred, and defendant is not in possession of the requested document.

It is well settled law with regard to missing or lost evidence that: "[s]poilation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence in an accident before the adversary has an opportunity to inspect them." *Kirkland v. New York City Housing Authority,* 236 AD2d 170, 173, 666 NYS2d 609, 611 (1st Dep't 1997); *see also*, Poligkeit v. Colmenero, 2007 N.Y. Slip Op. 34350[U] [N.Y. Sup Ct, Suffolk County 2007]. Here, plaintiff's motion to impose sanctions on defendant is denied as there is no indication that the defendant intentionally or negligently disposed of the appraisal report. The court finds in defendant's favor that she misplaced or lost the document due to lapse of time from when the accident occurred in 2013 to 2019, when the document was requested, and finds that defendant did not intentionally or negligently dispose of the requested appraisal report.

Defendant cross-moves for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury as a matter of law. In support of the motion, defendant submits the affirmation of Dr. Warren Cohen who conducted an examination of plaintiff on September 1, 2019. (*See, Cohen's affirmation, exhibit C*). Dr. Cohen's diagnosis of plaintiff was that his neurological examination was normal, and that there is "no impairment of neurologic function that would impair the ability of [plaintiff] to participate in activities of daily living and all usual activities." Further, Dr. Cohen opined that plaintiff is not disabled.

Defendant also submits the affirmed report of Dr. Aaron Morgenstein, who conducted an orthopedic medical evaluation plaintiff on August 28, 2019. (*See, Morgenstein's report, exhibit D*). Dr. Morgenstein opined that plaintiff had no permanent injuries resulting from the subject accident, and that his cervical spine sprain, thoracic spine sprain, left elbow sprain, left knee sprain and right ankle sprain had all been resolved. Further, Dr. Morgenstein concluded that from an orthopedic perspective, there are no objective residuals related to the subject accident.

Defendant also argues that plaintiff did not suffer impairments that substantially curtailed his usual and customary activities for the 90 days during the first 180 days following the accident.

With respect to the 90-180-day category, the court finds that plaintiff's examination before trial testimony describing his curtailment of activities is insufficient to show that he sustained a medically determined injury or impairment of a nonpermanent nature which endured for 90 days of the first 180 days following the accident. This category requires proof that the impairment, to a great extent, "prevented the plaintiff from performing *substantially all* of his regular activities for the requisite period of time." *See, Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 357 (2002); *Talcott v. Zurenda,* 48 A.D.3d 989, 990 (3d Dep't 2008). (*Emphasis added).*

In opposition, plaintiff submits the expert medical opinions of three doctors, as well as the independent medical examiner, describing their examinations and findings. After the accident, EMS transported plaintiff to Belleview hospital, where he was admitted and then discharged days later on August 20, 2013. Upon admission, plaintiff was diagnosed with bilateral frontal contusions without active bleeding. (*See, Barovick affirmation, exhibit D).* Plaintiff's discharge summary diagnosed plaintiff as suffering from "an intracranial injury of other and unspecified nature." *Id.* After his first discharge, plaintiff spent two days in bed.

Plaintiff then was treated at Jersey City Medical Center on August 24, 2013, where he was diagnosed with an intra-cerebral hemorrhage and was admitted for further treatment. Plaintiff underwent repeated CAT scans, which were considered stable and indicative of contusions.

Plaintiff moved to Boston approximately one month later and resumed working approximately 8 months after the accident. Plaintiff was treated for pain at Brigham and Women's'

Hospital, and Tufts Medical Center (Tufts), both in Boston, on three occasions between November 5, 2013 and August 7, 2014, and was released with a prescription for nausea, and over-the-counter pain killers. An MRI performed at that time indicated the presence of a "Left frontal parenchymal hematoma measuring 3.1 cm without underlying enhancement, compatible with known hemorrhagic contusion."

On November 5, 2013, plaintiff was examined by a board-certified neurologist, Dr. Ozaire Awais at Tufts, and subsequently underwent a neurological examination and a memory test, during which he was able to remember about three objects. Dr. Awais diagnosed plaintiff with post-concussive syndrome. Dr. Awais also noted that the post collision symptoms still persist, that those symptoms may continue for several years, and that plaintiff might not entirely return to baseline even then.

On July 15, 2020, Dr. Yelena Ilina, a board-certified neurologist, examined plaintiff and found that his reported deficiencies, *inter alia*, persistent headaches, poor concentration, poor orientation, depression, unstable mood, irritability, decreased memory, impulse control issues, and poor social interaction, depend on the exact areas of the brain that were injured in the motor vehicle accident. Dr. Ilina also performed a "Romberg Test" on plaintiff, which revealed that plaintiff's balance is unsteady on July 15, 2020, at which time she "conducted a mental status examination which showed that [plaintiff] is suffering from the following: retrograde amnesia, short-term memory was three out of five, recent memory was decreased, attention and concentration span were decreased and affect was flat and depressed." (*See, Barovick affirmation, exhibit H).*

Dr. Ilina noted that plaintiff was treated right after the accident at Belleview Hospital, where a CAT scan of the head revealed, *inter alia*, bilateral inferior frontal parenchymal contusion, And left parenchymal hemorrhage/contusion. A cognitive test concluded that he suffers from unsteadiness, delayed recall and attention. Dr. Ilina also noted that the cognitive deficit will impact patient participation in novel tasks and instrumental activities of daily living. *Id.* Dr. Ilina noted further that plaintiff was examined three times between November 5, 2013, and August 7, 2014, by a neurologist at Tufts Medical Center, who diagnosed plaintiff with post concussive syndrome and short-term memory loss. Dr. Ilina opined that the symptoms and impairments of plaintiff's condition as of 2020 are "causally related" to the subject accident that occurred in 2013. Dr. Ilina opined that plaintiff continues to experience difficulties with his daily activities and he is not able to achieve his pre-injury level of functioning, and given the persistence of the deficits, any further improvement in the patient's medical condition is highly unlikely." *Id.*

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep't 1992), citing, *Dauman Displays, Inc. v. Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See, Ugarriza v. Schmieder*, 46 N.Y.2d 471, 475-476 (1979). Upon examination of the papers submitted to this Court, defendant's motion is denied because there are issues of fact precluding summary judgment. Here, this court determines that there are conflicting medical reports pertaining to the plaintiff's injuries, the causation of those injuries and the permanency of said injuries. Specifically, defendants' doctors' affidavits concluding no orthopedic disability and findings that plaintiff is currently without limitation. However, plaintiff's doctors find, *inter alia*, that plaintiff's symptoms are causally related to the subject accident and that he continues to experience difficulties with his daily activities. As such, defendant's cross- motion for summary judgment must be denied as issues of fact exist.

For the reasons set forth, the plaintiff's motion for sanctions is denied, and the defendant's cross motion is also denied.

Accordingly, it is

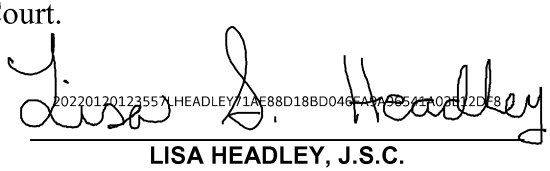
ORDERED the that the motion by plaintiff Pavel Akhmadeev, for sanctions, is DENIED; and it is further

ORDERED that the cross-motion of defendant Ameze S. Oronsaye, for summary judgment dismissing the complaint, is DENIED; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered, and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon the defendant with notice of entry.

This constitutes the Decision and Order of the Court.



1/19/2022
DATE

LISA HEADLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE