SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM **PART** 05RCP

Justice

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GEORGE HESS,

Plaintiff,

- v -

P.O. THOMAS P. FABRIZE, HUZAIFA AKRAM, THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, CHELSEA CAB CORP.,

Defendants.

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INDEX NO. 155232/2019

MOTION DATE 03/04/2022, 02/24/2022

MOTION SEQ. NO. 001 002

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, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to CONSOLIDATE/JOIN FOR TRIAL.

Plaintiff commenced the instant action to recover for injuries sustained in an automobile accident on September 7, 2018, when a motor vehicle owned by defendant New York City Police Department and operated by defendant P.O. Thomas P. Fabrize collided with the car owned by defendant Chelsea Cab Corp. and operated by defendant Huzaifa Akram, in which plaintiff was a passenger (NYSCEF Doc. No. 1 [Compl. at ¶¶22-24, 27]).

In his Bill of Particulars, plaintiff alleges various injuries including, inter alia: tears in his left knee, soft tissue injuries to his cervical spine and lumbar spine, abrasion of left shoulder, and right temporal lobe encephalomalacia (NYSCEF Doc. No. 19 [Bill of Particulars at ¶10]).

Plaintiff testified at a GML §50-h hearing that he sustained a lumbar injury to his back in 2000 when a steel deck fell on him at work (NYSCEF Doc. No. 51 [GML §50-h Tr. at p. 13]).

In motion sequence 001, defendants Huzaifa Akram and Chelsea Cab Corp. (the "Moving Defendants") move for summary judgment dismissing the complaint as against them. In motion sequence 002, the Moving Defendants move to consolidate this action with an action for property damage brought by the New York City Police Department against Chelsea Cab Corp arising out of the September 7, 2018 collision currently pending in Civil Court, New York County. These motions are consolidated for disposition.

Moving Defendants argue that they have established that plaintiff did not sustain a serious injury under Insurance Law §5102(d), mandating the dismissal of this action. In support of this argument, they submit the affidavit of Dr. Richard Semble, who performed an orthopedic medical evaluation of plaintiff on November 16, 2021, in which he found that plaintiff's range of motion was in the normal range and concluded that plaintiff's reported cervical spine sprain/strain, lumbar spine sprain/strain, left shoulder sprain/strain and left knee sprain/strain were fully resolved (NYSCEF Doc. No. 20 [Semble Affirm.]).

Defendants also submit the affidavit of Dr. Scott Springer, an independent medical examiner, who reviewed MRIs of plaintiff's lumbar spine, brain, left shoulder, and left knee performed at Lenox Hill Radiology & Medical Imaging Associates between October 4, 2018 and November 13, 2018, and concluded that none of the conditions documented in these MRIs resulted from the subject automobile collision, as they were chronic and degenerative in nature and therefore could not have developed between the date of the accident and the date of the MRIs (NYSCEF Doc. No. 21 [Springer Aff.]).

In opposition, plaintiff submits the affidavit of Dr. Mark S. McMahon, who attests that he performed a physical examination of plaintiff on January 27, 2022 with the aid of a goniometer and found there to be "quantifiable, objective limitations of range of motion" in plaintiff's left shoulder (and then, only with pain) as well as plaintiff's left knee, along with decreased strength and range of motion in his lumbar spine (NYSCEF Doc. No. 42 [McMahon Affirm. at ¶¶20-24]). Dr. McMahon asserts that these limitations resulted from the September 7, 2018 accident (Id. at ¶25). However, Dr. McMahon does not address Dr. Springer's assessment that the plaintiff's physical injuries were degenerative and not caused by the subject accident.

Plaintiff also submits a narrative report from Dr. McMahon[1] dated January 27, 2022 which largely reiterates the conclusions set forth in his affirmation and also states, inter alia:

> The patient's prognosis is poor. His condition is permanent. He is currently 3 years and 4 months from the day of the accident and remains symptomatic. His condition interferes with his qualify of life, his activities of daily living, and his ability to work as a set dresser. With respect to his left shoulder, the patient would benefit from arthroscopic surgery (cost $8000). With respect to his lumbar spine, the patient would benefit from a posterior Ll to S1 decompression and fusion using pedicle screw instrumentation and bone graft (cost $50,000) The opinions expressed above are made within a reasonable degree of medical certainty.

(NYSCEF Doc. No. 45 [McMahon Narrative Report).

Finally, plaintiff submits an affidavit attesting that:

> As a result of the injuries I sustained in the violent collision, I was out of work for approximately five months, or 150 days, following the accident. Additionally, in the five months following the accident, while I recuperated from my injuries I mostly stayed home, with the exception of traveling to doctors, and occasional grocery store runs.
>
> In the months following the accident, my life was negatively impacted in that I no longer pursued or took part in almost all of my usual daily activities. During that time I was unable to bowl, an activity I regularly did with my son. I was unable to play golf, an activity that I like to do whenever possible. I could not run (jog)

[1] To the extent Dr. McMahon relies on unaffirmed reports by other providers, the Court disregards these reports (See Malupa v Oppong, 106 AD3d 538, 539 [1st Dept 2013] ["While the affirmation of plaintiff's treating physician recites the findings in the unaffirmed reports, the affirmation may not be used to 'bootstrap[]' the unaffirmed reports"]).

> following the accident, which I regularly did before-hand, even having run the Los Angeles Marathon several years past. I was unable to ride my bicycle for the five months following the accident. Before the accident I regularly took long bike rides.
>
> During the months following the accident I also socialize with friends much less than usual - I had almost no social interactions during that time - and I partook in no extracurricular activities, sports or other activities as I convalesced.

(NYSCEF Doc. No. 43 [Hess Aff. in Opp. at ¶¶4-8]).

Defendants argue they have established their entitlement to judgment as a matter of law through the affirmations of Doctors Springer and Semble to establish lack of serious injury under Insurance Law §5102(d). In opposition, plaintiff argues that defendants have failed to meet this prima facie burden or, alternatively, that plaintiff has created a question of fact as to whether plaintiff has sustained a serious injury, precluding summary judgment.

DISCUSSION

Insurance Law §5102(d) defines a "serious injury" as a personal injury which results in, as relevant here: "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" (Insurance Law §5102[d]).

Plaintiff maintains that he suffered a serious injury under the statute because he "sustained permanent injuries to his shoulder, to lumbar spine, and knee that resulted in permanent consequential limitations of the use of those body organs, members, and systems and significant limitations of the use of a body function or system" and has also been prevented "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."

"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 Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]). "The issue of whether a claimed injury falls within the statutory definition of 'serious injury' is a question of law for the Court, which may be decided on a motion for summary judgment. The moving defendant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that plaintiff has not suffered a 'serious injury' as defined in section 5102(d). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit prima facie evidence, in admissible form, rebutting the presumption that there is no issue of fact as to the threshold question" (Coughman v Garcia, 25 Misc 3d 1217(A) [Sup Ct, NY County 2009] [internal citations omitted])

The Moving Defendants have met their burden here. They have established that plaintiff did not sustain a permanent loss, permanent consequential limitation, or significant limitation "through the report of their radiologist, who opined that the MRI of plaintiff's cervical spine revealed conditions that were degenerative and not causally related to the accident, and the report of their orthopedist, who found that plaintiff had normal range of motion (Blake v Sanchez, 198 AD3d 527, 527 [1st Dept 2021] [internal citations omitted] see also Reyes-Mendez v City of New York, 192 AD3d 464, 465 [1st Dept 2021]; Camilo v Villa Livery Corp., 118 AD3d 586, 586 [1st Dept 2014]). Given "the absence of evidence of a causal connection between plaintiff's condition and the subject accident" defendants also established their entitlement to dismissal of plaintiff's

"90/180-day claim (Antepara v Garcia, 194 AD3d 513, 514 [1st Dept 2021]). Plaintiff's affidavit, standing alone, is insufficient to create a question of fact as to this issue, as "an individual's unsupported subjective claim of continuing pain and the inability to work for more than 90 days is not dispositive of the existence of a 90/180 category injury" (Rosa-Diaz v Maria Auto Corp., 79 AD3d 463, 464 [1st Dept 2010] [internal citations omitted]; see also Zambrana v Timothy, 95 AD3d 422, 423 [1st Dept 2012]).

Contrary to plaintiff's claim, defendants' failure to serve a CPLR §3101(d) response for Dr. Semble does not preclude the Court from considering his affirmation. In fact, CPLR §3212(b) directs that "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR §3101(d)] was not furnished prior to the submission of the affidavit" (CPLR §3212[b]). Neither is plaintiff's attack on Dr. Semble's credibility availing; there is no inherent contradiction between the affirmations of Doctors Semble and Springer.

Plaintiff has failed to rebut the Moving Defendants' prima facie case. Dr. McMahon's affidavit "provide[s] only conclusory assertions that [plaintiff's] injuries were caused or aggravated by the subject" accident (Rodriguez v Morel, 201 AD3d 606, 606-07 [1st Dept 2022] [internal citations omitted]; see also Thompson v Bronx Merchant Funding Services, LLC, 166 AD3d 542, 543-44 [1st Dept 2018]). Moreover, Dr. McMahon's physical examination of plaintiff, more than three years after the subject accident, "is too remote to raise an inference that the limitations were causally related to the accident … [and] did not address the findings in plaintiff's MRI reports of degenerative conditions" (Reyes-Mendez v City of New York, 192 AD3d 464, 465 [1st Dept 2021] [internal citations omitted]; see also Camilo v Villa Livery Corp., 118 AD3d 586, 586-87 [1st Dept 2014]; Blake v Sanchez, 198 AD3d 527, 527-28 [1st Dept 2021]). Finally, Dr.

McMahon failed to acknowledge and address the plaintiff's prior lumbar injury (See Rodriguez v 3rd Ave. Tr. Inc., 201 AD3d 417, 417 [1st Dept 2022] [internal citations omitted]; see also Diaz v Anasco, 38 AD3d 295 [1st Dept 2007] ["Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's "conclusion that plaintiff's condition is causally related to the subject accident is mere speculation,' insufficient to support a finding that such a causal link exists"]).

Accordingly, the Moving Defendants' motion for summary judgment dismissing the complaint is granted. In addition, pursuant to CPLR §3212(b), the Court searches the record and, sua sponte, grants summary judgment to the non-moving defendants P.O. Thomas P. Fabrize, the City of New York, and the New York City Police Department dismissing the complaint and cross claim against them (See e.g., Ferrieri v Cascio, 12 Misc 3d 1165(A) [Sup Ct, Suffolk County 2006]; see also Kruithoff v Brady, 2012 NY Slip Op 32418[U] [Sup Ct, Suffolk County 2012]). In light of the foregoing, the Moving Defendants' motion to consolidate is denied as moot.

In light of the foregoing, it is

ORDERED that the motion by defendants Huzaifa Akram and Chelsea Cab Corp. for summary judgment dismissing the complaint as against them is granted; and it is further

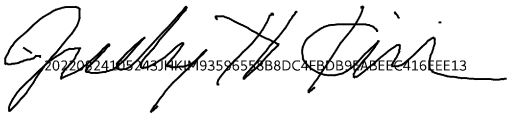
ORDERED that the Court searches the record and, sua sponte, grants summary judgment dismissing the complaint and the cross claim against the non-moving defendants, P.O. Thomas P. Fabrize, the City of New York, and the New York City Police Department; and it is further

ORDERED that defendants Huzaifa Akram and Chelsea Cab Corp.'s motion to consolidate (mot. seq. 002) is denied as moot; and it is further

ORDERED that counsel for Huzaifa Akram and Chelsea Cab Corp. shall serve a copy of this decision and 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 enter judgment accordingly; 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 "EFiling" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



8/24/2022
DATE

HON. JUDY H. KIM, J.S.C.

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