SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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BERNADEL SEMEXANT,

Plaintiff,

- v -

EDWARD ROBERT WORDEM-THOREN, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF SANITATION

Defendants.

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INDEX NO. 150510/2019

MOTION DATE 04/13/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 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, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff seeks to recover damages for personal injuries allegedly sustained on June 15, 2018 at approximately 5:40 P.M. when plaintiff was driving a 2010 Audi S7 vehicle that was struck by a sanitation truck at the intersection of Broadway and West 110 Street, New York, New York. The sanitation truck was under the control of defendants The City Of New York and the New York City Department Of Sanitation, and was being driven by defendant Edward Robert Wordem-Thoren. Collectively, the defendants are referred to herein as the "City."

Now pending before the court is a motion in which the City seeks an order, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, granting summary judgment to the City, dismissing the complaint and all cross-claims against the City, on the basis that plaintiff's alleged injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d) under any of the nine enumerated categories.

Also pending under this motion sequence is a cross-motion filed by plaintiff seeking : (i) an order, pursuant to CPLR § 3212, granting partial summary judgment to plaintiff on the basis that there are no questions of fact as to the absence of liability on the part of plaintiff; and (ii) an order dismissing defendants' affirmative defenses of culpable conduct on the part of plaintiff.

Serious Injury: Arguments Made by the Parties

In its motion, the City argues that plaintiff's alleged injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d) under any of the nine enumerated categories. The City argues that plaintiff underwent physical therapy in 2018 (the year of the accident) and 2019, but does not sufficiently explain why there were "gaps" in treatment. The City argues that the "Police Accident Report" (NYSCEF Document #46) explicitly states, "No injuries."

In support of these arguments, the City submits an x-ray report of plaintiff, taken four months after the accident, on September 13, 2018, (NYSCEF Document #47), and argues that plaintiff's x-rays do not indicate that plaintiff sustained any fracture.

The City also submits the expert medical report of Dr. John L. Xethalis, (NYSCEF Document #45), in which the doctor states that he reviewed plaintiff's prier medical records and history; interviewed and conducted a physical and orthopedic examination of the patient; and conducted range of motion testing using a hand-held goniometer. Dr. Xethalis concludes, in part, that there is "no evidence of orthopedic disability;" that plaintiff is "capable of working without restrictions;" that plaintiff can "perform his activities of daily living as he was doing prior to the accident;";and that plaintiff's "current prognosis is good." *Id.*

In opposition, plaintiff submits his own sworn Affidavit (NYSCEF Document #68) as well as an expert medical report by Dr. James M. Ligouri (NYSCEF Document #61). Plaintiff's Affidavit states, in part:

> 3. My current complaints of pain, are that I still, to this day, experience consistent pain to my right shoulder, right knee and lumbar spine, all as a direct result of this accident.
>
> […]
>
> 7. Due to the significant pain I am still experiencing in my right shoulder, right knee and lumbar spine, which continues to this day, I am required to utilize ice packs, as a method of self treatment, on a consistent basis. I still maintain difficulty in finding a comfortable position, while sleeping.
>
> […]
>
> 11. Despite all the physical therapy, treatment and the pain-relieving injection I received since the accident, to this day, I still feel constant pain in my right shoulder, right knee and lumbar spine, even as of the present day. I can state with certainty that these pains and limitations were not present prior to the accident and occurred as a direct result of this auto accident.
>
> 12. I have been suffering from significant limitations in the use of those body parts, which leaves me with difficulty of performing my usual and customary daily activities. Because of the physical restraint caused by the injuries and pain, I cannot perform basic daily activities, outlined above, as I could before the accident.
>
> 13. It is also my understanding that the defendant has alleged that I sustained a "gap in treatment" which is entirely untrue.
>
> 14. As I testified to in my deposition testimony, I underwent an extensive regime of physical therapy treatment, which lasted for at least one year following this accident up until the point when I was informed by my treating physicians that I had reached maximum medical improvement and that any further treatment would be palliative in nature.

In the expert medical report, Dr. Ligouri states that he conducted a physical exam of plaintiff and range of motion testing with inclinometer. Dr. Ligouri concludes, in part, that "It is with a high degree of medical certainty that the patient's injuries are directly related to the previously mentioned accident" and that "The patient will be left with a permanent partial disability." (NYSCEF Document #61).

Serious Injury: Conclusions of Law

Section 5102 (d) of the Insurance Law defines "serious injury" as: "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; 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."

A moving defendant must first establish a *prima facie* entitlement to summary judgment by submitting evidence demonstrating that plaintiff did not sustain a serious injury arising from an accident involving the parties. Once this is established, the burden then shifts to plaintiff to raise a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. Failure to raise a triable issue of fact requires the granting of summary judgment and dismissal of the complaint. *See* Gaddy v Eyler, 79 NY2d 955 (NY Ct, of Appeals); Thompson v Abbasi, 15 AD3d 95 (1st Dept 2005).

Courts have continually held that the question of whether a plaintiff has established a *prima facie* case for a "serious injury," as described in section 5102 (d), remains an issue of law (Licari v Elliott, 57 NY2d 230, 235 [1982]). Claims of "serious injury" are to be supported by objective medical evidence demonstrating a significant physical limitation resulting from the accident (Pommells v Perez, 4 NY3d 566, 574 [2005]).

Here, although the City's expert, Dr. Xethalis, concluded that plaintiff was able to work without restrictions and perform his activities of daily living as he was doing prior to the accident, Dr. Xethalis also found various limitations in range of motion, including:

> Cervical Spine: Flexion at 40 degrees (50 degrees normal), extension at 40 degrees (60 degrees normal), right lateral flexion at 30 degrees (45 degrees normal), left lateral flexion at 30 degrees (45 degrees normal), right rotation at 70 degrees (80 degrees normal), and left rotation at 70 degrees (80 degrees normal);
>
> Lumbar Spine: Flexion at 40 degrees (60 degrees normal), extension at 20 degrees (25 degrees normal);
>
> Right Shoulder: Forward flexion at 170 degrees (180 degrees normal), abduction at 170 degrees (180 degrees normal); and
>
> Right Knee: Flexion at 120 degrees (150 degrees normal)

Similarly, plaintiff's own medical expert, Dr. Ligouri, also found limitations in plaintiff's range of movement, including with respect to the lumbar spine ("flexion-extension--extension to 60°, normal 90°. Lateral flexion on the right to 20°, normal 25°").

Finally, in plaintiff's sworn affidavit, plaintiff averred that he still feels consistent, daily pain, and cannot perform basic daily activities as he could before the accident.

Given the above, the court finds that plaintiff has raised a triable issue of fact as to whether he sustained a serious injury under the Insurance Law, and the City's motion is accordingly denied.

The City also argues that dismissal is warranted, because there was a "gap" in plaintiff's medical treatment between 2018 and 2019, and a cessation of medical treatment at the end of June 2019. In Pommells v Perez, 4 NY3d 566 (2005) the New York Court of Appeals held that when additional contributory factors exist, such as a gap in treatment that interrupts the chain of causation between the accident and claimed injury, summary dismissal of the complaint may be appropriate. Here, however, the medical records submitted by plaintiff (NYSCEF Document #64, 65, 66, 67) show no gap in treatment between 2018 and 2019. In fact, the records show that from

June 2018, when the accident occurred, through June 2019, when plaintiff concluded treatment, there was not a single month when plaintiff did not have at least one medical session, and in most months plaintiff had multiple sessions.

Further, with respect to plaintiff concluding his treatment in 2019, the Court of Appeals also held in Pommells that a plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of his injury. Here, plaintiff's affidavit states, in part, that he underwent an extensive regime of physical therapy treatment, which lasted for at least one year following this accident up until the point when he was informed by his treating physicians that he had reached maximum medical improvement and that any further treatment would be palliative in nature. *See also* Rosario v Chico Car Inc., 95 AD3d 607 (1st Dept 2012) ("Moreover, plaintiff adequately explained the alleged gap in treatment. His father testified that plaintiff attended physical therapy for about five months after the accident, but stopped because it became palliative, his benefits expired, and he could not afford to pay out of pocket").

Plaintiff's Cross-Motion for Partial Summary Judgment

In his cross-motion, plaintiff argues that he should be awarded summary judgment on the issue of liability, as there are no questions of fact as to the absence of liability by plaintiff for the happening of this accident. Plaintiff argues that at the time of the accident, he was traveling straight southbound on Broadway, without any intention to make turns or to change lanes. Suddenly, the City's vehicle attempted to make an illegal left turn from the middle lane and in this process, impacted plaintiff's vehicle on the right side. As such, plaintiff argues, the City driver is

per se liable for the happening of this accident for changing lanes without first ascertaining whether it was safe to do so, in violation of New York Vehicle and Traffic Law ("VTL") Section 1128.

In opposition, the City argues that the City driver contends that the accident actually occurred because plaintiff's vehicle attempted to overtake the City vehicle as the City vehicle attempted to make a lawful left turn by carefully moving to the leftmost lane. The City argues that the City driver had no reason to believe that plaintiff's vehicle, which was in the middle lane, would attempt to overtake the City truck. The City further argues that these two differing versions as to the cause of the accident create questions of fact that preclude summary judgment.

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, the New York Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Here, it is undisputed that the collision occurred on the southbound side of Broadway, between 110 and 111 Streets. It is also undisputed that along that stretch of Broadway, there are three southbound lanes for driving: a right lane, from which cars can turn right or continue to go straight; a left lane, from which cars can turn left or continue to go straight; and a middle lane from which cars can only go straight.

Here, the transcript of plaintiff's deposition, (NYSCEF Document #60), shows that plaintiff testified as follows: Plaintiff was an Uber driver and on the day of the accident, he was driving straight southbound on Broadway, without any intention to make turns or to change lanes, on his way to pick up a customer. About five feet before Broadway intersects with 110th Street,

plaintiff was, suddenly and without warning, hit from the right side by a sanitation truck, which impacted plaintiff's vehicle's right side, "from the mirror to the fender." Before the accident occurred, plaintiff was traveling about 25 miles per hour, and he did not see the sanitation truck at all.

The transcript of the City driver's deposition (NYSCEF Document #61) shows that the City driver testified as follows: The City driver was a sanitation worker, and on the day of the accident, he was driving what was then his regular route. At the time of the accident, the City vehicle was driving in the right lane, heading south on Broadway, with the intention of turning left (east) onto 110th Street. The collision happened on Broadway midway between 110th and 111th Streets, when the City driver was moving from the right lane, though the middle lane, to the left lane, in anticipation of the turn. After the collision, the City driver called his field supervisor, who took about 15-20 minutes to arrive on the scene. The City driver denied trying to make the turn from the middle lane, and testified that such a turn would have been illegal. The City driver testified that plaintiff was in the middle lane, and sped up in an attempt to prevent the City driver from being able to successfully change lanes. Specifically, the City driver testified:

> Q: Did the Audi do anything to cause this accident?
>
> MS. MORANO: Note my objection. You can answer.
>
> A: I believe he was trying to, maybe, try to pass me, not letting me get over. As I was trying to get over from the middle lane to the left lane, I looked in my mirror, and then all of a sudden I saw him try to jump out and try to maybe overtake me.
>
> Q: Where would he have been trying to pass you from?
>
> A: From my left-hand side, my driver's side.

VTL section 1128 (Driving on roadways laned for traffic) provides, in relevant part:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Here, there are material discrepancies between the testimony given by plaintiff and that given by the City driver, including whether plaintiff's vehicle was in the middle lane or in the left lane when the accident occurred; whether the accident happened midway between 110th and 111th Street, or five feet north of 110th Street; and whether the City driver was attempting to turn from the middle lane or was merely moving from the middle lane into the left lane to prepare for the turn. Such discrepancies in the parties' accounts raise issues concerning credibility and "credibility issues are not appropriately resolved on a summary judgment motion" (Latif v Eugene Smilovic Hous. Dev. Fund Co., Inc., 147 AD3d 507 [1st Dept 2017]).

Plaintiff's Motion Regarding the City's Affirmative Defenses

Finally, to the extent that plaintiff seeks an order dismissing defendants' affirmative defenses of culpable conduct on the part of plaintiff, this relief is denied. CPLR 1411 provides that:

> *[i]n any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.*

CPLR 1412 further states that "[c]ulpable conduct claimed in diminution of damages, in accordance with [CPLR 1411], shall be an affirmative defense to be pleaded and proved by the party asserting the defense."

Here, the City's Answer (NYSCEF Document #17) states as an affirmative defense that: "Plaintiff(s)' culpable conduct caused or contributed, in whole or in part, to his/her/their injuries and or damage." If the City driver's version of the facts is true, then culpable conduct may very well be attributable to plaintiff, and the amount of damages otherwise recoverable could be diminished accordingly.

Conclusion

Given the above, it is hereby:

ORDERED that the City's motion for summary judgment is **DENIED**; and it is further

ORDERED that the branch of plaintiff's motion seeking partial summary judgment on the issue of liability is **DENIED**; and it is further

ORDERED that branch of plaintiff's motion seeking to dismiss the defendants' affirmative defenses of culpable conduct on the part of the plaintiff is **DENIED**.

10/17/2022
DATE

J. MACHELLE SWEETING, 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