**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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ADNAN A. FAGBEMI-MOHAMED

Plaintiff,

-against -

LUIS RODRIGUEZ and FREDY ESPAILLAT,

Defendants.

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**Index No. 26102/2019E**
**DECISION/ORDER**
**Motion Seqs. 1, 2**

**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 relevant to the motions of defendant LUIS RODRIGUEZ [Mot. Seq. 1] and defendant FREDY ESPAILLAT [Mot. Seq. 2], both of which are made pursuant to CPLR 3212 and seek an order dismissing the complaint on the ground that plaintiff ADNAN A. FAGBEMI-MOHAMED (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d).

Plaintiff commenced this action to recover damages for personal injuries plaintiff allegedly sustained as a result of a November 4, 2017, motor vehicle accident. Plaintiff claims to have suffered injuries to the cervical spine that satisfy the following Insurance Law § 5102(d) threshold category: 90/180 days. Plaintiff treated with a chiropractor from November 9, 2017 to February 20, 2018, less than four months post-Accident. He returned to work in a restaurant within one week of the Accident. A review of treating chiropractor's records reveals that plaintiff was treated before the Accident, on October 16, 2017, for headaches, lower back pain and loss of range of motion in the lumbar and cervical spines.

Defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" under Insurance Law 5102(d) as a result of the

Accident. Defendants argue 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 plaintiff's medical records, the pleadings, deposition transcripts, statements of material facts, attorney affirmations, a memorandum of law, and the affirmations/medical reports of Dr. Kiernan (orthopedist), Dr. Fitzpatrick (radiologist), and Dr. Golden (neurologist).

Dr. Kiernan examined plaintiff on April 13, 2021, over three years after the Accident. The expert reviewed the bill of particulars. The doctor took range-of-motion measurements of the cervical spine, thoracic spine, and lumbar spine, finding no loss in range of motion and negative objective test results. In the impression section the physician finds that the cervical, thoracic, and lumbar spines are "sprain/strain-resolved". There is no evidence of orthopedic disability, permanency, or residuals. Plaintiff is working and is able to work without restrictions and can perform the activities of daily living.

In relevant part, Dr. Fitzpatrick reviewed the cervical spine MRI taken of plaintiff on December 19,2017, one month post-Accident. In terms of the cervical MRI, the doctor findings are normal with a mild loss of cervical disc signal. There is no traumatic injury, and the intervertebral disc desiccation is age-related which occurs over time with no traumatic basis. This can progress to disk thinning and disc herniation. These MRI findings are within the spectrum of degenerative disc disease and are not causally related to acute traumatic spinal injury. The review of the lumbar spine MRI was normal.

Dr. Golden, a neurologist, conducted an examine of plaintiff on March 9, 2021, over three years post-Accident. The physician reviewed the bill of particulars, MRIs and CT Scans, and plaintiff's medical records. Dr. Golden found that plaintiff possessed a full range of motion in the cervical, thoracic ,and lumbar spines. As a diagnosis, the expert finds that the "status post cervical spine sprain/strain, resolved", "status post lumbar spine strain/strain, resolved" and "status post thoracic spine sprain/strain, resolved". Objective tests were negative.

The expert opines that the examination of the cervical, thoracic, and lumbar spines was normal with full range of motion. Plaintiff had full motor strength and reflexes and was neurologically intact in the upper and lower extremities with no objective signs of any neurologic deficits. There was no objective evidence of cervical or lumbar radiculopathy. The cervical and lumbar MRI reports did not document evidence of an acute injury. There were no objective findings noted during examination that support plaintiff's subjective complaints. Plaintiff is not disabled at this time from a neurologic point of view. He was employed as a cook at the time of the Accident and may continue to work in that capacity and perform all activities of daily living without any restrictions. There is no objective evidence of permanency or residuals.

Based on the submissions, defendants set forth a *prima facie* showing that plaintiff did not suffer a serious injury to the cervical spine that was causally connected to the Accident and failed to satisfy the 90/180 day category (*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, submitting an affidavit, medical records, and the reports/affirmations of Dr. Heyligers (Chiropractor). Plaintiff was treating for headaches and loss of range of motion in the cervical and lumbar spines before the Accident in October 2017. After the Accident, plaintiff received 21 chiropractor treatments from November 10, 2017 to February 20, 2018, and was thereafter examined over three years later on September 20, 2021.

Based on the extremely limited record, plaintiff fails to generate an issue of fact as to causation and therefore does not generate a question of fact as to serious injury. Plaintiff was treating with Dr. Heyigers before the Accident, on October 16, 2017, for headaches, neck and back pain and loss of range of motion, the same injuries claimed in this action. While in the "final medical examination" report Dr. Heyigers sets forth range of motion limitations in the

cervical spine and lumbar spine at the recent examination in September 2021, and causally relates the findings to the Accident, the expert fails to mention or address plaintiff's prior neck and back injuries and limitations to the body for which plaintiff was treating or explain why those injuries were different from those claimed as a result of the Accident (*Antepara v Garcia,* 194 AD3d 513 [1st Dept 2021]; *see Rodriguez v Morel*, 201 AD3d 606 [1st Dept 2022]; *Bogle v Paredes*, 170 AD3d 455 [1st Dept 2019]).Of note, plaintiff was already treating for injuries to the same body parts allegedly injured in the Accident, but the expert fails to address those prior injuries and treatment in any way(*Antepara v Garcia, supra*; *Rodriguez v Morel, supra*; *see Monahan v Reyes*, 184 AD3d 460 [1st Dept 2020]; *Blumenberg v Lora*, 193 AD3d 445 [1st Dept 2021]; *Booth v Milstein*, 146 AD3d 652 [1st Dept 2017]). As for the findings of the MRI reports, there is no claim that said reports include an expression of an opinion as to causation (*Paudani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]).

In addition, the report of plaintiff's physician sets forth the results of a recent examination but does not explain plaintiff's lack of treatment for years, since February 2018, rendering his opinion as to causation of plaintiff's current 2021 limitations in range of motion speculative (*Acevedo v Grayline N.Y. Tours, Inc.,* 204 AD3d 597 [1st Dept 2022]; *Black v Gordon*, 172 AD3d 580, 581 [1st Dept 2019]; *Vila v Foxglove Taxi Corp,* 159 AD3d 431, 431-432 [1st Dept 2018]). Hence, on this 90/180-day claim, defendants establish entitlement to summary judgment by demonstrating a lack of causation (*Blumenberg v Lora, supra)* and defendants are entitled to dismissal of the 90/180-day claim in the absence of a causal connection between plaintiff's injuries and the subject accident (*see Dellino v Puello,* 189 AD3d 430 [1st Dept 2020]; *Diakite v. PSAJA Corp.,* 173 A.D.3d 535, 536 [1st Dept. 2019]).

In any event, the testimony and medical records submitted in opposition fail to make a showing that plaintiff was medical curtailed from performing usual activities to a great extent rather than some slight curtailment (*Tarjavaara v Considine*, 188 AD3d 509 [1st Dept 2020]; *Olivare v Tomlin*, 187 AD3d 642 [1st Dept 2020]; *see Acevedo v Grayline N.Y. Tours, Inc*., *supra*).

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

ORDERED that the motions of defendant LUIS RODRIGUEZ [Mot. Seq. 1] and defendant FREDY ESPAILLAT [Mot. Seq. 2], both of which are made pursuant to CPLR 3212 and seek an order dismissing the complaint on the ground that plaintiff ADNAN A. FAGBEMI-MOHAMED (plaintiff) has not sustained a "serious injury" as defined by Insurance Law 5102(d), are granted; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint; and it is further

ORDERED that the Clerk shall mark these motions and the action disposed in all court records.

The foregoing constitutes the decision and order of the court.

Dated: June 30, 2022

E N T E R,

Hon. _____
Hon. Veronica G. Hummel

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| 1. CHECK ONE..... | x CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE |
| 2. MOTIONS 1 and 2 are..... | x☐ GRANTED DENIED ☐ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT |