SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22M**

Justice

----------X

LUIS ANGAMARCA CASTILLO,

Plaintiff,

- v -

ROSA D. DOMINGUEZ, JOHN DOE, JOSE MENDOZA

Defendant.

----------X

INDEX NO. 158574/2020

MOTION DATE 08/09/2022, 08/23/2022

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 70, 71, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 72, 73, 74, 75, 76, 77, 79, 82

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

Upon the foregoing documents, the motion by Defendants for summary judgment on the grounds that Plaintiff fails to meet the serious injury threshold under Insurance Law 5102 (d) (Motion Sequence #3) and the motion by Plaintiff for summary judgment as to liability against Defendants (Motion Sequence #4) are decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of a December 28, 2019 motor vehicle accident between a vehicle owned and operated by Defendants and a vehicle owned and operated by Plaintiff.

Defendants' Motion for Summary Judgment, Serious Injury Threshold (Motion Sequence #3)

Plaintiff's Bill of Particulars alleges injuries to Plaintiff's neck, back, right shoulder, right hip, and right knee. Plaintiff underwent right knee surgery on July 21, 2020.

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]).

In support of their motion, Defendants rely on the affirmed independent medical examination report of Dr. Richard D. Semble, orthopedic surgeon, the radiological review of Dr. Jonathan Lerner, radiologist, and Plaintiff's examination before trial (EBT) testimony.

Dr. Semble examined Plaintiff on February 14, 2022 and concluded that Plaintiff's cervical spine sprain, lumbar spine sprain, right shoulder sprain, and right hip sprain were all resolved and Plaintiff's status post right knee surgery is healed. Dr. Semble measured Plaintiff's range of motion with a goniometer pursuant to AMA Guidelines and found normal range of motion as to Plaintiff's cervical spine, thoracic spine, lumbar spine, right shoulder, and right knee. Dr. Semble also noted normal and negative objective tests for the subject areas. As to Plaintiff's right knee, Dr. Semble noted a healed arthroscopic scar. Dr. Semble determined that Plaintiff has fully recovered from the causally related injuries and that there is no evidence of any orthopedic disability or permanency.

Dr. Lerner undertook an independent radiological review of Plaintiff's MRIs right shoulder, right knee, lumbar spine, right hip, and cervical spine.

As to Plaintiff's right shoulder, Dr. Lerner noted tendinosis and internal tendon degeneration which can result either from an increase in breakdown from overuse, or from a decrease in the healing response. He also recorded diffuse supraspinatus tendinosis with a low-grade partial thickness intrasubstance tear within the posterior tendon without evidence of a full thickness component and moderate acromioclavicular joint arthrosis with subchondral irregularity

resulting in a narrowed acromiohumeral interval. Abnormalities from impingement, which may be referred to as impingement syndrome and range from myotendinous tears to full thickness tendon tears, can be characterized by acute or chronic shoulder pain induced by movements or by elevation and rotation of the shoulder. Dr. Lerner explained that this can occur in young athletes involved in repetitive movements, muscle overdevelopment, as well as degenerative changes of the acromioclavicular joint space.

As to Plaintiff's right knee, Dr. Lerner reported no evidence of fracture or dislocation and no evidence of a discrete meniscal tear but did note increased signal within the posterior horn of the medial meniscus. There was no evidence of surface extension, making it consistent with myxoid degeneration which can be caused by rotation, flexion, and extension of the knee during normal walking and other routine activities such as exercise.

As to the lumbar spine, Dr. Lerner found mild diffuse disc bulge with effacement of the thecal sac at L3-L4, with no evidence of central canal spinal stenosis or neural foraminal narrowing and moderate size diffuse disc bulge eccentric to the right and bilateral facet osteoarthritis at L5-S1 with effacement of the thecal sac and mild right neural foraminal narrowing. Dr. Lerner explained that his findings as to the lumbar spine were seen in the setting of desiccation of the L3-L4 through L5-S1 intervertebral disc space levels which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event. He further clarified that the findings of disc bulges in the lumbar spine are frequently nonspecific because they are seen in up to 63% of asymptomatic individuals.

As to the cervical spine, at C5-C6, there was mild diffuse disc bulge eccentric to the left with associated bilateral uncinate osteoarthritis. There was effacement of the ventral subarachnoid space and mild left greater than right bilateral neural foraminal narrowing. At C6-C7, Dr. Lerner

reported a right paracentral disc bulge, bilateral uncovertebral osteoarthritis with effacement of the ventral subarachnoid space but with no evidence of central canal spinal stenosis or neural foraminal narrowing. Dr. Lerner explained that his findings were seen in the setting of diffuse desiccation of the cervical intervertebral disc space levels which is consistent with degenerative disc disease and suggestive of a chronic degenerative process as opposed to an acute traumatic event.

With regard to his findings of the lumbar spine and cervical spine, Dr. Lerner noted that his findings were common in asymptomatic patients so they must be interpreted with caution. Specifically, Dr. Lerner described that in patients in their 40s, MRIs typically find 68% have disc degeneration, 54% have disc signal loss, and 50% will have a disc bulge.

As to the right hip, the MRI demonstrated no evidence of fracture or soft tissue abnormality to suggest an acute traumatic event. The abductors of the hip including the gluteus minimus, muscular attachment of the medius, and medius tendon were normal.

Dr. Lerner found no causal relationship between any of his findings and the subject accident.

Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]).

In opposition, Plaintiff has raised a triable issue of fact. Plaintiff relies on the affirmations of his treating physician, Dr. Barry Karzman and his treating surgeon, Dr. Robert Haar, Plaintiff's treating records, which include unaffirmed medical records from his treatment at Macintosh Medical P.C., Kinetic Approach Physical Therapy PC, Haar Orthopedics and Sports Medicine, P.C., KBJ Medical Practice, P.C., unaffirmed MRI reports, Plaintiff's examination before trial (EBT) testimony, and Plaintiff's affidavit. While it is true that uncertified medical records and

unsworn letters or reports are of no probative value in opposing a summary judgment motion, the New York Court of Appeals ruled that a sworn medical opinion that relies on unsworn MRI reports constitutes competent evidence (*Pommells v Perez*, 4 NY3d 566 [2005]). Accordingly, the Court will not consider the unsworn and unaffirmed treatment records. However, the affirmations by Dr. Haar and Dr. Katzman sufficiently raise an issue of fact.

Dr. Haar initially examined Plaintiff on June 19, 2020 and performed surgery on Plaintiff's right knee on July 21, 2020. During the operation, Dr. Haar visualized a right knee tear of the anterior horn of the medial meniscus and a tear of the posterior horn of the lateral meniscus that were fresh and were not related to any degeneration. Dr. Haar opined that these post-operative findings were traumatically induced and caused by the subject accident. Dr. Haan reported that the MRI showed a horizontal intrasubstance tear of the posterior horn of the medial meniscus but did not show tears of the anterior horn of the medial meniscus and posterior horn of the lateral meniscus but clarified that the findings made during an arthroscopic procedure are far more accurate than MRI findings. Dr. Haar's affirmation also accounts for the degenerative findings by Defendants' experts but explained the hypertrophic synovitis and medial patellar plica noted in the operative report are not the cause of Plaintiff's right knee pain and decreased range of motion because these symptoms began only after the accident.

Plaintiff initially treated with Dr. Katzman on October 11, 2022. He measured Plaintiff's range of motion using a goniometer pursuant to AMA Guidelines and found a limitation of flexion of Plaintiff's right knee. Dr. Katzman opined that the post-operative findings of right knee tear of the anterior horn of the medial meniscus and tear of the posterior horn of the lateral meniscus were traumatically induced and are causally related to the subject accident based on Plaintiff's medical

history, treatment records, and post-operative examination. Dr. Katzman also reported that Plaintiff's injuries are permanent and have resulted in a restriction of use and activity.

Plaintiff's testimony that he went to the hospital to treat his injuries within one month of the subject accident, is sufficiently contemporaneous to establish that Plaintiff suffered a serious injury within the meaning of the statute (*see Salman v Rosario*, 87 AD3d 482 [1st Dept 2011] [four months post-accident was sufficiently contemporaneous to establish that the plaintiff had suffered a serious injury]).

With respect to the 90/180 day serious injury claim, Plaintiff relied on his EBT testimony and his affidavit, in which he avers that he was unable to perform any usual household activities such as vacuuming, dishwashing, cleaning, and walking, and that he was unable to walk long distances and he used crutches for some months. However, Plaintiff's testimony was unsupported by competent medical proof that directly substantiated his claims that he could not perform substantially all her daily activities for 90 of the first 180 days following the accident as a result of the accident (*Cruz v Aponte*, 60 AD3d 431, 432 [1st Dept 2009]). Plaintiff's subjective complaints of pain and limitation, without more, do not rise to the level of a "serious injury" within this category of Insurance Law 5102 (d).

As such, Defendants' motion for summary judgment on the grounds that Plaintiff did not sustain a serious injury under Insurance Law 5102 (d) is denied, except for the 90/180 category.

Plaintiff's motion for summary judgment as to liability against Defendants (Motion Sequence #4)

Plaintiff's motion for partial summary judgment on the issue of liability in favor of Plaintiffs as against Defendants is granted. "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 eliminate any material issues of fact from the case" (*Winegrad v New York University*

Medical Center, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion 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 NY2d 557, 560 [1980]).

In support of his motion, Plaintiff relies on the EBT testimony of Defendant Driver Mendoza and Plaintiff.

Defendant Mendoza testified in is EBT that he saw the brake lights of Plaintiff's vehicle go on, approximately two seconds later he attempted to stop, but was unsuccessful and the front of his vehicle collided with the rear of the vehicle in front of him (Plaintiff's vehicle), when the accident occurred Defendant Mendoza's foot was on the brake.

Plaintiff testified that he was driving on the George Washington Bridge at 50 miles per hour, wearing his seatbelt, when he felt a strong impact to the rear right side of his vehicle.

A rear-end collision establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*Franklin v Chalov*, 209 AD3d 524 [1st Dept 2022]).

In opposition, Defendants rely on Defendant Mendoza's testimony in which he says that he was driving in the middle lane when another vehicle attempted to "cut" from the left lane into the middle lane in front of Defendant and behind Plaintiff, with the front wheels of the vehicle moving over the broken yellow line, then moving back into the left lane, when Plaintiff's vehicle braked, causing Defendant to "unavoidably" make contact with Plaintiff's vehicle. Defendants contend that this offers a non-negligent explanation of the accident. However, Defendant Mendoza's version of events does not offer a non-negligent explanation of the rear end collision with Plaintiff's vehicle. Courts have consistently held that the emergency doctrine may protect a

driver from liability where the driver, through no fault of his or her own, is required to take immediate action in order to avoid being suddenly cut off (*Maisonet v Roman*, 139 AD3d 121, 122 [1st Dept 2016]). However, here, Defendant Mendoza's testimony does not articulate how avoiding being cut off by the non-party third vehicle caused him to rear-end Plaintiff. Therefore, it is insufficient to defeat Plaintiff's motion as to liability.

Accordingly, based on the foregoing it is hereby

ORDERED that Defendants' motion for summary judgment on the grounds that Plaintiff fails to meet the serious injury threshold under Insurance Law 5102 (d) (Motion Sequence #3) is granted as to the 90/180 category only, and denied as to the other categories; and it is further

ORDERED that Plaintiffs' motion for summary judgment on liability in favor of Plaintiffs and against Defendants (Motion Sequence #4) is granted; and it is further

ORDERED that any requested relief not specifically 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 and Order upon Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

3/23/2023
DATE

JAMES G. CLYNES, J.S.C.

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