**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF KINGS: PART 9**

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**JOSEPH GILL,**

**Plaintiff,**

**-against-**

**METRO URBAN TRANSPORTATION CORP.,**

**Defendant.**

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**DECISION / ORDER**

**Index No. 506627/2020**
**Motion Seq. No. 2 & 3**
**Date Submitted: 7/20/23**

***Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment and the plaintiff's cross-motion for summary judgment.***

| Papers | NYSCEF Doc. |
|---|---|
| Notice of Motion, Affirmation and Exhibits Annexed..... | 32-42 |
| Affirmation in Opposition and Exhibits Annexed..... | 45-52 |
| Reply Affirmation..... | |
| Notice of Cross-Motion, Affirmation and Exhibits Annexed..... | 45-52 |
| Affirmation in Opposition and Exhibits Annexed..... | 53-54 |
| Reply Affirmation..... | 55 |

**Upon the foregoing cited papers, the Decision/Order on these motions is as follows:**

This is a personal injury action arising from a motor vehicle accident that took place on June 5, 2018, in Manhattan. Plaintiff claims that while he was stopped for a red light, the vehicle he was driving was struck from behind by the defendant's vehicle and that, as a result, he sustained serious personal injuries. The defendant's vehicle was being operated by an unknown individual who fled the scene.

The defendant moves, in motion sequence #2, for summary judgment pursuant to CPLR Rule 3212, seeking an order dismissing plaintiff's claims in their entirety because the "[p]laintiff fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102(d)." The plaintiff cross-moves, in motion sequence #3, for summary judgment on the issue of liability, "as well as on the issue of 'serious injury' as defined in

Insurance Law § 5102(d)." For the reasons which follow, the defendant's motion is denied in its entirety and the plaintiff's cross-motion is granted in its entirety.

In support of its motion (MS #2), the defendant submits an attorney's affirmation, copies of the pleadings, the plaintiff's bill of particulars, the plaintiff's deposition transcript, and affirmed reports from an orthopedic surgeon, Dr. Salvatore Corso, who conducted an independent physical examination of the plaintiff, and from a radiologist, Dr. Audrey Eisenstadt, who reviewed the plaintiff's MRI films on behalf of the defendant.

In support of his cross-motion (MS #3), the plaintiff submits an attorney's affirmation, a copy of a preclusion order, an affirmation from Dr. Susan DiStasio, plaintiff's treating surgeon, certified records from Dr. Nunzio Saulle, one of plaintiff's doctors, uncertified (and thus inadmissible) records from Multi-Specialty Pain Management and Mount Sinai Beth Israel Hospital.

**Liability**

Regarding the portion of the plaintiff's cross-motion seeking summary judgment on the issue of liability, the plaintiff testified that he was stopped at a red traffic signal on Union Square East when he felt an impact to his vehicle [Tr at Doc 38, pages 23-25]. Plaintiff further testified that he was looking ahead of him when the impact occurred and that his foot was on the brake pedal [*id.* page 25]. As a result of the impact, the plaintiff's vehicle moved forward and to the right, but did not strike anything else [*id.* page 26]. Plaintiff testified that there was damage to the rear left and left side of his car, which cost $1,600 to repair [*id.* page 31]. The police came to the scene of the accident, but by the time they arrived, the driver of the other vehicle had left the scene [*id.* page 30]. Plaintiff testified that an ambulance came to the scene, but that he declined transport to

a hospital because he did not want to leave his car unattended at the scene of the accident [*id.* page 32]. The plaintiff drove from the scene of the accident to Beth Israel Hospital, where he was seen in the emergency room, treated, and released [*id.* page 36].

The plaintiff's EBT testimony is all that is offered regarding the happening of the accident. The defendant never appeared for a deposition and, as a result, the Hon. Lawrence Knipel issued an order [Doc 22], wherein he ruled that "[t]he defendant is precluded from testifying at trail [*sic*] or offering an affidavit in support or in opposition to a dispositive motion on the issue of liability." The defendant offers only an attorney's affirmation in opposition to the motion, which does not constitute evidence. This case is on the trial calendar, and defendant has not moved to dismiss on the grounds that plaintiff sued the wrong party. Therefore, despite the absence of any evidence other than the plaintiff's version of the accident from his EBT transcript, the court will proceed to determine the motion with regard to liability. It is noted, however, that it is best to include a police report, to confirm that the plaintiff has correctly identified the defendant's vehicle.

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (*Gutierrez v Trillium USA, LLC*, 111 AD3d 669 [2d Dept 2013]; *Fajardo v City of New York*, 95 AD3d 820 [2d Dept 2012]; *Francisco v Schoepfer*, 30 AD3d 275 [1st Dept 2006]). As the defendant in this case offers no non-negligent explanation for the collision, the plaintiff's motion on the issue of liability is granted and the case shall proceed to trial on the issue of damages only. Any affirmative defenses of comparative fault are stricken.

**The Serious Injury Threshold in Insurance Law §5102(d)**

Both the defendant and the plaintiff also move for summary judgment regarding the issue of "serious injury" as defined by Insurance Law § 5102(d). The defendant seeks dismissal of the complaint based on its contention that plaintiff did not sustain a serious injury. The plaintiff seeks an order granting him summary judgment, finding that he satisfies the serious injury threshold, as defined in the Insurance Law.

In the plaintiff's amended verified bill of particulars [Doc 36], he alleges that, as a result of the accident, he sustained injuries to his lumbar spine, which necessitated a surgical repair, as well as injuries to his cervical spine and left shoulder. At the time of the accident, the plaintiff was thirty-six years old. He states in his bill of particulars that he was confined to bed for approximately one month and that he was confined to his home for approximately one year following the accident. He further states that he "continues to be fully incapacitated from employment and partially incapacitated from household duties from the time of the accident until the present."

At his deposition, taken on July 20, 2021, plaintiff describes the treatment he has had for his alleged injuries. He had MRIs and x-rays [Tr at Doc 38, pages 43-44], and his treatment included physical therapy and acupuncture [*id.* Pages 38-39]. Plaintiff also testified that he had a discectomy in his lower back [*id.* page 46], and that he was given injections to his neck, back and shoulder by Dr. Susan DiStasio [*id.* page 42-43], who is also the doctor that performed the plaintiff's surgery. Plaintiff testified that he was given a back brace and a neck brace, which he wore for approximately one year [*id.* page 49].

The plaintiff further testified that he can no longer drive for work, and that he was instructed by Dr. DiStasio that he should not return to work because of his injuries [*id.*

page 13]. He also testified that he cannot do "lengthy driving" or "long, lengthy bus and train rides," and cannot sit or stand for extended periods of time [*id.* page 61]. He stated that he has difficulty exercising and can only do minimal activities at the gym, he can no longer participate in contact sports, he is no longer "able to engage in full sexual activity," he has difficulty cooking, and he cannot sleep well [*id.* page 61].

Plaintiff testified that he was driving a livery taxi at the time of his accident, and that he was approved for Workers' Compensation benefits as a result of this accident [*id.* page 14]. Specifically, he testified that, at the time of the deposition, he was receiving biweekly payments from Worker's Compensation [*id.* page 14]. He also testified that he saw a doctor in connection with his Worker's Compensation claim, that he has an attorney for that claim, and that he gave testimony at a hearing in connection with that claim [*id.* page 62].

With regard to the 90/180 category of injury, the only evidence submitted by the defendant is plaintiff's EBT testimony. It does not make out a prima facie case for dismissal with regard to this category of injury. He testified that he did not return to work after the accident. He testified that he made a claim for Workers' Compensation as a result of the accident and that he was still receiving benefits at the time of his deposition in July of 2021. Thus, there is no evidence that he returned to work in the six months after the accident. When a plaintiff does not return to work for more than three months after a motor vehicle accident and receives Workers' Compensation for his loss of earnings, the court must conclude that he in fact had a medically determined injury which prevented him from returning to work (See *Peplow v Murat*, 304 AD2d 633 [2d Dept 2003]). Indeed, in support of the portion of the plaintiff's motion seeking summary

judgment on the issue of serious injury, plaintiff argues that the "[d]efendant's expert examined Plaintiff close to four years after the accident, and unsurprisingly, gives absolutely no opinion as to Plaintiff's condition in the first 180 days after the accident. As such, it is respectfully submitted that Plaintiff must prevail on his summary judgment motion with respect to the 90/180-day category." The court also notes that the plaintiff testified that, as a result of the injuries he sustained in the subject accident, he had not returned to work from the date of the accident on June 5, 2018, until, at least, the date of the deposition, July 20, 2021. Based on the foregoing, the court finds that the plaintiff has established that he sustained an injury within the 90/180 category of serious injury pursuant to the Insurance Law.

As defendant has failed to make a prima facie case with regard to all of plaintiff's injuries and all of the applicable categories of injury, the defendant's motion must be denied (*see Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]). As noted herein, the court also finds that the plaintiff has affirmatively demonstrated his entitlement to summary judgment on the issue of serious injury.

Accordingly, it is,

**ORDERED** that the defendant's motion is denied; and it is further

**ORDERED** that the plaintiff's motion is granted in its entirety. This action may proceed to trial solely on the issue of damages, and the question of the "serious injury threshold" may not be submitted to the jury.

This constitutes the decision and order of the court.

Dated: October 5, 2023

**ENTER:**

**Hon. Debra Silber, J.S.C.**