SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DENISE M DOMINGUEZ** **PART** **21**
Justice

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INDEX NO. 450720/2021

MICHEAL COOK

MOTION SEQ. NO. 002

Plaintiff

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, EDWARD D. DOUCE, VICTOR M. BORREL and EMMANUEL VARGAS BORREL

DECISION AND ORDER ON MOTION

Respondents

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For the reasons that follow, Defendants' summary judgment motion on the grounds that Plaintiff does not meet the serious injury threshold is denied.

This personal injury matter arises out of an automobile collision between an MTA bus and a motor vehicle owned by Defendant Victor M. Borrel (Borrel) and operated by Defendant Emmanuel Vargas Borrel (Vargas). Plaintiff, Michael Cook, a passenger on the MTA bus, alleges that on June 13, 2019, at about 2:20 p.m. at or about the intersection of West 125th Street and Amsterdam Avenue in Manhattan, he was injured as a result of this accident. On June 09, 2020, Plaintiff commenced a negligence action against the owners and drivers of the vehicles.

Now post-note of issue, Defendants Vargas and Borrel move for summary judgment pursuant to CPLR 3212 on the basis that Plaintiff did not sustain a "serious injury" as defined under Insurance Law § 5102 [d]. Defendants New York City Transit Authority, Metropolitan Transportation

Authority, MTA Bus Company, bus driver Douce, and Manhattan and Bronx Surface Transit Operating Authority join the motion. Plaintiff opposes.

Background

According to Plaintiff's examination before trial, he was injured when the bus driver slammed on the brakes and he jolted forward, striking his right knee into a hard plastic seat in front of him. Plaintiff also alleges that his head snapped forward then backward. Plaintiff further alleges feeling immediate pain in his neck, right knee, right hip and lower back.

Plaintiff was then taken to an emergency room. According to the emergency room records, tests and x-rays were performed. Nothing was broken or fractured, there was no numbness, no limited range of motion nor pallor and no pulseless extremity. Upon discharge, Plaintiff was given a prescription for acetaminophen. Plaintiff was discharged about three hours later. He then walked home from the hospital.

Plaintiff further testified that his attorneys recommended that he go to physical therapy. He sought treatment at DHD Medical P.C. (DHD) beginning one week after the accident, going three times a week for a period of about five months, ending January 31, 2020. Plaintiff specifically received treatment for his right knee, right hip, back and neck. DHD referred Plaintiff for MRIs and to see an orthopedic doctor. Plaintiff saw the orthopedic doctor twice. Plaintiff further testified that the orthopedist checked Plaintiff's range of motion and prescribed lidocaine patches. Regarding swelling to his knee, Plaintiff testified that the orthopedic doctor told him that it could be arthritis.

According to the medical records from the orthopedic doctor, D. L. Nigen, Plaintiff had "mild effusion in the right knee compared to the left. Tender to palpation on the medial patellar facet and medial joint line. Active range of motion from 0-115 degrees of flexion. No ligamentous laxity with varus valgus stress. TA/GS/EHL intact. Sensation is intact to light touch. Brisk capillary refill." At the first visit, about a month after the accident, Dr. Nighen recommend physical therapy

for the right knee and anti-inflammatory medication. He further recommended weightbearing x-rays of the right knee to check for any pre-existing osteoarthritis.

Approximately three months after the accident, on September 20, 2019, Dr. Nigen examined Plaintiff again. Dr. Nigen noted "plain radiograph of the right knee reveals mild tricompartmental osteoarthritis." Dr. Nigen updated his assessment to reflect that Plaintiff's right knee pain, is due to a "medial meniscus tear and patellofemoral chondromalacia and mild degenerative joint disease." Dr. Nigen recommended injections for the pain. Plaintiff chose not to seek injections.

Plaintiff also testified that approximately five years prior to this accident, he was involved in another accident resulting in injuries to his right leg, lower back and right knee. He sought treatment at the Hospital for Special Surgery. In addition, in 2004 he suffered a stroke that affected his balance.

Plaintiff further alleges that he can no longer casually walk like he used to as a result of the instant accident. Prior to this accident, Plaintiff alleges walking one mile a day, three times a week but after the accident he does not walk as much due to pain in the knee and hip. He also alleges that cannot do push-ups, crunches and stretching as much as he used to. Plaintiff also alleges difficulty putting on his socks and pants.

Plaintiff's Medical History Prior to the Accident

According to Plaintiff's medical records prior to this accident, Plaintiff has a lengthy medical history of injuries to his right knee and hip. Plaintiff was last seen for knee and hip pain on June 7, 2017, approximately two years *before* the accident. According to those records, Plaintiff

> "was an ex-marathon runner, still doing power walking 1.5mi 4 days a week. 20 years ago injured R knee, had fluid taken out, was told to rest it for a few months, but he went back to exercising after a week, since then has been having on/off pain. Located in suprapatellar tendon area. Regarding his R hip pain he points to R lower back and lateral hip area, does not radiate down leg, denies groin pain. His pain is worse with going up/down stairs and with weather. Has mild am stiffness for 20min. Hi's [sic] had these pains on/off for at least 6 years, but worse in the past year. No other injuries except twisted R ankle. No other joint symptoms.

> He saw someone at HSS in 2016 and had MRI of hip, also MRI L spine in 2015, was told that he needs PT but no surgery. He is seeing a neurologist in Long Island, who has been treating him with lidocaine patch, which helps, using 3 times a week. He's in rheumatology clinic because he was told 'synovitis'.[1] He is not taking any meds for pain. Previously did PT but not currently."

In addition, other medical notes related to an MRI taken of Plaintiff's right hip in January 2016 state:

"demonstrates moderate partial thickness chondral wear over the right hip joint with a small focal near full-thickness chondral defect over the medial femoral head in the setting of a chronically degenerated and chronically torn labrum and features of CAM-type femoral acetabular impingement. There is mild abductor tendinosis involving the gluteus medius and minimus tendons with minimal fluid within the right greater trochanteric bursa."

In addition, on April 23, 2018, more than *one year before* the accident, Plaintiff saw another doctor and complained of right knee pain "which began after hitting his knee on a chair." At that time, Plaintiff complained of dull pain "over the anterior knee" which worsens when powerwalking. A review of x-rays which were ordered and taken on April 20, 2018, reflected "mild OA[2] with osteophyte[3] off the patella." The doctor diagnosed, patellofemoral pain syndrome of the right knee, as well as patellar tendinitis of the right knee.

Discussion

It is well settled that the moving party in a summary judgment motion has the high burden of establishing entitlement to judgment as a matter of law and dispelling any material questions of fact for a trial (CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d320 [1986]). Only when this burden is met will opposing papers be considered (*Alvarez*, 68 NY2d320).

Pursuant to Insurance Law § 5102, there are nine categories defining a serious injury resulting from an automobile accident (Insurance Law § 5102). They include (1) death;

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[1] Synovitis is the inflammation of a synovial membrane, which is a layer of connective tissue that lines a joint, such as the knee, ankle or shoulder. Synovitis is caused by some times of arthritis and other diseases.
[2] OA stands for osteoarthritis, a most common form of arthritis that affects joints in the hand, spine, hip and knee.
[3] Osteophytes are commonly knowing as bone spurs, which are tiny bone growths that form in the joints or spine.

(2) dismemberment; (3)significant disfigurement; (4) a fracture; (5) loss of a fetus; (6) permanent loss of use of a body organ, member, function or system; (7) permanent consequential limitation of use of a body function or system; (8) significant limitation of the use of a body function or system; or (9) a medically determined injury or impairment of a non-permanent nature which prevents the injury or person from performing substantially all of the material acts which constitute such person's substantially all of the material acts which constitute such person's usual and customary daily activities for not less that ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (*id.*).

Category 6, "permanent loss" is defined as a total loss of use of the affected body part (*Oberly v Bangs Ambul*, 96 NY2d 295 [2001]). Category 7, "permanent consequential limitation" requires a permanent injury with significant and not just slight limitations (*Altman v Gassman*, 202 AD2d 265 [1st Dept 1994]). As to category 8, "significant limitation" requires an injury that limits the use of the area in a significant way rather than in a minor, mild or slight way (*Licari v Elliott*, 57 NY2d 230 [1982]). Thus, a permanent consequential limitation requires a greater degree of proof than a significant limitation (*Altman*, 202 AD2d at 265). As to category 9, "90 out of 180 days", must be a showing of a great extent rather than slight curtail of daily and usual activities (*Nelson v Distant*, 308 AD2d 338 [1st Dept 2003])

Here, it is undisputed that the first six of the nine categories are not applicable. Defendants thus argue that the remaining categories also do not apply. In support, Defendants rely on the Statement of Material Facts, the medical records of Dr. Semble and Dr. Winn, and Plaintiff's deposition.

Defendants alleges that the independent examinations by Dr. Semble and Dr. Winn establish that Plaintiff's injuries do not rise to the permanent consequential limitation category nor to the significant limitation category. Upon review, this Court agrees.

The medical records of Dr. Semble and Dr. Winn establish that Plaintiff's cervical and lumbar spine injuries were degenerative and that there was no causal connection between the injuries and the June 13, 2019, accident. Additionally, the records establish that Plaintiff did not sustain a serious injury to his right knee. Dr. Winn states that Plaintiff's right knee was unremarkable and found no causal relation between Plaintiff's alleged injuries with the accident. Dr. Winn's x-ray/film review establishes that Plaintiff's mild to moderate stenosis in the cervical spine from C-5-C-6 to C6-C-7 as well as to the lumbar spine from L2-L3, L3-L4 and mild bilateral neural foramen narrowing from L2-L3 through L-5-S-1 are typical of degenerations and not causally related to the accident. Further, Dr. Winn's review of the right hip MRI shows a small effusion but otherwise was unremarkable. As for the right knee, Dr. Winn's review states that Plaintiff's right knee reflects manifestations typical of osteoarthritis not causally related to the accident.

Thus, Defendants have established that Plaintiff did not sustain a permanent injury with significant limitations nor an injury that significantly limits the use of his knees, hip or back (*see* Insurance Law § 5102[d]; *Altman,* 202 AD2d 265 [1st Dept 1994]; *Licari v Elliott*, 57 NY2d 230 [1982]).

Defendants also argue that the 90/180 threshold of serious injury does not apply. Defendants argue that there is no medical record that Plaintiff was ordered not to work or carry normal activities. Further Defendant's rely on Plaintiff's testimony. Plaintiff testified that he cannot walk, exercise and stretch as much as he use to. As a result, Defendants have also established category 9 does not apply. A slight curtail to Plaintiff's usual activities with no other evidence is not enough for the serious injury threshold under category 9 (see *Nelson*, 308 AD2d 338).

In opposition, Plaintiff broadly argues that issues of fact exist and relies primarily on the affidavit prepared by Dr. Mathew from DHD rather than on the medical records of Dr. El-Khoury from DHD who treated Plaintiff for nearly six months after the accident. Dr. Mathew, nearly four years after the accident on March 3, 2023, examines Plaintiff for the first time. Dr. Mathew unlike

Dr. El-Khoury found that Plaintiff would benefit from ongoing physical therapy for the rest of his life. Dr. El-Khoury on the other hand found that Plaintiff after five months of physical therapy had achieved the maximum medical improvement and was unlikely to improve despite continuing rehabilitative treatment.

Further unlike any other doctors who examined Plaintiff closer in time to the instant accident, Dr. Mathew states that based on examining Plaintiff and reviewing his past medical history, it is his opinion to a reasonable degree of medical certainty that Plaintiff sustained the following injuries as result of the June 13, 2019 accident: " multilevel cervical disc herniations; disc bulge at the C5-C6 level; mild cord compression at the C6-C7 level; multilevel disc herniations; disc bulge at the L1-L2; central canal stenosis at the L3-L4 level; multiple levels of nerve root impingement of the lumbar spine; right knee medial meniscus tear; right knee medial collateral knee ligament sprain; patellar tendinosis of the right knee; right knee distal quadriceps tendinosis; right knee internal derangement; and right hip strain" Dr. Mathew also unlike any of the other doctors uses the following words to describe Plaintiff's injuries, "significant, partial and permanent"

Yet, Dr. Mathew in his medical notes opines that while Plaintiff had a prior accident, herniated and bulging discs and evidence of degenerative findings on the lumbar spine, it is "likely the majority of [Plaintiff's] symptoms/findings are related to traumatically-induced accident from June 13, 2019"

Nonetheless, all the DHD records of both Dr. El-Khoury and Dr. Mathew, assert a causal connection between the accident and Plaintiff's existing injuries. Thus, for the purpose of this summary judgment motion, Dr. Mathew's sworn statement and report although with some contradictions, coupled with Dr. El-Khoury many reports, do raise material questions of facts regarding the opposing objective medical opinions and the credibility of the doctors as to whether Plaintiff's injuries rise to the level of category 8, significantly limiting the use of a body part (*see e.g. Massillon v Regalado*, 176 AD3d 600, 601 [1st Dept 2019]; *Gordon v Hernandez*, 181 AD3d

424 [1st Dept 2020]; *De Los Santos v Basilio*, 176 AD3d 544 [1st Dept 2019]; *Hamilton v Marom*, 178 AD3d 424 [1st Dept 2019]). This Court further finds that Dr. Mathew's examination that was not contemporaneous in time to the accident, is insufficient to raise a question of fact as to whether category 7, permanent consequential limitation of a body party applies (*see e.g. Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559 [1st Dept 2009]; *see also Nemchyonok v Peng Liu Ying*, 2 AD3d 421 [2d Dept 2003]). Further a serious injury is not established solely by with a medical affidavit using language of Insurance Law § 5102 such as "permanent" or "significant" (*see Lopez v Senatore*, 65 NY2d 1017 [1982]).

Accordingly, it is thereby ORDERED that the motion by Defendants Emmanuel Borrel-Vargas and Victor M. Borrel is denied; and it is further

ORDERED that Defendants service and file a notice of entry of this order within 30 days in accordance with the Court's electronic filing.

11/8/2023
DATE

HON. DENISE M. DOMINGUEZ
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