Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN IAS Part 20

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MOHAMMAD S. KARIM,

Plaintiff,

-against-

DANIEL SERRANO, NEW YORK CITY TRANSIT AUTHORITY and MTA BUS COMPANY,

Defendants.

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Index No.: 700467/2020

Motion Seq. No.: 2

Motion Date: 3.15.2023

Motion Cal. No.: 21

The papers bearing NYSCEF Doc. Nos. 29-50 were read on the motion made by the defendants, Daniel Serrano ("Serrano"), New York City Transit Authority ("NYCTA") and MTA Bus Company ("MTA") (collectively, the "Defendants"), for summary judgment dismissing the complaint.

The plaintiff, Mohammad S. Karim (the "Plaintiff"), commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident (the "Accident"). Presently before the Court is the Defendants' motion for summary disposition, which is predicated on the assertion that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 [d]. For the following reasons, the motion is granted in part and denied in part.

I. Background

The Accident occurred on January 14, 2019 at or near the intersection of Northern Boulevard and 37th Avenue, Queens, New York. Two vehicles were involved in the Accident. The Plaintiff, a taxi driver, was the operator of one of the vehicles. The other vehicle was operated by Serrano and owned by MTA Bus.

The Plaintiff alleges that he suffered injuries to the cervical spine, lumbar spine, left knee, left elbow, left shoulder and head. It is further alleged that he meets the serious injury threshold under permanent loss of use; significant limitation; permanent consequential limitation; and 90/180-day categories.

A. The Defendants' Submissions in Support

In support of their motion, the Defendants submit, *inter alia*, the affirmed report of Dr. Richard Semble and the Plaintiff's deposition transcript.

Dr. Semble, an orthopedist, conducted the independent medical examination of the Plaintiff on November 2, 2021.

Preliminarily, with respect to the Plaintiff's complaints of headaches, the physician "defer[s] complaints to the appropriate specialty."

Range of motion testing with respect to the cervical spine, lumbar spine, left shoulder, left elbow and left knee was normal. Dr. Semble arrived at the following diagnoses/impressions: "cervical spine sprain – resolved; lumbar spine sprain – resolved; left shoulder sprain – resolved; left elbow sprain – resolved; [and] left knee sprain - resolved."

The Defendants also submit the Plaintiff's verified bill of particulars, which indicates that he missed "approximately 7 days" from work. In a supplemental verified bill of particulars, the Plaintiff alleges that he was confined to bed for seven days and home for nine days.

B. The Plaintiff's Opposition

The Plaintiff submits various manner of medical documents in opposition, which are analyzed below.

Dr. Stephanie Bayner, a physician specializing in physical medicine and rehabilitation, submits an affirmation setting forth, *inter alia*, her treatment of the Plaintiff. She first saw the Plaintiff on January 23, 2019. On June 30, 2019, she administered six trigger point injections, *inter alia*, in the areas of the thoracic and lumbar spines. On March 20, 2019, six more trigger point injections were administered to these areas. On March 27, 2019, November 27, 2019 and February 5, 2020, six trigger point injections were administered to "bilateral trapezial muscles, bilateral SCM cervical and sternal, bilateral cervical paraspinals." Six trigger point injections were administered to "bilateral thoracic paraspinals, bilateral erector spinae, and bilateral lumbar paraspinals" on June 12, 2019, June 26, 2019, July 17, 2019, August 21, 2019, October 30, 2019 and December 27, 2019.

Dr. Bayner's treatment ended in February 2020 because the physician concluded that the Plaintiff "had reached maximum medical improvement."

On February 8, 2023, in response to the Defendants' present motion for summary judgment and approximately three years after the cessation of treatment, Dr. Bayner examined the Plaintiff. She concluded that the Plaintiff had losses in range of motion with respect to the cervical spine, lumbar spine, left shoulder and left knee. The physician's diagnosis was "[c]ervicalgia; [l]ow back pain; [u]nspecified pain of left shoulder joint; and [s]prain of unspecified site of left knee."

The affirmation and accompanying MRI report of Dr. John T. Rigney, a radiologist, with respect to the lumbar spine indicate that the Plaintiff had disc bulges at L4-L5 and L5-S1.

The affirmation and accompanying MRI report of Dr. Rigney with respect to the cervical spine indicate that the Plaintiff had "[s]traightening of the cervical curvature and lateral angulation of the spine to the right … [p]osterior bulge and annular tear at C5-C6. Left sided bulge at C6-C7."

II. Discussion

A. Applicable Law

The familiar principles applicable to summary judgment motions are set forth below.

"Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law" (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The "function of summary judgment is issue finding, not issue determination" (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the "drastic" remedy of summary judgment, the movant "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 from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686, 688 [1984]).

Insurance Law § 5102 [d] states:

> Serious injury means 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.

The Court now turns to the four categories of serious injury that the Plaintiff alleges.

B. The 90/180 Day Category

"A claim under [the 90/180] category must be supported by objective medical evidence of an injury or impairment of a nonpermanent nature which would have caused the alleged limitations on [the] plaintiff's daily activities. Further, there must be proof that the injured party was curtailed from performing [his or her] usual activities to a great extent rather than some slight curtailment" (*Sul-Low v Hunter*, 148 AD3d 1326, 1327 [3d Dept 2017]) [internal quotation marks and citations omitted]).

The 90/180-day claim is dismissed because the Plaintiff missed only approximately one week from work (*see Arias v Martinez*, 176 AD3d 548 [1st Dept 2019]; *Thompson v Bronx Merchant Funding Services, LLC*, 166 AD3d 542 [1st Dept 2018]; *Marin v Ieni*, 108 AD3d 656, 657 [2d Dept 2013]).

C. The Significant Limitation and Permanent Consequential Limitation Categories

The Defendants fail to establish entitlement to summary judgment with respect to the head injuries, *i.e.*, headaches, because their medical expert, Dr. Semble, "defer[s] [these] complaints to the appropriate specialty" and no medical evidence to support dismissal of said claims is presented.

The left knee injury claims are dismissed. Here, the Defendants establish *prima facie* entailment to disposition under the significant limitation and permanent consequential categories through Dr. Semble's affirmed report, which indicates the injury to this body part consisted of a sprain that resolved (*see Heesook Choi v Mendez*, 161 AD3d 1054 [2d Dept 2016]). In opposition, the Plaintiff fails to raise a triable issue of fact because one of his physicians, Dr. Bayner, found only a "13.3%" loss of range of motion on flexion when she last examined him (*see Granger v Keeter*, 23 AD3d 886 [3d Dept 2005]; *Chinnici v Brown*, 295 AD2d 465 [2d Dept 2002]; *Waldman v Dong Kook Chang*, 175 AD2d 204 [2d Dept 1991]).

The left elbow injury claims are also dismissed. The Defendants establish *prima facie* entailment to summary disposition under the significant limitation and permanent consequential categories through Dr. Semble's affirmed report, which indicates that the injury to this body part was a sprain that has resolved (*see Heesook Choi v Mendez*, 161 AD3d 1054). The Plaintiff fails to raise a triable issue of fact in opposition because he presents no medical evidence to rebut this

showing. Among other things, Dr. Bayner did not perform range of motion testing with respect to this body part when she last examined the Plaintiff and does not refer to same in her diagnosis as the result of said visit.

The left shoulder claims also fail. The Defendants establish *prima facie* entailment to summary disposition under the significant limitation and permanent consequential categories through Dr. Semble's affirmed report, which indicates that the injury to this body part was a sprain that resolved (*see Heesook Choi v Mendez*, 161 AD3d 1054). In opposition, the Plaintiff fails to raise a triable issue of fact. Here, although Dr. Bayner concludes that there were losses in range of motion to this body part when she last examined the Plaintiff, there is no competent objective medical evidence to support these findings. A loss of range of motion predicated upon subjective complaints of pain is insufficient to establish a serious injury (*see Gillick v Knightes*, 279 AD2d 752 [3d Dept 2001]). The Plaintiff fails to submit any objective medical evidence, such as MRI or CT reports, indicating that the left shoulder loss of range of motion is caused by the Accident.

The Plaintiff fares better on his cervical and lumbar spine injury claims. The record reveals: (1) that MRI studies taken of the subject body parts revealed abnormalities; (2) that Dr. Bayner found losses in range of motion with respect to the subject body parts; and (3) that Dr. Bayner causally relates the cervical and lumbar spine injuries to the Accident. Triable issues of fact as to the cervical and lumbar spines are thus raised. Accordingly, summary judgment dismissing these claims is denied (*see Reyes v Se Park,* 127 AD3d 459 [1st Dept 2015]; *Caines v Diakite*, 105 AD3d 404 [1st Dept 2013]; *Collazo v Anderson*, 103 AD3d 527 [1st Dept 2013]).

D. The Permanent Loss Category

Lastly, the permanent loss or use of a body member, function and/or system claim, which is alleged in the bill of particulars is dismissed. The law is settled that "… to qualify as a serious injury within the meaning of the statute, 'permanent loss of use' must be total" (*Oberly v Bangs Ambulance Inc*., 96 NY2d 457, 460 [2001]; *see Gjoleka v Caban*, 188 AD3d 458 [1st Dept 2020]). The Defendants establish that through Dr. Semble's affirmed report that there is no permanent loss of use with respect to any body member, function and/or system. In opposition, the Plaintiff fails to raise a triable issue of fact because he presents absolutely no evidence of permanent loss or use (*see Oberly v Bangs Ambulance Inc*., 96 NY2d 457; *Gjoleka v Caban*, 188 AD3d 458).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Defendants' summary judgment motion is granted in part and denied in part; and it is further,

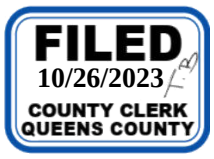
ORDERED, that the motion is granted to the extent that the Plaintiff's permanent loss of use, 90/180-day, left shoulder, left elbow and left knee injury claims are dismissed; and it is further,

ORDERED, that the motion is denied as to the Plaintiff's injury claims relating to headaches, the cervical spine and the lumbar spine; and it is further,

ORDERED, that the Defendants shall serve a copy of this Order with Notice of Entry upon the Plaintiff by September 29, 2023.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
August 14, 2023



MOJGAN C. LANCMAN, J.S.C.