SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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ANIS HOSSAIN,

Plaintiff,

- v -

ISMAEL DIAZ, ARUN BALI

Defendant.

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INDEX NO. 154458/2022

MOTION DATE 07/30/2024

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 120

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

Upon the foregoing documents, the motion by Defendant Arun Bali for summary judgment and dismissal of Plaintiff's Complaint is decided as follows:

Plaintiff, a taxicab driver, seeks recovery for injuries allegedly sustained as a result of a May 20, 2021 multi-vehicle accident. There is no dispute concerning the identity of the owners and operators of the three vehicles and the order in which they were traveling as set forth in the police report. The first vehicle was operated by Plaintiff, the second vehicle was owned and operated by Ismael Diaz, and the third vehicle was owned and operated by Defendant Arun Bali. While the first and second vehicles were stopped at a red traffic signal, the third vehicle struck the second and propelled it into the first. Diaz, a former Defendant, moved successfully for severance and dismissal from this action. Plaintiff, for his part, was awarded partial summary judgment against the remaining Defendant, Bali, on the issue of liability (*see* September 12, 2024 Decision and Order (NYSCEF Doc No. 97).

Defendant Bali now moves for summary judgment dismissing Plaintiff's Complaint on the basis that Plaintiff has failed to demonstrate a serious injury that would justify any damages in accordance with Insurance Law 5102 [d]. In support of his motion, Defendant Bali relies primarily on the examination before trial testimony of Plaintiff and the affirmed report of a physician engaged as an expert by Defendant Bali, Hugh Selznick, M.D.

In opposition, Plaintiff relies chiefly on affirmed reports of two physicians who examined him shortly after the accident and treated him for several months thereafter, as well as his own affirmation. A cross-motion for dismissal filed by Diaz was withdrawn following this Court's intervening September 12, 2024 Decision and Order which severed and dismissed him from the action.

The evolution of the collision is fundamentally undisputed. Plaintiff testified that, at the time of the accident, he was driving his leased taxicab with one rear passenger in his vehicle sitting behind the driver's seat. He was traveling uptown on Park Avenue, there was a traffic light on Park Avenue and East 35th Street, it was red, he brought his vehicle to a stop for the red light, it was the first vehicle at the light, and his vehicle was stopped for about a minute and a half, when his vehicle was struck in the rear, and as a result his vehicle moved straight a few feet. As this Court determined previously, Defendant Bali caused the accident by striking Diaz's vehicle, which was stopped at the red light immediately behind Plaintiff's taxicab. Plaintiff further testified that he was wearing his seatbelt at the time of the accident.

Because Diaz properly withdrew his cross-motion (*see Oshrin v Celanese Corp.* 37 NYS2d 548 [Sup Ct NY County 1973], *affd* 265 App Div 923 [1st Dept 1942], *affd* 291 NY 170 [1943]) – which was moot in any event – the Court will proceed with Defendant Bali's motion for dismissal alleging that Plaintiff has not satisfied the serious injury requirement of Insurance Law 5102 [d]).

In connection with the current motion, Defendant does not dispute the circumstances of the accident. Indeed, as the operator of the rearmost vehicle who offered no non-negligent explanation, he was presumptively at fault (*see Passos v MTA Bus Co.,* 129 AD3d 481 [1st Dept 2015]; *Beloff v Gerges,* 80 AD3d 460 [1st Dept 2011]). Rather, Defendant urges dismissal because Plaintiff has not suffered a serious injury.

The Appellate Division, citing *Licari v Elliott* (57 NY2d 230, 237 [1982]), has rejected the contention that whether a plaintiff has sustained a serious injury is always a question of fact for the jury and, instead, has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*Charley v Goss*, 54 AD3d 569, 570 [1st Dept 2008], *affd* 12 NY3d 750 [2009]). The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Perez v Rodriguez,* 25 AD3d 506 [1st Dept 2006]; *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]; *Rubensccastro v Alfaro*, 29 AD3d 436 [1st Dept 2006]).

In support of his motion, Defendant relies on an affirmed report from Hugh Selznick, M.D., a Fellow of the American College of Surgeons. He examined Plaintiff in April 2024, more than two years after the accident, including performance of appropriate range of motion testing with a goniometer and compared measurements with values according to AMA Guidelines. Dr. Selznick concluded that the alleged injury to the cervical spine, lumbar spine, right shoulder, and right knee were all resolved, and that Plaintiff had a normal examination of the thoracic spine and right hand/wrist. He further concluded that there is no objective evidence of permanency or disability, and that Plaintiff may work and perform his daily living activities without restrictions stemming from the accident.

Because the surgeon's report found Plaintiff's condition to be normal, and the alleged injuries resolved, the burden shifts to Plaintiff as the nonmovant to raise a triable issue of fact (*see Winegrad v New York University Medical Center,* 64 NY2d 851, 853 [1985]).

In opposition, Plaintiff submitted his own affirmation, his testimony from his examination before trial and affirmed reports and separate affirmations from two physicians who treated him over several months following the accident, Mike Pappas, D.O., and Naryan B. Paruchuri, M.D., a radiologist.

Dr. Pappas performed appropriate range of motion testing with a goniometer. He diagnosed multiple disc bulges, herniations and impingements, left uncinate joint hypertrophy, levoscoliosis, facet sclerosis and spondylosis of the lower lumbar spine. He found "a causal relationship between the patient's injuries on February 20, 2021 and the [Plaintiff's] complaints." His reports reflect continued improvement in Plaintiff's condition and range of motion, but not complete resolution. Although not specifically stated in the report of his final examination on August 26, 2021, Dr. Pappas's September 2024 affirmation in opposition to summary judgment recites his conclusion that "Mr. Hossain's injuries were permanent and that any further therapy would only be palliative in nature." And while Plaintiff himself does not deny that he discontinued treatment, his recent affirmation avers that he remains symptomatic and suffers significant pain and limitations. Plaintiff also contends that Dr. Selznick failed to review Plaintiff's medical records or diagnostic tests.

In reply, Defendant focuses on Plaintiff's gap in treatment between his last examination in August 2021 and the current motion three years later. In post-reply correspondence, Plaintiff contends that Defendant's argument and exhibit supporting the claim of gap in treatment was untimely raised in reply papers.

The Court's function in adjudicating a motion for summary judgment is issue-finding, not issue-determination (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Here, the conflicting opinions of the experts raise questions of fact concerning the seriousness and permanence of the injuries that cannot be resolved by summary judgment. This leaves only the question of the gap in treatment.

To the extent that there may have been a gap in Plaintiff's treatment, that purported gap is not fatal to Plaintiff's claim where, as here, Plaintiff explained that his insurance would not cover his treatment anymore (*Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 [2013]; *Nwanji v City of NY*, 190 AD3d 650 [1st Dept 2021]). He explained in his affirmation that he "had to stop therapy because insurance refused to pay for any more therapy and [he] could not afford to pay for this therapy . . ." As such, Plaintiff has raised a sufficient issue of fact to preclude summary judgement in favor of Defendants (*see generally Toure*, 98 NY2d 345).

Defendant is entitled to summary judgment, however, on Plaintiff's claim, stated in his Bill of Particulars, that he was substantially impaired from performing his normal daily activities for at least 90 of the first 180 days following the accident. Insurance Law 5102 (d) recognizes a "serious injury" in a case of "[m]edically 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." In his deposition, Plaintiff conceded that he returned to work immediately after the accident, partially curtailed his hours for only about a month and has been able to fully perform his duties since then (*see Deneen v Bucknor,* 178 AD3d 461, 462 [1st Dept 2019] [plaintiff did not sustain a serious injury under the 90/180-day category when he returned to work two weeks after the motor vehicle accident]; *see also Hernandez v Rodriguez,* 63 AD3d 520, 521 [1st Dept 2009]). Thus, that branch of Defendant's motion is granted.

Accordingly, it is

ORDERED that the motion by Defendant Arun Bali for summary judgment and dismissal of Plaintiff's Complaint is GRANTED in part and DENIED in part; and it is further

ORDERED that the motion by Defendant Arun Bali for summary judgment is GRANTED only to the extent of severing and dismissing Plaintiff's claim for injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment; and it is further

ORDERED that Defendant Arun Bali's motion is otherwise DENIED; 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.

2/19/2025
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