

Gely v Gray Line N.Y. Tours, Inc.

2025 NY Slip Op 35138(U)

October 10, 2025

Supreme Court, New York County

Docket Number: Index No. 158546/2019

Judge: James G. Clynes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES G. CLYNES PART 22

Justice

-----X

TIMOTHY GELY,

Plaintiff,

- v -

GRAY LINE NEW YORK TOURS, INC.,

Defendant.

INDEX NO. 158546/2019

MOTION DATE 03/25/2024, 03/11/2024

MOTION SEQ. NO. 007, 008

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 116, 117, 118, 119, 120, 121, 134, 135, 137, 140, 141, 153, 154

were read on this motion to/for STRIKE PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 008) 105, 106, 107, 108, 109, 110, 111, 112, 113, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 136, 138, 139, 142, 144, 145, 146, 147, 148, 149, 150, 151, 152

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The motion by Plaintiff pursuant to CPLR 3126 and 3124 for an Order striking Defendant's Answer, and to preclude Defendant Gray Line New York Tours, Inc. (Gray Line) from offering evidence at trial and/or any dispositive motions; and granting Plaintiff the costs, fees and disbursements associated with the making of the motion (Motion Sequence Number 007) and the motion by Plaintiff pursuant to CPLR 3212 for an Order granting summary judgment on the issue of liability in favor of Plaintiff and against Gray Line and the cross-motion by Gray Line pursuant to CPLR 3212 for summary judgment in favor of Gray Line and dismissal of the Plaintiff's Complaint against it on the grounds that Plaintiff's alleged injuries fail to satisfy the "serious injury" requirements of New York Insurance Law 5102 (d) and therefore has no cause of action under New York Insurance Law 5104 (a) are consolidated for disposition and decided as follows.

For the reasons stated below, Gray Line's cross-motion for summary judgment is granted and the complaint is dismissed. Plaintiff's motions for summary judgment on liability and to strike Gray Line's answer for failing to provide discovery responses and to preclude Gray Line from offering any evidence at trial and/or on any dispositive motions are denied as moot.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On August 17, 2018, plaintiff was driving on Second Avenue in Manhattan, New York, when he was rear-ended by a Gray Line bus operated by a Gray Line employee.

James Murphy (“Murphy”), the vice president and general manager of Gray Line, testified that he is responsible for day-to-day operations of the company (NYSCEF Doc No. 112, Lesnevec affirmation, exhibit 5, Murphy’s deposition tr at pp. 8-10, 15). He further testified that Gray Line is currently not in operation, but during the relevant time in 2018 Gray Line was in the business of providing tourist bus services and employed approximately 100 drivers (*id.* at pp. 9-10). Murphy explained that Gray Line maintained employee files for all its drivers and ensured that its employees were properly licensed (*id.* at pp. 11-12). The Gray Line buses were also inspected twice a year by the Department of Transportation (“DOT”) (*id.* at p. 10).

If a Gray Line driver was involved in a car accident, Murphy testified that the driver was required to fill out an accident report and notify the dispatch and the safety manager (*id.* at p. 13). DOT would also be notified (*id.*). A written report would then be generated for the accident (*id.* at p. 14). Murphy, however, had no firsthand knowledge of the car accident involving plaintiff or whether an accident report was generated (*id.* at pp. 11, 13). Murphy also did not know how long Gray Line retained these records (*id.* at p. 14).

Plaintiff was deposed on the case and testified that he was driving an SUV on East 22nd Street and Second Avenue on the evening of August 17, 2018 (NYSCEF Doc No. 111, Lesnevec affirmation, exhibit 4, plaintiff’s deposition tr at pp. 31, 36-37, 39, 49). He was alone in the car, was wearing a seatbelt and was driving to Brooklyn (*id.* at pp. 31, 49). The traffic at the time was light (*id.* at p. 41).

Plaintiff further testified that immediately before the accident, he was stopped at a red traffic light on East 22nd and Second Avenue, and there were no cars stopped in front or on the sides of the car he was driving (*id.* at pp. 41, 47-48, 53). He was looking straight ahead waiting for the light to change when a double-decker bus rear-ended his car (*id.* at pp. 51, 53-55, 121). Plaintiff explained that the impact from the rear of the car jolted him forward, causing his head, shoulders and back to bounce back and hit the seat (*id.* at pp. 54-55). Plaintiff testified that when he exited the car, he saw that the bus behind him was stopped, and the two vehicles were no longer in contact (*id.* at pp. 57-58). Plaintiff also saw that the car he was driving was damaged on the rear of the driver’s side (*id.* at p. 58-59).

Plaintiff explained that the bus driver approached him and apologized to him. The bus driver specifically stated in sum and substance that he was pressing the brakes and did not know what happened (*id.* at pp. 62-63). Plaintiff further testified that the bus driver told him he was going back to the bus to get his license and registration, but instead fled the scene (*id.* at pp. 62-64). Plaintiff followed the bus driver until police that plaintiff flagged down pulled the bus over at Canal Street (*id.* at pp. 64, 66). Plaintiff then saw the bus driver flee the scene on foot (*id.* at p. 67).

As to the injuries, plaintiff testified that he was not bleeding, but complained to the police of neck, back, and shoulder pain, and an ambulance transported him to Bellevue Hospital (*id.* at pp. 62, 67-68). Two weeks after the accident, plaintiff sought treatment for lower back, neck, and shoulder pain, but could not recall what specific doctors he visited (*id.* at pp. 76-79). He explained that he saw different specialists, had physical therapy, and underwent spinal surgery on his lower back performed by Dr. Macagno in 2021 (*id.* at pp. 82-83, 85, 88). Plaintiff further testified that although the spinal surgery improved his condition, he still uses a cane (*id.* at pp. 91-92, 96). He testified that he is unable to do many things that he was able to prior to the accident, such as walking up the stairs, sitting, standing, or driving for long periods of time, bending, lifting things, and exercising (*id.* at pp. 106-107).

Before his deposition, plaintiff also testified under oath on February 19, 2019 regarding a claim for no fault benefits, which was closer in time to the accident than his deposition (NYSCEF Doc No. 147, Block affirmation, exhibit 3, plaintiff's deposition tr). Plaintiff testified that he was stopped completely at a solid red light on Second Avenue and East 22nd Street when a bus rear-ended the car he was driving, causing his shoulders and chest to hit the steering wheel (*id.* at pp. 20-21, 24). He was wearing a seatbelt, and the airbags did not deploy (*id.* at pp. 21-22).

Plaintiff further testified that he spoke to the bus driver, who approached plaintiff after the collision (*id.* at pp. 23-25). Plaintiff explained that he asked the bus driver what happened, and the bus driver stated in sum and substance: "oh these brakes" (*id.* at pp. 25-26). Plaintiff thought the bus driver walked back to the bus to retrieve his license and insurance information, but instead saw him leave the accident scene (*id.*). Plaintiff then followed the bus driver and flagged down police officers, who pulled over the bus driver (*id.* at pp. 26-27). However, the bus driver managed to flee on foot from the police officers (*id.* at p. 27). Plaintiff further testified that he was taken to the hospital by an ambulance after complaining of neck, shoulder and back pain (*id.* at pp. 30-31).

As to the injuries, plaintiff testified the next day his whole body was sore, his neck was sore and stiff, his back was sore, and he could not raise his shoulder above a certain height (*id.* at p. 35). When the pain did not go away, plaintiff sought treatments from different doctors and received physical therapy (*id.* at pp. 35-37, 50, 55). He also saw neck, shoulder and spine specialists, and was recommended to undergo a spinal fusion surgery (*id.*, pp. 50-64). Plaintiff explained that after the accident he missed approximately two weeks of work but returned to work when the school year started and stopped working in November 2018 (*id.* at pp. 8-9).

The certified Police Accident Report shows that the subject accident occurred at approximately 10:00 p.m. on East 22nd Street and Second Avenue (NYSCEF Doc No. 110, Lesnevec affirmation, exhibit 3, police accident report). The report indicates that plaintiff stated that he was stopped on a red light when a bus rear-ended him and drove off (*id.*). The report further shows that plaintiff stated that he managed to stop the bus, but the driver fled the scene on foot, leaving the bus unattended (*id.*).

Plaintiff commenced this action against Gray Line on September 3, 2019, and Gray Line filed its answer on November 7, 2019. Plaintiff served a demand for authorizations on Gray Line on May 11, 2023 (NYSCEF Doc No. 119, Lesnevec's affirmation, exhibit A). In this demand for authorization, plaintiff requested an executed authorization for employment records of Damion Seeley, the driver of the subject tour bus (*id.*). It also sought an executed authorization for the maintenance and/or repair records of the subject tour bus.

On July 21, 2023, the court ordered Gray Line to respond to plaintiff's demands within 30 days (NYSCEF Doc No. 69). On August 25, 2023, plaintiff filed a motion to compel Gray Line to respond to plaintiff's demands (Motion Sequence Number 006) (NYSCEF Doc Nos. 78-84). During a conference call on October 6, 2023, the parties stipulated to withdraw plaintiff's Motion Sequence Number 006, and the court granted permission to withdraw said motion (*see* NYSCEF Doc No. 91). On March 11, 2024, however, plaintiff sent a good faith email to Gray Line demanding a response to plaintiff's May 11, 2023 demand for authorization (NYSCEF Doc No. 119, Lesnevec's affirmation, exhibit B). Plaintiff alleges that Gray Line has not yet produced such authorization.

Plaintiff moves, pursuant to CPLR 3126, to strike Gray Line's answer on the grounds that Gray Line failed to provide the discovery responses and comply with the July 21, 2023 court order directing Gray Line to produce the demand for authorizations. Plaintiff further moves to preclude

Gray Line, pursuant to CPLR 3124, from offering any evidence at trial and/or to support any dispositive motions. Gray Line opposes the motion.

Plaintiff moves for a summary judgment, pursuant to CPLR 3212, on the issue of Gray Line's liability and to dismiss Gray Line's affirmative defense of comparative negligence, and Gray Line opposes. Gray Line cross moves for summary judgment and dismissal of the complaint against it arguing that plaintiff's alleged injuries fail to satisfy the serious injury threshold requirement of Insurance Law 5102 (d) and 5104.

DISCUSSION

I. Summary Judgment Motions

A party moving for summary judgment under CPLR 3212 "must make 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

A. Gray Line's Cross-Motion for Summary Judgment

The Parties' Contentions

Plaintiff alleges that he suffered serious injuries as defined by Insurance Law § 5102 (d) due to the accident (NYSCEF Doc No. 108, Lesnevec affirmation, exhibit 1, complaint, p. 7). Specifically, plaintiff alleges cervical spine disc herniation at C3-C4 and C5-C6 levels and cervical disc bulging at C4-C5 and C6-C7 levels (NYSCEF Doc. No. 127, Maynard affirmation, exhibit c, plaintiff's verified bill of particulars, ¶ 5). Plaintiff further alleges lumbar spine disc herniation at L1-2, L2-3, and L4-5 levels and disc bulging at L3-4, L4-5 levels. Impingement at L5-S1 levels of the lumbar spine is also alleged (*id.*).

In his bill of particulars plaintiff specifically alleges serious injuries under the following categories: (1) permanent consequential limitation of use of a body organ or member; (2) significant limitation of use of a body function or system; and (3) an inability to perform customary and usual activities for not less than ninety of the one hundred and eighty days after the occurrence

of the injury (“90/180-day”) (*id.* at ¶ 15). He further alleges that after the accident he was confined to his bed for approximately five days and confined to his home for approximately two weeks (*id.* at ¶ 7).

Gray Line cross-moves for summary judgment on the basis that plaintiff did not suffer a “serious injury” pursuant to Insurance Law § 5102 (d), which is a threshold requirement under the statute. It argues that plaintiff has not suffered a permanent loss of use because the evidence does not show a total loss use of any body part. It also argues that plaintiff did not suffer a disfigurement, a permanent consequential limitation of use, a significant limitation of use, or a 90/180 injury.

In support of its motion, Gray Line submits the pleadings; plaintiff’s March 5, 2020 verified bill of particulars; plaintiff’s deposition transcript; a report from Dr. Howard A. Kiernan (“Dr. Kiernan”), a board-certified orthopedic surgeon; an IME report (corrected in form in its reply) from Dr. E. Merkler (“Dr. Merkler”), a board-certified neurology surgeon; and multiple affirmed and signed reports from Dr. Jeffrey Warhit (“Dr. Warhit”), a board-certified radiologist.

In support of his opposition to Gray Line’s cross-motion for summary judgment, plaintiff relies on a certified New York State Department of Motor Vehicles Police Accident Report; his deposition transcript; and an affirmed report of Dr. Angel Macagno (“Dr. Macagno”), his treating orthopedic surgeon. No medical records were submitted by either party.

As an initial matter, plaintiff argues that Gray Line’s expert reports from Dr. Kiernan and Dr. Merkler are inadmissible because Dr. Merkler does not affirm the truth of the content of its opinion. The court agrees that Dr. Merkler’s report submitted with the moving papers is not admissible because it fails to include required language pursuant to CPLR 2106. “[W]hile [Dr. Merkler’s] expert affirmation initially submitted . . . was defective in form . . . he corrected this technical defect in reply by submitting the identical evidence in proper form” (*Matos v Schwartz*, 104 AD3d 650, 653 [2d Dept 2013]; *see also Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539, 539 [1st Dept 2009]). In the re-submitted expert report, Dr. Merkler affirms his statements to be true under the penalties of perjury, thus containing the proper language required by CPLR 2106 without offering new facts (*see Hopwin Lingerie Co. Ltd. v Sasson*, 214 AD3d 596, 597 [1st Dept 2023]). There is no indication that plaintiff is prejudiced by this technical defect in opposing the motion, as the content of the re-submitted report by Dr. Merkel is identical to the procedurally defective one filed with the moving papers. The court, however, finds that Dr. Kiernan’s expert report is inadmissible because while he affirms the truthfulness of his report, he fails to sign it as

required by CPLR 2106. For these reasons, the court will only consider Dr. Merkler's and Warhit's expert reports in support of Gray Line's cross-motion.

Dr. Merkler opined that based on his independent neurological examination of plaintiff and his review of plaintiff's medical records, there is no objective evidence that plaintiff sustained any permanent spine or nerve injury as a result of the August 17, 2018 accident (NYSCEF Doc No. 154, Maynard's affirmation, exhibit A, Dr. Merkler's affirmation). Specifically, Dr. Merkler explained that on the day of the accident, plaintiff was able to get out of his car, speak to the driver, follow the bus driver that rear-ended him, did not complain of numbness, tingling or weakness and his neurological examination was normal (*id.*).

Dr. Merkler's also reviewed plaintiff's medical records from August 18, 2018, and noted that plaintiff complained of both neck and back pain but denied numbness and tingling on his extremities (*id.*). In these records, plaintiff was noted to be awake, alert, and oriented to person, place, and time (*id.*). The CT scan performed on plaintiff's cervical spine on the day of the subject accident was also normal (*id.*). Dr. Merkler opined that because there is no objective evidence of trauma, the spinal imaging of plaintiff's disc herniations and bulges are most consistent with a preexisting degenerative disease (*id.*). Dr. Merkler thus concluded that the accident did not cause, contribute to, or exacerbate spinal degenerative disease (*id.*). As to plaintiff's lumbar surgery, Dr. Merkler opined that it was purely based on plaintiff's subjective complaints and on the radiographical studies showing mild degenerative disease (*id.*).

Dr. Merkler also examined plaintiff on November 9, 2022 (*id.*). His examination showed a decreased sensation and possible decrease of strength on his left foot, but Dr. Merkler opined that they are unrelated to the accident since the examination findings on the day of plaintiff's accident were normal, with no evidence of any spinal cord or nerve injury (*id.*). On the same day, Dr. Merkler performed a range of motion test on plaintiff's cervical and lumbar spine, and on his bilateral shoulder joints using a computer goniometer. Plaintiff's range of motion test on his cervical spine was normal, his bilateral shoulder joint range of motion was normal, and his lumbar spine range of motion was normal with his extension and bilateral lateral flexion being 5 degrees each (normal is 25 degrees).

Dr. Warhit reviewed the MRI images of plaintiff's cervical and lumbar spine and an x-ray image of plaintiff's lumbar spine, and issued sworn reports regarding each (NYSCEF Doc No. 131, Maynard's affirmation, exhibit g, Dr. Warhit expert reports). Specifically, after reviewing

plaintiff's MRI of the cervical spine performed on October 25, 2018, Dr. Warhit opined that the "disc herniations noted at the C3-C4 and C5-C6 levels and the disc bulging noted at C4-C5 and C6-C7 levels appear degenerative" (*id.*). Dr. Warhit further opined that the October 25, 2018 MRI image showed degenerative changes throughout the cervical spine, but there was no evidence of traumatic injury (*id.*).

Dr. Warhit also reviewed plaintiff's MRIs of the lumbar spine performed on October 25, 2018. He opined that the "disc herniation noted in L1-L3 and L4-L5 levels and the disc bulging noted at the L3-L4 levels appear degenerative . . . [and] there is no traumatic injury to the lumbar spine" (*id.*, p. 2). As to plaintiff's MRI performed on June 18, 2021, almost three years later, Dr. Warhit concluded that the disc herniation noted on L1-L3 and L4-L5 levels and the disc bulging noted at the L3-L4 levels appear degenerative" (*id.*). Notably, Dr. Warhit opined that in comparison to the MRI image of plaintiff's lumbar spine performed on October 25, 2018, the degenerative changes in plaintiff's lumbar spine increased (*id.*).

Finally, Dr. Warhit reviewed plaintiff's x-ray of the lumbar spine from September 10, 2021 (*id.*, p. 1). Dr. Warhit opined that there was no evidence of fracture and destructive lesions (*id.*, p. 1). Dr. Warhit further opined that L4-S1 levels with prosthetic discs "and osseous and metallic densities appear in satisfactory position and alignment" post posterior metallic fusion (*id.*). Post operative changes, Dr. Warhit opined, have occurred since the prior study performed on January 2, 2020 (*id.*).

Dr. Angel Eduardo Macagno ("Dr. Macagno"), plaintiff's treating orthopedic surgeon, also submitted an affirmed expert report in support of plaintiff's opposition to Gray Line's cross-motion (NYSCEF Doc No. 146, Block affirmation, exhibit 2, Dr. Macagno's expert report). Dr. Macagno explained that plaintiff first sought treatment from him on November 29, 2018, where he complained of pain on his neck, left upper extremity and low back radiating into the lower extremity (*id.* at p. 1). Dr. Macagno emphasizes that prior to this visit, plaintiff had gone through physical therapy and medications with "no significant improvement" and was recommended to undergo a cervical surgery (*id.*). Plaintiff then had follow-up reevaluations with Dr. Macagno on January 2, 2020 and June 28, 2021, where he reported that his symptoms worsened, affecting his daily activities (*id.*).

Dr. Macagno explained that plaintiff underwent a posterior lumbar fusion surgery on July 28, 2021 (*id.*). While plaintiff's lumbar symptoms have improved from his pre-operative condition,

Dr. Macagno emphasized that plaintiff continues to have chronic low back pain and intermittent lower extremity paresthesia (*id.*). Dr. Macagno also reviewed the 2018 MRI images of plaintiff's cervical and lumbar spine and opined that there is evidence of disc herniation in this lumbar spine (*id.* at p. 2). Dr. Macagno also reviewed plaintiff's MRI of the lumbar spine from 2021 and noted that it showed a worsening on progression of disc dehydration and disc herniation (*id.* at p. 2).

As to plaintiff's range of motion, Dr. Macagno examined plaintiff using a goniometer and opined that his range of motion decreased: flexion at 40 degrees (normal range - 60 degrees), extension as 30 degrees (normal range - 45 degrees), left lateral flexion at 30 degrees (normal range - 45 degrees), and right lateral flexion at 40 degrees (normal range - 45 degrees) (*id.*). Dr. Macagno concluded that plaintiff's cervical and lumbar spine injuries were causally related to subject accident (*id.* at pp. 2-3). He further opined that plaintiff's injuries are permanent and progressive in nature, and that he has partial disability due to the accident (*id.* at p. 3).

Analysis

"[T]he legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795, 798 [1995] [citations omitted]). The law "precludes a right of recovery for any 'non-economic loss, except in the case of a serious injury, or for basic economic loss'" (*Martin v Schwartz*, 308 AD2d 318, 319 [1st Dept 2003 [citations omitted]; *see also* Insurance Law 5104 [a]).

"In order to recover damages for non-economic loss related to a personal injury allegedly sustained in a motor vehicle accident, a plaintiff is required to present competent, non-conclusory expert evidence sufficient to support a finding, not only that the alleged *injury is 'serious'* within the meaning of Insurance Law 5102 (d), but also that *the injury was proximately caused by the accident at issue*"

(*Carter v Full Serv., Inc.*, 29 AD3d 342, 344 [1st Dept 2006] [citations omitted] [emphasis added]).

Under the No-Fault Insurance Law, "serious injury" is defined in pertinent part:

"[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. (Insurance Law 5102 [d]).

“Any injury not falling within the definition of ‘serious injury’ is, by necessity, considered minor . . . [and] [w]hether a claimed injury meets the statutory definition of a ‘serious injury’ is a question of law which may properly be decided by the court on a motion for summary judgment” (*Martin*, 308 AD2d at 319).

“[E]ven where there is objective medical proof, when additional contributory factors interrupt the chain of causation between the accident and claimed injury—such as a gap in treatment, an intervening medical problem or a preexisting condition—summary dismissal of the complaint may be appropriate” (*Pommells v Perez*, 4 NY3d 566, 572 [2005]).

“The issue of whether plaintiff sustained a serious injury within the meaning of the Insurance Law, ‘is a threshold matter separate from the issue of fault’ and which must, therefore, be determined separately” (*Priester v Phanor*, 228 AD3d 593, 594 [1st Dept 2024] [citations omitted]). The issue of “serious injury” is thus “quintessentially an issue of damages, not liability” (*id.*).

“Once the proponent of a motion for summary judgment has presented a prima facie case that the plaintiff’s claimed injury is not ‘serious’ as defined in the statute, the burden shifts to plaintiff to demonstrate that he did sustain such an injury or that there are questions of fact as to whether his injury was ‘serious’” (*Martin*, 308 AD2d at 319). Plaintiff’s condition and treatment must be supported by objective evidence (*Dufel*, 84 NY2d at 798).

First, while Gray Line addresses many categories of serious injury under Insurance Law 5102 (d) in its cross-motion, prompting plaintiff to respond to these categories in their opposition, plaintiff alleged serious injury under three categories of Insurance Law 5102 (d) in his bill of particulars (NYSCEF Doc No. 127, ¶ 15). Consequently, the court will only address these three categories of serious injury, as Gray Line is not required to address serious injury categories that “plaintiff failed to allege . . . [in his] bill of particulars” (*Martinkus v Dahmen*, 105 AD3d 1014, 1015 [2d Dept 2013] [citations omitted]; *see also Sanchez v Steele*, 149 AD3d 458, 459 [1st Dept 2017]; *Boone v Elizabeth Taxi, Inc.*, 120 AD3d 1143, 1144 [1st Dept 2014] [“However, it was error for the court to consider this new serious injury claim, since plaintiff did not plead a fracture injury in the bill of particulars”] [citations omitted]).

The court will also not consider Gray Line's argument that plaintiff has not explained the gap in his treatment. This argument "is not properly before the [court], as it was raised for the first time in [Gray Line's] reply affirmations in support of [its cross] motion" (*Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]).

1. Permanent Consequential and Significant Limitation of Use of a Body Function or System

"For these two statutory categories, [the Court of Appeals has] held that '[w]hether a limitation of use or function is 'significant' or 'consequential' (i.e., important * * *) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part'"

(*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353 [2002] [citations omitted]). "[A] "minor, mild or slight limitation of use [is] classified as insignificant within the meaning of the [no-fault] statute" (*Gaddy v Eyley*, 79 NY2d 955, 957 [1992] [citations omitted]). When analyzing whether the injury is "significant," the court must make a "comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure*, 98 NY2d at 353 [citations omitted]).

Here, Gray Line met its initial prima facie that plaintiff did not sustain a serious injury involving "permanent" or "significant" limitations in use that were causally related to the subject accident. Dr. Merkler and Dr. Warhit reviewed plaintiff's medical records and Dr. Merkler also independently examined plaintiff. Both doctors agreed that plaintiff's spinal disc herniation and bulging that appear on the MRI images are degenerative and not a result of a traumatic injury (*see Krmic v Corrie*, 235 AD3d 450, 451 [1st Dept 2025]). Dr. Warhit's opinions were based on his review of objective evidence, the MRI imaging and an x-ray. And Dr. Merkler's opinions were based on his review of plaintiff's medical records, including records of treatments that were contemporaneous with the subject accident, plaintiff's MRI images, and the examination of plaintiff. Both Dr. Merkler and Warhit's conclusions that plaintiff's disc herniation and bulging are degenerative and not caused by the subject accident "interrupt the chain of causation between the accident and plaintiff's claimed injuries" (*see Pommells*, 4 NY3d at 572).

The burden thus shifts to plaintiff, who fails to raise a triable issue of fact. Dr. Macagno's affirmation is conclusory and unsupported by contemporaneous competent evidence. Plaintiff testified that he sustained multiple cervical spine injuries, lumbar spine injuries, is unable to attend

to his usual vocational activities and is unable to walk up the stairs, sit for long periods of time, walk or stand for long period of times, and carry things (NYSCEF Doc No. 111, pp. 1-6; NYSCEF Doc No. 127, ¶¶ 5-15). Plaintiff also submitted Dr. Macagno's opinion in support of his opposition. Dr. Macagno reviewed the MRI images and opined that plaintiff's cervical and lumbar spine show disc herniation and disc dehydration that were caused by the subject accident. Dr. Macagno, however, failed to explain the basis for his conclusion on how the subject accident is the cause of plaintiff's injuries. He did not address Gray Line's expert opinions and failed "to refute defendants' evidence of a preexisting degenerative condition of the [lumbar and cervical spine] . . . and therefore failed to raise an inference that injury . . . was caused by the accident" (*Arroyo v Morris*, 85 AD3d 679, 680 [1st Dept 2011] [citations omitted]). In fact, Dr. Macagno opined in his report that plaintiff's injuries are progressive in nature, supporting Gray Line's expert opinions (NYSCEF Doc No. 146, p. 3). Dr. Macagno's, thus, "conclusory opinion on causation does not sufficiently rebut the detailed findings of degenerative changes made by defendants' radiologist" and neurologist (*Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014] [citations omitted]).

Dr. Macagno failed to discuss and consider plaintiff's medical records of contemporaneous treatment, as did Dr. Merkler in his opinion. On May 13, 2024, Dr. Macagno conducted a range of motion test of plaintiff's spine and found that his range of motion has decreased. This range of motion test, however, "was too remote in time to raise an inference that any limitations were causally related to the collision" (*Krmic*, 235 AD3d at 451 [citations omitted]; *see also Perl v. Meher*, 18 NY3d 208, 217-218 [2011] [holding that, at minimum, a plaintiff must present a qualified or quantified assessment of his or her condition shortly after the accident]; *Lee v. Rodriguez*, 150 AD3d 481, 482 [1st Dept 2017] [holding that plaintiff failed to demonstrate a causal connection between the claimed injuries and the accident with evidence of contemporaneous treatment]). And as discussed *supra*, he failed to rule out that the limits on plaintiff's range of motion was related to a degenerative condition. "[W]ithout an explanation for ruling out [this] conditions as the cause of plaintiff's injuries," his opinion that plaintiff's injuries were caused by the accident is conclusory and "speculative" (*Arroyo*, 85 AD3d at 680; *see also Valentin v Pomilla*, 59 AD3d 184, 186 [1st Dept 2009] ["Absent an explanation of the basis for concluding that the injury was caused by the accident, as opposed to other possibilities evidenced in the record, an expert's conclusion that plaintiff's condition is causally related to the subject

accident is mere speculation, insufficient to support a finding that such a causal link exists”] [citations omitted]).

For all these reasons, Gray Line’s motion for summary judgment is granted as to plaintiff’s claims of permanent consequential and significant limitations of use of a body function or system.

2. Plaintiff’s 90/180-Day Claim

To show serious injury under this category, a plaintiff must show that he was prevented “from performing his usual activities to a great extent, rather than some slight curtailment” for 90 days during the 180 days following the accident (*Licari v Elliott*, 57 NY2d 230, 234 [1982]; see also *Thompson v Abbasi*, 15 AD3d 95, 100 [1st Dept 2005] [citations omitted]).

Here, “the lack of causation [mentioned *supra*] defeats [this] claim” as well (*Krmic*, 235 AD3d at 452). In any event, Gray Line met their burden by pointing to plaintiff’s testimony that he started graduate school at the time of accident and did not testify that he missed school as a result of the subject accident. Gray Line further relied on plaintiff’s testimony that he was on summer break and returned to work in September 2018, shortly after the accident.

Plaintiff failed to raise an issue of fact as to this serious injury claim. In his bill of particulars, he alleged that he was only confined to five days in bed and two weeks at home immediately after the accident. He also testified under oath that he went back to work after the accident and stopped working in November 2018 (see *Ramos v Rodriguez*, 93 AD3d 473, 474 [1st Dept 2012] [“Plaintiffs’ deposition testimony refuted their 90/180-day claims, since they alleged that they were confined to bed for only one week after the accident”] [citations omitted]; see also *Rosa v Mejia*, 95 AD3d 402, 405 [1st Dept 2012] [the court granted defendant’s summary judgment on plaintiff’s 90/180 claim where plaintiff alleged that he was confined to bed and home for only two days and approximately one week respectively in his bill of particulars]).

For all these reasons, the court grants Gray Line’s motion for summary judgment as to plaintiff’s 90/180-day claim as well and dismisses plaintiff’s complaint.

B. Plaintiff’s Motion for Summary Judgment

Plaintiff argues that he is entitled to summary judgment because the car he was driving was rear-ended by Grey Line’s employee, who was driving Gray Line’s bus. Plaintiff contends Gray Line is thus vicariously liable for his serious injuries because Gray Line owned the subject bus and it was negligent in hiring the driver. In opposition, Gray Lines argues that there is an issue of fact on whether plaintiff was stopped at the time of the impact. Gray Line further argues that there is

evidence in the case record that the bus driver was faced with an emergency, as plaintiff testified that the bus driver told him that "it was his breaks" when he tried to explain to plaintiff why the collision happened. Gray Line argues that there is also a question of fact as to whether the bus driver had a non-negligent explanation for striking plaintiff.

"Given the lack of serious injury, the issue of liability is academic, and plaintiff's [motion] for summary judgment," (*Krmic*, 235 AD3d at 452), is denied.

II. Plaintiff's Motion to Strike Gray Line's Answer

Because the court has granted Gray Line's cross-motion on the threshold question of serious injury and has dismissed plaintiff's complaint, plaintiff's motion pursuant to CPLR 3124 or 3126 is denied as moot.

The court has considered the parties' remaining contentions and finds them unavailing.

CONCLUSION and ORDER

ORDERED that defendant Gray Line New York Tours, Inc.'s cross-motion for summary judgment is granted and the complaint is dismissed; and it is further

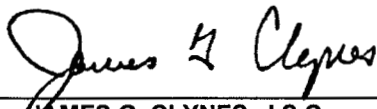
ORDERED that plaintiff Timothy Gely's motion for summary judgment on the issue of defendant Gray Line New York Tours, Inc.'s liability and to dismiss Gray Line New York Tours, Inc.'s affirmative defense of comparative negligence is denied as moot; and it is further

ORDERED that plaintiff Timothy Gely's motion to strike defendant Gray Line New York Tours, Inc.'s answer and to preclude it from offering any evidence at trial and/or on any dispositive motions pursuant to CPLR 3124 and 3126 is denied as moot.

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

10/10/2025
DATE



JAMES G. CLYNES, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: