

McHale v United Parcel Serv. of Am., Inc.
2026 NY Slip Op 31489(U)
March 31, 2026
Supreme Court, Kings County
Docket Number: Index No. 523809/2021
Judge: Ingrid Joseph
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At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31st day of MARCH, 2026.

P R E S E N T:

HON. INGRID JOSEPH,

Justice.

HOPE MCHALE,

Plaintiff,

Index No.: 523809/2021

-against-

DECISION & ORDER

UNITED PARCEL SERVICE OF AMERICA, INC.,
GREGORY C. CALLIS, EMERSON A. MENDOZA MINAYA
and DANIEL MURCIA QUINTERO,

Mot. Seq. Nos. 7-10

Defendants.

The following e-filed papers read herein:

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Mot. Seq. No. 7

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Mot. Seq. No. 10

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This action arises out of a motor vehicle accident that occurred on May 21, 2020, in the left lane of the Brooklyn-Queens Expressway in Brooklyn, New York. This accident involved four

vehicles. Plaintiff Hope McHale (“Plaintiff”) was driving a Mercedes-Benz and was positioned at the front of all the involved vehicles. Defendant Emerson A. Mendoza Minaya (“Minaya”) was driving a Honda behind Plaintiff. Defendant Daniel Murcia Quintero (“Quintero”) was driving a Toyota behind Minaya. Defendant Gregory C. Callis (“Callis”), who was employed by Defendant United Parcel Service of America, Inc. (“UPS”), was driving a truck and was the last vehicle, positioned behind Callis.¹

Plaintiff asserts that Callis rear-ended Quintero, causing Quintero to rear-end Minaya, which caused Minaya to rear-end her. Essentially, Plaintiff avers that Callis initiated the chain collision. As a result of the accident, Plaintiff alleges that she sustained injuries to her cervical and lumbar spine and pain to numerous parts of her body, including her left shoulder.

In Mot. Seq. No. 7, Minaya moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint and all cross-claims against him on the grounds that he was not negligent and is not liable for the accident. In Mot. Seq. No. 8, UPS moves for an order, pursuant to CPLR 3212, dismissing Plaintiff’s complaint on the grounds that she did not meet the serious injury threshold under Insurance Law § 5102 (d). In Mot. Seq. No. 9, Callis also moves for summary judgment, pursuant to CPLR 3212, on the threshold issue and adopts and incorporates all arguments made in UPS’s motion. In Mot. Seq. No. 10, Plaintiff moves for summary judgment, pursuant to CPLR 3212, on the issue of liability.

The Court will first address the liability motions (Mot. Seq. Nos. 7, 10). In his motion, Minaya asserts that he was stopped behind Plaintiff, when he was struck in the rear by co-defendant Quintero. At his deposition, Minaya testified that he was stopped a car length away from Plaintiff’s vehicle. As a result of being struck in the rear, Minaya testified that his vehicle was pushed forward into Plaintiff’s vehicle. In further support of his motion, Minaya cites to Callis’ deposition transcript. Prior to the accident, Callis testified that he had looked down at his dashboard and looked up and made impact with Quintero’s vehicle, which was ahead of his. Accordingly, Minaya argues that he was not the proximate cause of the accident, and he was not negligent.

In its opposition, UPS argues that Minaya’s motion must be denied because there are factual issues regarding how the accident occurred. Although Minaya testified that he was stopped in traffic, UPS notes that Plaintiff testified that she was moving at approximately 30 mph at the

¹ For ease of reference, the vehicles were positioned in the following sequence: (1) Plaintiff, (2) Minaya, (3) Quintero, and (4) Callis/UPS.

time of impact, and that the car in front of her was also moving at a similar speed. Callis further testified that prior to looking down, traffic ahead of him was moving. However, when he looked back up, Callis testified that a vehicle had stopped in front of him. In addition, UPS asserts that Minaya's testimony raises credibility issues since he testified that he was looking ahead before the impact, yet also claimed to have seen the collision between Callis and Quintero through his rear-view mirror.

Plaintiff and Callis also oppose the motion on the grounds that there are issues of fact. According to Plaintiff, there is no evidence or testimony establishing that Minaya was stopped at the time his vehicle was hit in the rear. Instead, Plaintiff argues that Minaya testified that he was driving at a speed of 15 mph at the time of impact. Moreover, Plaintiff asserts that Minaya may have been negligent by not maintaining a safe distance between his vehicle and Plaintiff's. Plaintiff further asserts that there is no evidence demonstrating that the impact to Minaya's vehicle was so forceful or sudden that he had no opportunity to respond and avoid colliding with Plaintiff. Callis argues that the evidence establishes that Minaya brought his vehicle to a sudden, unexplained stop in moving traffic and contributed to the collision. In addition, Callis points out that Plaintiff testified she was moving at 30 mph at the time of impact, but Minaya testified that Plaintiff was stopped because of traffic. Thus, Callis argues that this contradictory testimony precludes a finding of summary judgment.

In reply, Minaya avers that there are no issues of fact since it is undisputed that he was hit in the rear and pushed forward. In support, Minaya refers to Callis' deposition testimony that after he hit Quintero in the rear, Quintero's car was pushed forward into the car ahead of him. In addition, Minaya argues that Plaintiff also testified that she learned from the police officer at the scene that the sequence of collisions occurred this way.

In her motion for summary judgment (Mot. Seq. No. 10), Plaintiff asserts that each defendant operated their vehicle in a negligent manner. According to Plaintiff, UPS and Callis have not proffered a non-negligent explanation for the accident. In fact, Plaintiff argues that Callis was distracted and failed to observe the road conditions. Moreover, Plaintiff claims that she was able to avoid a forward collision due to her attentiveness and ability to quickly apply the brakes after she was rear-ended, which Quintero and Minaya failed to do. Plaintiff further argues that Quintero and Minaya did not maintain a safe distance between their vehicles and the vehicles ahead of them.

In opposition, Minaya argues that Plaintiff has not rebutted his non-negligent explanation for the accident. Callis also argues that Plaintiff and Minaya's testimonies suggest that one of them came to a sudden, unexplained stop in moving traffic. In addition, Callis was unable to avoid the collision because the vehicle ahead of him came to a sudden, unexplained stop. In its opposition, UPS raises various procedural arguments, including the lack of affidavit from someone with personal knowledge. Moreover, UPS asserts that Callis has presented a non-negligent explanation for the accident.

In reply, Plaintiff argues that Callis' testimony that he was not looking forward directly before causing the chain collision "undercuts" his alleged non-negligent explanation. In addition, any argument that she may be comparatively at fault is speculative and unsupported by evidence. Moreover, Plaintiff asserts that even if she was comparatively at fault, this would not preclude summary judgment on the issue of Callis' or UPS' liability. Turning to UPS's opposition, Plaintiff asserts that her motion is supported by her deposition transcripts and a certified police report, which constitute testimony from individuals with firsthand knowledge. Nonetheless, Plaintiff submits an affirmation to cure any purported procedural defects. While both Plaintiff and Minaya testified that they were each one car length distance from the vehicle in front of them, Plaintiff was able to avoid a collision, but Minaya was not. Thus, Plaintiff contends that Minaya was negligent.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad*, 64 NY2d at 853; *Skrok v Grand Loft Corp.*, 218 AD3d 702 [2d Dept 2023]; *Menzel v Plotnick*, 202 AD2d 558, 558-559 [2d Dept 1994]).

"[A] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator

to provide a nonnegligent explanation for the collision” (*Malak v Wynder*, 56 AD3d 622, 623 [2d Dept 2008]). “Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front of it may provide a sufficient non-negligent explanation” (*id.*). Thus, “[i]n chain collision accidents, the operator of the middle vehicle *may* establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was struck from behind by the rear vehicle and propelled into the lead vehicle” (*Kuris v El Sol Contr. & Constr. Corp.*, 116 AD3d 675, 676 [2d Dept 2014] [emphasis added]).

With respect to Minaya’s motion, it is undisputed that Minaya was hit in the rear; however, there are conflicting testimonies as to how the accident occurred. On the one hand, Minaya asserts that his vehicle was impacted seconds after he came to a stop and that Plaintiff’s vehicle was also stopped due to traffic. On the other hand, Plaintiff testified that at the time of impact to her vehicle, she was moving at approximately 30 mph, and her foot was on the gas. Moreover, she testified that the vehicle in front of her was also traveling at a similar rate of speed. Accordingly, Minaya’s own submissions raise an issue of fact as to whether he was comparatively at fault for coming to a sudden stop when traffic was moving (*see Salako v Nassau Inter-County Express*, 131 AD3d 687, 688 [2d Dept 2015]; *Laureano v EAN Holdings, LLC*, 225 AD3d 754, 757 [2d Dept 2024]; *Thompson v NY City Tr. Auth.*, 208 AD3d 815, 818 [2d Dept 2022]). Thus, Minaya’s motion for summary judgment is denied.

Turning to Plaintiff’s motion, the Court finds that she established entitlement to judgment as a matter of law by demonstrating that her vehicle was struck in the rear by Minaya’s vehicle, after Callis struck Quintero’s vehicle (*see Malak*, 56 AD3d at 623). In their opposition, defendants Minaya, Callis and UPS failed to raise an issue of fact as to whether there was a non-negligent explanation for the happening of the accident. The Court has already found an issue of fact as to Minaya’s comparative fault. Callis and UPS attempt to assert an issue of fact as to whether Plaintiff was negligent. However, “[a] plaintiff is no longer required to show freedom from comparative fault to establish her . . . prima facie entitlement to judgment as a matter of law on the issue of liability” (*Xin Fang Xia v Saft*, 177 AD3d 823, 825 [2d Dept 2019]; *see also O’Hara v Bancker Constr. Corp.*, 225 AD3d 889, 890 [2d Dept 2024]). Even if the vehicle(s) ahead of Callis came to a sudden stop, that alone is “insufficient to rebut the presumption of negligence of the operator of the rear vehicle” (*Pollet v Charyn*, 200 AD3d 728, 730-731 [2d Dept 2021]). Moreover, Callis testified that he looked down at the dashboard and when he looked up, he impacted Quintero’s

vehicle. Thus, the issue of comparative negligence as between Minaya and Callis/UPS is reserved for trial.

The Court will next address the threshold motions (Mot. Seq. Nos. 8-9). Whether a claimed injury falls within the statutory definition of “serious injury” is a question of law for the Court (*Licari v Elliot*, 57 NY2d 230 [1982]). The movant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that a party has not suffered a serious injury proximately resulting from the subject motor vehicle accident (*Toure v Car Sys., Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eycler*, 79 NY2d 955 [1992]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [2016]). However, where the movant has made a showing that a party has not suffered a serious injury as a matter of law, the burden shifts to the opposing party to submit evidence in admissible form sufficient to create a material issue of fact warranting a trial (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Grasso v Angerami*, 79 NY2d 813 [1991]).

Defendants UPS and Callis argue that Plaintiff did not sustain a “serious injury” as defined by Insurance Law § 5102 (d). According to UPS, any treatments Plaintiff received were unrelated to the subject accident. Instead, UPS asserts that Plaintiff suffered from a 2017 injury to her shoulder and from pre-existing degenerative conditions to her spine. In addition, UPS states that Plaintiff sustained a post-accident disc herniation that did not exist until several months after the subject accident, and therefore could not be attributed to it.

In support of its motion, UPS relies, in part, on the medical examination performed by its expert Dr. Saran S. Rosner, a neurological surgeon, and the report of Dr. Scott B. Berger, a neuroradiologist, who examined Plaintiff’s imaging studies. According to his examination, Dr. Rosner found no evidence of a disability and concluded that Plaintiff had not sustained a serious spinal injury from the subject accident. Based on his review of Plaintiff’s MRIs, Dr. Berger opined that Plaintiff had long-standing disease of her cervical spine and an old injury to her lumbar spine, which predated the subject accident. In addition, Drs. Rosner and Berger found that the new disc extrusion/herniation at C4-5, reflected in her February 4, 2021 MRI, could not be attributed to the subject accident.

UPS also relies on Plaintiff’s deposition transcript to argue that prior to the subject accident, Plaintiff suffered from the same pain and discomfort in her spine that she now attributes

to the accident. In addition, UPS argues that these issues were still being resolved until she discontinued physical therapy in September 2019 because she was stung by approximately 50 bees and never went back. Moreover, Plaintiff also admitted to having sustained a prior injury to her shoulder when a beach umbrella fell on it. UPS also notes that Plaintiff admittedly did not seek medical treatment until 10 days or two weeks following the subject accident.

Finally, UPS contends that Plaintiff has no claim under the 90/180-day category. According to UPS, there is no objective evidence that Plaintiff was unable to complete her usual and customary daily activities during the requisite statutory period. At her deposition, Plaintiff testified that no doctor recommended that she not work for any period of time after the accident. UPS argues that the only time a doctor told Plaintiff to limit her activities was for a few days after she received an injection when she was told not to do any heavy lifting. Although Plaintiff testified that she was not confined to her home because of her injuries, in her amended Bill of Particulars, she claimed to have been confined to her home and bed for “several weeks.” UPS argues that even assuming arguendo that those weeks fell within the first six months following the accident, they would not be at least 90 days.

In his motion,² Callis argues that Plaintiff suffered from pre-existing pain that led her to cease exercising months prior to the subject accident. Although Plaintiff testified that she regularly worked out up to the date of the subject accident, Callis asserts that this is contradicted by documentary evidence. Specifically, Callis indicates that Plaintiff’s physical therapy records from August 2019 note that her use of the Peloton made her complaints worse. In addition, certified Peloton records reflect that she stopped using the bike in January 2020, five months prior to the accident, and cancelled her subscription in April 2020. Thus, Callis asserts that Plaintiff’s inability to participate in physical activities is unrelated to the subject accident.

In opposition,³ Plaintiff argues that Defendants UPS’s and Callis’ motions should be denied since (i) they did not meet their prima facie burden, (ii) there are issues of fact as to whether

² Since Callis adopted the arguments made by UPS in its motion, the Court will only summarize those arguments that are unique to Callis’ motion.

³ While Plaintiff filed separate oppositions to each threshold motion, they contain identical, substantive arguments and will not be repeated. Nonetheless, Plaintiff’s opposition to Callis’ motion contains an additional argument that denial is warranted because he failed to include a statement of material facts; therefore, the motion is procedurally defective. Plaintiff ignores the fact that the Uniform Rules for New York State Trial Courts was amended to state that the court *may* direct that a statement of material facts be filed with a motion for summary judgment (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.8-g, eff July 1, 2022). At the time of filing, Part 83 did not require a statement of material facts and thus, it is immaterial whether Callis included one or not.

Plaintiff sustained a serious injury, (iii) Plaintiff's treating orthopedic surgeon, Dr. Joseph Lee, found that Plaintiff's injuries were aggravated by the subject accident and the medical treatments were necessary and causally related, and (iv) the defense's doctors did not address the 90/180-day category. In addition, Plaintiff seeks sanctions against UPS and Callis for filing frivolous motions.

Plaintiff maintains that she sustained a serious injury; thus, these motions must be denied. According to Plaintiff, the defense experts' reports rely on conclusory assertions and do not adequately address the evidence of traumatic onset of symptoms. In particular, Plaintiff argues that their opinion that the new C4-5 disc herniation was not caused by the subject accident is unsupported by any reasoning or explanation. In addition, Plaintiff asserts that Dr. Berger did not address or opine whether the subject accident aggravated Plaintiff's lumbar spine condition. According to Plaintiff, UPS and Callis failed to address Plaintiff's reported symptoms.

Plaintiff asserts that she has raised a triable issue of fact through the affirmation of her doctor. Dr. Lee examined Plaintiff on November 6, 2024, and found that Plaintiff exhibited restricted cervical and lumbar range of motion. In his report, Dr. Lee acknowledged that Plaintiff "had a documented history of cervical and lumbar degenerative disease, . . . but reported that her symptoms had resolved or were stable prior to the subject accident." Dr. Lee opined that the "escalation of pain and functional impairment following the accident is . . . consistent with aggravation of pre-existing conditions." Contrary to Dr. Berger's contention regarding the 2021 C4-5 disc herniation, Dr. Lee stated that this finding was "consistent with trauma-related aggravation of pre-existing pathology."

Plaintiff further asserts that UPS and Callis cannot make a prima facie showing as to the 90/180-day category since their experts did not address her limitations in the first 180 days following the accident. In her affirmation, Plaintiff states that "[f]or about 1 year following the car accident, including 90 of the 180 days following the accident, I was unable to perform substantially all of my normal daily activities." Plaintiff avers that UPS and Callis failed to submit any evidence to refute her evidence that she was unable to perform daily activities for the requisite period.

Moreover, Plaintiff seeks sanctions pursuant to 22 NYCRR § 130-1.1 against UPS and Callis for filing frivolous motions. Plaintiff asserts that UPS and Callis have made "significant settlement offers," above the threshold amount for serious injury. According to Plaintiff, these motions are an attempt to punish her for not accepting these settlement offers. Thus, Plaintiff

requests that the Court not allow UPS and Callis to continue to file frivolous motions meant to delay litigation and punish Plaintiff.

In reply, UPS argues that “Plaintiff’s entire claim rests on her subjective denial of pain before the [subject accident], and her complaints of pain, discomfort and inability to perform tests or perform them as well as she did prior to the [accident].” UPS asserts that Dr. Lee’s opinion is not objective since he relies on Plaintiff’s claims that her symptoms were previously stable and then escalated by the subject accident. In addition, UPS argues that while Dr. Lee’s examination revealed range of motion limitations, complaints of pain and pins and needles, and a limp, these are all subjective, performative findings under Plaintiff’s control. Moreover, UPS contends that Dr. Lee failed to address the injections Plaintiff was receiving prior to the accident that could account for her claim that she was not feeling pain in her cervical spine before the accident. Further, UPS asserts that Plaintiff has not submitted objective evidence to support her 90/180-day claim. With respect to Plaintiff’s demand for sanctions, UPS asserts that it is frivolous and inappropriately refers to settlement negotiations.

In addition, in his reply, Callis asserts that Plaintiff’s affirmation contradicts her deposition testimony and is thus, insufficient to defeat the summary judgment motion. Callis maintains that he and UPS have met their prima facie burden through the reports of Dr. Rosner and Dr. Berger and Plaintiff’s deposition testimony. Callis argues that Dr. Lee failed to sufficiently address evidence of Plaintiff’s degenerative, pre-existing conditions or explain why Plaintiff’s alleged injuries were not related to her degenerative conditions. Callis notes that Dr. Lee did not review or address any of Plaintiff’s pre-accident cervical spine imaging. Moreover, Callis asserts that Dr. Lee did not identify any evidence of trauma on Plaintiff’s cervical spine MRI taken about two weeks post-accident. With respect to Plaintiff’s lumbar spine, Callis argues that Dr. Lee did not specify whether the lumbar pathology was directly caused by the accident or was an aggravation of a pre-existing condition. Callis further argues that Dr. Lee failed to state normal values when testing Plaintiff’s range of motion. Turning to the 90/180-day claim, Callis asserts that Plaintiff failed to raise a triable issue of fact since the only evidence of this claim is her deposition testimony and self-serving affirmation, and self-described limitations, which are insufficient. Callis also argues that Plaintiff’s request for sanctions is procedurally improper since it was made in opposition and not in a cross-motion.

Whether a claimed injury falls within the statutory definition of “serious injury” is a question of law for the Court (*Licari v Elliot*, 57 NY2d 230 [1982]). The movant bears the initial burden of establishing, by the submission of evidentiary proof in admissible form, a prima facie case that a party has not suffered a serious injury proximately resulting from the subject motor vehicle accident (*Toure v Car Sys., Inc.*, 98 NY2d 345 [2002]; *Gaddy v Eycler*, 79 NY2d 955 [1992]).

Upon review of the documents submitted, the Court finds that Defendants UPS and Callis presented competent medical evidence establishing that Plaintiff’s spinal injuries, except for the disc herniation at the C4-5 level, were degenerative or preexisting.

Where a defendant presents “persuasive evidence that plaintiff’s alleged pain and injuries were related to a preexisting condition, plaintiff [has] the burden to come forward with evidence addressing defendant’s claimed lack of causation” (*Pommells v Perez*, 4 NY3d 566, 580 [2005]). “To meet [this] burden, the plaintiff must address the evidence of preexisting conditions and explain why [her] current reported symptoms [are] not related to the preexisting conditions or how the accident aggravated [her] underlying degenerative conditions” (*Moore v Maley*, ___ AD3d ___, 242 NYS3d 594, 598, 2025 NY Slip Op 05304, *1 [1st Dept 2025] [internal quotation marks and citations omitted]).

In his affirmation, Dr. Lee cites to three factors he asserts supports the claim of aggravation: the (1) temporal relationship between the accident and onset and escalation of symptoms; (2) objectively measured and persistent range of motion deficits; and (3) failure of extensive conservative treatment leading to the need for surgical intervention. In her opposition, however, Plaintiff did not submit medical records containing prior range of motion results, which would demonstrate persistent deficits. Dr. Lee also did not summarize any prior results in his affirmation. In addition, there are no medical records substantiating her claim that she was asymptomatic or stable prior to the subject accident. Moreover, although Dr. Lee states that the “escalation of pain and functional impairment . . . is well documented in the treatment records,” Plaintiff again did not include these records. Accordingly, the Court finds that Plaintiff “failed to submit objective evidence by which the claimed aggravation of injuries . . . could be measured” (*McNeil v Dixon*, 9 AD3d 481, 483 [2d Dept 2004]; *see also Falkner v Hand*, 61 AD3d 1153, 1155 [3d Dept 2009]).

However, with respect to the new disc herniation at C4-5, the Court finds that Defendants UPS and Callis did not meet their prima facie burden. Although this new finding appeared eight

months after the subject accident, Drs. Berger and Rosner's opinion that it is not causally related is entirely conclusory. The statements that the herniation or extrusion "cannot be the result of the accident" or "cannot be assigned causally to the accident" are insufficient since no foundation was offered.

In sum, the Court finds that Defendants UPS and Callis have established that Plaintiff's spinal injuries, excluding the C4-5 herniation, were pre-existing. In opposition, Plaintiff failed to raise an issue of fact as to whether the subject accident aggravated or exacerbated her prior injuries. However, Defendants UPS and Callis failed to meet their burden establishing that the C4-5 herniation was not causally related to the subject accident. Where causation is not proven for all injuries, it is proper for the supreme court to "limit[] the issues for trial to the one injury the causation of which is in dispute" (*Bonner v Hill*, 302 AD2d 544 [2d Dept 2003]). Thus, at trial, the only disputed injury is the C4-5 herniation.

The Court will now address the 90/180 category of Plaintiff's claim. Under this category, a "serious injury" is defined as a plaintiff's inability to "perform substantially all of the material acts which constitute [his or her] usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the date of the [accident]" (Insurance Law 5102 [d]). Therefore, a plaintiff's current condition has no bearing on whether she was unable to carry out her normal and customary activities during the statutory period.

Through Plaintiff's deposition testimony and Bill of Particulars, Defendants UPS and Callis have established prima facie entitlement to dismissal of the 90/180-day claim.⁴ In addition, Plaintiff testified that following the accident, she "only took off [from work] for doctors' appointments" (Plaintiff tr at 28, lines 19-24). Plaintiff further testified that she was not advised by any doctor to not work after the accident (Plaintiff tr at 191, lines 23-25; at 192, lines 2-3). In her affirmation, Plaintiff states that she was unable to perform substantially all of her normal daily activities for a year, including 90 of the 180 days after the accident. However, Plaintiff did not proffer any medical records substantiating these claims. Plaintiff's subjective description of her injuries is insufficient in the absence of medical evidence indicating that she was unable to perform substantially all of her daily activities for not less than 90 out of 180 days following the accident

⁴ In her Bill of Particulars, Plaintiff alleges that she was confined to her bed and home for several weeks following her surgeries, which were performed in January and March 2021. Plaintiff also alleged that she was totally incapacitated from work from January to May 2021. These allegations are irrelevant for purposes of this category since these occurrences happened well after the 180-day period had passed.

(*Muzashvili v Vicente*, 16 Misc 3d 1140[A] [Sup Ct, Kings County 2007], *affd* 59 AD3d 413 [2d Dept 2009]; *Ryan v Xuda*, 243 AD2d 457, 457-458 [2d Dept 1997]). Thus, Plaintiff failed to raise an issue of fact.

Accordingly, it is hereby

ORDERED, that Defendant Emerson A. Mendoza Minaya's motion for summary judgment (Mot. Seq. No. 7) is denied; and it is further

ORDERED, that Plaintiff Hope McHale's motion for summary judgment on the issue of liability (Mot. Seq. No. 10) is granted; and it is further

ORDERED, that the motions for summary judgment by Defendant United Parcel Service of America, Inc. (Mot. Seq. No. 8) and Defendant Gregory C. Callis (Mot. Seq. No. 9) are granted to the extent that (a) Plaintiff's claim that she sustained a "90/180 day" injury as a result of the subject accident is dismissed and (b) Plaintiff's claim at trial that she sustained a "serious injury" is limited to her C4-5 herniation.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.
Hon. Ingrid Joseph
Supreme Court Justice

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