SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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KIRSTEN GLAUBACH,

Plaintiff,

-against

MOHAMMED M. KADER, GARMOR SERVICE CORP., MTA CAPITAL CONSTRUCTION COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, SHIAVONE CONSTRUCTION CO. LLC individually and d/b/a 86th STREET CONSTRUCTORS JOINT VENTURE, JOHN P. PICONE, INC., CITY OF NEW YORK, NYC DEPARTMENT OF DESIGN AND CONSTRUCTION, NYC DEPARTMENT OF TRANSPORTATION, and NYC DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendants.

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Index No. 153357/2016

Motion Date: 5/14/2019

Motion Sequence Nos. 004 & 005

DECISION/ORDER

HON. ROBERT D. KALISH, J.S.C.:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 118-130, 134-139, 188-200, 219-234, 241-242 were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 150-177, 201-216, 235-238 were read on this motion for summary judgment.

Motion (Seq. 004) by defendants Mohammed M. Kader (Kader) and Garmor Service Corp. (Garmor) (together, the Kader defendants) pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied, except as indicated below as to any claim that might be asserted under the 90/180 provision of Insurance Law § 5102(d).

Motion (Seq. 005) by defendants MTA Capital Construction Company, Metropolitan Transportation Authority, New York City Transit Authority, Schiavone Construction Co. LLC

individually and d/b/a 86th Street Constructors Joint Venture. and John P. Picone, Inc. (collectively MTA defendants) pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims as against them is granted.

Motion Sequence Numbers 004 and 005 are hereby consolidated for disposition.

BACKGROUND

In this personal injury action, plaintiff Kirsten Glaubach (now Kirsten Levy) alleges that she suffered serious injuries on March 22, 2015, upon being struck by a taxicab after she was improperly channeled into traffic by a pedestrian walkway designed and constructed by the MTA defendants (Nosowitz Affirm. [Dkt. 119], Ex. A [Dkt. 120] [Verified Complaint] [Compl.] ¶¶ 260-264).[1] The vehicle was owned by defendant Garmor (*id.*, ¶ 250, Nosowitz Affirm., Ex. C [Dkt. 122] [Kader & Garmor Answer], p.1) and operated by defendant Kader (Despas-Barous Affirm. [Dkt. 151], Ex. M [Dkt. 165] [Kader Deposition Transcript] 15:5-16:18).

1. THE ACCIDENT

The Police Report

According to the police accident report (Despas-Barous Affirm., Ex. W [Dkt. 175]), the accident occurred at 8:26 p.m. on March 22, 2015 at Broadway and 8th Street. Under the "Accident Description/Officer's Notes", the report states:

> At t/p/o [time/place/occurrence] V[ehicle] #l [defendant Kader] states he was traveling [westbound] on East 86th Street & 2nd Ave., when the pedestrian [plaintiff Glaubach] was crossing in the middle of the street going south. Pedestrian states she was crossing in the middle of the block when V[ehicle] #l hit pedestrian on the left side. Pedestrian at fault.

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Plaintiff's 50-h Hearing and Deposition Testimony

Plaintiff timely filed a notice of claim (Despas-Barous Affirm., Ex. A [Dkt. 153]) and appeared for her hearing pursuant to General Municipal Law §50-h on November 30, 2015 (*id.*, Ex. B [Dkt. 154] [hearing transcript]). Her deposition was taken on July 12, 2018 (*id.*, Ex. K [Dkt. 163] [plaintiff's deposition transcript]. She testified that on the evening of the accident, she was walking south on Second Avenue towards the corner of 86th Street and wanted to go across that street to shop at Fairway (hearing tr., 27:14-16, 30:5-10, 43:14-16). However, she did not see a crosswalk, signage, or people directing traffic (*id.*, 30:19-25, 32:3-21) and it was dark, and she did not remember any street lights or other lighting (*id.*, 27:20-25,30:23-25, 115:6-8). She followed a makeshift pedestrian walkway that curved around westward on 86th Street toward Third Avenue and led to a construction barrier (*id.*, 25:5-10, 27:17-19, 28:3-8; P's dep tr 28:18-25). Although she knew there was a pedestrian crosswalk at Third Avenue which she had used before, she did not want to walk that far, and so instead crossed where the construction walkway ended and past the barrier in the middle of 86th Street (hearing tr 29:10-15; 47:12-18). She saw no crosswalk there, so she attempted to cross after looking to the left and to the right and not seeing any cars (*id.*, 47:19-49:19). After taking a couple of steps she felt "this hug[e], loud impact" on her left side, just below her knee (*id.*, 48:14-17). She lost consciousness, and later discovered she had been hit by a taxi (*id.*, 51:5-6, 54:15-19; P's dep tr 38:9-11). She was told by a witness that she had been thrown into the air and both of her legs went on the hood of the taxi, and that she landed on her head (hearing tr, 54:20-23).

Defendant Mohammed M. Kader's Deposition Testimony

Defendant Kader was deposed on July 12, 2018 (Despas-Barous Affirm., Ex. M [Dkt. 165]). He testified that he turned on to 86th Street from First Avenue and was driving westbound (*id.*, 18:4-10). As he crossed Second Avenue, his highest rate of speed was 15 miles per hour (*id.*, 26:25-27:13). He did not remember whether there was street lighting between Second and Third Avenue (*id.*, 43:8-14). When he got to the middle of 86th Street, "[s]uddenly, one woman ran and coming [sic] in front of my cab (id., 28:21-22, 37:7-19). He first saw her less than a second before hitting her (*id.*, 32:3-7), and thought she was wearing a "bright color, like a white or something" (*id.*, 45:3-7). He immediately applied his brakes and described the impact as "very light" (*id.*, 29:24-30:4). He claims that his passenger said "[d]on't worry. It's not your fault. She's running in the street in front of your cab" (*id.*, 41:8-14). He also told the police that the woman ran in front of his cab (*id.*, 40:17-20).

Non-Party Witness Tyler Doehring's Affidavit

Non-party witness Tyler Doehring asserts in his affidavit (Despas-Barous Affirm., Ex. X [Dkt. 176]) that he heard a car horn and witnessed plaintiff attempting to cross 86th Street from the north to south side (*id.*, ¶ 11). He states that she was not struck in the vicinity of the pedestrian walkway, but further west of it (*id.*, ¶¶ 12-13). He states that the final piece of the walkway is angled in a manner so as to direct pedestrians to walk toward Third Avenue onto the sidewalk[2] on the north side of 86th Street (*id.*, ¶¶ 9-10), and that in using it himself he had never been directed into oncoming traffic (*id.*, ¶ 14).

[2] The Court notes that Doehring refers to this sidewalk as "the Second Avenue sidewalk." However, reading the affidavit as a whole, and given that there is no dispute that the accident occurred on 86th Street between Second and Third Avenue, the Court finds that Doehring was referring to the sidewalk on the north side of 86th Street between Second and Third Avenue.

2. THE MEDICAL EVDIENCE

The Bill of Particulars

In her verified bill of particulars ((Despas-Barous Affirm., Ex. J [Dkt. 162), plaintiff claims that the accident caused the following injuries:

Left knee discoid lateral meniscus;

Left knee joint effusion;

Left knee chondromalacia patella;

Left knee bone contusions with trabecular marrow fractures involving the posterior lateral aspect of the proximal tibia and fibula;

Left knee internal derangement;

Disc herniation with central and foraminal narrowing at L5-S1 level;

Focal left foraminal disc hemations at L3-4 and L4-5 levels, narrowing the corresponding neural foramen and then exiting L3 greater than L4 nerve roots

Lumbar sprain;

Lumbar myositis/muscle spasms;

Cervical sprain/whiplash syndrome;

Cervical myositis/muscle spasms;

Post-concussion syndrome;

Pain and suffering.

(*Id.*, ¶ 9).

The bill of particulars further asserts that the injuries were

> . . . accompanied by and productive of pain and radiating pain; pulling sensation; numbness; tenderness; rigidity; stiffness; swelling; inflammation; weakness; denervation; paresthesia; synovitis; scarring; tightness; malfunction; spasms; restriction and limitation of all movement, motion and bending; post-traumatic arthritis and/or arthritic changes; osteoarthritis; pain on change of weather; soreness; induration; mal coordination; effusions; ecehymosis; edema; loss of strength; fatigue; thickening; contracture; softening,; fragmentation; myositis; atrophy; sensitivity; shrinking; anesthesia; nerve damage; separation, calcification; osteoporosis; tearing; neuropathy; adhesions; difficulty sleeping; narrowing instability; restricted and painful active and passive movements; movements with great difficulty, misalignment of vertebrae; overstretching of ligaments and muscles; irritation of nerves; inflammation of soft tissues; impingement; encroachment; flattening; myositis; stretching and avulsion of ligamentous supporting structure; weakening of supporting soft tissues; limping; pain in limb; discomfort; deformity; disability.

(*Id.*). Finally, the bill of particular states that "[i]t is impossible to state with reasonable certainty an exact division of time plaintiff . . .was confined to bed and home, except to state that there were periods of bed and home confinement, except for visits for necessary medical aid, treatment, and attention, for duration of two weeks after the incident and intermittently thereafter" (*id.*, ¶ 24).

The Kader Defendants' Medical Witnesses

The Kader defendants have submitted affirmations from four medical professionals: Timothy G. Haydock, MD., board certified in emergency medicine (Nosowitz Affirm., Ex. E [Dkt. 124]); William Walsh, MD, a board certified orthopedist (*id.*, Ex. G [Dkt. 126]); Warren E. Cohen, MD, a board certified neurologist (*id.*, Ex. H [Dkt 127]); and A. Robert Tantleff, MD, a board certified radiologist (*id.*, Ex. I [Dkt. 128]).

Dr. Haydock reviewed the bill of particulars, the police report and the emergency room records on March 14, 2017, but did not examine plaintiff. He concluded that "[t]here is no indication that the plaintiff sustained any significant injury as a result of this motor vehicle accident other than contusion of the lower limb, scalp laceration and low back pain . . . it is my

conclusion that the injuries claimed in the Bill of Particulars are inconsistent with the initial presentation and documentation in the medical record" (Haydock Affirm., p. 3). In particular, he asserted that her claim of significant injuries to the lumbar and cervical spine was inconsistent with the x-ray results; with the absence of immediate severe pain and only mild pain upon discharge; the lack of deformity, restriction of range of motion and midline bony tenderness, of radicular pain, neurologic deficits, weakness, numbness or tingling; and with the treating physician's finding no necessity to order a CT scan, MRI or orthopedic or neurosurgical consultation (id, p. 4). He also observed that plaintiff had a history of lumbar spine surgery/disc herniation surgery, and that there was evidence of chronic degenerative changes to the lumbar spine (*id.*, pp. 23). As to her knee, he noted the negative x-ray findings, her failure to complain of pain and the absence of swelling, effusions, tenderness, and restriction of range of motion, that no MRI or orthopedic consultation was recommended, that she was discharged without a brace or crutches (*id.*, 4). Finally, he discounted her claim of post-concussion syndrome because the CT scan was normal, there was no evidence of amnesia, altered mental status, nausea/vomiting and dizziness, and no neurology consultation was recommended (*id.*, 5).

Dr. Walsh examined plaintiff on August 29, 2018. While noting her complaints of pain in her neck, lower back and bilateral knees, he concluded that plaintiff's orthopedic examination was "objectively normal and indicates no findings which would result in no orthopedic limitations in use of the body parts examined . . . [t]he examinee is capable of functional use of the examined body parts for normal activities of daily living as well as usual daily activities including regular work duties" (Walsh Affirm, p. 4). With respect to her cervical spine, he found there was no muscle spasm upon palpation of the paracervical muscle, and no complaint of

tenderness upon palpation or of radicular pain in the bilateral upper extremities (*id.*, p. 3). He found that her range of motion in flexion (50°), extension (60°), right and left lateral flexion (both 45°) and right and left rotation (both 80°) were normal (*id.*). Her deep tendon reflexes and sensation to touch were also normal, and she tested negative on orthopedic tests for distraction and compression and on the Jackson's tests (*id.*).

He made the same findings regarding her lumbar spine, the paralumbar muscles and the bilateral lower extremities (*id.*). He deemed her range of motion in flexion (60°), extension (25°) and right and left lateral bending [flexion] (both 25°) to be normal, and she tested negative for Fabere, Ely's, Kemp's and heel toe walk tests (*id.*). Neither knee showed swelling, crepitus, heat, erythema instability, or tenderness upon palpation and both tested negative or stable for orthopedic tests for Lachman's (ACL injury), valgus stress instability (MCL Injury), varus stress instability (LCL injury), McMurray's (meniscus tear), patella tracking and anterior drawer (*id.* pp. 3-4). He further found that her cervical and lumbar spine sprains and bilateral knee contusion were resolved (*id.*, p. 4)

Dr. Cohen examined plaintiff on September 12, 2018. He noted plaintiff's complaints of intermittent neck tightness and lower back pain radiating to the right leg, left knee pain and headaches, but concluded that "there are no objective clinical exam findings that correlate with those complaints . . . [t]he exam demonstrates no impairment of neurologic function that would impair the ability of the examinee to participate in activities of daily living and all usual activities" (Cohen Affirm., p. 5). He found her head to be atraumatic and normal, and her posture and stance normal as well (*id.*, p. 3). With respect to her cervical spine, he discovered no tenderness to palpation of the cervical paraspinal musculature and trapezius

muscles, and no muscle spasm and no trigger points (*id.*). Her range of motion was identical to that found by Dr. Walsh (id). He made the same findings regarding her lumbar spine, but as to the range of motion he employed different values from Dr. Walsh for "normal" in evaluating right and left lateral flexion (45° vs. 25°) (*id.*, p. 4). He also found no issues with respect to her cranial nerves, motor function, sensation, coordination or gait (*id.*, 4-5)

Dr. Tantleff reviewed the MRI of plaintiff's lumbar spine performed on April 16, 2015, approximately three weeks after the accident. He concluded that plaintiff suffered from "longstanding chronic degenerative disc disease" which was consistent with her age, and that there was "no evidence of acute or recent injury" or of spasm, contusion, edema, abnormal or asymmetric contractions or whiplash. In particular, he found that the diagnosis of chronicity was supported, *inter alia*, by discovertebral endplate spurring of the opposing discovertebral endplates, degenerative retrolisthesis of first degree of L5 on S1, spondylosis and bulging discs (Tantleff Affirm., p. 4).

Plaintiff's Medical Witness

Plaintiff has submitted a medical report from Joyce Goldenberg, MD (Curis Affirm. [Dkt. 188], Ex. O [Dkt. 189], a physiatrist. Dr. Goldenberg's report relied upon her own examinations of plaintiff, and upon the review of affirmed MRI reports by six radiologists: Thomas M. Kolb, MD (Curis Affirm., Ex. A [Dkt. 189]), Steven A. Albert, MD (Curis Affirm., Ex. B [Dkt. 190]), Peter Glickman, MD (Curis Affirm., Ex. C [Dkt. 191]), David Milbaur, MD (Curis Affirm., Ex. I [Dkt. 197], John Himmelfarb (Curis Affirm., Ex. F [Dkt. 194]) and John Melnick, MD (Curis Affirm., Ex. J [Dkt. 198]).

Dr. Goldenberg examined plaintiff on April 8, 2015, approximately two weeks after the

accident. Dr. Goldberg also reviewed the following diagnostic studies: the MRI of plaintiff's lumbar spine, performed on April 15, 2015; the MRI of plaintiff's left hip, performed on May 7, 2015; the MRI of plaintiff's brain, performed on November 18, 2015; and the EMG/NCV of plaintiff's cervical and lumbar spine, performed April 22, 2015. She opines that the accident resulted in cervical sprain/whiplash syndrome, cervical myositis/muscle spasms, possible cervical radiculopathy, lumbar sprain, lumbar myositis/muscle spasms, possible lumbar radiculopathy, internal derangement of the left knee, contusion of the left lower leg, trabecular fracture of the left tibia/fibula and post-concussion syndrome (Goldenberg Affirm., p. 5). With respect to the cervical spine, she found severe tenderness to palpation along the upper trapezius and supraspinatus muscles and tenderness to palpation along the levator scapulae, rhomboid, scalene, cervical paraspinal, sternocleidomastoid and teres minor muscles with diffuse trigger point spasms present throughout (*id.*, p. 3). Dr. Goldenberg also found plaintiff's range of motion limited as follows: flexion (31° vs. 45° normal), extension (28° vs.45°), right side bends [flexion] (26° vs, 45°), left side bends (24° vs. 45°), right rotation (37° vs. 60°) and left rotation (40° vs. 60°) (*id.*).

Dr. Goldenberg's examination of plaintiff's lumbar spine at that time revealed tenderness to palpation along the lumbosacral paraspinal, quadratus lumborum with rigidity, sacroiliac and piriformis muscles with diffuse trigger point spasms present throughout. She further found plaintiff's range of motion limited as follows: flexion (39° vs. 85° normal), extension (11° vs.25°), right side bends [flexion] (18° vs, 35°), left side bends (22° vs. 35°), right rotation (22° vs. 45°) and left rotation (25° vs. 45°) (*id.*). Dr. Goldenberg also observed that whereas an MRI of the lumbar spine on November 19, 2014 had reflected a disc bulge at L5-S1, there were

additional disc herniations at L3-4 and L4-5 (*id.*, p. 6).

Dr. Goldberg also notes that the MRI of plaintiff's left knee on March 31, 2015 revealed discoid lateral meniscus, joint effusion and chondromalacia patella trabecular fracture involving proximal tibia and fibula (*id.*, p. 1). At a follow-up visit on May 13, 2015, plaintiff complained of left hip pain and an examination revealed tenderness to palpation at the greater trochanteric bursa and the iliotibial band (*id.*, p. 5). Range of motion was limited to flexion (96° vs. 120° normal), with the extension, abduction, internal and external rotation all normal (*id.*, 6).

Dr. Goldenberg re-evaluated plaintiff on January 8, 2019, with her findings regarding the condition of the cervical and lumbar spines substantially similar to those from 2015. The limitations in the range of motion with respect to the cervical spine were flexion (33° vs. 45° normal), extension (28° vs. 45°), right side bends (24° vs. 45°), left side bends (25° vs 45°), right rotation (30° vs. 60°) and left rotation (33° vs. 60°) (*id.*, p.8). The limitations relating to the lumbar spine were flexion (56° vs. 85° normal), extension (14° vs. 25°), right side bends (17° vs. 35°), left side bends (18° vs. 35°), right rotation (20° vs. 45°) and left rotation (21° vs. 45°) (*id.*).

Dr. Goldenberg's made a final diagnosis cervical disc herniation at the levels of C3-4, C4-5 and C5-6, cervical radiculopathy at the level of C5, cervical myofascial pain syndrome/ muscle spasms, lumbar disc herniation at the levels of L3-4, L4-5 and L5-S1, lumbar radiculopathy at the level of L5, lumbar myofascial pain syndrome/muscle spasms, left knee discoid lateral meniscus/joint effusion/chondromalacia patella/trabecular fracture involving proximal tibia and fibula, post-traumatic stress disorder and headaches (*id.*, p. 9). The report concluded that plaintiff "developed limitation of use of her cervical and lumbar spine and left knee, which prevents her from performing her activities of daily living . . . [t]he loss in mobility

that she suffers is permanent . . . [s]he will live the rest of her life with pain and reduced range of motion" (*id.*, p. 10). Finally, Dr. Goldenberg opined that "[t]o a reasonable degree of medical certainty, the accident of March 22, 2015 described above is the competent producing cause of [plaintiff's] injuries and limitations to her cervical and lumbar spine and left knee as indicated in this report" (*id.*, p. 9)

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Id.) Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012].) "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the plaintiff . . . the court on a summary judgment motion must indulge all available inferences . . . ." (*Torres v Jones*, 26 NY3d 742, 763 [2016].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*Rotuba Extruders v Ceppos*, 46 N.Y.2d 223,

231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 A.D.2d 224, 226 [1st Dept 2002].)

In Motion Sequence Number 004, the Kader defendants move to dismiss on the grounds that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In Motion Sequence Mumber 005, the MTA defendants move to dismiss on the ground that plaintiff was the sole proximate cause of the accident.[3] The Court will discuss each motion in turn.

I. The Kader Defendants' Motion Regarding Serious Injury (Seq. 004)

The Kader defendants' motion is governed by Insurance Law §5102 (d), which provides:

> "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 purpose of the No-Fault statute is to weed out frivolous claims and limit recovery to significant injuries" (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002], *quoting Dufel v Green*, 84 NY2d 795, 798 [1995]). Accordingly, a plaintiff must present objective proof rather than subjective complaints to meet the serious injury threshold (*Toure*, 98 NY2d 345, 350). However, to prevail on a motion for summary judgment under this statute, it is the defendant that has "the initial burden to present competent evidence showing that the plaintiff has not suffered a

[3] At oral argument, MTA conceded that its motion to dismiss in Motion Seq. 004 (erroneously labeled a "cross motion") based on the lack of a serious injury should be denied on the ground that it is not a "covered person" within the meaning of Insurance Law § 5102 (j) (oral argument tr, 5/14/2019, 6:8-9:15).

serious injury" (*Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590 [1st Dept 2011] [internal quotation marks omitted]; *Holloman v Am. United Transportation Inc.*, 162 AD3d 423, 423 [1st Dept. 2018]; *Rodriguez v Goldstein*, 182 AD2d 396 [1st Dept 1992]).

Such evidence may consist of "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003], *quoting Grossman v Wright,* 268 AD2d 79, 84 [1st Dept 2000]; *Spencer*, 82 AD3d 589, 590), including a showing that the injuries have resolved (*see Riollano v Leavey*, 173 AD3d 494, 495 [1st Dept 2019]; *Baez v Boyd*, 90 AD3d 524, 524 [1st Dept 2011]). Where objective proof of injury does exist, the defendant may nevertheless satisfy the burden with expert affidavits indicating that the injury was caused by a pre-existing or degenerative condition, rather than the accident (*Holloman*, 162 AD3d 423, 423-424; *Paulling v City Car & Limousine Servs., Inc.*, 155 AD3d 481 [1st Dept 2017]; *Spencer*, 82 AD3d 589, 590; *Farrington v Go On Time Car Serv.*, 76 AD3d 818 [1st Dept 2010]). To meet its summary judgment burden under the 90/180 category of the statute, a defendant must provide medical evidence of the lack of an injury preventing 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). However, a defendant may prevail on this issue without medical evidence by relying on other evidence, such as the plaintiff's own deposition testimony or records demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities during the relevant period (*id.*; *Holloman*, 162 AD3d 423, 424.).

Once the defendant has met its burden, the plaintiff must raise a triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). In this connection, "[a]

plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion" (*Spencer*, 82 AD3d 589, 590). And if the defendant has substantiated a pre-existing condition, the plaintiff's expert must address causation (*id.*).

The physicians' affirmations submitted by the Kader defendants constitute competent medical evidence from examining and reviewing physicians that at least some of plaintiff's alleged injuries were not serious. However, as discussed above and at oral argument (tr. 10:17-11:6), in determining the loss of range of motion related to plaintiff's alleged lumbar spine injury, Drs. Walsh and Cohen employed different values to evaluate whether right and left lateral flexion were normal. Such a conflict in a defendant's evidence defeats the prima facie case, and prevents the burden from shifting to the plaintiff (*Johnson v Salaj*, 130 AD3d 502, 502-03 [1st Dept 2015]).

Furthermore, plaintiff has pointed to the failure of defendants' medical witnesses to address the trabecular marrow fractures indicated by the MRI reviewed by Dr. Albert (Albert Affirm., p.2); Goldenberg Affirm., pp. 1, 5, 9). "A fracture, by definition, constitutes a 'serious injury' under the statute (Insurance Law § 5102[d]" (*Baez*, 90 AD3d 524, 525; *see Elias*, 58 AD3d 434, 434-35; *Glover v Capres Contracting Corp.*, 61 AD3d 549, 550 ["A knee fracture is an independent category of serious injury under the statute"]). Although the Court questioned whether a marrow fracture, as opposed to a bone fracture, qualifies as a serious injury (tr.,16:16-17), section 5102(d) makes no apparent distinction between the two and it is a question for medical rather than judicial resolution. In any event, the questions raised regarding the lumbar

spine injury is sufficient to preclude summary judgment, as "in establishing that any one of several injuries sustained in an accident is a serious injury within the meaning of Insurance Law § 5102(d), a plaintiff is entitled to seek recovery for all injuries incurred as a result of the accident" (*Bonner v Hill*, 302 AD2d 544, 545 [2d Dept 2003]).

Plaintiff also argues that defendant has failed to establish a prima face case that the injuries were degenerative or pre-existing because the findings put forward by the medical witnesses of Kader Defendants were either conclusory, inconclusive or made without reference to the relevant diagnostic tests (*see Angeles v Am. United Transp., Inc.*, 110 AD3d 639, 640-41 [1st Dept 2013]; *Frias v James*, 69 AD3d 466 [1st Dept 2010); *Pommells v Perez*, 4 NY3d 566, 577–578 [2005]). However, the Court finds that the affirmations of both Drs. Tantleff and Haydock, based upon MRIs and X-rays, are sufficiently specific to make a prima facie showing that the alleged injuries were caused by the chronic degenerative changes they describe, rather than the subject accident.

Even so, summary judgment must be denied. Dr. Goldenberg—who also reviewed the April 16, 2015 MRI of plaintiff's lumbar spine that Dr. Tantleff relied upon—is equally definitive as to the presence of trauma and its connection to the accident, thus creating questions of fact and credibility (*see Grant v United Pavers Co.,*, 91 AD3d 499, 500 [1st Dept 2012] ["Although plaintiff's physicians did not expressly address defendants' expert's conclusion that the injuries were degenerative in origin, by relying on the same MRI report as defendants' expert, and attributing plaintiff's injuries to a different, yet equally plausible cause, plaintiffs raised a triable issue of fact"]). As in *Holloman,* 162 AD3d 423, 424, "[p]laintiff's physiatrist adequately addressed the issue of causation by opining that the injuries were the direct result of

the accident, and offering a different, yet equally plausible, explanation for them." Moreover, the Court finds that even if defendant met its burden of establishing a serious injury, it was also adequately rebutted by Dr. Goldenberg's detailed findings (see *Amaro v Am. Med. Response of New York, Inc.*, 99 AD3d 563, 564 [1st Dept 2012] ["Plaintiff's physicians also addressed the defense expert's findings of degeneration by opining that his injuries were causally related to the accident"]; *Pietropinto v Benjamin*, 104 AD3d 617, 617 [1st Dept 2013] [same]; *Munoz v Robinson*, 170 AD3d 414 [1st Dept 2019] [same]; *Seck v Balla*, 92 AD3d 543, 544 [1st Dept 2012] [holding that "questions about the credibility of the conflicting doctors' opinions are for the jury to resolve"]).

However, defendant is entitled to the dismissal of any claim based on the 90/180 category of section 5102(d). As a preliminary matter, plaintiff does not appear to oppose that aspect of defendants' motion, and it is not clear from either the complaint or the submissions on this motion that plaintiff has even raised such a claim. And such a claim would be futile in view of her admission in her bill of particulars that she was only confined to bed or home for two weeks after the accident and then "intermittently" thereafter, and her deposition testimony that she returned to work shortly after the accident as well see (*Streety v Toure*, 173 AD3d 462, 462–63 [1st Dept 2019]; *Holloman*, 162 A3d 423, 424). Nor has plaintiff submitted any medical records or testimony indicating that she is unable to perform substantially all her customary daily activities (*Johnson*, 130 AD3d 502, 503).

As such, the Kader defendants' motion for summary judgment, dismissing the complaint (Seq. 004), is granted in part to the extent that any claim that might be asserted under the 90/180 provision of Insurance Law § 5102(d) is dismissed, and the motion is otherwise denied.

II. The MTA Defendants' Motion Regarding Proximate Cause (Seq. 005)

The MTA defendants argue that plaintiff was the sole proximate cause of the accident because she admittedly crossed in the middle of the street at night while wearing black, despite knowing that there was traffic and that she could have instead continued walking westward to a designated crosswalk on the corner of Third Avenue and 86th Street. They also contend that the construction barrier did not contribute to the accident, as the walkway curved toward, and directed pedestrians to, the sidewalk—not the street. Plaintiff counters that questions of fact exist as to whether the barrier was negligently designed to leave pedestrians in the middle of street, and as to whether there was adequate lighting and signage to ensure that pedestrians could return to the sidewalk.

"Proximate cause is almost invariably a factual issue" for the trier of fact to determine (*Haibi v 790 Riverside Drive Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017]; *see Derdiarian v Felix Contracting Corp.*, 51 NY2d 308, 315 [1980]). It may, nevertheless, be decided as a matter of law where only one conclusion can be drawn from the facts in the record (*Haibi*, 156 AD3d 144, 147).

The crux of plaintiff's theory of liability as against the MTA defendants, per her notice of claim, is that the walkway "channeled" her into moving traffic by inviting her to cross 86th Street between Second and Third Avenue—rather than walking west (on the sidewalk along the north side of 86th Street) to a designated crosswalk at the corner of Third Avenue and crossing there. There is simply no evidence submitted to support this theory. Although the walkway ended before the block ended, there was nothing directing plaintiff to cross where she did and there was nothing preventing plaintiff from walking west (on the sidewalk along the north side of

86th Street) to the end of the block at Third Avenue and crossing at the designated crosswalk there. Indeed, plaintiff admits that she chose to cross where she did because it was quicker than walking to the designated crosswalk at Third Avenue. On this theory, plaintiff might arguably sue Fairway arguing that its location encouraged potential customers to cross 86th Street in the middle of the block, rather than at a designated crosswalk on the corner. Moreover, that other pedestrians may have similarly crossed where plaintiff did is not evidence that the walkway channeled them into traffic. It merely indicates that others made a similar independent decision to cross outside a designated crosswalk.

The Court further finds that the case of *Rosen v New York City Transit Authority*, (295 AD2d 125 [1st Dept 2002]), is instructive. In *Rosen*, the plaintiff pedestrian similarly claimed that he was struck by a car due to the negligent design of a walkway. Although the *Rosen* plaintiff argued that the walkway should have, but did not, channel pedestrian traffic to the sidewalk through an extension of the barrier in the area where the accident occurred, his own testimony established that he was hit after he had already taken a few steps after exiting the walkway. In affirming the trial court's decision to set aside the jury verdict for plaintiff as a matter of law, the First Department concluded that "[n]o valid line of reasoning can support a finding that defendant's walkway in any manner contributed to the accident" (id. at 125).

The Court further notes that there is no evidence that the accident happened because the walkway obstructed plaintiff's view and that she was channeled into moving traffic. Indeed, plaintiff testified that she looked both ways before attempting to cross the street, noticed that there were no cars approaching, and that there was not a designated crosswalk where she was attempting to cross. This wholly negates the theory that plaintiff's view was obstructed and that

she was channeled into traffic (*compare Cherrez v Gonzalez*, 94 AD3d 938, 940 [2d Dept 2012] [holding that there were issues of fact "as to whether [the defendant] negligently placed barricades in a way that obstructed visibility at the corner of Third Avenue and East 10th Street, and, if so, whether this negligence was a proximate cause of the infant plaintiff's accident"]).

Further, there is no allegation here that the accident occurred because plaintiff was unable to take advantage of the protection afforded by the walkway, so any claim of alleged lack of lighting and signage is irrelevant (*compare Doumbia v City of New York*, 78 AD3d 587, 587 [1st Dept 2010] [finding triable issues fact concerning whether the walkway was closed on date of accident and/or "whether there was adequate signage directing pedestrian traffic to the walkway"]).

As such, this Court finds that the MTA defendants are entitled to summary judgment, dismissing the complaint and all cross-claims as against them.

CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendants Mohammed M. Kader and Garmor Service Corp. (collectively, "Kader Defendants") for summary judgment dismissing the complaint, pursuant to CPLR 3212, is granted in part to the extent that any claim that might be asserted under the 90/180 provision of Insurance Law § 5102(d) is dismissed, and the motion is otherwise denied; and it is further

ORDERED, that the motion of defendants MTA Capital Construction Company, Metropolitan Transportation Authority, New York City Transit Authority, Schiavone Construction Co. LLC individually and d/b/a 86th Street Constructors Joint Venture and John P. Picone, Inc. (collectively, "MTA Defendants") for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross-claims as against them, is granted, with costs and disbursements to said MTA Defendants as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that counsel for MTA Defendants serve the parties, via NYSCEF, with a copy of the instant decision and order within twenty (20) days.

The foregoing constitutes the Decision and Order of the Court.

Dated: Oct 17, 2019

ENTER:

J.S.C.

HON. ROBERT D. KALISH
J.S.C.