To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ANTHONY VACCARO,

Plaintiff,

-against-

OMARLIN FRANCOLOPEZ, RYDER TRUCK RENTAL INC. and D. BERTOLINE & SONS INC.,

Defendants.

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DECISION and ORDER
Motion Sequence No. 7
Index No. 57032/2018

RUDERMAN, J.

The following papers were considered in connection with the motion by defendants Omarlin Francolopez, Ryder Truck Rental Inc. and D. Bertoline & Sons Inc. for summary judgment dismissing the complaint as against them:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - X	1
Affirmation in Opposition, Exhibits A - F; Further Affirmation in Opposition, Exhibit A	2
Reply Affirmation	3

This is an action for personal injuries allegedly sustained by plaintiff Anthony Vaccaro on July 25, 2017 as a result of a two-vehicle collision. Plaintiff asserts that he was driving westbound on Croton Avenue near the intersection of Clinton Avenue in Ossining, New York, slowing down for traffic in front of him, when his vehicle was struck in the rear by a truck owned by defendant Ryder Truck Rental, leased by defendant D. Bertoline & Sons Inc. and operated by defendant Omarlin Francolopez.

In moving for summary judgment, all the remaining defendants[1] contend that plaintiff's injuries do not meet the serious injury threshold of Insurance Law § 5102; defendant Ryder Truck Rental Inc. ("Ryder") also relies on the Graves Amendment (49 USC § 30106), which creates an exception to a vehicle owner's vicarious liability where the owner is in the business of renting or leasing motor vehicles, and there is no negligence on the part of the owner.

The Graves Amendment

This Court previously denied, with leave to renew following completion of discovery, Ryder Truck Rental's earlier summary judgment application based on the Graves Amendment. While Ryder had established therein that it is "engaged in the trade or business of renting or leasing motor vehicles" (*id.*), its submissions on the prior motion "failed to conclusively establish that it was not negligent in the maintenance of the vehicle, as alleged" (*see Anglero v Hanif*, 140 AD3d 905, 906-907 [2d Dept 2016]). The decision remarked that this was particularly true in view of Francolopez's statement, as reported in the police accident report, that he had a problem with the air brakes. Moreover, facts essential to plaintiff's ability to oppose the application were exclusively within the knowledge and control of defendants.

Now that discovery is complete, Ryder again moves for relief based on the Graves Amendment. It cites Francolopez's deposition testimony in which he disavowed the statement reported by the police officer, to the effect that the air brakes were not full and did not respond immediately, causing the collision. It further quotes from the deposition testimony of the representative for D. Bertoline & Sons Inc., who asserted that if there had been insufficient air pressure, as the police officer reported having been told by Francolopez, the truck would not

[1] Anheuser-Busch d/b/a Budweiser was granted summary judgment dismissing the complaint as against it by decision and order dated October 31, 2019.

have been able to proceed at all. In addition, Ryder provides the deposition testimony of its own witness, who confirmed that the air brake, which functions as a parking brake, regardless of whether it was full, would not cause the braking system to fail, or have anything to do with the driver's ability to reduce his speed when driving. However, the motion papers do not include any showing regarding the maintenance performed on the truck.

Analysis

While defendants repeatedly assert that Ryder is entitled to dismissal of the claim against it because it is in the business of leasing vehicles, the Graves amendment creates an exception to an owner's vicarious liability where *two* requirements are met:

> "[The] owner of a motor vehicle that rents or leases the vehicle to a person . . . shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle . . ., for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if --
> (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; *and*
> (2) *there is no negligence* or criminal wrongdoing on the part of the owner (or an affiliate of the owner)"

(49 USC § 30106 [emphasis added]; *see Graham v Dunkley*, 50 AD3d 55 [2d Dept 2008]).

"[I]n order to establish its prima facie entitlement to judgment as a matter of law . . . [the company that leased the vehicle to the driver] was required to prove not only that it is in the business of leasing vehicles, but also, that it did not negligently maintain the . . . vehicle" (*Casine v Wesner*, 165 AD3d 749, 750 [2d Dept 2018]). Although Ryder established that the statement attributed to Francolopez regarding the truck's air brake does not provide a basis for a claim that Ryder was negligent in its maintenance of the truck, Ryder failed to sustain its prima facie burden of demonstrating that it did not negligently maintain the truck, since it did not provide any other evidence on the subject.

Accordingly, that branch of defendants' motion must be denied.

Serious Injury

In moving for summary judgment, defendants contend that plaintiff's injuries do not meet the serious injury threshold of Insurance Law § 5102. Defendants' analysis begins with the observation that testing performed on July 25, 2017, the date of the accident, at Phelps Memorial Hospital Center, showed no serious injury or traumatic changes, but only degenerative changes. Further, an MRI taken on September 14, 2017 of plaintiff's thoracic spine revealed only "disc dessication from C2-3 through C6-7," and "C5-6 midline disc herniation indents ventral cord causing moderate central canal stenosis, with superimposed right foraminal disc herniation causing proximal right neural foraminal stenosis, potentially abutting exiting right C6 nerve root, and multilevel disc bulges." They also submit findings from a CT scan of plaintiff's orbits on September 18, 2017, which states "Indication: Orbital fracture left side," and reports findings of a mass in the left orbit, and a subsequent biopsy report regarding that mass, which was determined, upon biopsy, to be a neurofibroma.

Defendants also submit the reports of their orthopedic expert, Dr. Ronald L. Mann, dated May 4, 2018, which found that plaintiff's thoracolumbar sprain/strain was resolved and he has no disability, and that his range of motion is normal, and that of Dr. Jeffrey Passick dated June 6, 2019, who opined that plaintiff's cervical and lumbar spine sprain/strain was resolved, and that "spinal imaging shows degeneration only."

Finally, defendants rely on plaintiff's deposition testimony regarding his ability to work, and his previous accidents and injuries.

Plaintiff emphasizes in opposition that his claims, as reflected in his supplemental and second supplemental bill of particulars, include a left eye lateral orbital fracture, and bulging and

herniated discs, as well as nerve damage. In support of those claims he submits affirmed reports from radiologist Thomas Kolb, M.D. One of the affirmed reports by Dr. Kolb, dated October 12, 2019, describes his review of a CT scan dated September 18, 2017, and his finding that the scan disclosed, inter alia, a fracture of the left inferior orbital floor. An operative report from New York Eye and Ear Infirmary of Mount Sinai, dated October 20, 2017, indicates that David A. Della Rocca, M.D., performed an operative procedure on plaintiff at that time, including a left orbitotomy with excision of an orbital mass, and repair of an orbital floor fracture with implant. Dr. Kolb also reviewed the MRIs performed on September 12, 2017, and reported that they reflect the presence of disc bulges and herniation of the cervical and lumbar spine. The affirmed report of Kevin H. Weiner, M.D., reports finding limited range of motion in plaintiff's cervical and lumbar spine, and opines that the disc bulges and herniation, as well as the orbital fracture, are posttraumatic and were causally related to the accident of July 25, 2017.

Analysis

When defendants move for summary judgment dismissing a complaint on the grounds of a lack of serious injury, they bear the initial burden of establishing, prima facie, that the plaintiff did not sustain a serious injury caused by the accident (*Smith v Matinale*, 58 AD3d 829 [2d Dept 2009]). Fractures are one of the forms of serious injury explicitly included in the list provided by Insurance Law § 5102 (d). Defendants' moving papers de-emphasize the orbital fracture, and suggest that the fracture was pre-existing. They include as exhibits the radiologist's report from September 18, 2017 regarding the CT scan of plaintiff's orbits, which report contains the words "Indication: Orbital fracture left side." However, although they also included as an exhibit the post-surgical pathology report, they did not include the operative report from October 20, 2017, which noted, inter alia, the repair of an orbital fracture. Significantly, Dr. Passick's report

acknowledged the post-accident presence of an orbital fracture.

Given the evidence establishing the presence of an orbital fracture less than two months after the accident, and the lack of any basis to invalidate that evidence, defendants failed to make a prima facie showing of an absence of any form of serious injury. Moreover, the materials submitted by plaintiff demonstrating, prima facie, the existence of an orbital fracture caused by the accident, preclude summary judgment to the defendants on the serious injury issue. Notably, the suggestion by defendants' counsel that the orbital fracture is a pre-existing injury cannot serve as an evidentiary showing of that claim, and no evidence supporting the assertion is provided.

As long as a plaintiff establishes one serious injury of any kind, the plaintiff is entitled to recover for all injuries incurred as a result of the accident (*see Marte v New York City Tr. Auth.*, 59 AD3d 398, 399 [2d Dept 2009]). Accordingly, plaintiff's evidence that he suffered an orbital fracture as a result of the accident at issue here is sufficient in itself to preclude summary judgment.

The motion must be also denied on the grounds of significant or permanent consequential limitation of use or function. Assuming that defendants' submissions were sufficient to make a prima facie showing that plaintiff did not sustain a significant or consequential limitation of a body part or function, the opposing evidence submitted by plaintiff suffices to create issues of fact on that point.

The necessary objective evidence must show both (1) contemporaneous treatment – qualitative or quantitative – to establish that the plaintiff's injuries were causally related to the accident and (2) recent examination to establish the required permanency (*see Perl v Meher*, 18 NY3d 208, 217 [2011]; *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 353 [2002]). The

requirement of objective proof of plaintiff's injuries at the time of, and causally related to the accident, is satisfied by the September 15, 2017 MRIs revealing the presence of soft tissue injury such as bulging or herniated discs. The need for recent objective examination to establish the required permanency is satisfied by findings of decreased ranges of motion, by Dr. Passick as well as plaintiff's expert, Dr. Weiner, in conjunction with his medical opinion that the injury was causally related to the subject accident (*see Clervoix v Edwards*, 10 AD3d 626, 627 [2d Dept 2004]; *see also McEachin v City of New York*, 137 AD3d 753, 756 [2d Dept 2016]).

This Court rejects defendants' suggestion that plaintiff's gap in, or cessation of treatment for those injuries, disqualifies his claim of serious injury. Unlike *Pommells v Perez* (4 NY3d 566, 574 [2005]), where the plaintiff "provided no explanation whatever as to why he failed to pursue any treatment for his injuries after the initial six-month period," a plaintiff's sworn statement or testimony as to why he did not get treatment may be enough to raise an issue of fact (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 907 [2013]; *Croisdale v Weed*, 139 AD3d 1363, 1364 [4th Dept 2016]). Here, plaintiff indicated during his deposition testimony that he saw Dr. Matthew Kohler for a number of appointments until he canceled his most recent appointment because he became frightened; and also testified that he attended physical therapy for a long time, but stopped going when he found that it was not helping, and that he now handles his own therapy for his back. Under these circumstances, plaintiff's failure to continue obtaining treatment for his claimed injuries presents an issue of fact rather than grounds for dismissal of the claim.

However, defendants have established grounds to dismiss plaintiff's claim of "serious injury" under the 90/180-day category, with their submission of plaintiff's testimony that he returned to work in August 2017. To satisfy the definition of "serious injury" under the 90/180

category, a plaintiff must provide competent medical evidence of the plaintiff's inability to perform substantially all of his or her daily activities for at least 90 of the first 180 days subsequent to the accident (*Nunez v Motor Veh. Acc. Indem. Corp.*, 96 AD3d 917, 919 [2d Dept 2012]; *Sainte-Aime v Suwai Ho*, 274 AD2d 569 [2d Dept 2000]). Plaintiff has not offered any evidence creating an issue of fact on that point.

For the foregoing reasons, the branch of defendants' motion seeking summary judgment dismissing the complaint for failure to satisfy the serious injury threshold is granted only to the extent of dismissing plaintiff's 90/180 claim, and is otherwise denied.

The third branch of defendants' motion, for an extension of their time to file any dispositive motions, was already addressed, and denied, in the decision and order of Hon. Joan B. Lefkowitz dated September 23, 2019, and may not be reconsidered here.

Based upon the foregoing, it is hereby,

ORDERED that defendants' motion for summary judgment is denied except with regard to plaintiff's 90/180 claim; and it is further

ORDERED that the parties shall appear on March 24, 2020 at 9:15 a.m. in the Settlement Conference Part of the Westchester Supreme Court in the Courthouse located at room 1600, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601, to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 5, 2020

HON. TERRY JANE RUDERMAN, J.S.C.