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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

111844

JOHN FAYOLLE and URSULA FAYOLLE,

Plaintiffs,

-v-

RICHARD ROTHBARD, INC., NEW YORK CRAFT MARKET, INC. and RICHARD ROTHBARD,

Defendants.

Index No.: ~~111844~~/2009

Motion Date: 04/20/12

Motion Seq. No.: 001

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1
Answering Affidavits - Exhibits	No(s).	2
Replying Affidavits - Exhibits	No(s).	3

Cross-Motion: ☐ Yes ☒ No

In this action to recover for personal injuries allegedly suffered by plaintiff John Fayolle (plaintiff) in a car collision, defendants Richard Rothbard, Inc., New York Craft Market, Inc. and Richard Rothbard (Rothbard) move for summary judgment dismissing the complaint (mot. seq. no. 001); and (2) plaintiffs John and Ursula Fayolle's move for leave to extend their time to make a motion for summary judgment, and subsequently, to move for summary judgment on the issue of liability on the complaint (mot. seq. no. 002). The motions are

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

consolidated for disposition.

Plaintiff was involved in a automobile accident on October 25, 2008, when he was rear-ended by a van operated by Rothbard. Plaintiff did not go to the emergency room or otherwise seek medical attention for injuries allegedly sustained in the accident at that time. He now claims that he sustained a concussion and other sequella related to a head injury, including among other things, post-concussion syndrome, traumatically induced anorexia, with resulting weight loss, and post-traumatic stress disorder.

Plaintiff was involved in an earlier accident on March 25, 2008, where he fell on a sidewalk and allegedly sustained traumatic injuries to his face, along with brain damage. This accident is the subject of another lawsuit, which has been consolidated for discovery with the present action. The other action, Favolle v East West Manhattan Portfolio L.P., Index No. 115715/08, is currently pending in this court (the trip-and-fall accident). The dispositive motions in that action have been addressed in a separate decision and order.

Plaintiff claims that the concussion and other injuries in the automobile accident exacerbated the injuries he sustained in the March trip-and-fall accident. He claims that, as a result, he has sustained an actionable "serious injury" pursuant to New York Insurance Law (Insurance Law) § 5102 (d), permitting

him to proceed with this action. Defendants maintain that plaintiff did not sustain a serious injury as a matter of law, and thus cannot pursue this action under the Insurance Law.

Plaintiffs' attorney seeks an extension of time to move for summary judgment, claiming that his present motion was served nine days late because he confused the dates upon which dispositive motions could be made on the two related cases, pursuant to the Preliminary Conference Order in each separate action. Each Preliminary Conference Order provided the parties 120 days to move from the date of the filing of the Note of Issue in each case. Plaintiffs' attorney apparently confused the dates upon which the motions were due, conflating the date for motions to be made under the earlier action with the date upon which motions could be made on the present action. Plaintiffs claim that defendants have not been prejudiced in any way by the delay.

CPLR 3212 (a) allows a court to set a date after the filing of a Notice of Issue after which dispositive motions cannot be made. Late motions may be allowed "on good cause shown". "Good cause" under 3212 (a) "requires a showing of ... a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy." Brill v City of New York, 2 NY3d 648, 652 (2004). "No excuse at all, or a perfunctory excuse, cannot be 'good cause.'" Id. An excuse which merely emphasizes the "lack of prejudice to

other parties" will not suffice. Reeps v BMW of North America, LLC, 94 AD3d 475, 476 (1st Dept 2012).

This court accepts plaintiffs' attorney's excuse as constituting good cause under the circumstances. The court will address the plaintiffs' motion on its merits.

In enacting New York's No-Fault Law, the Legislature "provided that there shall be no right of recovery for non-economic loss [i.e., pain and suffering] except in the case of a serious injury ... [internal quotation marks and citation omitted]." Licari v Elliott, 57 NY2d 230, 234 (1982). The Court of Appeals has "long recognized that the legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries. As such, we have required objective proof of a plaintiff's injury in order to satisfy the statutory serious injury threshold; subjective complaints alone are not sufficient [internal quotation marks and citations omitted]." Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345, 350 (2002).

Insurance Law § 5102 (d) defines "serious injury" as: 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 issue before the court is whether plaintiff suffered a serious injury stemming from the automobile accident. Defendants argue that plaintiff has no competent medical evidence that would show that he has suffered a serious injury as set forth under Insurance Law § 5102 (d). They rely on the letter report of Dr. Robert S. April, dated October 7, 2010, in which Dr. April, opined that the "minor fender bender" in which plaintiff was involved in October 2008 was not the cause of any of his symptoms as of the date of Dr. April's examination, all of which, Dr. April claims, stem from the March 2008 incident, in which plaintiff injured his head and face. Dr. April concluded with a reasonable medical certainty that whatever the change in affect and personality [suffered by plaintiff], it was not the result of traumatic injury to the brain arising from the very minor accident of record. He found no evidence "of an organic brain syndrome secondary to anatomical changes in the brain based on imaging." Dr. April concluded that, with a "reasonable medical certainty the accident of record did not produce a

neurological diagnosis, traumatic brain injury, disability, limitation or the need for any neurological intervention."

Defendant submits another report of Richard P. DeBenedetto, Ph.D., a doctor of "Clinical and Neuropsychiatry", prepared after his examination of plaintiff on November 12, 2010. Dr. DeBenedetto opines that "[b]ased on the findings of this neuropsychological examination, the claimant's self-report and review of the available records, it is my opinion that psychological symptoms, negative personality change and multiple cognitive deficits are likely primarily due to the brain injury sustained in the first accident in March 2008."

Although defendants insist that plaintiff has no medical records at all relating to injuries plaintiff claims to have sustained in the October 2008 accident, plaintiff provides the report of Dr. John Leddy, a medical doctor specializing in sports medicine, whom, after examination of plaintiff and his various complaints, opined that plaintiff sustained a concussion in the automobile accident and suffers from "[s]evere postconcussion syndrome. His brain injuries have affected multiple physiological systems to include cognition, cerebral autoregulation, autonomic function, hypothalamic function and limbic function (emotional status)." In his affidavit accompanying the report, Dr. Leddy states that

> [a]s set forth in the attached report, my opinion, to within a reasonable degree of medical certainty, is

> that Mr. Fayolle's repeat injury of October 25, 2008, resulted in a concussion and post-concussion syndrome ...

Moreover, Dr. Leddy rendered a report to plaintiff's treating neuro-psychiatrist Jonathan Silver, M.D., which he incorporated by reference in his affidavit, which states

> His head hit the steering wheel. His headache increased substantially so that he had to resume high dose narcotic medications. After this repeat injury he became anorexic, had nausea vomiting, increased headache and he developed a tremor in his left hand. He lost 20 pounds in a month and experienced significant personality changes again.
> All of the aforementioned symptoms persist to this day and have interfered with his work life, his recreational life and his relationship with his wife...now he is taking testosterone replacement as a result. He is also using amantadine, Aricept and Celexa as a result of his postconcussion symptoms.

With respect to whether plaintiff suffered a "significant limitation of use of a body function or system" arising from the October 2008 accident, plaintiffs submitted sufficient evidence to raise an issue of fact. Unlike in Ranford v Tims Tree and Lawn Service, Inc., 71 AD3d 973 (1st Dept 2010) plaintiff here submits the sworn affidavit of Dr. Leddy that cites his examination of the plaintiff and his medical opinion. Such affidavit, which incorporates his report, raises an issue of fact as to the seriousness of the alleged injury plaintiff suffered in the car accident. See Jordan v Goldstein, 129 AD2d 616 (2d Dept 1987) (doctor's affidavit in opposition to summary judgment motion sufficient to raise issue of fact that

plaintiff's post traumatic syndrome resulted in significant limitation of intellectual, affectual and physical functions.) The facts at bar are also distinguishable from those of the recent decision of the Third Department in Smith v Reeves, __ NYS2d ___, 2012 NY Slip Op. 04856, to the extent that here Dr. Snyder, another one of plaintiff's treating physicians, reports that he treated plaintiff within three weeks of the car accident. Notwithstanding that the brain imaging, including MRIs and CT scans, were negative in this case, and the opinion of Dr. April, that "there is no objective evidence of any structural neurological damage that would explain any organic cognitive deficits", Dr. Leddy's findings that plaintiff suffered symptoms of anxiety, depression, anger, and severe personality changes arising from the repeat trauma of the car accident are sufficient to raise an issue of fact as to whether the car accident was a substantial factor in exacerbating the injuries plaintiff suffered in the trip-and-fall accident to the extent of a significant limitation of a body function or organ. Chapman v Capoccia, 283 AD2d 798 (3d Dept 2001).

Defendants have not refuted the general proposition that a driver of a vehicle who rear-ends a stopped vehicle is prima facie liable for the collision. Beloff v Gerges, 80 AD3d 460 (1st Dept 2011). Therefore, plaintiffs are entitled to a partial summary judgment on the issue of negligence.

Accordingly, it is

ORDERED that defendants Richard Rothbard, Inc., New York Craft Market, Inc. and Richard Rothbard's motion for summary judgment dismissing the complaint (mot. seq. no. 001) is denied; and it is further

ORDERED that plaintiffs John and Ursula Fayolle's motion for leave to serve a late motion for summary judgment (mot. seq. no. 002) is granted; and it is further

ORDERED that plaintiffs John Fayolle and Ursula Fayolle's motion for summary judgment is granted on the issue of negligence; and it is further

ORDERED that the parties shall proceed to mediation, and if the action is not settled in mediation, the parties shall

appear in IAS Part 59, 71 Thomas Street, New York, New York on October 23, 2012, 2:30 PM for a pre-trial conference.

This is the decision and order of the court.

Dated: August 3, 2012 ENTER:

J.S.C.

DEBRA A. JAMES