Joseph v Wanchoo
2024 NY Slip Op 31386(U)
March 21, 2024
Supreme Court, Kings County
Docket Number: Index No. 529853/2021
Judge: Ingrid Joseph

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 21st day of March 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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DARYL JOSEPH,

Plaintiff(s)

-against-

NYMPHIA WANCHOO,

Defendant(s)

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Index No: 529853/2021
Motion Seq. 1

ORDER

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/	11-20; 28
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	23-27

In this action, Nymphia Wanchoo ("Defendant") moves (Motion Seq 1) for summary judgment dismissing Daryl Joseph's ("Plaintiff") Complaint pursuant to CPLR 3212 and 3211(a)(7) on the ground that Plaintiff has not suffered a "serious injury" as required by Insurance Law 5102 and 5104. Plaintiff has opposed the motion.

This action arises out of a motor vehicle collision that occurred on November 14, 2019, wherein Plaintiff alleges that Defendant's vehicle struck him, while he was driving a van for Value Care. As a result of the accident, Plaintiff alleges in his complaint and Bill of Particulars that he sustained serious and permanent injuries to his cervical and lumbar spine, thoracic spine, and right shoulder. Additionally, Plaintiff claims he suffered a disabling injury for a period in excess of 90 out of the first 180 days following the accident, significant limitation of use of a bodily function or system, significant disfigurement, and a permanent consequential limitation of use of a bodily organ and/or member.

In support of her motion, Defendant argues that Plaintiff has failed to make a prima facie showing that he suffered a serious injury as defined under Insurance Law. Defendant cites Plaintiff's deposition testimony wherein he states that as a result of the accident, he was never confined to his bed or home, nor is he unable to do anything now that he could not do prior to the accident, nor is he limited in doing any of his daily activities during 90 of the first 180 days following the accident. Defendant also claims that Plaintiff's supported medical proof is insufficient to demonstrate either a permanent loss of use or a permanent consequential

limitation of use. In further support, Defendant attaches an Independent Medical Examination (IME) report by Dr. Howard Levy ("Levy"), who conducted a full orthopedic evaluation of Plaintiff's cervical spine, thoracic spine, lumbar spine, and right shoulder. In his report, Levy states that Plaintiff's ranges of motion are completely normal as compared to the quantitative norm for each area tested for all injuries listed in the Bill of Particulars. Additionally, Levy states that the examination of Plaintiff's injuries were normal and/or resolved and that he found no objective evidence of a disability.

In opposition, Plaintiff argues that Defendant has failed to meet her initial burden of proof establishing that Plaintiff did not sustain a serious injury. Plaintiff contends that it has proffered sufficient and objective evidence to establish the existence of his injuries including diagnostic films, MRI report, and an expert report, raising triable issue of facts. Plaintiff alleges that as a result of the accident, his usual activities were affected for 90 of the first 180 days following the accident, and that he still experiences negative effects of his injuries. Moreover, Plaintiff asserts that Levy's IME report fails to refute the existence of Plaintiff's injuries or that they were not causally related to the subject accident because Levy concedes that the injuries in fact are. Additionally, Plaintiff claims the IME report fails to set forth the objective tests that he performed to support his findings.

In his deposition, Plaintiff testified that at the time of the accident he was wearing a seat belt and the vehicle was at a complete stop at a stop sign.[1] Plaintiff states that as a result of the impact, his vehicle "moved a little but not too far" and that no part of his body came into contact with the interior of the car nor was he bleeding or bruised.[2] Plaintiff testified that an ambulance did not arrive at the scene nor did he or any passengers request one because no one had a big injury at that time and thought it was necessary.[3] Plaintiff claims that he sought treatment from a chiropractor the following day when he started feeling back pain.[4] Plaintiff testified that he complained of back, neck, and hand pain and received acupuncture treatment several times a week for about three-four months on his neck and back and physical therapy on his right hand.[5] Plaintiff claims that he initially stopped treatment due to a family emergency in Haiti but

[1] (Plaintiff Dep. Pg. 27 line 17; 30 lines 8-10; 42 lines 17-19).
[2] (Plaintiff Dep. Pg. 30 lines 14-19; 45 lines 14-18; lines 22-25; 46 lines 2-6).
[3] (Plaintiff Dep. Pg. 40 lines 18-25; 41 lines 2-6).
[4] (Plaintiff Dep. Pg. 64 lines 8-25; 65 lines 2-24).
[5] (Plaintiff Dep. Pg 66 lines 9-25; 66 lines 2-25; 68 lines 4-8; 69 lines 2-7).

occasionally resumed sessions once he returned.[6] Plaintiff states that he is not currently receiving chiropractic treatment because he does not experience pain all the time and that he attempts to do treatments and exercises himself.[7] Additionally, Plaintiff testified that he stopped treatment when it started to snow because it can be "dangerous to go on the street, but that his chiropractor still contacts him and if he is able to go in, he will."[8] Furthermore, Plaintiff testified that he received an MRI which was sent to his chiropractor.[9] As a result of the MRI, Plaintiff states that he was not recommended to get surgery or take any injection.[10] Plaintiff testified that he has previously injured his back as a result of his job and that he went to the hospital and received treatment for it.[11]

Following the accident, Plaintiff states that he resumed his regular duties at work and that he is not currently taking any medication, but he was previously prescribed pain medication by his chiropractor.[12] Plaintiff initially testified that he does not have any current complaints of plain from the accident, but then states that he often feels some sort of pain in his back, but tries his best to still do his job.[13] Additionally, Plaintiff claims that while he does not have any specific activities that he is limited in doing, that if he is capable of doing something he will and if he cannot he will not.[14] Plaintiff testified that he travels occasionally to visit his children and to spend Thanksgiving with his sister.[15] Plaintiff testified that he was not confined to his bed or home following the accident, and that he missed between 5-10 days of work.[16]

It is well established that "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 demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio,* 81 NY2d 1062, 1063 [1993], *citing Alvarez v. Prospect Hospital,* 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form,

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[6] (Plaintiff Dep. Pg. 69 lines 13-25; 70 lines 2-23; 71 lines 6-15).
[7] (Plaintiff Dep. Pg. 72 lines 6-13).
[8] (Plaintiff Dep. Pg. 72 lines 14-25; 73 lines 2-4).
[9] (Plaintiff Dep. Pg. 74 lines 3-23).
[10] (Plaintiff Dep. Pg. 75 lines 3-14).
[11] (Plaintiff Dep. Pg. 76 lines 5-19; 77 lines 15-21).
[12] (Plaintiff Dep. Pg. 79 lines 12-25; 80 lines 2-6).
[13] (Plaintiff Dep. Pg. 81 lines 21-22; 82 lines 3-5).
[14] (Plaintiff. Dep. Pg. 82 lines 6-18).
[15] (Plaintiff Dep. Pg 83 lines 10-25; 84 lines 2-25).
[16] (Plaintiff Dep. Pg. 85 22-25; 86 lines 2-11; 17 lines 22-25; 18 lines 2-13).

sufficient to establish the existence of material issues of fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212, [2d Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, [2d Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325, [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610 [2d Dept. 1990]; *Rebecchi v. Whitemore,* 172 AD2d 600 [2d Dept. 1991]).

Pursuant to Insurance Law § 5104(a), in an action by one covered person against another covered person, the plaintiff cannot recover for noneconomic injury unless he or she has sustained a "serious injury" as defined in section 5102(d) of the Insurance Law. Section 5102(d) defines in relevant part that a serious injury is a personal injury which results in:

> (6) permanent loss of use of a body organ, member, function or system,
> (7) permanent consequential limitation of use of a body organ or member;
> (8) significant limitation of use of a body function or system; or
> (9) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

The issue of 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 Eyler*, 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]). Once the movant has made such 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]).

A plaintiff claiming permanent loss of use of a body organ, member, function or system must demonstrate that the permanent loss of use is a total loss of use (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295 [2001]). Here, the IME Report establishes that Plaintiff did not sustain a total loss of use of an organ, member, function, or system as Levy recorded movement in the body parts examined. In rebuttal, Plaintiff's proffered medical reports are silent as to permanence and Plaintiff testified that he has not experienced any physical permanent loss as a result of his injuries. Mere conclusory allegations that an injury is permanent in and of itself is insufficient.

In *Toure v. Avis Rent–a–Car Systems, Inc.*, 98 NY2d (2002), the Court of Appeals stated that resolving the question of whether plaintiff suffered a "serious injury" involves a comparative analysis of the quantified degree and duration of an alleged injury, or its qualitative impact and duration in the claimant's normal activities. This analysis requires admissible proof of injury based on objective medical testing, which establishes a causal relation between the accident and the injury alleged, as well as between the injury and the claimed limitation and impairment. In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury (*Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 350 [2002]; *Dufel v Green*, 84 NY2d 705 [1995]; *Lemieux v Horn*, 209 AD3d 1100 [3d Dept. 2022]). An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Id.*; *Black v Robinson*, 305 AD2d 438 [2d Dept. 2003; *Junco v Ranzi*, 288 AD2d 440 [2d Dept. 2001]; *Papadonikolakis v First Fid. Leasing Group*, 273 AD2d 299 [2d Dept. 2001]). Establishing a lack of limitations normally would enable a defendant to successfully establish that the permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system have not been satisfied by Plaintiff (*Toure* at 350; *Franchini* at 536).

To establish that the plaintiff has suffered a permanent or consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than a mild, minor or slight limitation of use and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Burnett v. Miller,* 255 A.D.2d 541 [2d Dept. 1998]; *Booker v. Miller,* 258 AD2d 783 [3d Dept. 1999]; *Jones v Marshall*, 147 AD3d 1279 [3d Dept 2017]). While the Appellate Divisions are

split on what evidence should be submitted in support of this category, it has been Kings County Supreme Court's position that the guidelines which a medical expert uses to determine whether ranges of motion are deemed normal or limited must be reported in addition to which device was used to perform measurements to defeat dismissal (such as a goniometer or inclinometer) (*Wilks v Baichans*, 79 Misc.3d 1226[A] [Sup. Ct. Kings County 2023]).

Here, the court finds that Plaintiff has raised a triable issue of fact as to whether he has suffered a permanent or significant limitation. In his IME Report, Levy lists that he used a goniometer and compared the ranges to the American Medical Association's "Guides to the Evaluation of Permanent Impairment," Fifth Edition. While Levy finds that Plaintiff's injuries have recovered, and that his ranges of motion are normal, he does concede that Plaintiff's injuries were casually related to the accident. In rebuttal, Plaintiff submits an affidavit to demonstrate that the physical limitations that he has been experiencing due to his injuries were more than minor, mild, or slight. In his affidavit, Plaintiff states in part that he has difficulty sitting, standing, and walking for long periods of time, lifting, and carrying heavy things, bending, going up and down stairs, showering, dressing, doing daily chores and engaging in sexual relations. Plaintiff claims that these injuries continue to impact his daily life.

Additionally, Plaintiff proffers medical evidence that is contemporaneous with the subject accident and objectively and qualitatively assess what restrictions, if any, Plaintiff was afflicted with. In an affirmation by Madhu Babu Boppana M.D., ("Boppana") the physician who initially performed range of motion tests on November 23, 2019, following the subject accident, the ranges were taken with a goniometer and analyzed in comparison with the "normal" ranges of motion published by the American Medical Association. The ranges in that examination demonstrate a decrease in Plaintiff's mobility. In an affirmation by Dr. Ssasn Azar, M.D., ("Azar") a radiologist who reviewed Plaintiff's diagnostic films and MRI dated August 23, 2023, Azar states that:

> "There is a normal signal of the marrow. There are no intrinsic bony lesions or infiltrative or destructive processes. There is no fracture line. There is Type III acromion. There are productive changes of the acromioclavicular joint. There is thickening and tendinopathy of the supraspinatus and subscapularis tendons. The infraspinatus and teres minor tendons are unremarkable. There is no displaced labral tear. There is no paralabral cyst. The long and short heads of the biceps' tendon are intact. The biceps anchor is unremarkable. There is no Hills-Sachs lesion. There is no joint effusion. There is fluid noted within the bicipital groove,

> compatible with bicipital tenosynovitis. There is fluid noted within the subcoracoid bursa, compatible with subcoracoid."

Plaintiff also submits an affirmation by Hank Ross, M.D., ("Ross") who performed range of motion tests on July 7, 2023, wherein the ranges were taken with a goniometer and analyzed in comparison with the New York State disabilities and/or Worker's compensation guidelines. Based on his findings, Ross states that Plaintiff's injuries are causally related to the subject accident. Ross also states that Plaintiff's injuries are permanent in nature and that he is likely to continue to suffer symptoms and exacerbations of intensity and severity. In instances where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury (*Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, [1st Dept 2008]). Accordingly, the difference between the measurements of the Plaintiff's and the Defendant's medical experts, and whether injuries such as "tendinopathy" constitute as a serious injury pursuant to Insurance Law 5102(d), raise material issues of fact warranting a trial.

With respect to the 90/180-day 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 activities for not less than 90 of the 180 days immediately following the date of the accident (Insurance Law 5102[d]). A claim under the 90/180-day category by its terms does not have a durational element beyond the 180–day period set forth by the statute, making a plaintiff's current condition irrelevant as to whether he or she was unable to carry out her normal and customary activities during the statutory period (see Insurance Law 5102; *Peplowv Murat*, 304 AD2d 633 [2d Dept. 2003]). To prevail under this category, a plaintiff must demonstrate through competent, objective proof, a medically determined injury or impairment of a nonpermanent nature which would have caused limitations on the plaintiff's daily activities (*Ryan v Xuda*, 243 AD2d 457 [2d Dept. 1997]; *Olivare v Tomlin*, 187 AD3d 642 [1st Dept. 2020]; *Fernandez v Fernandez*, 151 AD3d 581 [1st Dept. 2017]). This limitation must be to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230 [1982]). Additionally, a gap or cessation of treatment is immaterial as to whether the plaintiff sustained a medically determined injury or impairment of a nonpermanent nature which prevents him or her from performing substantially all the material acts which constitute his or her usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or

impairment (Insurance Law 5102 [d]). Plaintiff, however, must offer some reasonable explanation for the gap in treatment or cessation of treatment (*Pommells v Perez*, 4 NY3d 566 [2005]; *Neugebauer v Gill*, 19 AD3d 567 [2d Dept. 2005]).

Here, while Defendants argue in part that Plaintiff has not suffered a serious injury under the 90/180 category because he testified that he was never confined to his bed or home and only missed between 5-10 days of work, Plaintiff also testified that if he is incapable of doing something, he will not. Furthermore, Plaintiff both testified and stated in his affidavit that he does still feel pain but tries to do the best that he can for his job. With respect to the gap in treatment, Plaintiff has proffered an adequate explanation as to why he initially stopped treatment, and that he still attempts to receive treatment if he is able to go, and also that he attempts to self-treat at home. Plaintiff's medical evidence also raises a triable issue of fact as to whether Plaintiff still experiences pain and limitations as a result of his injuries. Thus, Defendant has failed to meet her prima facie burden establishing that Plaintiff did not suffer a serious injury under the 90/80 category of the Insurance Law.

Accordingly, it is hereby,

ORDERED, that Defendant's motion to for summary judgment dismissing Plaintiff's Complaint pursuant to CPLR 3212 and 3211(a)(7) on the ground that Plaintiff has not suffered a "serious injury" as defined by Insurance Law 5102 and 5104 is denied since Plaintiff has raised triable issues of fact warranting a trial.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice