

Mirdita v Ash Leasing Inc.

2011 NY Slip Op 34036(U)

September 29, 2011

Supreme Court, Bronx County

Docket Number: 0309860/2008

Judge: Lucindo Suarez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

PART 19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input checked="" type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

-----X
MIRDITA, PETER

Index N^o. **0309860/2008**

- against -

Hon. **LUCINDO SUAREZ,**

Justice.

ASH LEASING INC., et al
-----X

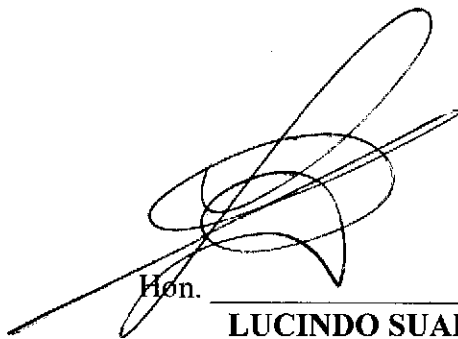
The following papers numbered 1 to **10, 14-16** read on this motion, **SUMMARY JUDGMENT DEFENDANT** noticed on **July 28, 2011** and duly submitted as No. **56** on the Motion Calendar of **September 26, 2011** and the following papers numbered **11** to **16** read on this motion, **SUMMARY JUDGMENT DEFENDANT** noticed on **July 28, 2011** and duly submitted as No. **57** on the Motion Calendar of **September 26, 2011**

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed (Motion Sequence # 4)	1, 2, 3, 4, 5, 6, 7, 8, 9	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed (Motion Sequence # 5)	11, 12, 13	
Answering Affidavit and Exhibits	14, 15, 16	
Replying Affidavit and Exhibits		
Sur-replying Affidavit and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	10	

RECEIVED
BRONX COUNTY CLERK'S OFFICE
OCT - 5 2011

Upon the foregoing papers, defendants' motions for summary judgment dismissing plaintiff's complaint are granted, in accordance with the annexed decision and order.

Dated: **09/29/2011**


Hon. _____
LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

-----X

PETER MIRDITA,

Plaintiff,

- against -

ASH LEASING INC., MAMADY TRAORE, and M.L.
MARCASCIANO, JR.,

Defendants.

-----X

DECISION AND ORDER

Index No. 309860/2008

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated June 7, 2011 of defendants Ash Leasing Inc. and Mamady Traore and the affirmation, physicians' affirmed reports (6), exhibits, and memorandum of law submitted in support thereof (Motion Sequence # 4); the notice of motion dated July 8, 2011 of defendant M.L. Marcasciano, Jr. and the affirmation and exhibits submitted in support thereof (Motion Sequence # 5); plaintiff's unsigned affirmation in opposition dated September 19, 2011 and the physician's affirmation and exhibits annexed thereto; and due deliberation; the court finds:

This personal injury action stems from a motor vehicle accident that occurred on November 19, 2007 when the vehicle owned and operated by defendant M.L. Marcasciano, Jr. ("Marcasciano"), in which plaintiff Peter Mirdita was a passenger, was involved in a collision with the vehicle owned by defendant Ash Leasing Inc. and operated by defendant Mamady Traore (collectively "Ash Leasing"). Ash Leasing now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a "serious injury," as the phrase is defined in Insurance Law § 5102. Marcasciano moves separately for the same relief, and adopts the arguments set forth by Ash Leasing.

Defendants' motions for summary judgment are consolidated for decision herein as Marcasciano

relies on the proof submitted by Ash Leasing inasmuch as plaintiff submits a single opposition to both applications.

Plaintiff alleges in his verified bill of particulars to have sustained injuries to his left shoulder, including tears to the rotator cuff, supraspinatus tendon, and subscapularis tendon resulting in surgery performed January 25, 2008. Plaintiff also sustained disc herniations at C5-C6 and C6-C7 and a broad disc bulge at T8-T9. After the accident, plaintiff was confined to his home for bed and home for three months and returned to work after eleven months. Plaintiff alleges injuries in the categories of fracture; significant disfigurement; 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; and, 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 ("90/180" claim).

On a motion for summary judgment on the issue of serious injury, defendant bears the burden of proof that the injuries are not serious. *See Gaddy v. Eyler*, 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 (1992), through objective medical proof, such medical affirmations, MRIs and surgical reports. *See Johnson v. Singh*, 82 A.D.3d 565, 918 N.Y.S.2d 483 (1st Dep't 2011). The burden then shifts to plaintiff to demonstrate, through objective proof, the nature and degree of the injury sustained or that there are questions of fact whether the purported injury was "serious." *See Charley v. Goss*, 54 A.D.3d 569, 863 N.Y.S.2d 205 (1st Dep't 2008), *affirmed*, 12 N.Y.3d 750, 904 N.E.2d 837, 876 N.Y.S.2d 700 (2009). Where defendant fails to make a *prima facie* showing, the court need not look at the sufficiency of plaintiff's opposition. *See Reyes v. Diaz*, 82 A.D.3d 484, 917 N.Y.S.2d 632 (1st Dep't 2011).

In support of the application, Ash Leasing submits copies of the pleadings, plaintiff's deposition transcript and affirmed reports from radiologist David A. Fisher, M.D. and orthopedic surgeon Gregory Montalbano, M.D. Dr. Fisher reviewed five MRIs taken of plaintiff's spine and left and right shoulders. The cervical spine MRI, taken December 4, 2007, revealed diffuse degenerative disc changes at C5-C6 and C6-C7 with disc dehydration, disc space narrowing and endplate spurring. There was no evidence of trauma or other causally related injury. The lumbar spine MRI, taken the same date, showed no evidence of a disc herniation or bulge. The vertebral bodies were normal in height and alignment, and the disc spaces were well-maintained. There was no evidence of any trauma or causally related injury in an otherwise unremarkable study. The thoracic spine MRI, taken December 14, 2007, revealed no evidence of a disc bulge or herniation. The vertebral bodies were intact and normally aligned. He concluded that the thoracic spine study was normal.

The left shoulder MRI, taken December 14, 2007, revealed no evidence of any fracture or dislocation. The rotator cuff, biceps tendon and labrum were all intact. There was no evidence of joint effusion or bursal fluid collection. Dr. Fisher noted acromioclavicular hypertrophy changes, which indicated a chronic degenerative condition. There was no evidence of any trauma or causally related injury. As to the right shoulder MRI, taken January 8, 2008, Dr. Fisher found no evidence of a fracture or dislocation. There was no evidence of tendon retraction, muscle atrophy, joint effusion or bursal fluid collection. The biceps tendon was not displaced and there was no labral tear. There was moderate impingement due to acromioclavicular hypertrophy, supraspinatus tendinosis and a small thickness tear. He concluded that the changes to the acromioclavicular joint were due to pre-existing, degenerative changes. There was no evidence of trauma or other causally related injury.

Dr. Montalbano examined plaintiff on August 27, 2010. Examination of the cervical and lumbar/thoracic spine revealed a normal lordosis and no paraspinal spasm or tenderness. Range of

motion was normal in nearly all aspects tested, and in some instances, range of motion exceeded normal values. However, Dr. Montalbano observed decreased motion in bending and flexion of the cervical spine and flexion of the lumbar/thoracic spine. He opined, though, that the restricted movement was voluntary based upon plaintiff's complaints of pain. Straight leg raising was negative bilaterally. Examination of the right and left shoulders revealed no evidence of muscle atrophy or tenderness or impingement. Drop arm, apprehension and relocation tests were negative. Range of motion was also normal and exceeded normal values in flexion and abduction. However, Dr. Montalbano observed decreased motion in internal and external rotation. The minimal, restricted movement in internal and external rotation was identical in both shoulders, and Dr. Montalbano opined that such movement was both voluntary and within what may be a normal range for plaintiff.

Dr. Montalbano also reviewed plaintiff's five MRI films and medical records. The left and right shoulder MRIs revealed identical injuries, and Dr. Montalbano opined that the bilateral nature of the findings was a strong indicator of pre-existing, degenerative conditions. He noted finding degenerative changes on the cervical and lumbar spine MRIs unrelated to the accident.

Defendants have established through objective medical evidence entitlement to summary judgment. *See Dennis v. New York City Tr. Auth.*, 84 A.D.3d 579, 923 N.Y.S.2d 473 (1st Dep't 2011); *Rubencamp v. Arrow Exterminating Co., Inc.*, 79 A.D.3d 509, 913 N.Y.S.2d 68 (1st Dep't 2010). The injuries plaintiff sustained to his shoulders and spine were degenerative in nature and unrelated to the accident. *See Feliz v. Fragosa*, 85 A.D.3d 417, 924 N.Y.S.2d 82 (1st Dep't 2011); *Valentin v. Pomilla*, 59 A.D.3d 184, 873 N.Y.S.2d 537 (1st Dep't 2009). "Permanent loss of use must be total," *Oberly v. Bangs Ambulance Inc.*, 96 N.Y.2d 295, 299, 751 N.E.2d 457, 460, 727 N.Y.S.2d 378, 381 (2001), and the medical evidence as well as plaintiff's deposition testimony do not establish a total loss of use. There was no radiographic evidence of a fracture, nor does plaintiff claim he was diagnosed with a

fracture in his bill of particulars. *O'Bradovich v. Mrijaj*, 35 A.D.3d 274, 827 N.Y.S.2d 38 (1st Dep't 2006). As to plaintiff's claim of significant disfigurement, plaintiff denied that he was bleeding after the accident, and Dr. Montalbano reported difficulty in visualizing plaintiff's three surgical scars on the left shoulder. Small, well healed scars do not establish a significant disfigurement. *See Santos v. Taveras*, 55 A.D.3d 405, 866 N.Y.S.2d 43 (1st Dep't 2008). Defendants have also established entitlement to dismissal of plaintiff's 90/180 claim, as the shoulder and spine injuries were not caused by the accident. *See Reyes v. Esquilin*, 54 A.D.3d 615, 866 N.Y.S.2d 4 (1st Dep't 2008).

The burden having shifted, plaintiff fails to raise a triable issue of fact in opposition. Plaintiff submits the affirmation of Robert A. Marini, M.D. along with Dr. Marini's treatment records. Dr. Marini avers that he observed tenderness, muscle spasm, and decreased ranges of motion of the cervical and lumbar spine during his physical examinations of plaintiff. He also observed tenderness and decreased ranges of motion in the left and right shoulders. Dr. Marini opined that plaintiff's spine and shoulder injuries were caused by the accident and that the injuries were permanent. Dr. Marini also noted that plaintiffs' limitations resulted in restrictions in plaintiff's physical activities, including difficulty in sitting, standing or walking, climbing stairs, and lifting heavy objects.

Dr. Marini, though, did not address the experts' conclusions that the disc bulges and herniations and shoulder injuries were degenerative in nature, *see Graves v. L&N Car Serv.*, 2011 N.Y. App. Div. LEXIS 6289 (1st Dep't Sept. 8, 2011), and he failed to rule out degenerative changes as a possible cause. *See Valentin v. Pomilla*, 59 A.D.3d at 186, 873 N.Y.S.2d at 539-540. Plaintiff submitted no proof of range of motion limitations contemporaneous with the accident. *See Rossi v. Alhassan*, 48 A.D.3d 270, 851 N.Y.S.2d 193 (1st Dep't 2008). Plaintiff testified that he visited a chiropractor the day after the accident, after which he began a course of physical therapy two to three times per week. However, none of those records were submitted. *See Whisenant v. Farazi*, 67 A.D.3d 535; 891

N.Y.S.2d 13 (1st Dep't 2009). The earliest record of Dr. Marini's treatment plaintiff is dated January 3, 2008, six weeks after the accident. Although he observed limited ranges of motion of plaintiff's cervical and lumbar spine and left and right shoulder, he did not compare those findings to the normal ranges of motion for those areas. *See Mickens v. Khalid*, 62 A.D.3d 597, 879 N.Y.S.2d 138 (1st Dep't 2009); *Johnson v. Paulino*, 49 A.D.3d 379, 852 N.Y.S.2d 772 (1st Dep't 2008). Plaintiff, who ceased medical treatment approximately ten months after the accident, also submitted no proof from a more recent examination showing a loss of range of motion. *See Shu Chi Lam v. Dong*, 84 A.D.3d 515, 922 N.Y.S.2d 381 (1st Dep't 2011).

Accordingly, it is

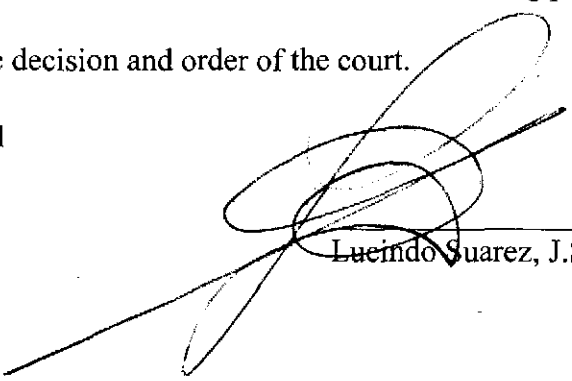
ORDERED, that the motion of defendants Ash Leasing, Inc. and Mamady Traore for summary judgment (Motion Sequence # 4) is granted; and it is further

ORDERED, that the motion of defendant M.L. Marcasciano, Jr. for summary judgment dismissing plaintiff's complaint (Motion Sequence # 5) is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants Ash Leasing, Inc., Mamady Traore, and M.L. Marcasciano, Jr. dismissing plaintiff's complaint.

This constitutes the decision and order of the court.

Dated: September 29, 2011



Lucindo Suarez, J.S.C.