

Mombo v Bowman
2017 NY Slip Op 31997(U)
September 21, 2017
Supreme Court, New York County
Docket Number: 161935/2013
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

MOMBO, YVES
-v-
BOWMAN, LAWSON

INDEX NO. 161935/2013

MOTION DATE _____

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1 + 2

Answering Affidavits — Exhibits _____ No(s). 3

Replying Affidavits _____ No(s). 4

Upon the foregoing papers, it is ordered that this motion is

Motion for SJ

Defendants Marcos Grullen and Cepin Livery Corp.'s (hereinafter "Defendants") motion for summary judgment pursuant to CPLR 3212 on the grounds that the injuries allegedly sustained by Plaintiff Yves Mombo as a result of the September 21, 2013, motor vehicle accident fail to establish serious injury thresholds as defined by Insurance Law 5102 (d) and Plaintiff's cross-motion for summary judgment on threshold are decided as follows:

Treating Plaintiff's bill of particulars dated August 7, 2014, in response to Defendant Lawson Bowman's demand for a verified bill of particulars as a supplemental bill of particulars, Plaintiff alleges he sustained injuries to his brain/head, cervical and lumbar spine, left shoulder, and teeth (fracture). Plaintiff avers that his injuries meet the following Insurance Law 5102 (d) criteria: Permanent loss of use; permanent consequential limitation; significant limitation of use; and 90/180-day.

Defendants' trauma expert/emergency medicine physician, Dr. Craig Mochson, examined the emergency medical records from Harlem Hospital in relation to Plaintiff's visit there after the accident. Dr. Mochson concludes that the emergency medical records do support a finding that Plaintiff suffered acute traumatic injuries to his brain, cervical and lumbar spine, left shoulder and teeth as a result of the accident on September 21, 2013.

Dated: SEP 21 2017

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_____, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. PAUL A. GOETZ
J.S.C.

PRESENT: _____
Justice

PART **22**

INDEX NO. _____

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MOTION SEQ. NO. _____

-v-

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Defendants' orthopedist, Dr. Barbara Freeman, states in her August 7, 2015, report that "[r]agne of motion testing of the spine was done for reference only. It has been found in multiple studies and guidelines not to be a reliable indicator of disability." Dr. Freeman performed range of motion testing on Plaintiff's cervical and lumbar spine, and left shoulder during her examination of Plaintiff on August 7, 2015. Regarding Plaintiff's cervical spine Dr. Freeman found Plaintiff "flexed 60 degrees, extended 40 degrees, performed 80 degrees rotation to the right, 80 degrees rotation to the left and 40 degrees of side to side bend." In Dr. Freeman's "estimation, the above range of motion findings of the cervical spine are within normal ranges for this individual." Regarding Plaintiff's lumbar spine, Dr. Freeman found Plaintiff "flexed to the level of the toes with normal rounding of the back. He extended 40 degrees. He performed 30 degrees side to side motion and rotation." Dr. Freeman opines "[t]he above range of motion findings of the lumbar spine are within normal ranges for this individual." Dr. Freeman cites the American Medical Association 6th Edition normal shoulder ranges of motion and then lists the ranges of motion of both of Plaintiff's shoulders and determines that Plaintiff's ranges of motion for his shoulders fall within the normal ranges of motion set forth in the American Medical Association 6th Edition. Dr. Freeman found negative results for the objective tests she performed and concludes Plaintiff "exhibited no orthopedic disability to the claimed areas of injury."

Defendants' neurologist, Dr. Michael J. Carciente found during his examine of Plaintiff on August 18, 2015, that Plaintiff had a normal neurologic examination and "[t]here were no objective

Dated: **SEP 21 2017**

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_____, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
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Upon the foregoing papers, it is ordered that this motion is

neurological findings in reference to any complaints of neck and lower back pain. . . In reference to any injuries in reference to the head, there were no findings consistent with a residual nervous system condition. The findings noted in the brain MRI alleged in the Bill of Particulars are unrelated to the reported accident.”

Defendants’ radiologist, Dr. Audrey Eisenstadt, reviewed an MRI’s of Plaintiff’s cervical and lumbar spine taken on November 19, 2013, and found degenerative disc disease and no evidence of an annular tear or traumatic disc rupture. Dr. Eisenstadt also reviewed an MRI of Plaintiff’s left shoulder taken on November 25, 2013, and found “os acromiale with secondary degenerative joint disease . . . [and] no rotator cuff tear, labral tear, bursal fluid or joint effusion [].”

Defendants’ dental consultant, Dr. Isaac Seinuk, performed an oral examination of Plaintiff on August 5, 2015, and noted “various teeth missing and restored” and concluded that Plaintiff “had his alleged dental injuries treated.”

Regarding Plaintiff’s 90/180-day claim, Defendants argue that Plaintiff was not medically prevented from performing “substantially all” of his customary activities for the requisite period and that their medical evidence establishes that Plaintiff did not sustain any causally related serious injuries.

Dated: **SEP 21 2017**

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_____, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART **22**

-v-

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Upon the foregoing papers, it is ordered that this motion is

Cross-Motion for SJ

Although untimely as a motion for summary judgment since it was not made within 60 days of the filing of the note of issue as required by the Part rules, the Court may properly consider Plaintiff's cross motion since it addresses the same issue that Defendants raised in their motion i.e. whether Plaintiff suffered a serious injury as defined by Insurance Law 5102 (d) as a result of the accident (*Lofraco Belgium v Mateo Productions*, 138 AD3d 479 [1st Dept 2016]).

Plaintiff submits an affirmation from his treating physician, Dr. Dorina Drukman, who first saw Plaintiff on October 15, 2013. During the October 15, 2013, visit Dr. Drukman found decreased range of motion in Plaintiff's cervical and lumbar spines and left shoulder. Dr. Drukman reviewed the MRI studies of Plaintiff's cervical and lumbar spine taken on November 19, 2013, annexed to Plaintiff's papers and affirmed by Dr. Vidya Malholtra and found that the injuries to Plaintiff's cervical and lumbar spine were post-traumatic in nature and were caused, aggravated, precipitated and or exacerbated by the September 21, 2013, accident and that Plaintiff's limitations are permanent. Dr. Drukman states that Plaintiff underwent a course of conservative treatment for approximately seven months following the accident with his last visit being on May 19, 2014, when Dr. Drukman determined that Plaintiff reached the maximum medical improvement from treatment and would not receive any addition benefit from further treatment from his office. Finally, Dr. Drukman concludes that Plaintiff was prevented from substantially engaging in his normal daily activities for the

Dated: **21 2017**

4/9/6

_____, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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PART **22**

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Upon the foregoing papers, it is ordered that this motion is

first 90 out of the first 180 days following the accident as a result of the injuries to his cervical and lumbar spine.

Plaintiff submitted an affirmed report from his treating dentist Dr. Shawn Sadri. Dr. Sadri first examined Plaintiff on October 15, 2013, and he states that Plaintiff presented with fractured teeth from the accident requiring immediate treatment and that he will require continued dental visits throughout his life to correct and maintain treatment.

Since there is conflicting medical evidence on the issue of whether Plaintiff's injuries to his teeth and cervical and lumbar spine are causally related to the accident (*Suazo v Brown*, 88 AD3d 602 [1st Dept 2011] [holding conflicting medical evidence "raises issues of fact as to the existence and causation of plaintiff's injuries"]) and whether they are permanent or significant, and varying inferences may be drawn (*Martinez v Pioneer Trans. Corp.*, 48 AD3d 306 [1st Dept 2008] [holding conflicting medical evidence "of whether plaintiff's injuries are permanent or significant and varying inferences may be drawn, the question is one for the jury"]), these are questions for the jury to resolve. Because there is a trial issue of fact as to whether Plaintiff sustained a serious injury to his teeth and cervical and lumbar spine, he is entitled to seek recovery for all the injuries he alleged sustained as a result of the accident (*Boateng v Yiyan*, 119 AD3d 424 [1st Dept 2014]; *Caines v Diakite*, 105 AD3d 404 [1st Dept 2013]; *Delgado v Papert Transit, Inc.*, 93 AD3d 457 [1st Dept 2012] [holding "[o]nce a serious injury has been established, it is unnecessary to address additional injuries to determine whether the proof is sufficient to withstand defendants' summary judgment."]);

Dated: _____, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ
J.S.C.
Justice

PART 22

Index Number : 161935/2013
MOMBO, YVES
vs
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Sequence Number : 002
SUMMARY JUDGMENT

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Upon the foregoing papers, it is ordered that this motion is

Sin v Singh, 74 AD3d 1320 [2nd Dept 2010] [holding “[s]ince the Supreme Court found that there were triable issues of fact regarding whether the plaintiff sustained a serious injury to her right ankle, she is entitled to seek recovery for all injuries allegedly incurred as a result of the accident.”)]. Likewise, the conflicting evidence and inferences that may be drawn as to Plaintiff’s 90/180-day claim is for the jury to decide (*Diaz v Dela Cruz*, 125 AD3d 552 [1st Dept 2015] [holding conflicting evidence on plaintiff’s 90/180-day claim precludes summary judgment]).

Accordingly, based on the foregoing it is hereby

ORDERED that Defendant’s threshold summary judgment motion is DENIED in its entirety; and it is further

ORDERED that Plaintiff’s cross motion for summary judgment on threshold is DENIED in its entirety.

This constitutes the Decision and Order of the Court.

Dated: 9/21/17

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Paul A. Goetz, J.S.C.

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