

<b>Roazzi v What's Next Taxi, Inc.</b>
2019 NY Slip Op 30122(U)
January 14, 2019
Supreme Court, New York County
Docket Number: 153862/2013
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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INDEX NO. 153862/2013

VINCENT ROAZZI,

MOTION DATE 11/07/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

WHAT'S NEXT TAXI, INC., G TRANSPORTATION, AMANAT ULLAH, ABDU KHADIR SAMB, JOHN DOES 1-3, XYZ CORPORATION

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 36, 37, 38, 39, 40, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60

were read on this motion to/for JUDGMENT - SUMMARY

Before the Court is defendant, What's Next Taxi, Inc.'s ("What's Next") motion for summary judgment, for an Order pursuant to CPLR §3212 granting summary judgment in favor of What's Next and to dismiss plaintiff Vincent Roazzi's complaint on the grounds that plaintiff has failed to demonstrate that plaintiff has suffered a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants G Transportation and Abdou Khadir Samb Cross-move for the same relief and adopt the argument of defendant What's Next. Plaintiff opposes the motions.

This matter stems from a motor vehicle incident which occurred on June 24, 2010, on the southbound FDR Drive near East 73rd Street, in the County, City and State of New York, when a stopped vehicle owned by defendant G Transportation maintained by defendant What's Next Taxi, Inc. and operated by defendant Amant Ullah struck a vehicle operated by plaintiff Vincent M. Roazzi and allegedly led to the serious injury of plaintiff.

**Summary Judgment (Serious Injury)**

Defendant's motion for summary judgment, pursuant to CPLR 3212, against plaintiff on the issue of "serious injury" as defined under Section § 5102(d) of the Insurance Law is granted in part. "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 eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order to establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

Defendants allege that plaintiff has failed to demonstrate the existence of a "serious injury" as defined under Section 5102(d) of the Insurance Law. Defendants allege that the injuries plaintiff is seeking relief for stem from degenerative changes in the lumbar spine and for prior and subsequent motor vehicle accidents. In support of their motion, defendants submit doctor affirmations, plaintiff's deposition, and the police report of the accident.

Defendants note that plaintiff testified that he did not request medical assistance at the scene of the accident and drove himself back home immediately following the accident (Mot, Exh D at 83). Plaintiff also testified that he had been under the care of a pain management specialist Dr. Yan Qi before and after the accident at issue and received 9 epidural injections to the lower back prior the incident (*id.* at 96). Plaintiff further testified to having been in a prior motor vehicle accident in 2005 in addition to a subsequent accident in 2015 (*id.* at 142). The prior and subsequent accidents resulted in lower back injuries for which he sought medical treatment (*id.* 142-144).

In his medical report, Dr. Pierce J. Ferriter found that plaintiff presented with a normal orthopedic examination on all objective testing and found no decrease of range of motion aside from a reduction of 10 degrees in the lumbar spine. However, defendants point to a report by Dr. Stuart Pollack from July 21, 2010 which notes that plaintiff suffers from degenerative disc disease in the lumbar spine. Plaintiff also testified that his left leg has a degenerative condition which was not the result of any blow or accident (*id.* at 174).

In support of its motion defendant also submits the medical report of Dr. Elizabeth Ortof; however, the report notes that plaintiff has a limited range of motion of 40 degrees (normal 80 degrees) as to left lateral rotation of the cervical spine (Mot, Exh I). However, Hospital Records from Doylestown Hospital signed by Dr. Pollack, note that plaintiff has injuries due to degenerative disc disease. Thus, defendant has made a prima facie showing of entitlement to summary judgment on the issue of serious injury and the burden now shifts to plaintiff.

In opposition, plaintiff's responding medical submissions raise a triable issue of fact as solely as to the lumbar spine but does not raise a triable issue of fact as to the cervical spine and knees. Plaintiff submits Hospital Records from Doylestown Hospital signed by Dr. Pollack, and

William R Corse DO, both which note that plaintiff has cervical injuries due to degenerative disc disease and do not attribute said injuries to the accident at issue (Aff in Op, Exh J). As to plaintiff's lumbar spine, plaintiff submits the report of Dr. Todd A Bromberg who on April 9, 2013 stated that "Vincent Roazzi has degenerative disease of the lumbar spine" but also notes that the 2010 "accident exacerbated the same pain that he normally experience" (*id*, Exh K). In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

Here, plaintiff's medical reports fail to address plaintiff's supposed degenerative conditions to the cervical spine and meniscus tears. Plaintiff does not address the cervical spine degenerative disease as having been exacerbated by the accident. Further, plaintiff does not demonstrate that the tears to the meniscus were not caused by the preexisting degenerative conditions. Thus, plaintiff has failed to raise an issue of fact as to the two other allegedly injured body parts and summary judgment is granted in part only as the cervical spine and meniscus tear. However, plaintiff's doctor acknowledges degenerative disease in plaintiff's lumbar spine and opines that the instant accident exacerbated plaintiff's pain. Thus, an issue of fact has been raised as to plaintiff's lumbar spine and defendants motion for summary judgment is denied as to the lumbar spine.

Accordingly, it is

ORDERED that defendant's What's Next Taxi, Inc.'s motion for summary judgment, on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law, is granted as to the cervical spine and meniscus tear and denied in part as to the lumbar spine; and it is further

ORDERED that defendants G Transportation and Abdou Khadir Samb's cross-motion for summary judgment, on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 and 5104 of the Insurance Law, is granted as to the cervical spine and meniscus tear and denied in part as to the lumbar spine; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

1/14/19  
DATE

  
ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE