

Quattara v Andrades Transp. Inc.

2019 NY Slip Op 30521(U)

March 4, 2019

Supreme Court, New York County

Docket Number: 153609/2015

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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MAMADOU OUATTARA,

Plaintiff,

INDEX NO. 153609/2015

- v -

MOTION DATE 01/23/2019

ANDRADES TRANSPORTATION INC., LUIS OCAMPO-CORREA

Defendant.

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendants Andrades Transportation, Inc. and Luis A. Ocampo-Correa’s motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff, Mamadou Outtara’s Complaint is denied. Before the Court is defendants’ motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant 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. Plaintiff opposes the motion.

This matter stems from a motor vehicle incident which occurred on February 9, 2015, near the intersection of West 152nd Street at or near its intersection with 7th Avenue in the County, City and State of New York, when plaintiff was allegedly seriously injured when his vehicle was struck by defendants’ vehicle.

Summary Judgment (Serious Injury)

Defendants' 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 denied. "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 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 are not causally related to the underlying accident and are a result of degenerative disc disease. Defendants submit the IME report from Dr. Yong H. Kim in support of their motion.

In his report, Dr. Kim opined based on his March 19, 2018 examination of plaintiff and review of radiological records that plaintiff suffers from degenerative disc disease in the cervical

spine significant degenerative disc disease in the lumbar spine preexisting degenerative changes in the cervical spine that predate the accident at issue (Mot, Exh E at 6). Dr. Kim concludes that the injuries sustained as a result of the accident were “temporary aggravation of preexisting conditions in the lumbar spine” (*id.*, at 7). Thus, defendants have 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 to plaintiff’s alleged degenerative injuries. 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, in contrast to the plaintiff in *Rosa*, plaintiff, submits an opinion from his doctors which address findings of degeneration. Plaintiff submits the November 20, 2018, affidavit of treating chiropractor Dr. Lucas Bottcher (Aff in Op, Exh B). Dr. Bottcher specifically addresses defendant’s doctor’s findings of degeneration and “emphatically refute the contention of defendant’s doctor” (*id.*, at 8). Dr. Bottcher notes that “[t]here were no degenerative changes worth comment found in Mr. Ouattara’s MRIs when examined. Specifically, there were no degenerative changes to the lumbar and cervical spine” (*id.*, at 9). Dr. Bottcher demonstrates that plaintiff has suffered a loss of range of motion to the cervical spine and lumbar spine (*id.*, at 3-4).

Thus, plaintiff has raised an issue of fact precluding defendants' motion for summary judgment to dismiss plaintiff's Complaint.

Accordingly, it is

ORDERED that defendants' motion for summary judgment to dismiss plaintiff's Complaint on the grounds that plaintiff allegedly has not sustained a "serious injury" as defined in 5102 of the Insurance Law is denied; 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.



3/4/2019
DATE

ADAM SILVERA, J.S.C.

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