

Dike v Bouhouche

2019 NY Slip Op 31321(U)

March 20, 2019

Supreme Court, Queens County

Docket Number: 707721/14

Judge: Leslie J. Purificacion

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

-----X
HENDRIX DIKE,

Index Number: 707721/2014

Plaintiff,

DECISION/ORDER

--against--

Motion Sequence: 3

DJAMEL BOUHOUCHE, LANA EXP CAB
CORP., and JAMES FENNICK

Defendants.
-----X

The following papers numbered 1 to 12 read on defendants' motion pursuant to CPLR §3212 dismissing the complaint of the plaintiff on the grounds that plaintiff's alleged injuries fail to meet the serious injury threshold requirement of Insurance Law §5102(d).

	<u>PAPERS NUMBERED</u>
N.M., Aff., Exhibits and Service.....	1-4
Aff in Support, Exhibits and Service.....	5-7
Opp. Aff., Exhibits and Service.....	8-10
Reply and Service.....	11-12

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QUEENS COUNTY

Upon the foregoing papers, the motion is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on March 29, 2014 on 134th Street at or near its intersection with N. Conduit Avenue in Queens County, New York. In his verified bill of particular and amended bill of particulars, plaintiff alleges injuries to his right knee, left knee, cervical spine and lumbar spine. Plaintiff asserts that as a result of the accident he suffered: "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member; a 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 90 days during the 180 days immediately following the occurrence of the injury or impairment" (Insurance Law §5102[d]). Plaintiff also alleges that any and all pre-existing injuries and/or conditions suffered by the plaintiff have been precipitated, aggravated and exacerbated by this accident. Defendants Djamel Bouhouche and Lana Exp Cab Corp. assert that plaintiff's alleged injuries do not meet the threshold requirement of Insurance Law §5102(d), and therefore summary judgment dismissing plaintiff's complaint is warranted. Co-defendant James Fennick submits an affirmation in support.

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, (see CPLR §3212[b]; Alvarez v Prospect Hosp., 68 N.Y.2d 320; Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851; Zuckerman v City of New York, 49 N.Y.2d 557). The question of whether plaintiff sustained a "serious injury" as defined by Insurance Law §5102(d) is one of law that can be disposed of by summary judgment and defendant in seeking same has the burden to show that plaintiff's injuries do not rise to the level of those set forth in the statute (see Gaddy v Eyler, 79 N.Y.2d 955; Licari v Elliot, 57 N.Y.2d 230). This may be accomplished through submission of plaintiff's deposition testimony and/or affidavits, affirmations or sworn reports of medical experts who examine the plaintiff and conclude that no objective medical findings support the plaintiff's claim (see Grossman v Wright, 268 A.D.2d 79; Toure v Avis Rent A Car Sys., 98 N.Y.2d 345).

In support of their application, defendants submit the properly affirmed report of emergency medicine physician Stacey M. Donegan, M.D., the properly affirmed amended

report of neurologist Edward M. Weiland, M.D., the properly affirmed report of orthopedist Thomas P. Nipper, M.D., plaintiff's bill of particulars and plaintiff's examination before trial testimony.

The court finds that the defendants have met their prima facie burden with respect to whether plaintiffs have sustained "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member"; and "a significant limitation of use of a body function or system". The court further finds the defendants have failed to refute plaintiff's claim that he suffered "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". In the plaintiff's deposition transcript submitted by the defendants, plaintiff testified that he remained in his home for approximately 2-3 months following the accident due to pain with the exception of attending medical visits and then another 2 months after his knee surgery. Accordingly, that branch of the motion seeking to dismiss the complaint of the plaintiff's 90/180 is denied. Thus, the burden shifts to the plaintiff to raise a triable issue of fact as to whether they have suffered a "serious injury" as defined by Insurance Law 5102(d).

In opposition to the motion, plaintiff submits an affirmation from his treating doctor Ajendra Sohal, M.D., who incorporates her certified treatment notes; an affirmation from plaintiff's radiologist Christopher Foresto, who reviewed the MRI of plaintiff's right and left knee; and the certified records of plaintiff's orthopedic surgeon Barry Katzman who performed arthroscopic surgery on plaintiff's right knee on June 6, 2014.

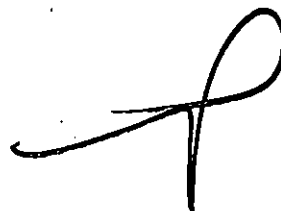
The court finds that the reports of plaintiff's treating doctors are sufficient to raise a triable issue of fact with respect to whether plaintiff has sustained a permanent loss of

use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member and a significant limitation of use of a body function or system to his right knee only.

Accordingly, defendants' motion is granted to the extent that those portions of plaintiff's complaint asserting "a permanent loss of use of a body organ, member, function or system"; "a permanent consequential limitation of use of a body organ or member" or "a significant limitation of use of a body function or system" to his cervical spine, lumbar spine and left knee is dismissed.

In all other respects, the motion is denied.

This is the decision and order of the court.



Hon. Leslie J. Purificacion, J.S.C.

Date:

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