

**Song v Riadh**

2019 NY Slip Op 31687(U)

June 12, 2019

Supreme Court, New York County

Docket Number: 160855/2017

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*

-----X INDEX NO. 160855/2017

JOO SONG,

MOTION DATE 12/17/2018

Plaintiff,

MOTION SEQ. NO. 001

- v -

SOUSSI RIADH, LECHAIM CAB CORP.

**DECISION AND ORDER**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendants Soussi Riadh and Lechaim Cab Corp.'s motion for summary judgment, pursuant to CPLR 3212 to dismiss plaintiff, Joo Y.

Song'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 April 15, 2016, at or near Route 46, in the County of Ridgefield, State of New Jersey, 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 IME reports from Dr. Scott A. Springer and Dr. Warren E. Cohen in support of their motion (Mot, Exh F & G).

In his November 1, 2018, report, Dr. Cohen opined based on an October 24, 2018, examination of plaintiff, that plaintiff “demonstrates no impairment of neurologic function” and has a normal range of motion (*id.*, Exh F). In an April 9, 2018, report, Dr. Springer opined based on review of MRI’s dated June 28, 2016, October 19, 2016, and November 22, 2016, that plaintiff suffers from degenerative conditions in the lumbar spine and cervical spine (*id.*, Exh G). Dr. Springer concludes that plaintiff does not suffer from any posttraumatic changes casually related to the underlying April 15, 2016 incident (*id.*). 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 injury to the lumbar spine. 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 submits an opinion from his doctors which address findings of degeneration as to the lumbar spine. Plaintiff submits the February 15, 2019, affidavit of Dr. Mark S. McMahon who examined plaintiff on February 6, 2019 and found severe restriction in plaintiff's cervical spine and lumbar spine (Aff in Op, Exh B). Dr. McMahon demonstrated the restriction in plaintiff's range of motion by listing the normal range of motion and the restricted range of motion of plaintiff (*id.*, ¶ 19). Dr. McMahon also addressed plaintiff's alleged degeneration and noted that plaintiff shows no sign of degenerative disc space narrowing in the lumbar spine (*id.*, ¶ 11).

While plaintiff's opposition does raise an issue of fact as to the lumbar spine, plaintiff's physicians do not address the cervical spine degenerative conditions alleged by defendants. Thus, plaintiff's have failed to raise an issue of fact as to defendant's assertion that plaintiff has not

suffered a serious injury to the cervical spine. Defendant's motion is granted in part solely as to plaintiff's cervical spine and denied in part as to plaintiff's lumbar spine.

Accordingly, it is

ORDERED that defendants' 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 in part as to the cervical spine 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.

6/12/2019  
DATE

  
ADAM SILVERA, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED  DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

- NON-FINAL DISPOSITION
- GRANTED IN PART  OTHER
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT  REFERENCE

**HON. ADAM SILVERA**  
**J.S.C.**