

**Mazumdar v Sherpa**

2019 NY Slip Op 31984(U)

June 20, 2019

Supreme Court, Kings County

Docket Number: 502463/2017

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20<sup>th</sup> day of June, 2019.

P R E S E N T: HON. CARL J. LANDICINO, JSC

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SOMEN MAZUMDAR,

Plaintiff,

Index No.: 502463/2017

- against -

TENZI SHERPA,

Defendant(s).

DECISION AND ORDER

MOTION SEQ. #2

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2
Opposing Affidavits (Affirmations).....	3
Reply Affidavits (Affirmations).....	4

After oral argument and review of the papers, the Court finds as follows:

This action concerns a motor vehicle incident that occurred on March 9, 2016. The Plaintiff Somen Mazumdar (hereinafter "Plaintiff") alleges that he was the owner and operator of his vehicle when the Defendant Tenzi Sherpa, as owner and operator of her vehicle, struck the Plaintiff from behind. The collision purportedly occurred on the Brooklyn-Queens Expressway, eastbound, at or near the exit ramp for Queens Boulevard, in Queens, New York. By way of a summons and verified complaint, the Plaintiff asserts a cause of action against the Defendant, alleging the negligent operation of her vehicle.

Plaintiff claims in his Verified Bill of Particulars (Defendant Movants' Motion Exhibit C, Paragraph 11), that as a result of said incident he has sustained a number of serious injuries, including, *inter alia*, disc herniation and bulge with neural impingement of the lumbar spine, disc herniation with impingement and marked restriction in range of motion and weakness to the cervical spine and right elbow. Plaintiff also alleges (Defendant Movants' Motion Exhibit C, Paragraph 20) that he was prevented from "performing substantially all the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment."

Defendant moves (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint, as against the Defendant, "in as much as plaintiff, SOMEN MAZUMDAR fails to meet the serious injury threshold requirement mandated by Insurance Law § 5102(a)." <sup>1</sup>

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff*, 14 AD3d 493 [2<sup>nd</sup> Dept, 2005], *citing Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2<sup>nd</sup> Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

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<sup>1</sup> The Court notes that throughout the Affirmation in Support the papers are specifically affirming that summary judgment should be granted in that Defendant alleges Plaintiff failed to meet the serious injury as required by Insurance Law §5102(d).

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2<sup>nd</sup> Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2<sup>nd</sup> Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2<sup>nd</sup> Dept, 1994].

Insurance Law § 5102(d)

Defendant contends that the affirmed reports of Dr. Chandra Sharma, Dr. Eric Cantos and Dr. Alan Zimmerman, support their contention that Plaintiff did not suffer a serious injury as defined under Insurance Law § 5102(d). In making a motion for summary judgment on threshold grounds a defendant has the initial burden of demonstrating that the Plaintiff did not sustain a “serious injury” as that term is defined by Insurance Law § 5102.

Defendant Movants’ Reports

Dr. Sharma performed an independent neurologic examination on February 3, 2018. In her report, dated February 21, 2018 and duly affirmed on that same day, Dr. Sharma detailed her findings based upon the examination and a review of the Bill of Particulars (Defendant Motion Exhibit C) related to the instant matter. Dr. Sharma opined, among other things, that the Plaintiff had no objective, clinical or neurological deficiencies upon examination, that are related to the March 9, 2018 accident. (See Defendant Movants’ Motion, Exhibit D).

Dr. Eric Cantos, conducted a review of an MRI of the Lumbar and Cervical Spine dated April 17, 2016. In his report dated July 17, 2018, which was duly affirmed on that same day, Dr. Cantos

opined that while a review of the MRI “obtained approximately 4 weeks after the accident” reveals a slight herniation and degenerative changes there was no fracture or contusion that could be attributed to the accident. (See Defendant Movants’ Motion Exhibit E).

Dr. Zimmerman, performed an independent orthopedic evaluation on January 30, 2018. In his report dated February 6, 2018, which was duly affirmed, Dr. Zimmerman detailed his findings based upon an examination of the Plaintiff and a review of the Bill of Particulars (Defendant Motion Exhibit F) related to the instant matter. Dr. Zimmerman opined, among other things, that the Plaintiff had no objective, clinical, orthopedic deficiencies upon examination, that are related to the March 9, 2018 accident. (See Defendant Movants’ Motion, Exhibit F).

Turning to the merits of the motion for summary judgment, the Court is of the opinion that based upon the foregoing submissions, the Defendant Movant has not met his initial burden of proof. It is true that Dr. Sherma’s and Dr. Zimmerman’s reports provided a range of motion and did “compare those findings to the normal range of motion...” *Manceri v. Bowe*, 19 A.D.3d 462, 463, 798 N.Y.S.2d 441, 442 [2<sup>nd</sup> Dept, 2005]. However, the Court finds that the Defendant Movant met his *prima facie* burden regarding the Plaintiff’s “90/180” claim. Although Plaintiff’s deposition testimony and bill of particulars reflect that he was not confined to his bed or home and did return to work two weeks after the accident, Plaintiff stated that his hours changed due to the need to take constant breaks. Plaintiff also stated that he was trouble lifting things and requires assistance since the accident. (See Plaintiff’s Deposition, Defendants’ Motion, Exhibit G, Pages 54 to 60 and Plaintiff’s Bill of Particulars, Exhibit C, Paragraph 20) Additionally, Dr. Sharma and Dr. Zimmerman both rely on the Bill of Particulars and Dr. Sharma a physical exam, but the exam was performed approximately two years after the accident. Dr. Cantos does make a causation finding as to cervical and lumbar spine but does not refer to the 90/180 claim or the alleged elbow injury. Additionally, the EBT of the Plaintiff raises questions of fact regarding the 90/180

claim. *Serebryany v. Royal Seafood International, Inc.*, --A.D.3d --, rev Sup. Ct. Kings County, May 1, 2017 Order (decided June 19, 2019 2d Dept.); *Faun Thai v. Butt*, 34 a.D.3d 447, 824 N.Y.S.2d 131 (2d Dept. 2006). See, *Moriera v. Durango*, 65 A.D.3d 1024, 886 N.Y.S.2d 45 (2d Dept. 2009); *Farrah v. Pinos*, 103 A.D.3d 831, 959 N.Y.S.2d 741 (2d Dept. 2013).

Assuming, *arguendo*, that the Defendant had met his initial *prima facie* burden, the Plaintiff would be required to prove that there are triable issues of fact as to whether the Plaintiff suffered serious injuries, as defined by Insurance Law §5102, in order to prevent the dismissal of the action. See *Jackson v United Parcel Serv.*, 204 AD2d 605 [2<sup>nd</sup> Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2<sup>nd</sup> Dept, 1995]. In this regard, the Plaintiff must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiff's injuries as defined by statute. See *Shamsodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2<sup>nd</sup> Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2<sup>nd</sup> Dept, 2000]. See also, *Levitant v. Beninati*, 167 A.D.3d 730, 731, 87 N.Y.S.3d 504, 505 [2<sup>nd</sup> Dept, 2018]; *Nussbaum v. Bablu*, 138 A.D.3d 703, 704, 27 N.Y.S.3d 886, 887 [2<sup>nd</sup> Dept, 2016]; *Ye Jin Han v. Karimzada*, 92 N.Y.S.3d 906, 907 [2<sup>nd</sup> Dept, 2019]; *Lacombe v. Castellano*, 134 A.D.3d 905, 906, 22 N.Y.S.3d 484, 484 [2<sup>nd</sup> Dept, 2015].

The issue of whether a serious injury was sustained involves a comparative determination of the degree or qualitative nature of an injury based upon the otherwise normal function, purpose and use of the body part. See *Toure v Avis Rent-a-Car Sys., Inc.*, 98 NY2d 345, 353 [2002]; *Walker v. Esses*, 72 A.D.3d 938, 939, 899 N.Y.S.2d 321, 322 [2<sup>nd</sup> Dept, 2010]. In the alternative, the Plaintiff must establish that he sustained a medically-determined injury or impairment which prevented her from conducting substantially all of the material acts which constituted his usual and customary daily activities for 90 out of the 180 days immediately following the accident. See *Licari v Elliott*, 57 NY2d 230 [1982].

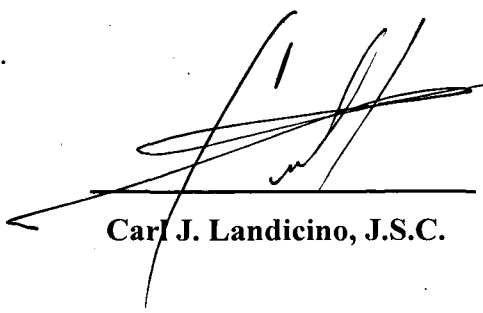
Plaintiff's evidence, namely the affirmed reports of Dr. Leonid Reyfman and Dr. Justin Mendoza, raised triable issues of fact with regard to Plaintiff's claims that he sustained a serious injury, as defined by the applicable statute. The reports and MRI review of the Plaintiff were conducted in 2016, which is closer in time to the accident than the Defendant's Reports, which were all performed at least two years after the date of the alleged accident. Additionally, Plaintiff's Narrative Report (Plaintiff's motion, Exhibit H) dated and affirmed on January 23, 2019, makes a causal finding after a review of the medical records, films and physical examination, that there is a "partial and quantifiable loss of use and function" of the neck and lower back as a result of the motor vehicle accident. "An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system." *Toure v Avis Rent A Car Systems Inc.*, 98 N.Y.2d 345, 774 N.E.2d 1197 [2002]; see, *Castro v. Anthony*, 153 A.D.3d 655, 57 N.Y.S.3d 895 (2d Dept. 2017); *Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995].

It is hereby ORDERED as follows:

Defendant's Motion Seq. #2 is denied.

This constitutes the Decision and Order of this Court.

ENTER:

  
 Carl J. Landicino, J.S.C.

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 KINGS COUNTY CLERK  
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