

Bregvade v Mishli
2019 NY Slip Op 31988(U)
June 20, 2019
Supreme Court, Kings County
Docket Number: 506736/2016
Judge: Carl J. Landicino
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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 20th day of June, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

-----X
NINO BREGVADE AND SHALVA CHANTLADE,

Index No.:506736/2016

Plaintiff,

DECISION AND ORDER

- against -

ITAMAR MISHLI, IGOR GNEZDILOV and AVIS
BUDGET GROUP, INC.,

Motions Sequence #5, #6

Defendants.

-----X

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

Notice of Motion/Cross Motion and

Papers Numbered

Affidavits (Affirmations) Annexed.....

1/2, 3/4

Opposing Affidavits (Affirmations).....

5, 6,

Reply Affidavits (Affirmations).....

7, 8

Upon the foregoing papers, and after oral argument, the Court finds as follows:

This lawsuit arises out of a motor vehicle accident that allegedly occurred on January 28, 2016. Plaintiff Nino Bregvade (hereinafter "Plaintiff Bregvade" or "Bregvadze")¹ and Plaintiff Shalva Chantlade (hereinafter "Plaintiff Chantlade") both allege in their Complaint that on the day in question they both suffered personal injuries after a vehicle owned and operated by Defendant Itamar Mishli (hereinafter "Defendant Mishli") struck the vehicle in which the Plaintiffs were passengers. The Plaintiffs were passengers in a vehicle operated by Defendant Igor Gnezdilov (hereinafter "Defendant Gnezdilov") and owned by Defendant Avis Budget Group, Inc. (hereinafter "Defendant Avis").² The Plaintiffs allege that the collision occurred at or near Coney Island Avenue and Gerald Street, County of Kings, State of New York.

¹ This Plaintiff's name appears as Nino Bregvade in the caption but as Nino Bregvadze in the various medical reports annexed.

² A Decision and Order of this Court dated June 15, 2018, held that Defendant Avis was not a proper party to the action as it is immune from claims of vicarious liability pursuant to 49 U.S.C. §30106 ("the Graves Amendment").

By way of a summons and verified complaint, the Plaintiffs assert a cause of action against both Defendant Mishli and Defendant Gnezdilov alleging the negligent operation of both vehicles. Plaintiff Chantlade claims in her Verified Bill of Particulars (Defendants' Motion Exhibit E, Paragraph 13), that as a result of the incident she sustained a number of serious injuries, including but not limited to, injuries to her lumbar spine, neck pain, left arm pain, mid and low back pain. Plaintiff Bregvade claims in his Verified Bill of Particulars (Defendants' Motion Exhibit E, Paragraph 13), that as a result of the incident he sustained a number of serious injuries, including but not limited to, injuries to his lumbar spine, left ankle, cervical spine, left shoulder, left elbow and neck pain. Both Plaintiffs also allege (Defendant's Motion Exhibit E, Paragraph 14) that they were prevented from "performing all of the material acts which constitute plaintiffs' usual and customary daily activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the occurrence of the injury or impairment, and/or permanent pain."

Defendant Gnezdilov now moves (motion sequence #5) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint on the ground that none of the injuries allegedly sustained by either Plaintiff meet the "serious injury" threshold requirement of Insurance Law § 5102(d).³

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 [2nd 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 [2nd 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].

³ Defendant Mishli cross-moves (motion sequence #6) for the same relief and for the sake of judicial economy adopts and incorporates the submissions made by Defendant Gnezdilov.

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 [2nd 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 [2nd Dept, 2006]; *see Menzel v. Plotnick*, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Insurance Law § 5102(d)

Defendant Gnezdilov contends that the affirmed reports of Dr. Audrey Eisenstadt, Dr. Philip Cilio, Dr. Chandra M. Sharma, Dr. Arnold T. Berman and Dr. Edward A. Toriello support his contention that neither Plaintiff suffered a serious injury as defined under Insurance Law § 5102(d). In making a motion for summary judgment on threshold grounds the Defendant Gnezdilov have the initial burden of demonstrating that the Plaintiffs did not sustain a “serious injury” as that term is defined by Insurance Law § 5102.

The Defendant’s Doctors’ Reports for Plaintiff Bregvadze

Dr. Audrey Eisenstadt, did not conduct a medical examination but instead reviewed the MRI records related to examinations of the Plaintiff Bregvadze’s left ankle (3/15/16) and brain (3/31/16). In relation to the reviews of the left ankle, Dr. Eisenstadt found “no osseous, tendinous, ligamentous or soft tissue abnormality posttraumatic in origin or associated with the incident of 01/28/16.” In relation to the reviews of the brain, Dr. Eisenstadt found “no posttraumatic changes are noted.” (See Defendant’s Motion, Examination of Dr. Eisenstadt, Exhibit H).

Dr. Philip Cilio (a chiropractor and acupuncturist), conducted an examination of Plaintiff Bregvadze on July 13, 2016. In his report, Dr. Cilio detailed his findings based upon his review of Plaintiff's medical records, his personal observations and range of motion testing. Dr. Cilio opined that any "[c]hiropractic treatment is not necessary as physical examination fails to reveal any ongoing pathology", but does find that the injuries are causally related to the accident (See Defendant's Motion, Examination of Dr. Cilio, Exhibit I).

Dr. Chandra Sharma, conducted a neurologic examination of Plaintiff Bregvadze on May 23, 2017. Dr. Sharma performed a neurological exam including range of motion measurements using a goniometer, an instrument for objective testing. Dr. Sharma reported limited range of motion but opined that any "subjective mechanical limitations due to perception of pain not confirmed on objective examination and do not represent neurological problems." Dr. Sharma also opined that "...there are no causally related neurological problems" and "[t]here will be no permanent neurological problems of a causally related nature." (See Defendant's Motion, Examination of Dr. Sharma, Exhibit J).

Dr. Arnold T. Berman conducted an orthopedic examination on Plaintiff Bregvadze on July 12, 2017. Dr. Berman performed range of motion measurements using a goniometer, an instrument for objective testing. Dr. Berman found no range of motion limitations and opined that "[t]here are no objective findings on the clinical exam to support the claimant's subjective complaints of cervical, lumbar and left ankle pain." (See Defendant's Motion, Examination of Dr. Berman, Exhibit K).

Dr. Edward A. Toriello performed an orthopedic examination on Plaintiff Bregvadze on August 2, 2017. Dr. Toriello performed range of motion measurements using a goniometer, an instrument for objective testing and found no limitations as a result of such testing. Dr. Toriello opined that "[t]he claimant reveals evidence of resolved cervical strain, resolved low back strain and resolved left ankle strain." Further, Dr. Toriello opined that "[t]he claimant reveals no objective

evidence of continued disability.” He further stated that “[t]here is no evidence of any causally related injury to the left elbow or the left shoulder.” (See Defendant’s Motion, Examination of Dr. Toriello, Exhibit L).

The Defendant’s Doctors’ Reports for Plaintiff Chantladze

Dr. Jonathan Gross performed an orthopedic examination on Plaintiff Chantladze on July 8, 2016. Dr. Gross performed range of motion measurements using a goniometer, an instrument for objective testing. Dr. Gross opined that “[t]here is no objective evidence of a disability.” However, Dr. Gross also opined that “further orthopedic treatment is medically necessary from an orthopedic viewpoint.” (See Defendant’s Motion, Examination of Dr. Gross, Exhibit Q).

Dr. Audrey Eisenstadt, did not conduct a medical examination but instead reviewed the MRI records related to examinations of the Plaintiff Chantladze’s lumbar spine, thoracic spine and left elbow on February 8, 2016. In relation to the reviews of the thoracic spine, Dr. Eisenstadt found “no evidence of any posttraumatic bony fracture, paravertbral abnormality or pleural or parenchymal abnormality seen.” Dr. Eisenstadt found no posttraumatic changes for the lumbar spine or left elbow as well. (See Defendant’s Motion, Examination of Dr. Eisenstadt, Exhibit R).

Dr. Chandra Sharma conducted a neurologic examination of Plaintiff Chantladze on May 23, 2017. Dr. Sharma performed a neurological exam including range of motion measurements using a goniometer, an instrument for objective testing. Dr. Sharma opined that any “subjective mechanical limitations due to perception of pain not confirmed on objective examination and do not represent neurological problems.” Dr. Sharma also opined that “there are no causally related neurological problems” and “[t]here will be no permanent neurological problems of a causally related nature.” (See Defendant’s Motion, Examination of Dr. Sharma, Exhibit S).

Dr. Arnold T. Berman conducted an orthopedic examination on Plaintiff Chantladze on July 12, 2017. Dr. Berman performed range of motion measurements using a goniometer, an

instrument for objective testing. Dr. Berman opined that “[t]here are no objective findings on the clinical exam to support the claimant’s subjective complaints of cervical, lumbar, left shoulder and left knee pain.” (See Defendant’s Motion, Examination of Dr. Berman, Exhibit K).

Dr. Edward A. Toriello performed an orthopedic examination on Plaintiff Bregvadze on October 4, 2017. Dr. Toriello performed range of motion examinations on the cervical spine, right shoulder, left shoulder, right elbow, left elbow, and left wrist and hand, right wrist and hand, lumbosacral spine, right knee and left knee, using a goniometer. Dr. Berman opined that “[t]he claimant reveals evidence of resolved cervical strain, resolved low back strain and resolved left shoulder contusion.” Also Dr. Berman found that “[n]o further orthopaedic intervention or treatment is indicated.” (See Defendant’s Motion, Examination of Dr. Toriello, Exhibit U).

Turning to the merits of the motion by the Defendants, the Court is of the opinion that the instant motion papers do not adequately address as a matter of law either Plaintiff’s claim as set forth in the subject verified bill of particulars (Defendant Lee’s Motion, Exhibit B, Paragraph 14). Both Plaintiffs allege that they individually sustained a medically determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. As to Plaintiff Bregvadze, Dr. Cilio found a causal relationship between the injury and the accident. As to Plaintiff Chantlade, although Dr. Gross found no evidence of disability, he still determined that “further orthopedic treatment is medically necessary.” *See Serebryany v. Royal Seafood Int’l, Inc.*, No. 165/13, 2019 WL 2518493, [2nd Dept, 2019]. “The injured plaintiff was not examined by the defendants’ examining neurologist and orthopedist until more than one year after the accident, and both failed to relate their findings to the 90/180 category of serious injury for the period of time immediately following the accident.” *Rouach v. Betts*, 71 A.D.3d 977, 977, 897 N.Y.S.2d 242, 243 [2nd Dept, 2010]; *see also Epstein v. MTA Long Island Bus*, 161 A.D.3d 821, 823, 75 N.Y.S.3d 532, 534 [2nd Dept, 2018]; *Stead v.*

Serrano, 156 A.D.3d 836, 837, 67 N.Y.S.3d 244 [2nd Dept, 2017]; *Nembhard v. Delatorre*, 16 A.D.3d 390, 791 N.Y.S.2d 144 [2nd Dept, 2005]; *Peplow v. Murat*, 304 A.D.2d 633, 758 N.Y.S.2d 160, 161 [2nd Dept, 2003]; *Frier v. Teague*, 288 A.D.2d 177, 732 N.Y.S.2d 428 [2nd Dept, 2001].

Assuming, *arguendo*, that the Defendants had made a *prima facie* showing, the Plaintiffs 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. *See Jackson v United Parcel Serv.*, 204 AD2d 605 [2nd Dept, 1994]; *Bryan v Brancato*, 213 AD2d 577 [2nd Dept, 1995]. In this regard, the Plaintiffs must submit quantitative objective findings, as well as opinions relative to the significance of the Plaintiffs' injuries as defined by statute. *See Shamsoodeen v. Kibong*, 41 A.D.3d 577, 578, 839 N.Y.S.2d 765, 766 [2nd Dept, 2007]; *Grossman v Wright*, 268 AD2d 79 [2nd Dept, 2000].

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 [2nd Dept, 2010]. In the alternative, the Plaintiffs must establish that they, each as to themselves, sustained a medically-determined injury or impairment which prevented them from conducting substantially all of the material acts which constituted her usual and customary daily activities for 90 out of the 180 days immediately following the accident. *See Licari v Elliott*, 57 NY2d 230 [1982].

The Court finds that the Plaintiffs' opposition to Defendants' dispositive material issues of fact regarding the injuries allegedly sustained by both Plaintiff Bregvadze and Plaintiff Chantladze as a result of the subject accident. The Plaintiffs proffer the affirmation of Dr. Donald I. Goldman for each Plaintiff (2/4/19 for Plaintiff Shalva Chantlade, 2/8/19 for Plaintiff Bregvadze). Dr. Goldman performed an orthopedic examination of the Plaintiffs with the use of a hand held goniometer and found, *inter alia*, material limited range of motion for each Plaintiff. "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 *Dufel v. Green*, 84 N.Y.2d at 798, 622 N.Y.S.2d 900, 647 N.E.2d 105 [1995]. Accordingly, the motions by the Defendants is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant Gnezdilov's motion (motion sequence #5) is denied.

Defendant Mishli's cross-motion (motion sequence #6) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino
J.S.C.

KINGS COUNTY CLERK
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