

**Rodriguez v Nazrul**

2019 NY Slip Op 32127(U)

May 16, 2019

Supreme Court, Bronx County

Docket Number: 25677/2017E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

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JOSE R. RODRIGUEZ,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 25677/2017E

ISLAM ALI NAZRUL and NURYSIA GAMCIA,

Defendants.  
-----X

John R. Higgitt, J.

Upon defendants' March 21, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; there being no opposition to the application; the court having advised the parties, by email directed to the addresses associated with the action on the NYSCEF site on April 18, 2019 at 7:08 p.m., that the motion was unopposed, and having received no indication that the court's communication was not received by the parties; the court not having received any response to its communication; the court's review of the records relating to this matter indicating that the matter has not been settled, discontinued or otherwise disposed; and due deliberation; defendants' motion for summary judgment on the ground that plaintiff did not sustain a "serious injury" in the subject August 27, 2016 motor vehicle accident is granted.

Plaintiff alleges injuries to his right shoulder and the cervical and lumbar aspects of his spine, including aggravation of an existing lumbar condition. Plaintiff alleges "serious injury" under the Insurance Law § 5102(d) categories of death, dismemberment, significant disfigurement, fracture, loss of a fetus, permanent loss of use, permanent consequential limitation, significant limitation and 90/180-day injury.

In support of the motion, defendants submit the transcripts of plaintiff's deposition testimony and the affirmed reports of orthopedic surgeon Dr. Elfenbein, neurologist Dr. Cohen and radiologist Dr. Eisenstadt.

Dr. Elfenbein examined plaintiff on October 16, 2018, approximately two years after the accident. Dr. Elfenbein measured normal or near-normal ranges of motion in all planes of movement of plaintiff's cervical and lumbar spine, with negative provocative testing and normal neurological findings. Dr. Elfenbein measured reduced ranges of motion in most planes of movement of plaintiff's right shoulder; however, all provocative testing, including impingement, was negative. Dr. Elfenbein concluded that plaintiff had sustained resolved cervical and lumbar sprain, and that plaintiff was status post arthroscopic shoulder surgery. Dr. Elfenbein concluded that all objective testing was normal and inconsistent with orthopedic limitations.

Dr. Cohen measured full ranges of motion in all planes of movement of plaintiff's cervical and lumbar spine, without tenderness or spasm. His neurological examination of plaintiff yielded normal results, without clinical objective evidence of a deficit of neurological function. Dr. Cohen concluded that there were no objective findings corresponding with plaintiff's subjective complaints.

Dr. Eisenstadt examined the films from the November 15, 2016 MRIs of plaintiff's cervical and lumbar spine and the February 1, 2017 MRI of plaintiff's right shoulder. In the cervical spine, Dr. Eisenstadt found diffuse degeneration that could not have occurred in the interval between the accident and the imaging, characterized by dessication and osteophyte formation, without evidence of traumatically-induced injury. In the lumbar spine, Dr. Eisenstadt found longstanding degenerative disc disease, characterized by osteophyte formation, facet joint hypertrophy, and endplate signal change superimposed on a prior laminectomy and fusion. With respect to plaintiff's shoulder, Dr. Eisenstadt found a downsloping acromion (a non-traumatic developmental abnormality that narrows the subacromial space) with degeneration characterized by hypertrophic bony spurring. There were no findings to suggest traumatically-induced tears;

positive findings were chronic and due, in part, to plaintiff's anatomy.

Defendants' proof of full ranges of motion without evidence of traumatic injury was sufficient to meet their burden with respect to plaintiff's claims premised on injuries to the cervical and lumbar aspects of his spine (*see Mendoza v L. Two Go, Inc.*, 2019 NY Slip Op 02613 [1st Dept 2019]). Furthermore, Dr. Eisenstadt's reports established that all claimed injuries were due to causes unrelated to the subject accident (*see Tejada v LKQ Hunts Point Parts*, 166 AD3d 436 [1st Dept 2018]; *Aquino v Alvarez*, 162 AD3d 451 [1st Dept 2018]; *Auquilla v Singh*, 162 AD3d 463 [1st Dept 2018]).

Furthermore, defendants established a lack of causal connection between the accident and the claimed injuries through plaintiff's deposition testimony that he injured his lumbar spine in 2012, for which he underwent internal fixation surgery, and that he injured his neck, back and right shoulder in a 2015 motor vehicle accident (*see Silverman v MTA Bus Co.*, 101 AD3d 515 [1st Dept 2012]; *Chintam v Fenelus*, 65 AD3d 946 [1st Dept 2009]). Such proof meets defendants' prima facie burden with respect to all claimed categories and injuries (*see Sosa-Sanchez v Reyes*, 162 AD3d 414 [1st Dept 2018]; *see also Andrade v Lugo*, 160 AD3d 535 [1st Dept 2018]).

With respect to plaintiff's 90/180-day injury claim, plaintiff's bill of particulars alleged confinement to home and bed and the inability to work for three months. Plaintiff testified that he missed 11 weeks from his work as an Uber driver and returned to his same full-time schedule. Plaintiff testified further that he missed three weeks from work after having arthroscopic shoulder surgery; however, this procedure occurred well after the statutory period had expired. Plaintiff's testimony was sufficient to defeat his 90/180-day claim (*see Schaefer v Pierce*, 205 AD2d 521 [2d Dept 1994]).

It is apparent that plaintiff did not sustain death, dismemberment, significant disfigurement, fracture, loss of a fetus or permanent loss of use.

Accordingly, it is

ORDERED, that defendants' motion for summary judgment is granted, without opposition; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendants dismissing the complaint.

This constitutes the decision and order of the court.

Dated: May 16, 2019

  
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John R. Higgitt, A.J.S.C.